

## APPLICATION FOR MODIFICATION ASSESSMENT REPORT

|                            |              |
|----------------------------|--------------|
| <b>Application Number:</b> | Mod2019/0208 |
|----------------------------|--------------|

|   |  |
|---|--|
| <b>Responsible Officer:</b>               | Daniel Milliken  |
| <b>Land to be developed (Address):</b>    | Lot 8 DP 5234, 1106 Pittwater Road COLLAROY NSW 2097   |
| <b>Proposed Development:</b>              | Modification of Development Consent DA2018/1878 granted for the construction of coastal protection works |
| <b>Zoning:</b>                            | Warringah LEP2011 - Land zoned R2 Low Density Residential  |
| <b>Development Permissible:</b>           | Yes, under State Environmental Planning Policy (Coastal Management) 2018                                 |
| <b>Existing Use Rights:</b>               | No   |
| <b>Consent Authority:</b>                 | Northern Beaches Council   |
| <b>Land and Environment Court Action:</b> | No   |
| <b>Owner:</b>                             | Jean-Pierre Salama   |
| <b>Applicant:</b>                         | Barker Ryan Stewart Pty Ltd  |

|                                  |                |
|----------------------------------|----------------|
| <b>Application lodged:</b>       | 09/05/2019     |
| <b>Integrated Development:</b>   | No             |
| <b>Designated Development:</b>   | No             |
| <b>State Reporting Category:</b> | Other          |
| <b>Notified:</b>                 | Not Notified   |
| <b>Advertised:</b>               | Not Advertised |
| <b>Submissions Received:</b>     | 0              |
| <b>Clause 4.6 Variation:</b>     | Nil            |
| <b>Recommendation:</b>           | Approval       |

### 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.

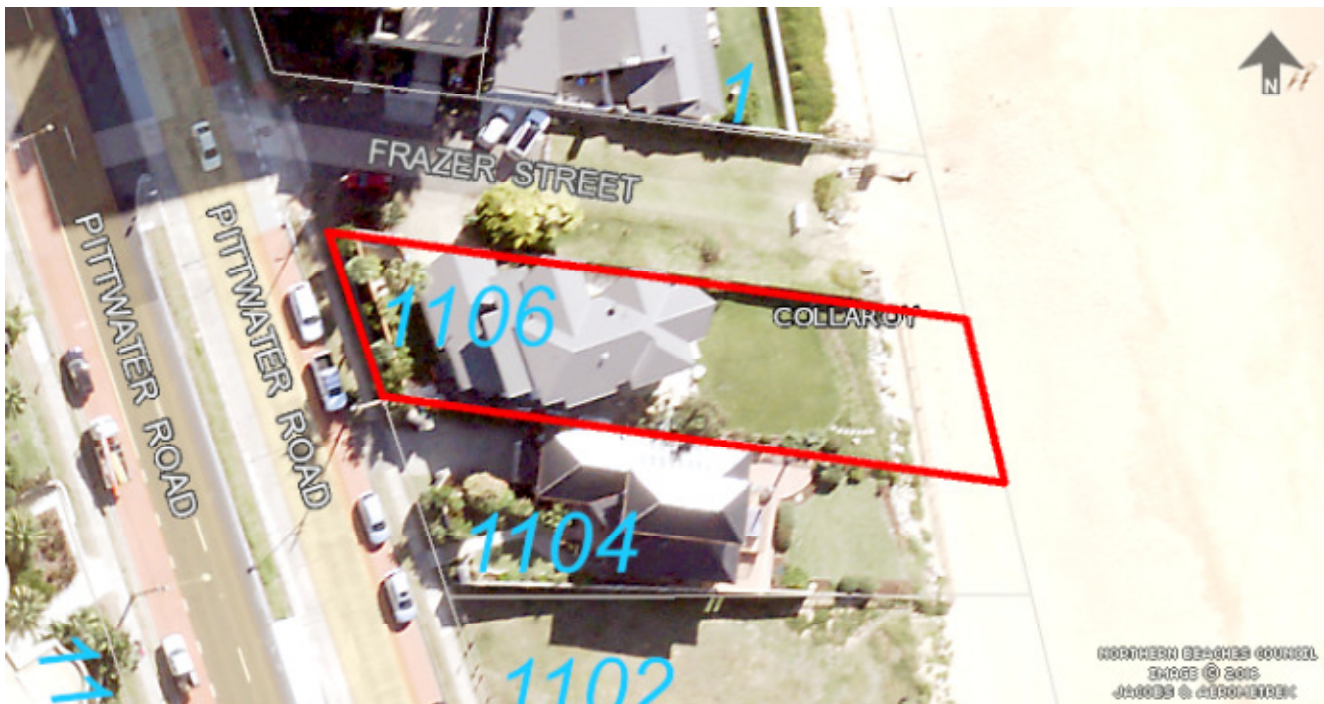
## SUMMARY OF ASSESSMENT ISSUES

There are no assessment issues.

## SITE DESCRIPTION

|                                   |  |
|-----------------------------------|--|
| <b>Property Description:</b>      | Lot 8 DP 5234 , 1106 Pittwater Road COLLAROY NSW 2097  |
| <b>Detailed Site Description:</b> | <p>The subject site is located on the eastern side of Pittwater Road and the southern side of Frazer Street. Collaroy Beach is located directly to the east and a private property (No. 1104 Pittwater Road) is located to the south.</p> <p>The site has an area of 780sqm and is generally flat, with a slop down towards the beach at the rear (eastern edge) of the site. The site contains a two storey dwelling with driveway access obtained from Frazer Street.</p> <p>The site also contains a loose rock barrier near the eastern boundary that previously provided some protection from coastal erosion during storms. This rock barrier was damaged during the large storms in June 2016.</p> <p>The surrounding development consists of detached dwellings, residential flat buildings, an arterial road and public open space.</p> |

Map:



## SITE HISTORY

### DA2018/1878

This application was for the construction of coastal protection works and was approved under delegated authority on 9 April 2019.

Further history of the site is contained within the assessment report for DA2018/1878 and does not need to be repeated here.

## PROPOSED DEVELOPMENT IN DETAIL

The modification seeks the following changes to conditions:

1. Delete Condition 6 - Maintenance Management Plan for Coastal Protection Works.
2. Delete Condition 10 - Performance of coastal protection works
3. Delete Condition 13 - Construction Management Plan
4. Delete Condition 26 - Removal of unsuitable material
5. Delete Condition 39 - Ongoing maintenance of the Coastal Protection Works and public safety
6. Modify Condition 40 - Post storm inspection
7. Delete Condition 41 - Time limited consent

The applicant's Statement of Environmental Effects provides justification for the above changes.

No amendments to the design of the works are proposed.

Detailed discussion of each of these changes can be found at the end of this report.

## ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

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

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 and is attached taking into all relevant provisions of the Environmental Planning and Assessment Act 1979 and associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon all lands whether nearby, adjoining or at a distance;
- Consideration was given to all documentation provided (up to the time of determination) by the applicant, persons who have made submissions regarding the application and any advice given by relevant Council / Government / Authority Officers on the proposal;

In this regard, the consideration of the application adopts the previous assessment detailed in the Assessment Report for DA2018/1878, in full, with amendments detailed and assessed as follows:

The relevant matters for consideration under Section 4.55 (2) of the Environmental Planning and Assessment Act, 1979, are:

| Section 4.55 (2) - Other Modifications  | Comments  |
|---|---|
| A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:   |   |
| (a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and   | The development, as proposed, has been found to be such that Council is satisfied that the proposed works are substantially the same as those already approved under DA2018/1878.   |
| (b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and | Development Application DA2018/1878 did not require concurrence from the relevant Minister, public authority or approval body.  |
| (c) it has notified the application in accordance with:<br><br>(i) the regulations, if the regulations so require, or<br><br>(ii) a development control plan, if the consent authority is a council that has made a development control plan under section 72 that requires the notification or advertising of applications for modification of a development consent, and  | The application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000, Warringah Local Environmental Plan 2011 and Warringah Development Control Plan. |
| (d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by  | The modification does not propose any changes to the design. Therefore, in accordance with Part A7 of the WDCP,   |

| Section 4.55 (2) - Other Modifications            | Comments                        |
|---|---------------------------------|
| the development control plan, as the case may be. | notification was not necessary. |

## Section 4.15 Assessment

In accordance with Section 4.55 (3) of the Environmental Planning and Assessment Act 1979, in determining an modification application made under Section 96 the consent authority must take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application.

The relevant matters for consideration under Section 4.15 of 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 instrument   | See discussion on “Environmental Planning Instruments” in this report.  |
| Section 4.15 (1) (a)(ii) – Provisions of any draft environmental planning instrument                                      | None applicable.  |
| Section 4.15 (1) (a)(iii) – Provisions of any development control plan  | Warringah Development Control Plan 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&amp;A Regulation 2000 requires the consent authority to consider Prescribed conditions of development consent. These matters have been addressed via a condition in the original consent.</p> <p><u>Clauses 54 and 109</u> of the EP&amp;A Regulation 2000, Council requested additional information and has therefore considered the number of days taken in this assessment in light of this clause within the Regulations. No Additional information was requested.</p> <p><u>Clause 92</u> of the EP&amp;A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This matter has been addressed via a condition in the original consent.</p> <p><u>Clauses 93 and/or 94</u> of the EP&amp;A Regulation 2000 requires the consent authority to consider the upgrading of a building (including fire safety upgrade of development). This matter has been addressed via a condition in the original consent.</p> <p><u>Clause 98</u> of the EP&amp;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 in the original consent.</p> |

| Section 4.15 'Matters for Consideration'   | Comments   |
|--|--|
|  | Clause 98 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 in the original consent.   |
| 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) <b>Environmental Impact</b><br/>The environmental impacts of the proposed development on the natural and built environment are addressed under the Warringah Development Control Plan section in this report.</p> <p>(ii) <b>Social Impact</b><br/>The proposed development will not have a detrimental social impact in the locality considering the character of the proposal.</p> <p>(iii) <b>Economic Impact</b><br/>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   | <p>The assessment within this report has found that it is not in the public interest to approve all the condition deletions and changes requested by the applicant.</p> <p>Some modifications to some conditions are reasonable, in this case and this has been outlined in the recommendation of this report.</p>   |

## EXISTING USE RIGHTS

Existing Use Rights are not applicable to this application.

## BUSHFIRE PRONE LAND

The site is not classified as bush fire prone land.

## NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application was not notified.

## REFERRALS

| Internal Referral Body      | Comments  |
|-----------------------------|---|
| NECC (Coast and Catchments) | <p><b>Response to condition deletions or changes</b></p> <p><b>Condition 6: Maintenance Management Plan for Coastal</b></p> |



| Internal Referral Body | Comments   |
|------------------------|--|
|                        | <p><b>Protection Works</b></p> <p>The reason provided for the condition in the Notice of Determination for DA2018/1878 is to ensure that a plan is in place for the on-going maintenance of the works prior to the start of construction and at each extension in design life.</p> <p>It is in the interests of the current and future owners of the property that they have a clear understanding of the actions required to maintain the works.</p> <p>While conditions 7 and 11 provide a financial mechanism and confirm the standards the works are to be maintained to they do not define key actions required to ensure that the wall is maintained. These include:</p> <ul style="list-style-type: none"> <li>• triggers for inspections and maintenance actions</li> <li>• description of the required access arrangement</li> <li>• suitable time-frames for maintenance to be undertaken</li> <li>• qualifications of those undertaking and certifying any maintenance works.</li> </ul> <p><u>Response:</u> Proposed deletion not accepted.</p> <p><b>Condition 10: Performance of Coastal Protection Works</b></p> <p>Condition 10 is required to ensure the ongoing structural integrity and performance of the proposed works is delivered through the construction design and construction.</p> <p>While the justification provided with the modification request notes a number of statements made in the Coastal Engineering Report provided with DA2018/1878. The plans provided with the application do not provide sufficient detail to confirm the necessary arrangements are in place. In assessing DA2018/1878 council accepted in principle that the works would be constructed entirely on private land and could be constructed without affecting the adjoining land.</p> <p>The additional information required in preparing the construction certificate to satisfy condition 9 of the consent is to confirm key design details are factored into the design and construction of the works. Once these design elements are confirmed a suitably qualified coastal engineer will be in a position to re-affirm that the requirements of condition 10 can be satisfied in accordance with the statements made in the Coastal Engineering Report provided with DA2018/1878.</p> <p><u>Response:</u> Proposed deletion not accepted.</p> <p><b>Condition 26: Removal of unsuitable material</b></p> |

| Internal Referral Body | Comments   |
|------------------------|--|
|                        | <p>Condition 26 has been modified to confirm that only unusable materials found within the area of excavation and not utilised in the construction of the works will be required to be removed.</p> <p><u>Response:</u> Proposed deletion not accepted, however, the condition can be amended to address the modification request.</p> <p><b>Condition 39: Ongoing maintenance of the Coastal Protection Works and public safety</b></p> <p>Condition 39 ensures that the works are maintained over their life so as not to pose a significant threat to public safety. Its inclusion as an ongoing condition ensures that this requirement is attached to the property for the life of the works. Condition 7 establishes the financial mechanism through which maintenance works can be funded. Therefore, condition 39 it is not a duplication of condition 7 and is to remain.</p> <p><u>Response:</u> Proposed deletion not accepted.</p> <p><b>Condition 40: Post storm inspection</b></p> <p><u>Response:</u> Proposed modification accepted.</p> <p><b>Conditions 13 and 41</b></p> <p>Planner to address.</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 (Coastal Management) 2018

The site is subject to SEPP Coastal Management (2018).

An assessment under the SEPP was carried out for the original application.

The modification does not include any changes to the design of the works, just amendments to the conditions. In this regard, no further assessment, beyond that already conducted in the report for



DA2018/1878, is required.

### **Warringah Local Environmental Plan 2011**

|  |     |
|--|-----|
| 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?  | Yes |

#### Principal Development Standards

The proposal is permissible under State Environmental Planning Policy (Coastal Management) 2018

No amendments to the design are proposed under this modification and therefore, there are no changes to any development standards.

#### Detailed Assessment

### **Warringah Development Control Plan**

#### Built Form Controls

No amendments to the design are proposed under this modification and therefore, there are no changes to any development standards.

#### Compliance Assessment

| Clause         | Compliance with Requirements | Consistency Aims/Objectives |
|----------------|------------------------------|-----------------------------|
| A.5 Objectives | Yes                          | Yes                         |

### **THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES**

The proposal will not significantly effect 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**

Section 7.12 contributions were levied on the Development Application.

### **ASSESSMENT OF PROPOSED CHANGES TO THE CONDITIONS**

The following is an assessment of each condition change proposed by the applicant.

### **Deletion of Condition 6 - Maintenance Management Plan for Coastal Protection Works**

Council's Senior Environment Officer - Coast has provided the following response in relation to this proposed change:

*"The reason provided for the condition in the Notice of Determination for DA2018/1878 is to ensure that a plan is in place for the on-going maintenance of the works prior to the start of construction and at each extension in design life.*

*It is in the interests of the current and future owners of the property that they have a clear understanding of the actions required to maintain the works.*

*While conditions 7 and 11 provide a financial mechanism and confirm the standards the works are to be maintained to they do not define key actions required to ensure that the wall is maintained. These include:*

- *triggers for inspections and maintenance actions,*
- *description of the required access arrangement,*
- *suitable time-frames for maintenance to be undertaken,*
- *qualifications of those undertaking and certifying any maintenance works."*

#### **Comment:**

Given the above, the deletion of Condition 6 is not recommended.

### **Deletion of Condition 10 - Performance of coastal protection works**

Council's Senior Environment Officer - Coast has provided the following response in relation to this proposed change:

*"Condition 10 is required to ensure the ongoing structural integrity and performance of the proposed works is delivered through the construction design and construction.*

*While the justification provided with the modification request notes a number of statements made in the Coastal Engineering Report provided with DA2018/1878. The plans provided with the application do not provide sufficient detail to confirm the necessary arrangements are in place. In assessing DA2018/1878 council accepted in principle that the works would be constructed entirely on private land and could be constructed without affecting the adjoining land.*

*The additional information required in preparing the construction certificate to satisfy condition 9 of the consent is to confirm key design details are factored into the design and construction of the works. Once these design elements are confirmed a suitably qualified coastal engineer will be in a position to re-affirm that the requirements of condition 10 can be satisfied in accordance with the statements made in the Coastal Engineering Report provided with DA2018/1878."*

#### **Comment:**

Given the above, the deletion of Condition 10 is not recommended.

### **Deletion of Condition 13 - Construction Management Plan**

The applicant's justification for the removal of this condition is as follows:

*"A Construction Management Plan was not required prior to the issue of Construction Certificate for the following seawall applications: DA2017/0591 (Coastal Protection Works for 1126- 1144 Pittwater Road Collaroy) or DA2014/1250 at 1 Frazer Street. This condition is therefore inconsistent with Northern Beaches Council's recent Coastal Protection Works determinations and it is requested that Condition 13 be deleted as this has not been previously imposed on similar consents."*

Comment:

The conditions issued for each successive approval for coastal protection works have evolved. This is a result of Council's continued growth in the understanding of the complexities of coastal legislation and the issues related to the construction of these works.

This growth and development has meant that each successive approval has been accompanied by a different, more refined condition set. In many respects, this has made the set of conditions much less onerous for the owners and applicants. However, in the case of this condition, it is an addition to what was imposed on DA2017/0591 and DA2014/1250. It is important to note that the condition has been imposed on DA2018/1289 and DA2017/0947.

The reason for the condition is to ensure appropriate measures have been considered for site access, storage and the operation of the site during all phases of the construction process in a manner that respects adjoining owner's property rights and protects amenity in the locality, without unreasonable inconvenience to the community.

It is unreasonable to argue that, just because the condition was not imposed on other similar consents, it should not be imposed on these works or any future similar consents, especially given the changing nature of approvals for coastal protection works.

It is considered that the reasons for the condition are valid and important, and it is not considered that the condition is onerous or difficult to comply with.

Given the above, the deletion of Condition 13 is not recommended.

**Deletion of Condition 26 - Removal of unsuitable material**

Council's Senior Environment Officer - Coast has provided the following response in relation to this proposed change:

*"Condition 26 has been modified to confirm that only unusable materials found within the area of excavation and not utilised in the construction of the works will be required to be removed."*

Comment:

Given the above, the deletion of Condition 26 is not recommended, however, the condition is recommended to be modified to address the issues raised by the applicant.

**Deletion of Condition 39 - Ongoing maintenance of the Coastal Protection Works and public safety**

Council's Senior Environment Officer - Coast has provided the following response in relation to this proposed change:

*"Condition 39 ensures that the works are maintained over their life so as not to pose a significant threat*

*to public safety. Its inclusion as an ongoing condition ensures that this requirement is attached to the property for the life of the works. Condition 7 establishes the financial mechanism through which maintenance works can be funded. Therefore, condition 39 it is not a duplication of condition 7 and is to remain."*

Comment:

Given the above, the deletion of Condition 39 is not recommended.

#### **Modification to Condition 40 - Post storm inspection**

Comment:

The applicant's modifications to Condition 40 are reasonable and are recommended to be approved.

#### **Deletion of Condition 41 - Time limited consent**

##### **Applicant's justification**

The applicant's justification for the removal of this condition is summarised as follows:

*"Condition 41 provides consent via a 60 calendar year time limit for approved works. It is argued that the granting of a time limited consent effectively undermines the purpose and utility of granting any development consent. The proposed works have been designed to allow construction entirely within private property boundaries and regardless of coastal processes, the works will remain within private property in perpetuity.*

*The imposition of Condition 41 pursuant to Section 27 of the Coastal Management Act 2016, as outlined in the reasoning provided by Northern Beaches Council, is vague and unjustified.*

*Given that the proposed works are located entirely within private property and a significant distance landward of the eastern property boundary, opportunities for limiting public access to or use of the beach are entirely non-existent. The coastal protection works have been designed to tie in with existing seawall structures to the north in the Frazer Reserve and to the south at 1104 Pittwater Road and suitable maintenance obligations, including an irrevocable bank guarantee associated with Condition 7, will ensure that the coastal protection works will pose no threat to public safety. If required, any maintenance works will be funded by this bank guarantee, thus consistently reinforcing that Clause 27 can be satisfied in perpetuity.*

*Without design changes that would require a Development Application be submitted to Council, the owner must legally maintain the works in the approved location. Given that the coastal protection works will be located entirely within private property (refer to Appendix B for confirmation), the approved coastal protection works will not inhibit access to or use of the public beach. Like the subject owner of 1106 Pittwater Road, Northern Beaches Council is obliged to maintain the adjacent Frazer Street Reserve Coastal Protection Works to reasonably facilitate public access to and use of the beach. The location of the subject works adjacent to a Reserve should have no immediate bearing on any conditional imposition of a time limit pursuant to Section 27 of the Act. The approved works do not extend onto Crown land and will continue to remain within private property in perpetuity, as enforced by several conditions provided in the DA2018/1878 approval.*

*Satisfactory arrangements have been made, by condition, to ensure the restoration of adjacent private property if erosion is caused by the subject works (Condition 7 - Maintenance Obligations and Public Safety and Condition 40 - Post Storm inspection). These conditions will continue to ensure that Section 27 (b) of the Coastal Protection Act 2016 is satisfied in the future.*

*Further to the above, coastal protection works associated with DA2014/1250 at 1 Frazer Street, Collaroy were not provided with time limited consent and it is both unreasonable and inconsistent for Northern Beaches Council to enforce this onerous condition in the present circumstances. Note the property at 1 Frazer Street is located on the northern side of Frazer Street Reserve, effectively only 15-20m from the subject site property boundary.*

*In addition to the above, the following advice has been provided by the owners legal counsel:*

*"Contrary to the Council's reasons for imposing condition 41, the Coastal Management Act 2016 does not enable a Council to legally impose a condition on a development consent such as condition 41. The Land and Environment Court has said that a Council cannot legally impose a condition on a development consent, in any form, that is designated to ensure the proposed works will not pose a risk to public safety in terms required by the Coastal Management Act 2016. The Court expressed that view because a Council must be satisfied that a proposed development will not pose a risk to public safety before it has the power to impose a condition on the development consent.*

*In another case involving an appeal against the imposition of a similar condition to condition 41, the Land and Environment Court decided the condition was unreasonable and allowed the appeal. The Court said that although the Council had the power to impose the condition (presumably the Council in that case did not rely on the Coastal Management Act), the condition was nonetheless unreasonable. Court said that the condition was unreasonable because "the burden that is placed [by the condition] on whoever might be the owners of the dwelling at that time is a not insignificant one" and the condition was "so out of context with that imposed on the surrounding existing development". Condition 41 appears to involve analogous circumstances."*

*For the reasons discussed above it is requested that Condition 41 be deleted from the consent."*

### **Assessment of the applicant's reasoning**

#### The works are entirely on private property:

The applicant places a large amount of emphasis on the works being entirely within the subject site (unlike some of the coastal protection works on properties to the north of the site).

It is not disputed that the works are entirely on private land. The location of the works is not the reason for imposing the time limited condition of consent.

#### The works will not limit public access to the beach:

Council is satisfied that the works will not limit public access to the beach. Public access to the beach is not the reason for imposing the time limited condition of consent.

#### There are already conditions for maintenance obligations and bank guarantees to ensure on-going maintenance. This will protect public safety:

The conditions around maintenance and legally binding obligations (including by way of financial assurance or bond) are required by a different clause of Section 27 and are not related to the need for a time limited consent condition. It also cannot be known that the works, in their approved design (and assuming they will be maintained to that standard), over the life of the works, will not pose a risk to

public safety.

A time limited condition wasn't imposed on DA2014/1250 (the works approved included a seawall). Therefore it shouldn't be imposed on the current application:

The conditions issued for each successive approval for coastal protection works have evolved. This is a result of Council's continued growth in the understanding of the complexities of coastal legislation and the issues related to the construction of these works.

The interpretation and understanding of the legislation governing coastal protection works has changed since DA2014/1250 was assessed and approved. The current interpretation of Section 27 requires a time limited consent condition.

Land and Environment Court cases have made judgements on other seawalls and have not imposed a time limited consent condition:

It is important to note that the Land and Environment Court cases referenced in the legal advice above are different in many respects to the subject application in terms of the site, the proposed works and the existing works. As such, the comments in relation to the lack of a time limited consent condition are not as useful as they may seem.

The two cases referenced (but not named above) are: *Ralph Lauren Pty Ltd v Transitional Coastal Panel [2018] NSWLEC 1679* and *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel; Stewartville Pty Ltd v New South Wales Transitional Coastal Panel; Robert Watson v New South Wales Transitional Coastal Panel [2018] NSWLEC 207*.

The critical differences in the Ralph Lauren matter when compared to the Collaroy Narrabeen Beach coastal protection works, are:

- The works in the Ralph Lauren matter comprise minor repair works to an existing seawall. Following the works, the seawall would not meet a contemporary coastal engineering standard, although there would be a level of improved beach safety and amenity.
- Ongoing damage to the seawall would be expected, for this reason the consent conditions require preparation of a Maintenance, Repair and Rectification Plan. Strict limiting controls apply within this plan, e.g. limitation on seaward migration of the structure over time, limitation on the size of imported repair rocks, and limitation on the annual quantity of imported rocks. The plan only ensures the seawall provides a level of protection equivalent to that at the completion of the original works authorised under the development consent.
- In accordance with condition 10 (of the Ralph Lauren matter), the owner of the private property must, at its own cost, remove the existing seawall structure (including the 'works') if and when a 'whole of embayment' solution proposed by a government authority is approved by a government authority for implementation (approved proposal). The expectation is that an approved proposal will be in place at some reasonable time into the future.

The considerations in these cases were quite different to the subject site and the current application.

None of the reasons provided by the applicant are sufficient to justify the removal of the time limited consent condition. Council's reasoning for the need for the condition is as follows.

### **Need for a Time Limited Condition**

Council's reasoning for imposing the condition is not vague nor unjustified. A detailed discussion



explaining why a time limited condition is necessary can be read in the assessment report for DA2018/1878. There is no need to repeat it in full in this report.

In summary, a time limited condition is necessary because Section 27 of the *Coastal Management Act 2016* requires the consent authority to be satisfied that the works will not, over the life of the works, pose or be likely to pose a threat to public safety.

Given it is effectively impossible to forecast the state of the coast for the life of the works (and therefore how that would impact on the structure and its effect on public safety), a method needs to be found of being able to grant consent for the time period that a consent authority can be certain that the works will not pose a risk to public safety.

The solution is to impose a time limited condition for a period of time that the experts (in this case, both the applicant's and Council's Coastal Engineers) can reasonably forecast. As outlined in the applicant's documentation for DA2018/1878, and again in the documentation for this modification application, and confirmed by Council's Coastal Engineers, this time period is 60 years.

It is important to note that the time limited condition is not a time limited consent in a pure sense. There is an inbuilt mechanism for the extension of the consent in 6 decades when there will be a proper understanding of coastal processes associated with climate change at that time, should there be sufficient expert opinion to support this.

In this regard, the time limited condition is not only reasonable, it is the only way a consent can be granted, given the current wording of Section 27 of the *Coastal Management Act 2016*.

## 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 EPIs
- Consistent with the objects of the Environmental Planning and Assessment Act 1979

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

## **RECOMMENDATION**

THAT Council as the consent authority grant approval to Modification Application No. Mod2019/0208 for Modification of Development Consent DA2018/1878 granted for the construction of coastal protection works on land at Lot 8 DP 5234, 1106 Pittwater Road, COLLAROY, subject to the conditions printed below:

### **A. Modify Condition No. 26 - Removal of unsuitable material, to read as follows:**

Unusable materials found within the area of excavation and not utilised in the construction of the works will be required to be removed.

Confirmation of this requirement is to be provided to Council by the engineer supervising the works.

Reason: To ensure that all unsuitable material is removed from the beach.

### **B. Modify Condition No. 40 - Post storm inspection, to read as follows:**

After any storm event that exposes any part of the coastal protection works to damage that impacts the support or performance of the works, the owners are to procure, at their cost, inspections by a suitably qualified coastal engineer of the coastal protection works. A detailed report is to be provided by this coastal engineer and any recommendations within the report are to be undertaken as soon as reasonably practicable in accordance with the Maintenance Management Plan or after necessary approvals are obtained, if required.

Reason: To ensure the coastal protection works are maintained after a storm event.

In signing this report, I declare that I do not have a Conflict of Interest.

**Signed**



**Daniel Milliken, Principal Planner**

The application is determined on 22/08/2019, under the delegated authority of:



**Rodney Piggott, Manager Development Assessments**