

8 February 2019

Chief Executive Officer
Northern Beaches Council
725 Pittwater Road
DEE WHY NSW 2099

Dear Chief Executive Officer

**SUPPLEMENT TO STATEMENT OF ENVIRONMENTAL EFFECTS
APPLICATION FOR REVIEW OF DETERMINATION – DA2018/1472
DIV 8.2 ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979
25 PALM ROAD NEWPORT**

We act for David and Gayle Hall-Johnston, C/- Blue Sky Building Designs Pty Limited ('our client'), being the applicant in respect of Development Application DA2018/1472 ('the DA') relating to a proposal to construct a new front fence (the 'proposal' or 'proposed development') on the land known as 25 Palm Road, Newport (the 'site').

1.0 Introduction

This letter comprises a statement of environmental effects in support of an application for review of Council's determination (by way of a refusal of development consent) made in respect of the DA. The determination the subject of the application for review was made on 13 December 2018.

The application for review is made under Division 8.2 of the *Environmental Planning and Assessment Act 1979* (NSW) ('EPAA').

2.0 Background

The DA, which was lodged with Council on 5 September 2018, sought consent from Council, as consent authority, for the construction of a new front fence on the site.

On 13 December 2018, Council, under delegated authority, made a decision to refuse development consent to the DA for the following reasons:

Reasons for Refusal:

1. The proposed fence design is non-compliant with the outcomes, controls and variations prescribed by clause D10.14 (Fences - General) of *Pittwater 21 Development Control Plan*, specifically with regard to the desired character of the locality, and the requirement for an open streetscape with maximum casual surveillance of the street. Furthermore, the proposed fence will likely compromise the retention of an existing mature street tree within the public road reserve, as retention/mitigation measures stipulated within the Arboricultural Impact Assessment report have not been adhered to in the proposed design.

3.0 Purpose and status of this document

As mentioned above, this letter comprises a statement of environmental effects in support of an application for review under Division 8.2 (in particular, under section 8.2(1)(a)) of the EPAA of Council's determination (by way of a refusal of consent) made in respect of the DA.

The application for review makes some minor amendments to the proposed development; see, in that regard, section 4.1 ('The amendments') of this statement, below.

The application for review by Blue Sky Building Designs, includes the following documents:

1. A completed Division 8.2 application form signed by the owners of the site.
2. Amended plans prepared by Blue Sky Building Designs Pty Limited ['Blue Sky'] (Project No 2018048).
3. This statement of environmental effects.
4. The requisite application fees.

4.0 The application for review

Section 8.3(3) of the EPAA relevantly provides that in requesting a review, the applicant may amend the proposed development the subject of the original application for development consent. The subsection goes on to provide that the consent authority may review the matter having regard to the amended development, but only if it is satisfied (that means in law, 'reasonably satisfied' [see *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at

430 per Latham CJ]) that it is 'substantially the same development' [see below].

4.1 The amendments

The application for review makes provision for some minor amendments to the proposed development (see, in that regard, the amended plans prepared by Blue Sky Building Designs Pty Limited ['Blue Sky'] (Project No 2018048)), namely:

- the lowering of the height of the proposed new front fence to 1.4m;
- a change in the colour of the horizontal fence panels to a darker tone to comply with Council's prescribed colour palette;
- the removal of plants that were shown on the DA drawings as proposed to be planted on the Council verge; and
- notes relating to flood issues as well as a tree located on the verge.

In addition, notes reflecting flood requirements, as well as notes from the arborist, are provided in the revised plans.

Consideration has also been given to setting the fence back from the front boundary of the site. However, there would be considerable difficulties in so doing, the main (but not the only) issue being the small size of the front yard. The reason that the front garden precludes that possibility is that the owners of the site use the grassed area of the garden to reverse out of their garage so that they can drive out the driveway in a forward direction. In that regard, there is a great deal of foot traffic from the nearby veterinary clinic on the corner of Barrenjoey Road by reason of the fact that staff walk the dogs in the clinic up and down Palm Road; they walk along the fence line on the grass and can be 'invisible' in the event that our clients were to reverse out of the driveway. By undertaking a three-point turn on their own property, the owners of the site avoid the risk of an accident involving someone walking past on the grass or on the road where most people walk (because, as Council will be aware, there are no footpaths as such on Palm Road). In short, the informal turning circle on the site augments traffic safety, given pedestrian traffic to and from the veterinary clinic. We submit to Council that it is important that this facility (namely, the ability for the owners to successfully undertake a three-point turn onsite) not be abrogated, which would likely be the case if the proposed front fence were to be set back from the front boundary of the site.

In the spirit of compromise, the applicant proposes to amend the proposal to lower the height of the new front fence to 1.4m, even though the occupiers of the property will lose some privacy as a result of the lowered height. The colour will also now reflect Council's desired palette in accord with P21 DCP.

Amended plans giving effect to the amended proposal have been prepared by Blue Sky Building Design and accompany the application for review.

The planning justification for the amendments is to accede, as far as is reasonably possible, to Council's policy position on the height and colour of a front fence as embodied in clause D10.14 (Fences - General) of *Pittwater 21 Development Control Plan* ('PDCP'). That clause states, insofar as the issue of height is concerned, that a front fence is not to exceed a maximum height of 1m above existing ground level. The original proposal the subject of the DA proposed a front fence with a height of 1.5m above existing ground level.

The compromise proposal—namely, a front fence with a height of 1.4m and of a colour consistent with Council's prescribed colours—is, in our opinion, worthy of support. More will be said below about the 'guideline' nature of PDCP: see, in that regard, *Zhang v Canterbury City Council* (1999) 105 LGERA 18, and sections 3.42 and 4.15(3A) of the *Environmental Planning and Assessment Act 1979* (NSW) ('EPAA').

4.2 Substantially the same development

The amendments to the proposed development referred to above are minor in nature and would not render the development different in terms of its essential and material character. In this regard, Bignold J in *Moto Projects (No 2) Pty Limited v North Sydney Council* (1999) 106 LGERA 298 stated at 56:

[T]he comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some kind of sterile vacuum. Rather the comparison involves an appreciation, qualitative as well as quantitative, of the developments being compared in their proper contexts ...

Having regard to the various cases summarised in *Bandora Holdings Pty Ltd v Byron Shire Council* [2009] NSWLEC 1317 it can be confidently stated that:

- the development will not be materially altered by the proposed changes in a material sense; and
- there will be no change to the essential character of the development.

In short, the essence of the development is substantially the same as that in respect of which consent was originally sought. There is no radical transformation of the development: see *Vacik Pty Limited v Penrith City Council* (unreported, NSW LEC, Stein J, 18 February 1992); *Moto Projects (No 2)*. In a comparison of the proposed development in respect of which consent was originally sought and the amended development, the only reasonable conclusion that is capable of being drawn by a consent authority, properly directed in law, and applying the correct legal test, is that the development will be 'substantially the same development'.

5.0 The proposed development

The proposal involves the construction of a new front fence.

As mentioned in section 4.1 ('The amendments') of this statement, the application for review makes provision for some minor amendments to the proposed development as follows:

- the lowering of the height of the proposed new front fence to 1.4m;
- a change in the colour of the horizontal fence panels to a darker tone to comply with the preferred colour palette;
- removal of plants that were shown on the DA plans as proposed to be planted on the Council verge;
- additional notes from the arborist to deal with the issue of the street tree; and
- additional notes relating to flood requirements.

6.0 Relevant matters for the consent authority to consider

6.1 Introduction

The matters in section 8.2 of the EPAA for the consent authority to consider that are of relevance to the application are essentially the matters for consideration applicable to the consideration and determination of applications, namely, the matters set out in section 4.15 of the EPAA, to the extent to which they are relevant.

The stated reasons for refusal of the DA comprise the following (when listed severally):

- The proposed fence design is non-compliant with the outcomes, controls and variations prescribed by clause D10.14 (Fences - General) of *Pittwater 21 Development Control Plan* ('PDCP'), specifically with regard to:

- the desired character of the locality, and
 - the requirement for an open streetscape with maximum casual surveillance of the street.
- The proposed fence will likely compromise the retention of an existing mature street tree within the public road reserve, as retention/mitigation measures stipulated within the Arboricultural Impact Assessment report have not been adhered to in the proposed design.

6.2 Errors, omissions, deficiencies and inadequacies with the Assessment Report

Replacement of an existing fence

Under the heading 'SITE DESCRIPTION', and the subheading 'Detailed Site Description', on page 2 of the Assessment Report, the responsible officer makes no mention of the fact that there is an existing 1.5m high front fence on the property and that the existing fence is unsightly to say the least.

Here are photos of the existing front fence:





Given that the DA proposes a replacement front fence that, by any reasonable assessment, will be more amenable to the public eye, Council's objections and reasons for refusal seem, with respect, to be unreasonable.

Supposed detrimental social impact

The statement on page 5 of the Assessment Report that the proposal 'will have a detrimental social impact in the locality considering the nature of the proposal' is, with respect, quite extraordinary and gives a purported meaning to the expression 'social impact' that is unknown in planning law. In that regard, in *An Australian Dictionary of Environment and Planning* (Melbourne: OUP, 1990), by Alan Gilpin, in the context of the expression 'social impact assessment (SIA)', on page 184, the learned author states:

Social impacts are defined as those changes in social relations between members of a community, society, or institution, resulting from external change. The changes in social relationships can result from severance (q.v.), both physical and psychological; general life-style; group relationships; cultural life (language, rituals, and dress); attitudes and values; obligations to kin and marriage patterns; social tranquillity (disrupted, for example, by the arrival of a large all-male workforce); relocation of large populations. ...

Numerous judgments have dealt with the correct application of the expressions 'social impacts' and 'economic impacts'. The parties referred me to *Kentucky Fried Chicken v Gantidis* (1979) 140 CLR 675; *Fabcot v Hawkesbury City Council* (1979) 93 LGERA 373; *Cartier Holdings v Newcastle City Council* (2001) 115 LGERA 407; *Randell v Willoughby City Council* (2005) 144 LGERA 119; *Milne v Minister for Planning [No 2]* [2007] NSWLEC 66. It is sufficient to say that the interpretation that the responsible officer has given to the words 'social impact' in his Assessment Report is legally flawed. The

true meaning of the words 'social impacts' is as described in Gilpin's text. In any event, the responsible officer in his report gives no indication as to exactly what the 'detrimental social impact' might be. Be that as it may, and with all due respect to the responsible officer, it does strain credulity to assert that the erection of a front fence of the kind and of the height proposed will have a detrimental social impact in the locality.

Numerous errors in fact finding

Under the heading 'SITE DESCRIPTION', and the subheading 'Detailed Site Description', on page 2 of the Assessment Report, there is a 'Detailed Description of Adjoining/Surrounding Development', also on page 2 of the report. The responsible officer states:

The majority of properties along Palm Road that are characterised with a front fence are comprised by of [sic] a mix of low, transparent wooden fencing or alternatively, landscaped hedging.

With respect, this statement is incorrect and quite misleading. The officer also rather conveniently fails to mention any properties with high fences. Here, for the information of Council, are the facts (based on a survey by our client):

1. There are 20 dwelling houses 'characterised with a front fence' fronting Palm Road, Newport.
2. Of those 20 dwelling houses, only 6 are at or less than Council's stipulated limit of 1m in height. That represents a mere 30%, far from a 'majority'.
3. In fact, there are 14 dwelling houses with fences at or over 1.2m in height.
4. Of those 14 dwelling houses, 12 of the 14 fences are at least 1.4m in height, with one being slightly set back from the front boundary.

So, the **true majority** (60%) of dwelling houses 'characterised with a front fence' have fences that are at least 1.4m in height and that are situated on the boundary.

Existing tree on the verge

On pages 3-4 of the Assessment Report, under the heading 'SITE HISTORY' and subheading 'Background of Application', the responsible officer states:

On 24 October 2018, the applicant provided an arboricultural impact assessment report and amended plans, demonstrating the inclusion of landscaping within Council's road reserve. However, it is noted that the amended plans did not propose any changes to the height or design of the front fence, and did not respond to the recommendations of the arboricultural impact assessment report.

With respect, there were no recommendations in the arboricultural report that required a response. The report contained only one specification limiting the depth of any footing excavation, and showed that the proposed development would have NO impact on the tree in question. With respect, the officer appears to have not understood the arboricultural report. The owner of the site has informed us that, after he had mentioned this misinterpretation to the arboriculturalist, he spoke with Matthew Edmonds of Council on the telephone and pointed out that there would indeed be no impact on the tree by the proposed fence. He has also supplied a letter to correct this misinterpretation of the report which was, we are told, emailed to Mr Edmonds. We are informed that, firstly, the arboriculturalist said he understood Mr Edmonds to say that the tree wasn't the problem, and that it was only the height of the proposed fence that was purportedly the problem and, secondly, that the owner of the site spoke with Mr. Edmonds over the telephone shortly after the arboriculturalist's conversation and that Mr Edmonds had made the same comment to him (that is, the owner).

Purported unsuitability of the site

On page 5 of the Assessment Report, the responsible officer asserts, in relation to section 4.15(1)(c) ['the suitability of the site for the development'] of the EPAA, that the site 'is considered unsuitable for the proposed development'. Once again, no indication is given as to why the site is considered unsuitable. It strains credulity to assert that the site is allegedly unsuitable for the proposed fence when there is already an existing fence erected on the site which has been there for some time and without incident.

On page 5 of the Assessment Report, the responsible officer asserts, in relation to section 4.15(1)(e) ['the public interest'] of the EPAA:

This assessment has found the proposal to be contrary to the relevant technical requirements and objectives of the Pittwater 21 DCP and will result in a development which will create an undesirable precedent such that it would undermine the desired future character of the area and be contrary to the expectations of the community. In this regard, the development, as proposed, is not considered to be in the public interest."

We make two points here. Firstly, it is unreasonable and strains credulity to assert that the proposed new fence would create an undesirable precedent when the fact is that 60% of the fenced residential properties in Palm Road have fences over 1.4m in height, and 45% of the fenced properties have 'light coloured' fences. If there be a precedent, it has already been set. In fact, there are two adjoining newly constructed white houses in Palm Road, and one has a light coloured (white) fence approximately 1.4m high. Secondly, exactly how can replacing an eyesore, with a newer fence be contrary to the public interest?

Requirements of the hydraulic engineer

On page 6 of the Assessment Report, under the heading 'REFERRALS' and subheading 'Internal Referral Body', the responsible officer states (in relation to comments from NECC (Stormwater and Floodplain Engineering – Flood risk)):

The proposed fence generally complies with the flood requirements of the DCP and LEP.

Planner Comment:

It is noted that Council's Flood Engineer has imposed conditions of consent to require changes to the design, as follows:

"the front fence must be designed with openings in the bottom as shown on drawing Fence A101, to allow overland floodwaters to leave the property"

However, concern is raised in this regard as Council cannot be satisfied how the Applicant will amend the proposal to comply with this condition, or what impacts may arise as a result of any changes, particularly with respect to an existing native canopy tree located 3.3m from the proposed works.

With respect, no amendment to the proposal is required because the requirements required by the hydraulic engineer have already been incorporated in the proposal (and, as has already been established, the canopy tree is unaffected). The site lies within an overland flood flow zone as mapped by Council. The current development involves an attached garage addition to serve the dwelling house. The relevant approval in respect of the garage required the provision of a culvert underneath the garage floor to allow any potential overland flooding to escape to the street. A hydraulic engineer was engaged to design this culvert and the development was approved by Council. In the design of the culvert, the hydraulic engineer specified a minimum cross sectional area for the culvert to be the equivalent of an area delineated by sides of 200mm x 800mm. That culvert runs down the eastern boundary of the property.

The submitted revised drawings for the fence show that there is a gap below the lowest horizontal panel on the fence on the eastern side of the site driveway. That gap will measure 200mm x 940mm, which exceeds that of the culvert. In addition, the culvert attains ground level with the driveway well before the proposed fence and gate, and there is a gap of at least 50mm below the proposed gate which is 4.9 metres wide. This is the reason why the hydraulic engineer engaged for the culvert, issued a supporting statement for the application for the fence, as he is satisfied that there is sufficient capacity below the proposed fence and gate to allow for any overland flood flow from the culvert to dissipate to the street.

Now, when the responsible officer states in the Assessment Report that 'Council cannot be satisfied how the Applicant will amend the proposal to comply with this condition', the officer appears to have ignored the professional input from the hydraulic engineer. We are at a loss to understand the reasoning behind the officer's statement.

Purported non-compliances with DCP controls

On page 8 of the Assessment Report, under the subheading 'Detailed assessment' (being a subheading to the heading 'Pittwater 21 Development Control Plan', on page 7), the responsible officer states:

D10.14 Fences – General

The proposed fence design is non-compliant with the technical controls prescribed within Clause D10.14 (Fences-General). This controls states that a front fence is not to exceed a maximum height of 1 metre above existing ground level. This application however, proposes a fence measured 1.5 metres above existing ground level. the [sic] control also requires front fences to be compatible with the streetscape character however, this proposed design strays from the existing context and desired future character of the Newport locality. Additionally, the control requires fences to be constructed of dark-coloured materials, yet this control has also been contravened, with light sandstone materials and colours proposed. Furthermore, the proposed landscaped screening on the roadside of the fence is considered insufficient due to it's [sic] siting in Council's own road reserve.

The proposal is deemed to contravene the outcomes of this Clause, such that the desired future character of the locality is not epitomised by the proposed design, which dominates over landscaping as seen from the street. Due to such design, an open streetscape allowing for casual visual surveillance of the street is not accomplished, nor, as previously stated, have sufficient measures been proposed for the screening of the fence. Furthermore, the application fails to positively contribute to the visual character of the streetscape and the wider public domain of the Newport neighbourhood. ...

As we have previously pointed out:

- Only 30% of the fenced residential properties in Palm Road have fences 1m or less in height.
- Some 60% of the properties have fences over 1.4m in height and that are on the front boundary.
- Some 45% of the fences are light in colour.

In addition, 39% of the fenced properties in Palm Road have plantings of some type 'on Council's own road reserve'.

In short, the proposal, particularly in its amended form, will have absolutely no negative streetscape impact.

With regard to the phrase 'casual visual surveillance of the street' (p 9), we wish to point out that some 26% of the residential properties in Palm Road have vegetation screening the front of the properties, with some up to 3m in height, and one over 6m in height. In any case the design allows casual surveillance.

With regard to officer's assertion that the application 'fails to positively contribute to the visual character of the streetscape', we fail to see how the replacement of an eyesore fence with an attractive new fence would fail to contribute to the visual character of the streetscape.

As for the phrase, 'the wider public domain of the Newport neighbourhood', that would also include commercial and high rise development and all existing properties with fences over 1m in height in Newport. A quick perusal of surrounding streets would appear to indicate a similar high proportion of properties with fences over 1.2m in height as existing in Palm Road.

Once again, the responsible officer has reached findings and drawn conclusions that are either not supported by facts or are in objective contradiction to known facts.

Contradictions and inconsistencies

On page 7 of the Assessment Report, the responsible officer answers the question, 'After consideration of the merits of the proposal, is the development consistent with aims of the LEP?', with the answer 'Yes'. However, on page 9

of the report, the officer states that the proposal is considered to be '[i]nconsistent with the aims of the LEP'. With respect, the officer cannot have it both ways. Either the proposal is, or is not, considered to be consistent with the aims of PLEP.

On pages 9 and 10 of the Assessment Report the responsible officer asserts that:

- 'insufficient amendments have been made to the architectural plans such that mitigation measures stipulated in the Arboricultural Impact Assessment report have not been adhered ... [with the result] that the proposal is incapable of ensuring native vegetation be retained as a result of this development' (p 9), and
- the proposed fence 'will likely compromise the retention of an existing mature street tree within the public road reserve, as retention/mitigation measures stipulated within the Arboricultural Impact Assessment report have not been adhered to in the proposed design' (p 10).

These assertions in relation to the existing tree on the Council verge, namely, that the proposal does not meet the 'requirements' of the arboricultural report, and that the tree involved will be badly affected, are incorrect. As both the owner and the arboriculturalist have pointed out to Mr Edmonds—and we are reliably informed that he verbally agreed—the tree will not be affected by the proposal. The location of the proposed new front fence does not interfere with existing tree on the verge.

6.3 The guideline nature of DCP controls

Before addressing the reasons for refusal, it is essential to bear in mind that the Land and Environment Court has held that development control plans contain guideline controls at best: see *Zhang v Canterbury City Council* (1999) 105 LGERA 18.

The 'guideline' nature of a development control plan and its contents is expressly enshrined in sections 3.42 and 4.15(3A) of the EPAA, which are as follows:

3.42 Purpose and status of development control plans

(cf previous s 74BA)

(1) The principal purpose of a development control plan is **to provide guidance** on the following matters to the persons proposing to carry out development to which this Part applies and to the consent authority for any such development:

- (a) giving effect to the aims of any environmental planning instrument that applies to the development,
- (b) facilitating development that is permissible under any such instrument,
- (c) achieving the objectives of land zones under any such instrument.

The provisions of a development control plan made for that purpose are not statutory requirements.

(2) The other purpose of a development control plan is to make provisions of the kind referred to in section 3.43 (1) (b)–(e).

(3) Subsection (1) does not affect any requirement under Division 4.5 in relation to complying development. *[Our emphasis]*

4.15 Evaluation

(cf previous s 79C)

... ..

(3A) **Development control plans** If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority:

- (a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and
- (b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be ***flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development***, and
- (c) may consider those provisions only in connection with the assessment of that development application.

In this subsection, ***standards*** include performance criteria. *[Our emphasis]*

Thus, any purported ‘requirements’ in *Pittwater 21 Development Control Plan 2014* (‘PDCP’) and, in particular, D10.14 (Fences - General) of PDCP relating to sunlight access and overshadowing, are only **guidelines**. They are not statutory requirements. This means, among other things, that any purported controls or ‘requirements’ in PDCP, as well as in any policy of Council (eg a dividing fences policy or code), must not be applied automatically and inflexibly but flexibly: see *Emmott v Ku-ring-gai Municipal Council* (1954) 3 LGRA 177.

6.4 The reasons for refusal

The reasons for refusal will now be addressed *seriatim*.

i. Purported non-compliance with the outcomes, controls and variations prescribed by clause D10.14 of PDCP

The first part of the reason for refusal states that the proposed fence design is non-compliant with the outcomes, controls and variations prescribed by clause D10.14 (Fences - General) of *Pittwater 21 Development Control Plan*, specifically with regard to the desired character of the locality and the requirement for an open streetscape with maximum casual surveillance of the street.

Clause D10.14 of PDCP is as follows:

Outcomes

- To achieve the desired future character of the Locality. (S)
- An open streetscape that allows casual surveillance of the street. (S)
- Fences, where provided, are suitably screened from view from a public place. (S)
- Safe and unhindered travel for native animals. (En)
- To ensure fences compliment and conserve the visual character of the street and neighbourhood.
- To define the boundaries and edges between public and private land and between areas of different function.
- To contribute positively to the public domain.
- To enhance safe sight distances and clear view of the street (including to and from driveways) for motorists and pedestrians. (S)
- To ensure heritage significance is protected and enhanced. (S)
- To ensure an open view to and from the waterway is maintained. (S)
- To ensure native vegetation is retained (En).
- To ensure any fencing provides for the safe and unhindered travel of native animals. (En)

Controls

a. Front fences and side fences (within the front building setback)

Front fences and side fences (within the front building setback) shall:

- not exceed a maximum height of 1 metre above existing ground level,
- be compatible with the streetscape character, and
- not obstruct views available from the road.

Fences are to be constructed of open, see-through, dark-coloured materials.

Landscaping is to screen the fence on the roadside. Such landscaping is to be trimmed to ensure clear view of pedestrians and vehicles travelling along the roadway, for vehicles and pedestrians exiting the site.

Original stone fences or stone fence posts shall be conserved.

b. Rear fences and side fences (to the front building line)

Fencing is permitted along the rear and side boundaries (other than within the front building setback) to a maximum height of 1.8 metres.

c. Rear fences to land zoned RE1 Public Recreation or E2 Environmental Conservation abutting the Pacific Ocean

Fencing is to be constructed of open, see-through, dark-coloured materials and shall have a maximum height of 1.8 metres.

d. Fencing adjoining Pittwater Waterway

Fences are to be setback 3 metres from the property boundary adjacent to the waterway, and shall have a maximum height of 1.8 metres.

Fences are to be constructed of open, see-through, dark-coloured materials. Landscaping is to screen the fence on the foreshore side.

e. Fencing in Category 1 and 2 areas

No front fences will be permitted.

Vegetation is preferred to any fencing

Side and rear fences where necessary are to be constructed of dark coloured materials and shall not obstruct the passage of wildlife and shall have opening(s) with minimum dimension of 150mm accessible to ground dwelling animals.

Fencing required for the containment of companion animals should be minimised.

f. Fencing on land on Council's Flood Hazard Maps

No masonry fences will be permitted on land identified in High Flood Hazard Areas or on land within a Floodway.

All fences in High Flood Hazard Areas or within a Floodway are to be constructed in 'open' materials, for the full height of the fence, to allow for the passage of floodwaters through the fence.

Variations

Within the front building setback, provided the outcomes of this clause are achieved, fencing to a maximum height of 1.8 metres may be considered where the main private open space is in front of the dwelling, the lot is a corner lot or has more than one frontage or the site is located on a main road with high traffic noise. In such instances, front fencing shall:

- i. be setback a minimum of one metre for any fence higher than one metre (in the case of corner lots or lots with more than one frontage this setback may be varied based on merits); and
- ii. be articulated to provide visual interest and further opportunities for landscaping, and
- iii. be screened by landscaping within the setback area; and
- iv. not restrict casual visual surveillance of the street, and

- v. provide a 45 degree splay (or equivalent) either side of any vehicular entrance, minimum dimensions of 2 metres by 2 metres; and
- vi. 50% or more of the fence is transparent.

See also controls relating to gated access points in Part B: Access Driveways and Offstreet Parking

Provided the outcomes of this control are achieved, where fencing exceeds more than 1m in height and abuts a public road, a boundary setback less than the height of the fence may be considered based on merits.

Advisory Notes

For all fencing on land identified in High Flood Hazard Areas or within a Floodway, it is recommended that a minimum of 50% of the area is 'open' for the full height of the fence, to allow for the passage of floodwaters through the fence.

The location of existing fences and walls to be retained, and proposed fences and walls.

Information to be shown on the Development Drawings

The existing fences and walls to be retained, and proposed fences and walls, to be clearly shown on the Ground Floor Level Plan and Elevations.

Information to be included in the Statement of Environmental Effects

An analysis of the impact of any proposed and existing fencing and / or walls to be retained demonstrating that : -

- an open streetscape that allows casual surveillance of the street is achieved; (S)
- fences, where provided, are suitably screened from view from a public place; (S)
- safe sight distances and clear view of the street for motorists and pedestrians are maintained; (S)

As we have previously pointed out:

- Only 30% of the fenced residential properties in Palm Road have fences 1m or less in height.
- Some 60% of the properties have fences over 1.4m in height.
- Some 45% of the fences are light in colour.

In addition, 39% of the fenced properties in Palm Road have plantings of some type 'on Council's own road reserve'.

Accordingly, it strains credulity, and is contrary to the known facts, that the proposed new front fence, especially in its amended form, is inconsistent with the outcomes prescribed by clause D10.14 of PDCP. True, even in its amended form, the height of the front fence is non-compliant with the maximum height prescribed (as a 'guideline' control) in the development control plan but, as mentioned, some 60% of the properties have fences over 1.4m in height and only 30% of the fenced residential properties in Palm Road—a clear minority—have fences 1m or less in height.

With regard to the assertion that the proposal is non-compliant clause D10.14 (Fences - General) of PDCP as respects the purported 'requirement' (NOTE: No control in a DCP is, in law, a 'requirement') for an 'open streetscape with maximum casual surveillance of the street', we have already pointed out that some 26% of the residential properties in Palm Road have vegetation screening the front of the properties, with some up to 3m in height, and one over 6m in height.

With regard to officer's assertion that the application 'fails to positively contribute to the visual character of the streetscape', we fail to see how the replacement of an eyesore fence with an attractive new fence would fail to contribute to the visual character of the streetscape.

With respect, Council's reason for refusal is 'weak and insubstantial'.

ii. The proposed fence will likely compromise the retention of an existing mature street tree within the public road reserve, as retention/mitigation measures stipulated within the Arboricultural Impact Assessment report have not been adhered to in the proposed design

This matter has been addressed above. The assertions made in the Assessment Report in relation to the existing tree on the Council verge, namely, that the proposal does not meet the 'requirements' of the arboricultural report, and that the tree involved will be badly affected, are incorrect. As both the owner and the arboriculturalist have pointed out to Council's Mr Edmonds—and we are reliably informed that he verbally agreed—the tree will not be affected by the proposal.

The bottom line is this—the location of the proposed new front fence will not interfere with existing tree on the verge.

7.0 Justification for the proposal

To a large extent, we have already addressed this issue in this statement of environmental effects and in our letter to Council of 24 October 2018.

We note the provisions of clause D10.14 (Fences - General) of PDCP in relation to the construction of front fences in the Newport Locality. We also note that the existing timber lattice fence is approximately 1.5m high and is in our opinion an aesthetically blighting and a most inconsistent element, as regards the streetscape.

The amended plan that was provided to Council under cover of our letter of 24 October 2018 detailed landscaping in front of the fence to suitably soften the built form. The new sandstone cladding, timber elements and gate, would significantly improve the visual appearance of the site when viewed from the street and the public domain generally. The new elements would not detract, but rather augment the existing streetscape character. As such, relevant objectives for streetscape are, in our opinion, completely achieved.

The term 'streetscape' refers to the character of a locality defined by the spatial arrangement and visual appearance of built and landscape features when viewed from the street. However, the task of identifying the visual or spatial attributes of a streetscape is often problematic: see N Alexander and P Stark (2003) *Neighbourhood Characters - Multi- or Mono-Cultural*, Planning with Diversity (Adelaide, 2003).

As the main channel where people move in a city, town or other locality, streetscape character serves as an immediate source of general images and perceptions on the urban identity. In that regard, a combination of individual elements forms a streetscape and it is often the entire streetscape that is rightly regarded as establishing the character of a residential area. Indeed, the perceived number of elements within a streetscape, and particularly the noticeable differences between them, provides a measure of visual complexity. Be that as it may, the basic elements which contribute to the character of a locality include, among other things, the orientation of development, the proportion and shape of building form, scale, height and siting of the development, colours and materials, the location of parking and related structures, landscaping, and fencing. New developments should contribute positively to the street environment. This scheme certainly achieves such a purpose.

Identifying streetscape character in a city/suburbs is an approach to discover the urban identity. In undertaking a streetscape analysis, the focus must be on the positive and negative elements of the particular streetscape and locality. The key character elements that need to be analysed include the following:

- (i) the relationship between building and landscape in the immediate locality;
- (ii) the scale, height and built form character of buildings and other structures;
- (iii) the architectural character and dominant materials/finishes;
- (iv) the character of spaces between buildings including vehicular and pedestrian entries fences etc;
- (v) the type roofscape and forms of roofs; and

- (vi) the front setback treatment, fencing and front garden area characteristics.

The most relevant element here is the sixth, namely, the front setback treatment, fencing and front garden area characteristics.

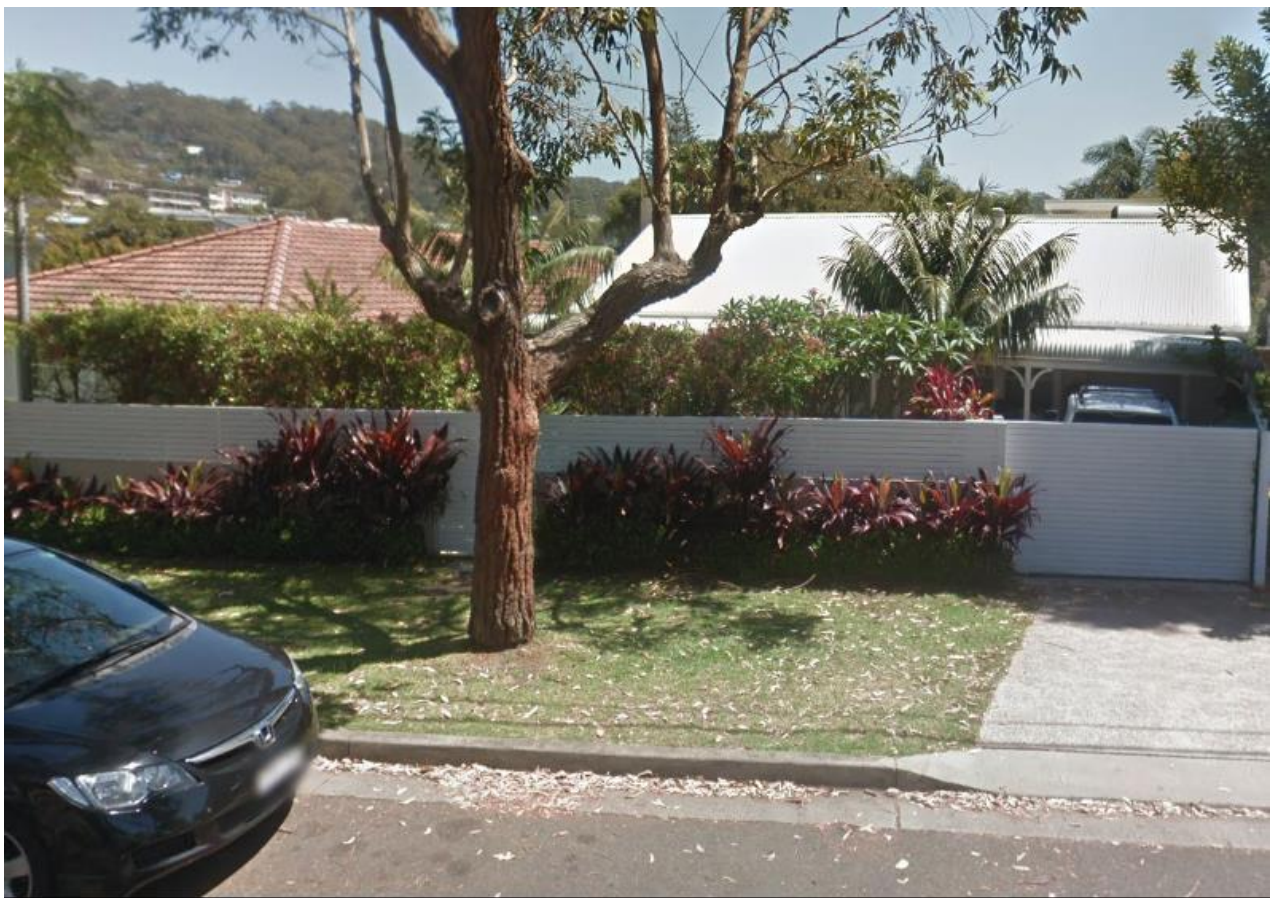
It is important to look at what the dominant fencing character is—if *there be a fencing character that is dominant*—and then describe that character and draw a conclusion on that basis. However, when one comes to consider the streetscape of Palm Road, one finds a variety of front fences of varying heights and styles. Be that as it may, we strongly submit that attention should be given to the front fence and gate at No 12 Palm Road (see *below*). That property is directly opposite the subject site. The fence at No 12 appears of be over 1.5m in height with minimal transparency provided. See also extant fence and an example of an inappropriate fence typology.



Extant Fence at Front of Site Whilst Transparent Not Sympathetic



Inappropriate Fence Near to Subject Detracting from Streetscape



Existing Front Fence Opposite the Subject and more appropriate in Context of Precinct. See planting on verge which softens environmental impact

We strongly submit that the proposed front fence would not detract from the existing streetscape and would in fact be a significant improvement from the current existing fence.

The reference in the controls in clause D10.14 of PDCP to 'compatibility', as respects front fences and side fences (within the front boundary setback), with the streetscape character requires some comment. The word 'compatible' is a word that is often used in planning legislation and planning instruments and basically means 'capable of living in harmony with' or 'not antipathetic to' (cf the words 'consistent' or 'not inconsistent'): see *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 18. In a paper titled 'A method for the visual analysis of streetscape character using digital image processing', by Chris Tucker, Michael J Ostwald and Stephan K Chalup, which was presented at the 38th International Conference of Architectural Science Association (ANZASCA), *Contexts of Architecture*, held at Launceston, Tasmania, on 10-12 November 2004, the authors of the paper stated (on page 134):

However, such descriptions are necessarily subjective and qualitative leading to extensive debate and limited objectivity.' [original emphasis]

Here, then, are a number of questions one needs to ask when considering whether, relevantly, a proposed fence is compatible with the streetscape character:

- (i) Is the area strongly characterised by the provision of front fencing?
- (ii) Are brick, stone or rendered materials/finishes the most common form or do palisade fences dominate?
- (iii) Is there also variety in other materials scattered throughout the area?
- (iv) Is there a spread in level of 'transparency', it being noted that an open style fence as proposed is somewhat transparent, thus improving the appearance of the street by allowing glimpses of green behind the 'barrier' provided by the fence?
- (v) Is an open style fence preferable to a solid masonry fence in the current circumstances? (In answer to that question, we would say, 'Most definitely.')

Fencing, if open style, is far more acceptable in streetscape terms even if say, 1.5m high. Such an outcome is arguably a far better outcome in planning terms and aesthetically, than a solid fence (i.e. masonry) that may only be 1.0m high. To the extent that there may be a departure from the PDCP control as respects the height of the fence, the guideline nature of that control is such that, having regard to what we have just said, the variation is not material or significant.

Any excess of the guideline control as respects height must be considered in light of what we have said above as respects the status and nature of a development control plan. We are not talking about a 'development standard' as that term (relevantly, 'development standards') is relevantly defined in section 1.4(1) the EPAA.

In our opinion, the proposed new front fence would make a positive contribution to the streetscape and will allow for the north facing front open space area to be used in a safe and practical manner.

Additional planting is proposed adjacent to the fence to further soften any impact.

8.0 Conclusion and submission to Council

In light of the fact that:

- the native tree on the verge will not be affected by the implementation of the proposal;
- the overland flow hydraulic requirements have been met;
- there is no possible basis in fact or law to assert that the proposal will have an adverse 'social impact' (cf the responsible officer's almost risible assertion to the contrary in the Assessment Report);
- there is no possible basis in fact to support the view expressed by the responsible officer in his Assessment Report that the implementation of the proposal will create a precedent (NOTE: The precedent in regard to the height and colour of the fence has already been established with 60% of fenced houses in the street having fences over 1.4 metres high, and 45% having light coloured fences); and
- there is a change in the colour of the horizontal fence panels to a darker one to reflect the colour of fascia and so as to comply with Council's prescribed colours,

the only *possible* reasons to object to the proposal could be:

- the height of the fence, and
- the visual impact of the fence.

The height of the fence has been dealt with exhaustively in this statement. In any event, the applicant has amended the proposal so as to lower the height of the proposed new front fence to 1.4m. Sixty per cent of fenced houses in the street already have fences over 1.4 metres in height. That dispenses with an objection based on the height of the proposed new fence.

The visual impact reason for purportedly rejecting the proposal totally ignores the visual impact of the existing fence in comparison with the proposed fence, and also ignores the plantings behind the proposed fence. In addition, a change in the colour of the fence will make a discernible difference.

We are of the opinion that the amended proposal the subject of the application for review, will not cause any adverse environmental impact. In addition, the amendments are not such as to render the proposed development no longer 'substantially the same development' as the development the subject of the original application.

In short, the proposal, particularly in its amended form, will have a positive streetscape impact.

We conclude and respectfully submit to Council that there is sufficient probative material for Council to be more than comfortably satisfied that the proposal, as amended pursuant to the application for review, is more than satisfactory and appropriate from an environmental planning viewpoint and warrants a grant of conditional consent.

We would welcome the opportunity to sit down with Council officers and discuss this matter and amplify any matters discussed in this letter and address any further queries or questions Council officers may have, should this be necessary.

Yours faithfully,

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