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**From:** [REDACTED]  
**Sent:** 19/06/2023 10:28:51 AM  
**To:** Council Northernbeaches Mailbox  
**Subject:** DA 2023/0607 173 WHALE BEACH ROAD, WHALE BEACH WRITTEN  
SUBMISSION: LETTER OF OBJECTION SUBMISSION: TULLOCH  
**Attachments:** LIPSON WS.pdf;

Kind regards,

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

# SUBMISSION

a written submission by way of objection

BILL TULLOCH BSC [ARCH] BARCH [HONS1] UNSW RIBA RAIA

prepared for

ROBYN LIPSON, 171 WHALE BEACH ROAD, WHALE BEACH

16 JUNE 2023

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RE: DA 2023/0607  
173 WHALE BEACH ROAD, WHALE BEACH  
WRITTEN SUBMISSION: LETTER OF OBJECTION  
SUBMISSION: TULLOCH

Dear Sir,

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

I have been instructed by my clients to prepare an objection to this DA.

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

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## A. EXECUTIVE SUMMARY

The design of the proposed development does not ensure that the existing high levels of amenity to my clients' property are retained.

The proposal is considered to be inappropriate within the streetscape.

The bulk, scale, density and height of the proposed development is excessive and inconsistent with the established and desired streetscape character.

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

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

- The proposed dwelling houses are not consistent with the desired future character identified for the Palm Beach Locality
- The lots fail to achieve the minimum subdivision lot size width and slope prescribed by clause 4.1 of PLEP 2014 and cannot readily accommodate dwelling houses that are compatible with the character of the locality.
- The proposed dwelling houses fails the maintenance of the existing environment.
- The proposed dwelling houses fails to provide a built form that does not dominate the natural setting.
- The proposed dwelling houses fails to provide an equitable preservation of views and vistas to and/or from public/private places.
- Unacceptable Adverse Visual Impacts
- Unacceptable Adverse View Loss Impacts
- Unacceptable Adverse Privacy Loss Impacts
- Unacceptable Adverse Landscape Impacts
- Loss of on-street car parking

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

- Fails to accord with Minimum Lot Size Width: Proposed 12.45m v Control 16.0m [29% non-compliance]
- Fails to accord with Minimum Lot Size Slope: Exceeds 30 degrees
- Excessive Building Height [HOB]: Proposed 12.01m v Control 8.5m [41% non-compliance]
- Excessive Wall Height [WH]: Proposed 11.7m
- Insufficient Side Setback: Proposed 1.0m facing my client's property v Control 2.5m [>100% non-compliance]

- Exceedance of Side Boundary Envelope [SBE] or Building Height Plane [BHP] substantial zones in the upper levels exceed the controls. Proposed 11.7m v Control [3.5m + 1.0m setback] 4.5m[>100% non-compliance]
- Insufficient Front Setback: Proposed ZERO v Control 6.5m [>100% non-compliance]

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

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

A compliant building design would reduce the amenity impacts identified.

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

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

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

My clients wish to emphasise the fact that my clients take no pleasure in objecting to their neighbour's DA.

The proposed DA has a deleterious impact on the amenity of their property caused by the DA being non-compliant to controls.

If the DA was fully or even substantially compliant to all development controls, they recognise that their rights with respect to any resulting amenity loss to their property would be more limited.

Council and NSWLEC Commissioners regularly concede that development standards and building envelopes provide for maximums and that there is no entitlement to achieve those maximums.

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

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

Council's development controls relating to managing building bulk and scale are designed to ensure that buildings are consistent with the height and scale of the desired character of the locality, are compatible with the height and scale of

surrounding and nearby development, respond sensitively to the natural topography and allow for reasonable sharing of views and visual amenity.

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

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

The proposed development fails the fundamental principles of design excellence in terms of:

- Context and local character
- Built form, scale and public domain, urban design response
- Density
- Landscape integration
- Amenity impacts on neighbours

Council should note that spot survey levels and contour lines from the Registered Surveyors drawings have not been adequately transferred to the proposed DA drawings of plans, sections, and elevations to enable an assessment of height and the relationship and impact to adjoining neighbours. Neighbour's dwellings have not been accurately located on plans, sections and elevations, including windows and decks, to enable a full assessment of the DA. The plans and documentation are misleading as they do not clearly portray the true extent of works proposed. The plans include inaccuracies and inconsistencies and insufficient information has been provided in order to enable a detailed assessment, including incomplete dimensional set-out and incomplete levels on drawings to define the proposed building envelope. There is incomplete analysis provided including view loss, solar loss and privacy loss.

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

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

## **B. FACTS**

### **1. THE PROPOSAL**

The development application seeks approval for the subdivision of 2 lots into 3 and the construction of a new dwelling on each resultant allotment

### **2. THE SITE**

The site comprises two allotments, being 173 Whale Beach Road (Lot 22 in Deposited Plan 10782) and 175 Whale Beach Road (Lot 21 in Deposited Plan 10782). 173 Whale Beach Road is slightly irregular in shape, with a 20.115m wide frontage to Whale Beach Road, a maximum depth of 60.59m and a total area of 998m<sup>2</sup>. 173 Whale Beach Road comprises a two-storey dwelling with a multi-storey detached garage and hardstand parking area, with access via two separate driveways to Whale Beach Road. 175 Whale Beach Road is slightly irregular in shape, with a 20.115m wide frontage to Whale Beach Road, a maximum depth of 71.465m and a total area of 1183m<sup>2</sup>. 175 Whale Beach Road is currently vacant and is heavily vegetated. When combined, the site has a 40.230m wide frontage to Whale Beach Road, a maximum depth of 71.465m and a total area of 2181sqm. The site falls approximately 32m from the upper street frontage down to the rear, where it adjoins a public reserve which separates the site from the ocean beyond. The site is otherwise surrounded by dwelling houses of varying age, character and scale.

### **3. THE LOCALITY**

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

My clients' property shares a common boundary with the subject site.

### **4. STATUTORY CONTROLS**

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

- Environmental Planning and Assessment Act 1979
- Environmental Planning and Assessment Regulation 2000
  
- SEPP (Building Sustainability Index: BASIX) 2004;
- SEPP (Resilience and Hazards) 2021;
- SEPP (Biodiversity and Conservation) 2021.
  
- Pittwater Local Environmental Plan 2014 [referred to as LEP in this Submission]
- Pittwater 21 Development Control Plan [referred to as DCP in this Submission]



## C. CONTENTIONS THAT THE APPLICATION BE REFUSED

### 1. LACK OF STATUTORY POWER

#### CLAUSE 4.6

The application benefits from Clause 2D of Clause 4.3 *Height of Buildings*, which permits a 10.0m height on the site, in lieu of the standard 8.5m. As the Objectives of the clause are not met, the lesser building height of 8.5m is applicable.

The application involves a variation to the Clause 7.8 *Limited Works in Foreshore Area* development standard as a stormwater system is proposed seaward of the foreshore building line. Clause 7.8 is a non- numerical development standard and any works within the Foreshore Area necessitate referral to the NBLPP. The proposal is not accompanied by a Clause 4.6 Variation Request in relation to works in the Foreshore Area and as this is a pre-condition to the grant of consent, the proposal should not be approved.

### 2. CONTRARY TO AIMS OF LEP

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

- The development is not compatible with the desired future character of the locality in terms of building height and roof form.
- The development does not minimise the adverse effects of the bulk and scale of buildings

### 3. CONTRARY TO ZONE OBJECTIVES

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

- The development compromises amenity impacts on neighbours
- The development compromises solar loss
- The development does not minimise visual impact

### 4. CHARACTER

#### CLAUSE A4.12 PALM BEACH LOCALITY

The site is located within the Palm Beach locality, as identified on the Palm Beach Locality Map of P21 DCP.

The proposed dwelling houses are not consistent with the desired future character identified for the Palm Beach Locality, as follows:

- The dwelling houses do not contribute to the existing low-density residential area.
- The dwelling houses have a multi storey character as seen from the public domain, with heights to over 12m, zero street setbacks, lack of 2.5m side setbacks to neighbours, massive non-compliance to side boundary envelope, and a total absence of canopy trees within the front setback zone
- The height of the dwelling houses will not remain below the height of the tree canopy, as heights exceed 12m.
- The design of the proposed dwelling houses is a not highly considered and not a sensitive response to the attributes and constraints of the site.
- The proposed dwelling houses are not appropriately articulated and do not incorporate shade elements in order to reduce the visual impact of the development.
- The proposed development has not been designed to be safe from hazards that affect the site.

#### CLAUSE B2.2 SUBDIVISION – LOW DENSITY RESIDENTIAL

Clause B2.2 of P21 DCP identifies minimum and maximum numerical requirements for proposed new lots, which are addressed below.

At 12.5m – 15.3m in width, the proposed lots are less than the 16m wide minimum lot width prescribed by clause B2.2 of P21 DCP. Furthermore, each of the lots have a slope in excess of 30%, being the maximum gradient for new lots prescribed by this control.

The lots exceed the minimum subdivision lot size width and slope prescribed by clause 4.1 of PLEP 2014 and cannot readily accommodate dwelling houses that are compatible with the character of the locality.

Furthermore, the proposed development is inconsistent with the outcomes of the control, as follows:

#### *ACHIEVE THE DESIRED FUTURE CHARACTER OF THE LOCALITY.*

The proposed development is inconsistent with the desired character for the Palm Beach Locality prescribed by clause A4.12 of P21 DCP.

The proposed non-compliant widths and gradients detract from consistency with any of the outcomes identified.

The proposed non-compliant widths of lots to the street, coupled with zero front setbacks, coupled with non-compliant side setbacks, coupled with substantial non-compliant side boundary envelopes, set against non-compliant heights of building and wall heights, produces a poor character to the streetscape.

The result of this overdevelopment causes the streetscape to appear as a commercial outcome, more appropriate to an urban inner-city environment.

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

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

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

#### MAINTENANCE OF THE EXISTING ENVIRONMENT.

The controls states:

*"Any lot or lots are to be capable of providing for the construction of a building which is safe from hazards, does not unreasonably impact on the natural environment, does not adversely affect heritage and can be provided with adequate and safe access and services."*

The proposed development presents non-compliant zero front setbacks, coupled with non-compliant side setbacks, coupled with substantial non-compliant side boundary envelopes, set against non-compliant heights of building and wall heights.

This outcome cannot be considered 'reasonable' as the applicant suggests.

This outcome produces unreasonable impact on the natural environment, with removal of native trees, and replacement with a dense overdevelopment within the streetscape.

The proposed subdivision is substantially greater than if the two lots were to be developed together, as clearly a more compliant envelope to standards and controls would emerge, substantially reducing the damage to the natural environment.

#### EQUITABLE PRESERVATION OF VIEWS AND VISTAS TO AND/OR FROM PUBLIC/PRIVATE PLACES.

No height poles have been erected to test the impact of the proposed development to the view loss to the public places of view loss from the footpath zones, or from private places.

#### THE BUILT FORM DOES NOT DOMINATE THE NATURAL SETTING.

The proposed built form completely dominates the streetscape, with boundary to boundary, built form, presenting a completely non-compliant outcome to every control.

## CLAUSE D12.1 CHARACTER AS VIEWED FROM A PUBLIC PLACE

Clause D12.1 of P21 DCP prescribes that parking structures must not be the dominant site feature when viewed from a public place, and that parking structures should be located behind the front building line.

The proposed garages are located with a nil setback to Whale Beach Road and are located forward of the 6.5m minimum front building line prescribed by clause D12.5 of P21 DCP.

As mentioned above, the proposed built form completely dominates the streetscape, with boundary to boundary, built form, presenting a completely non-compliant outcome to every control.

### 5. INCORRECT CONSIDERATIONS OF 'GROUND LEVEL EXISTING'

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

The LEP states the following within the LEP Dictionary:

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

Spot levels and contour lines from the Registered Surveyors drawings have not been transferred to the proposed DA drawings of plans, sections, and elevations to enable an assessed of height and the relationship and impact to adjoining neighbours. Neighbour's dwellings have not been accurately located on plans, sections and elevations, including windows and decks, to enable a full assessment of the DA.

### 6. EXCESSIVE BUILDING HEIGHT

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

The proposed development should be refused due to its excessive height and failure to comply with the *Height of Buildings* set out in the LEP, and in particular:

- The proposed development, by virtue of its height and scale, will not be consistent with the desired character of the locality
- The development will not be compatible with the height and scale of surrounding and nearby development.

The development application should be refused because the proposed building height is excessive and does not comply with the objectives or controls in the LEP in

circumstances where the written request made pursuant to clause 4.6 of the LEP in relation to the contravention of the development standard is inadequate and should not be upheld.

The submitted written variation request under cl.4.6 of the LEP seeking to justify the contravention of the height of buildings development standard is not well-founded having regard to the requirements of cl.4.6(3) and 4.6(4)(a)(i) of LEP.

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

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss
- The development does not minimise visual impact
- The development is not compatible with the desired future character of the locality in terms of building height and roof form.
- The development does not minimise the adverse effects of the bulk and scale of buildings

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

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

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

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

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

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

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

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

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

In respect of the compatibility test, unsurprisingly the applicant completely ignores multiple considerations dealing with the understanding of the site in respect of its topography, how it is viewed from neighbouring properties as well as the lack of compatibility with its form and articulation.

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

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

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

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

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

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

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

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

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

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

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

The planning controls are not limited to preventing offence and the like; and are concerned with establishing a certain physical and landscape character. In this instance I am not convinced that there are strong environmental planning grounds to justify a contravention of the scale proposed.

## 7. EXCESSIVE WALL HEIGHT & NUMBER OF STOREY

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

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

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

This non-compliance, as well as the other non-compliances, arising from the proposed upper level indicates that the proposal cannot satisfactorily achieve the underlying objectives of this control, ultimately resulting in an unacceptable building bulk that creates a severe amenity impact.

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss
- The development does not minimise visual impact
- The development is not compatible with the desired future character of the locality in terms of building height and roof form.
- The development does not minimise the adverse effects of the bulk and scale of buildings

The impacts are very similar to the HOB impacts raised in the section above.

## 8. INADEQUATE CLAUSE 4.6 VARIATION REQUEST

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

- The applicant's written request has not adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, or that there are sufficient environmental planning grounds to justify contravening the development standard to the extent proposed.
- The proposed development will not be in the public interest because it is inconsistent with the objectives of the height of buildings development standard or the objectives in the zone to provide for residential development of a low density and scale integrated with the landform and landscape.

There is nothing in the written request's consideration of the relationship between the proposal and the zone objectives which might provide sufficient environmental planning grounds for the breach.

The test is concerned with establishing sufficient environmental planning grounds to justify a contravention, something more than compliance or consistency with zone and development standard objectives must be sought.

The Applicant seeks to vary the height of buildings development standard.

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

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

My clients contend that:

- The written request does not establish that the development is consistent with the objectives of the standard as the proposal does not reasonably share public and private views.
- The written request does not establish that the development is consistent with the character compatibility objectives of the height standard in terms of FSR, maximum building height, number of storeys and wall height.

Furthermore, and in simple terms, I contend that:

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss
- The development does not minimise visual impact
- the impacts are not consistent with the impacts that may be reasonably expected under the controls;
- the proposal's height and bulk do not relate to the height and bulk desired under the relevant controls;
- the area has a predominant existing character and are the planning controls likely to maintain it;
- the proposal does not fit into the existing character of the area;
- the proposal is inconsistent with the bulk and character intended by the planning controls;



- the proposal looks inappropriate in its context

The objectives of the standard have not been met.

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

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

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

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

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

## 9. POOR STREETSCAPE OUTCOMES

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide adequate streetscape outcome, presenting non-compliant envelope controls that are visible from the street.

The proposal is excessive in scale, has adverse impacts on the visual amenity of the environment, does not positively contribute to the streetscape in terms of an adequately landscaped setting. The proposal is visually dominant, and is incompatible with the desired future townscape area character.

## 10. UNACCEPTABLE BUILDING SEPARATION

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

- Side
- Front
- Side Boundary Envelope

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

The non-compliance fails:

- To provide opportunities for deep soil landscape areas.
- To ensure that development does not become visually dominant.
- To ensure that the scale and bulk of buildings is minimised.

- To provide adequate separation between buildings to ensure a reasonable level of privacy, amenity and solar access is maintained.
- To provide reasonable sharing of views to and from public and private properties.

The proposed development results in an encroachment beyond the prescribed building envelope. This non-compliance is indicative of an unacceptable built form and contributes to the severe amenity loss.

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

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

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

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

## 11. BUILT FORM, BULK AND SCALE

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

The development has excessive bulk and scale and fails to comply with development standards set out LEP, resulting in a building which has unacceptable adverse impacts on neighbouring properties and the locality.

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

The multiple non-compliances arising from the proposed upper floor level indicates that the proposed development cannot achieve the underlying objectives of this control, resulting in an unacceptable building bulk when viewed from adjoining and nearby properties.

The development presents an inappropriate response to the site and an unsatisfactory response to the desired future character of the area.

As detailed above, a redesign of the proposed development is strongly recommended to improve the amenity of adjoining properties.

## 12. INSUFFICIENT LANDSCAPE AREAS IN FRONT SETBACK & SIDE SETBACK ZONES

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide adequate landscape area in the side setback zone facing my client's property and within the front setback zone.

The proposal fails:

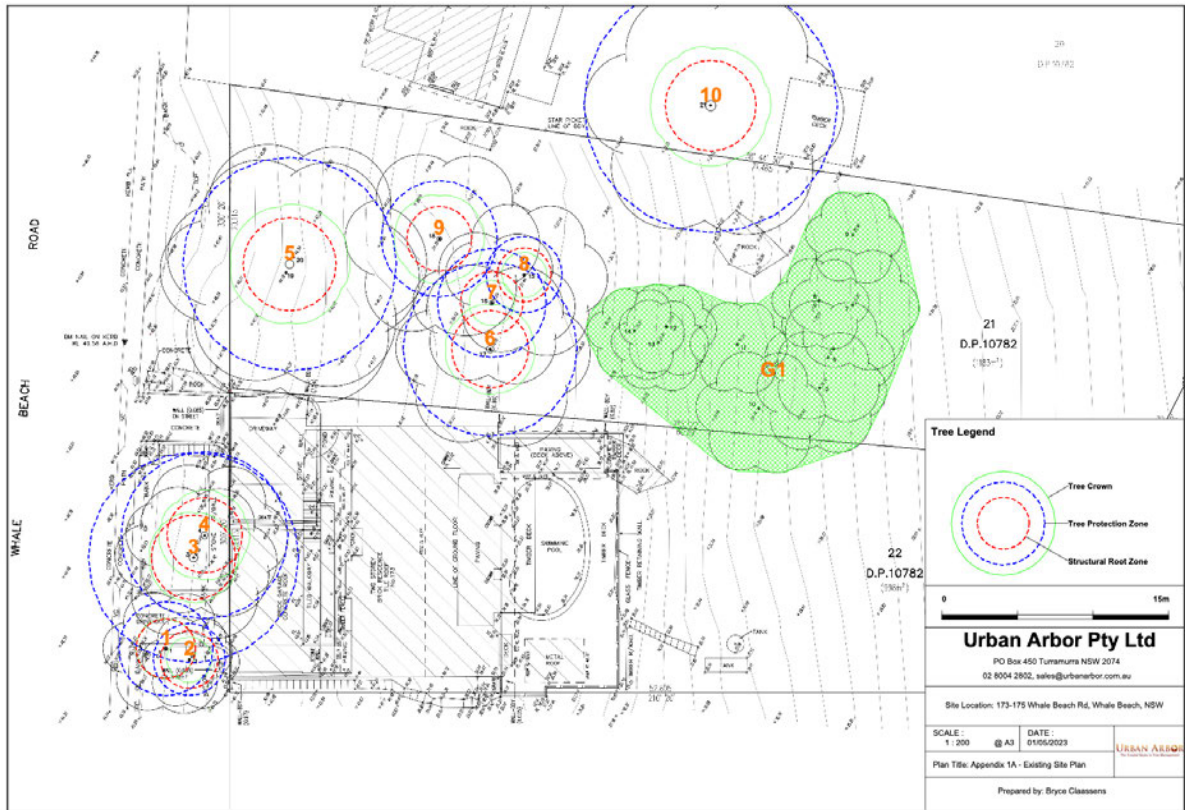
- To enable planting to maintain and enhance the streetscape.
- To conserve and enhance indigenous vegetation, topographical features and habitat for wildlife.
- To provide for landscaped open space with dimensions that are sufficient to enable the establishment of low-lying shrubs, medium high shrubs and canopy trees of a size and density to mitigate the height, bulk and scale of the building.
- To enhance privacy between buildings.
- To accommodate appropriate outdoor recreational opportunities that meet the needs of the occupants.
- To provide space for service functions, including clothes drying.
- To facilitate water management, including on-site detention and infiltration of stormwater.

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

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

## 13. EXCESSIVE REMOVAL OF NATIVE TREES

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



Nine trees and one group of trees have been recommended for removal to accommodate the development works, including tree 1, 2, 3, 4, 5, 6, 7, 8, 9 and G1.

Tree 3, 4, 5, 6 and 9 are higher value category A retention value trees.

Tree 1, 2, 7, 8 and G1 are lower value category Z retention value trees.

Tree 1, 2, 3 and 4 are located within the nature strip and will be located within the footprint of proposed structures.

We strongly object to Tree 3, 4, 5, 6 and 9 that are higher value category A retention value trees.

- Tree 3: Port Jackson Fig: *Ficus rubiginosa* 7m
- Tree 4: Port Jackson Fig: *Ficus rubiginosa* 7m
- Tree 5: Port Jackson Fig: *Ficus rubiginosa* 9m
- Tree 6: Swamp Oak: *Casuarina glauca* 9m
- Tree 9: *Araucaria heterophylla* 8m

We strongly object to built form within the TPZ of the neighbours tree:

- Norfolk Pine 17m

The arborist has not considered existing trees to the neighbouring site to the east.

#### 14. POOR GARAGE DESIGN

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

My clients are concerned that the proposed garage:

- Is built without adequate side setback to my clients' property;
- Is built within the front setback zone, taking away the opportunity for deep soil planting
- Is built without an adequate turning area to allow front in and front out access

#### 15. EXCESSIVE SWIMMING POOL ENVELOPE

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

My clients are concerned that the proposed swimming pool:

- Has excessive height above GLE
- Has inadequate separation to the side boundary

#### 16. EXCESSIVE EXCAVATION & GEOTECHNICAL CONCERNS

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

The proposed development provides excessive excavation. The excavation should be removed within the setback zones. The excavation should be reduced elsewhere to reduce the risks.

I have numerous concerns:

- The steep slope that falls across the property and continues above failing and impacting on the property.
- The vibrations produced during the proposed excavations for the houses impacting on the neighbouring properties.
- The proposed excavations for the houses collapsing onto the worksite and impacting the neighbouring properties during the excavation process.
- A mass failure of the slope that falls across the property and continues above at moderate angles failing and impacting on the proposed works.
- The excavation collapsing onto the work site before retaining structures are in place.

- The proposed basement excavation undercutting the footings of the house causing failure.
- Excessive vibration recommendations considering the age and fragility of neighbours' properties

I have other concerns:

- The geotechnical report shows little investigation upon which the report is based and is limited to visual inspection and the conducting of limited DCP test and limited boreholes that extended through soils before being terminated at shallow depth
- The geotechnical report provides no description of adjacent properties or conditions/hazards with these properties that could be impacted by or impact upon the development (i.e. boulders, stabilised outcrops)

The geotechnical report supplied does not meet the Council's policy requirements or objectives and as such should not be accepted by Council with the Development Application.

The geotechnical report provides limited assessment which does not appear site or development specific, provides no design or construction recommendations to maintain stability within the "Acceptable Risk Management" criteria and involved very limited and shallow investigation for what are deep excavations into the hill slope that have high potential for detrimental impact on adjacent properties and structures.

As such, should approval of the proposed development occur based on the supplied geotechnical report, then serious concerns should be held for the stability and protection of my client's property and house.

My clients have geotechnical concerns.

- Stability of the natural hillside slope; upslope of the proposed residence, beneath the proposed residence, downslope of the proposed residence and to all neighbour's land.
- Stability of the cliff adjacent to the site.
- Stability of existing retaining walls that will remain;
- Stability of proposed retaining walls to support the excavations for the proposed residence, and external landscaping walls.
- Incomplete consideration of landslip hazards
- Incomplete consideration of Natural Hillside Slope
- Incomplete consideration of the Cliff
- Incomplete consideration to create a Large-Scale Translational Slide
- Incomplete consideration of Existing Retaining Walls
- Incomplete consideration of Proposed Retaining Walls
- Incomplete consideration of partial excavation of large boulders
- Incomplete consideration and inadequate identification of 'floaters' across neighbour's boundary
- Incomplete consideration of Surface Erosion
- Incomplete consideration of potential Rock Fall

- Incomplete consideration of landslip of soils from excavation

My clients have concerns regarding the lack of extensive recommendations in respect to the following:

- Incomplete Conditions Recommended to Establish the Design Parameters
- Incomplete Conditions Recommended to the Detailed Design to be Undertaken for the Construction Certificate
- Incomplete Conditions Recommended During the Construction Period
- Incomplete Conditions Recommended for Ongoing Management of the Site/Structure(s)
- Incomplete Geotechnical Risk Management Forms

The Geotechnical report does not contain the full extent of conditions normally associated with this type of deep excavation on a steep slope. Some of these matters are partially addressed but not all.

Typical conditions are as follows:

#### Conditions Recommended to Establish the Design Parameters

- all existing landscaping retaining walls within the site will be replaced as part of the development.
- a geotechnical investigation of the site should be carried out to confirm the subsurface conditions prior to the start of excavation. The investigation should be carried out following demolition to so access to the entire site for a drilling rig is possible.
- at least four boreholes be drilled, involving coring of the rock to assess its quality
- Cone Penetration Testing across the site to determine the soil profile and consistency;
- Boreholes for soil identification and collection of laboratory samples;
- Installation of groundwater monitoring wells with data loggers to measure groundwater levels before and during construction;
- Permeability testing in wells;
- Groundwater modelling to assess inflows and drawdown;
- Shoring wall analyses.
- Assess the groundwater level and fluctuations across the site and provide a detailed groundwater assessment to predict soil permeability, inflow rates, drawdown and its effect in the short and long term for the site and surrounding properties;
- Excavations are expected to encounter sandstone bedrock and where such excavation is carried out using a hydraulic rock hammer continuous vibration monitoring must be carried out during rock hammer use. Vibration monitors should be set up on the adjoining houses. The ground vibration measured as peak particle velocity must not exceed 5mm/sec at the site boundaries, or 3mm/sec on older fragile properties. Lower PPV may be necessary due to the structural design of neighbouring properties
- Subject to inspection by a geotechnical engineer temporary batters for the proposed excavation should be no steeper than 1 Vertical (V) in 1 Horizontal

(H) within the soil profile and extremely weathered rock and vertical in competent rock. All surcharge and footing loads must be kept well clear of the excavation perimeter.

- Where the required batters cannot be accommodated within the site geometry, or where not preferred, a retention system would be required and should be installed prior to excavation commencing.
- proposed new retaining walls should be designed using parameters set out by the geotechnical engineer, such as: For cantilever walls, adopt a triangular lateral earth pressure distribution and an 'active' earth pressure coefficient,  $K_a$ , of 0.3, for the retained height, assuming a horizontal backfill surface. A bulk unit weight of 20kN/cubm should be adopted for the soil profile. Any surcharge affecting the walls (e.g. traffic loading, live loading, compaction stresses, etc) should be allowed in the design. Propped or anchored retaining walls may be designed based on a trapezoidal lateral pressure distribution of  $6H$  kPa, where  $H$  is the retained height in metres, assuming no structures are located within  $2H$  of the wall. The retaining walls should be provided with complete and permanent drainage of the ground behind the walls. The subsoil drains should incorporate a non-woven geotextile fabric (e.g. Bidim A34), to act as a filter against subsoil erosion. For soldier pile walls strip drains should be placed behind the shotcrete panels. Toe resistance of the wall may be achieved by keying the footing into bedrock. An allowable lateral stress of 200kPa may be adopted for design.
- No rock anchors beyond the subject site boundary
- All proposed footings must be founded in sandstone bedrock. The footings should be designed for an allowable bearing pressure of 600kPa, subject to inspection by a geotechnical engineer prior to pouring.
- The surface water discharging from the new roof and paved areas must be diverted to outlets for controlled discharge to the existing stormwater system which appears to drain to the north. Any stormwater discharge must be spread across the slope and not discharged in a concentrated manner.
- The guidelines for Hillside Construction should also be adopted.

#### Conditions Recommended to the Detailed Design to be Undertaken for the Construction Certificate

- All structural design drawings must be reviewed by the geotechnical engineer who should endorse that the recommendations contained in this report have been adopted in principle. As the construction certificate will need to be obtained prior to demolition, the structural drawings prepared for the construction certificate application will require review following completion of the geotechnical investigation and must be marked as such. The need for the geotechnical investigation following demolition must be clearly stated on the construction certificate structural drawings.
- All hydraulic design drawings must be reviewed by the geotechnical engineer who should endorse that the recommendations contained in this report have been adopted in principle.
- All landscape design drawings must be reviewed by the geotechnical engineer who should endorse that the recommendations contained in this report have been adopted in principle.



- Dilapidation surveys must be carried out on the neighbouring buildings and structures. A copy of the dilapidation report must be provided to the neighbours and Council or the Principle Certifying Authority.
- An excavation/retention methodology must be prepared prior to bulk excavation commencing. The methodology must include but not be limited to proposed excavation techniques, the proposed excavation equipment, excavation sequencing, geotechnical inspection intervals or hold points, vibration monitoring procedures, monitor locations, monitor types, contingency plans in case of exceedances.
- The excavation/retention methodology must be reviewed and approved by the geotechnical engineer.
- A Geotechnical Monitoring Plan is to be prepared which will detect any settlement associated with temporary and permanent works and structures; Will detect vibration in accordance with AS 2187 .2-1993 Appendix J including acceptable velocity of vibration (peak particle velocity); Will detect groundwater changes calibrated against natural groundwater variations; Details the location and type of monitoring systems to be utilised; Details the pre-set acceptable limits for peak particle velocity and ground water fluctuations; Details recommended hold points to allow for the inspection and certification of geotechnical and hydro-geological measures by the professional engineer; and Details a contingency plan.
- A geotechnical investigation meeting the requirements of TfNSW Technical Direction Geotechnology GTD 2020/001 | Version No. 01 – 2 July 2020 *Excavation adjacent to Transport for NSW Infrastructure*. This investigation will relate to the proximity of the excavation to the road
- Geotechnical assessment meeting the requirements of Sydney Water, *Technical guidelines, Building over and adjacent to pipe assets*, August 2021. This assessment will relate to the proximity of the excavation to the existing sewer main.
- A minimum of four cored boreholes extending to at least 3 m below the proposed bulk excavation level. A monitoring well is to be installed in at least one borehole the presence or otherwise of a groundwater level within the proposed depth of excavation established prior to design.
- Rock grinders are to be used for excavation. Hydraulic rock hammering is not to be used for excavation as it has the potential to provoke rock instability of the existing cliff face.
- Vibration monitoring limits are to be set at maximum Peak Particle Velocity of 5 mm/sec on neighbouring properties, or 2mm/sec to heritage, historical, structures in sensitive and fragile conditions or older fragile dwellings.
- Monitoring is to be carried out during demolition and excavation using a vibration monitoring instrument [Vibra] and alarm Levels [being the appropriate PPV] selected in accordance with the type of structures present within the zone of influence of the proposed excavation. If vibrations in adjacent structures exceed the above values or appear excessive during construction, excavations should cease, and the project Geotechnical Engineer should be contacted immediately for appropriate review.

#### Conditions Recommended During the Construction Period

- The recommendations provided below must be reviewed and amplified following completion of the geotechnical investigation. The

recommendations given below assume that good quality rock will be encountered at relatively shallow depths.

- The structural drawings must be updated following completion of the geotechnical investigation and subsequently reviewed by the geotechnical engineer to confirm that the geotechnical recommendations have been adopted.
- The approved excavation/retention methodology must be followed.
- Bulk excavations must be progressively inspected by the geotechnical engineer as excavation proceeds. We recommend inspections at 1.5m vertical depth intervals and on completion.
- The geotechnical engineer must inspect all footing excavations prior to placing reinforcement or pouring the concrete.
- Proposed material to be used for backfilling behind retaining walls must be approved by the geotechnical engineer prior to placement.
- Compaction density of the backfill material must be checked by a NATA registered laboratory to at least Level 2 in accordance with, and to the frequency outlined in, AS3798, and the results submitted to the geotechnical engineer.
- If they are to be retained, the existing stormwater system, sewer and water mains must be checked for leaks by using static head and pressure tests under the direction of the hydraulic engineer or architect, and repaired if found to be leaking.
- The geotechnical engineer must inspect all subsurface drains prior to backfilling.
- An 'as-built' drawing of all buried services at the site must be prepared (including all pipe diameters, pipe depths, pipe types, inlet pits, inspection pits, etc).
- All rock anchors must be proof-tested to 1.3 times the working load. In addition, the anchors must be subjected to lift-off testing no sooner than 24 hours after locking off at the working load. The proof-testing and lift-off tests must be witnessed by the geotechnical engineer. The anchor contractor must provide the geotechnical engineer with all field records including anchor installation and testing records. No rock anchors under neighbours property.
- The geotechnical engineer must confirm that the proposed alterations and additions have been completed in accordance with the geotechnical reports.

#### Conditions Recommended for Ongoing Management of the Site/Structure(s)

The following recommendations have been included so that the current and future owners of the subject property are aware of their responsibilities:

- All existing and proposed surface (including roof) and subsurface drains must be subject to ongoing and regular maintenance by the property owners. In addition, such maintenance must also be carried out by a plumber at no more than ten yearly intervals; including provision of a written report confirming scope of work completed (with reference to the 'as-built' drawing) and identifying any required remedial measures.
- The existing retaining walls on the western and eastern boundaries that are to remain must be inspected by a structural engineer at no more than ten yearly

intervals; including the provision of a written report confirming scope of work completed and identifying any required remedial measures

- No cut or fill in excess of 0.5m (e.g. for landscaping, buried pipes, retaining walls, etc), is to be carried out on site without prior consent from Council.
- Where the structural engineer has indicated a design life of less than 100 years then the structure and/or structural elements must be inspected by a structural engineer at the end of their design life; including a written report confirming scope of work completed and identifying the required remedial measures to extend the design life over the remaining 100 year period.

#### Other Conditions:

- It is possible that the subsurface soil, rock or groundwater conditions encountered during construction may be found to be different (or may be interpreted to be different) from those inferred from the surface observations
- Surface run-off patterns during heavy rainfall may present poor outcomes

Concern is raised that the Geotechnical report has not fully addressed these matters

- Comprehensive site mapping conducted - inadequate
- Mapping details presented on contoured site plan with geomorphic mapping
- Subsurface investigation required
- Geotechnical model developed and reported as an inferred subsurface type-section
- Geotechnical hazards identified
- Geotechnical hazards described and reported
- Risk assessment conducted in accordance with the Geotechnical Risk Management Policy; Consequence analysis & Frequency analysis
- Risk calculation
- Risk assessment for property conducted in accordance with the Geotechnical Risk Management Policy
- Risk assessment for loss of life conducted in accordance with the Geotechnical Risk Management Policy
- Assessed risks have been compared to "Acceptable Risk Management" criteria as defined in the Geotechnical Risk Management Policy
- Opinion has been provided that the design can achieve the "Acceptable Risk Management" criteria provided that the specified conditions and recommendations presented in the Report are achieved recommendations presented in the Report are adopted.
- Design Life Adopted:100 years
- Geotechnical Conditions to be applied to all four phases as described in the Geotechnical Risk Management Policy
- Additional action to remove risk where reasonable and practical have been identified and included in the report.

The Applicant has not provided adequate protection to my clients' property from excessive excavation and potential land slip and damage to my clients' property, including intrusive geotechnical investigations, incomplete geotechnical recommendations, incomplete geotechnical monitor plan, excessive vibration limits, lack of full-time monitoring of the vibration, incomplete dilapidation report

recommendations, incomplete attenuation methods of excavation, exclusion of excavation in the setback zone, exclusion of anchors under my clients' property, and incomplete consideration of battering in the setback zone.

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

#### 17. IMPACTS UPON ADJOINING PROPERTIES: ADVERSE VIEW LOSS IMPACTS

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

The development application should be refused as it results in unacceptable view loss from adjoining and nearby residential dwellings.

Particulars:

- (a) The proposal is inconsistent objectives of the DCP regarding views;
- (b) The proposal is inconsistent with objective and controls of the DCP regarding views and view sharing;
- (c) The proposal is inconsistent with the height of building development standard under LEP and the maximum wall height and setback controls under the DCP;
- (d) The application documentation has failed to accurately and comprehensively consider and document view loss impacts on affected neighbours;
- (e) Given that the applicant has failed to undertake an actual view impact analysis associated with the individual impacted properties then the proposal is inconsistent with the Land and Environment Court Planning Principle contained in *Tenacity Consulting v Warringah Council* and in particular the "fourth step" regarding the reasonableness of the proposal in circumstances where impacts arise from a development that breaches planning controls; and secondly whether a more skilful design could reduce the impact on views of neighbours.

Height poles are to be erected and are to be certified by a registered surveyor.

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

18. IMPACTS UPON ADJOINING PROPERTIES: VIEW LOSS CAUSED BY POOR STRATEGIC POSITIONING OF TREE CANOPY

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to strategically locate new tree canopy to avoid amenity loss.

My clients are concerned that new trees are positioned within the Tenacity Viewing Corridors to my clients' view.

There are 60 proposed trees over 10m in height that could take neighbours views. I attach the schedule from the Landscape Plan.

**PLANT SCHEDULE**

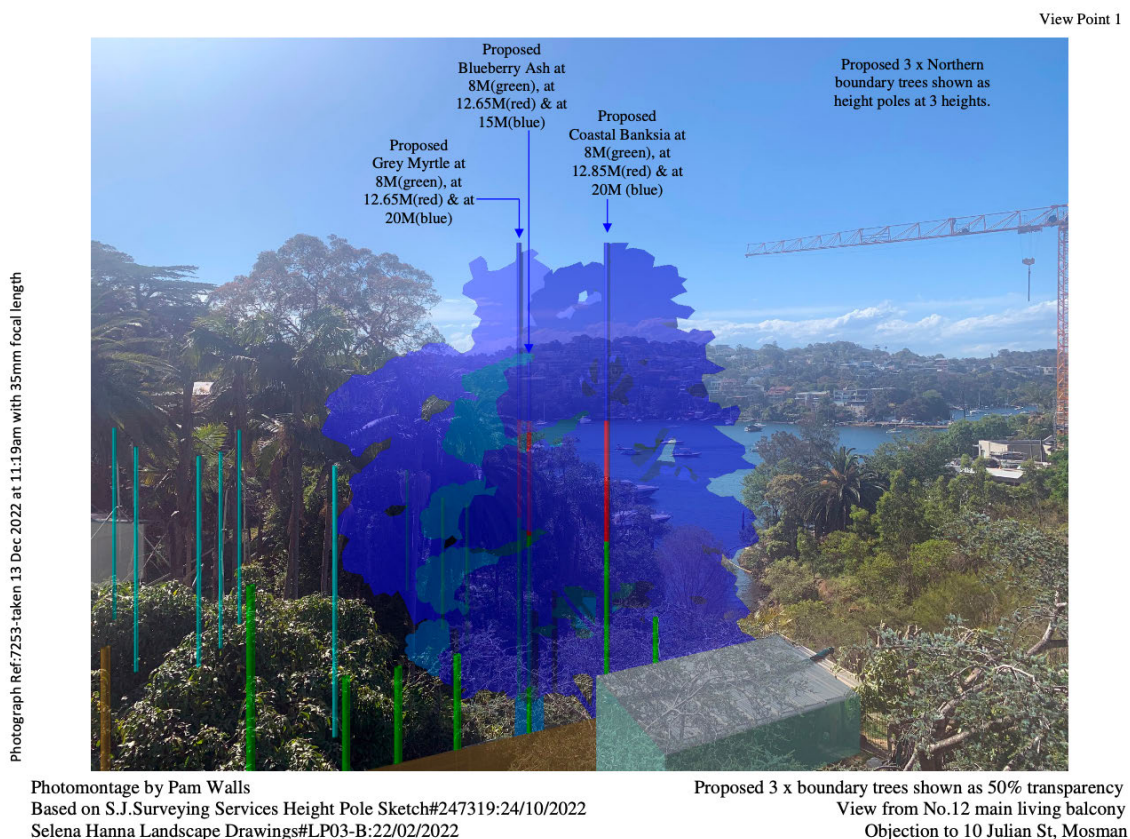
PLANT SYMBOL	BOTANICAL NAME	COMMON NAME	MATURE HEIGHT M	POT SIZE MM	QTY
<b>PROPOSED TREES</b>					
BAI	<i>Banksia integrifolia</i>	Coastal Banksia	15	450	5
BIS	<i>Bismarckia nobilis</i>	Bismark Palm	12	450	1
CAG	<i>Casuarina glauca</i>	Swamp Oak	20	450	10
CEG	<i>Ceratopetalum gummiferum</i>	NSW Christmas Bush	6	450	2
ELR	<i>Elaeocarpus reticulatus</i>	Blueberry Ash	5	450	2
EUC	<i>Eucalyptus species</i>	Gum	-	na	ex
HOF	<i>Howea forsterana</i>	Kentia Palm	6	450	6
LIA	<i>Livistona australis</i>	Cabbage Tree Palm	13	450	23
STN	<i>Strelitzia nicolai</i>	Giant White Bird of Paradise	7	na	ex
TRL	<i>Tristania laurina</i> "Luscious"	Water Gum	5	450	1

At the recent NSWLEC case, *Hong v Mosman Municipal Council [2023] NSWLEC 1149* decision dated 31 March 2023, view loss caused by excessive landscape was a key issue. Commissioner Walsh summarised the matter in cl 30 of his decision:

*In regard to landscaping and tree protection, I note again that in Court and to some degree of detail, I worked through with the experts the various points of concern raised. This resulted in a number of further agreed alterations to the landscape plan. The Revision C drawings, based on the evidence of the experts but also in my own reading, now provide that appropriate balance between retaining and sometimes enhancing Middle Harbour views, while also providing for a valuable local landscape contribution.*

The Revision C drawings required 9 high canopy trees to be deleted and replaced by 3m high species. The condition of consent required a further four transplanted palms to be deleted from the Landscape Plans.

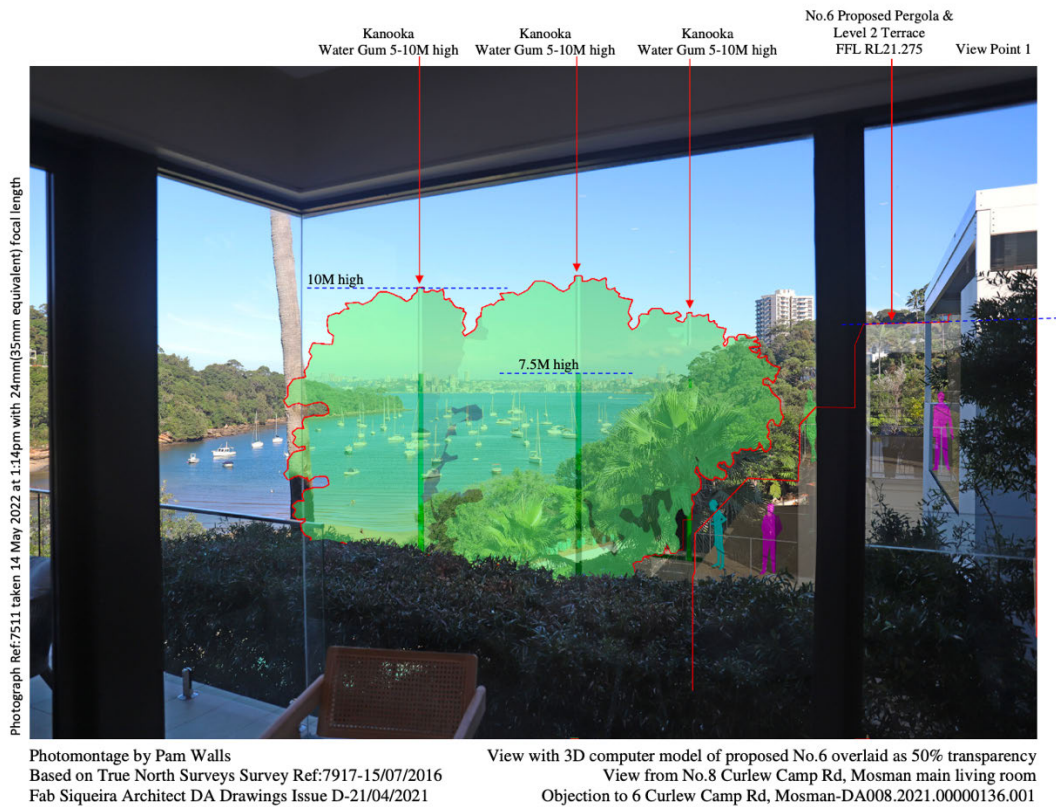
I add the montage prepared to support the neighbour's submission in these respects.



*Hong v Mosman Municipal Council [2023] NSWLEC 1149*  
View Loss caused by excessive landscape in the harbour viewing corridor zone

At the recent NSWLEC case, *Zubani v Mosman Municipal Council [2022] NSWLEC 1381*, decision dated 19 July 2022, clearly identifies that under *Tenacity*, Council must be mindful to restrict landscape heights to ensure views are adequately protected. Commissioner Morris referred to the matter in 47 and 49.

I add the montage prepared to support the neighbour's submission in these respects

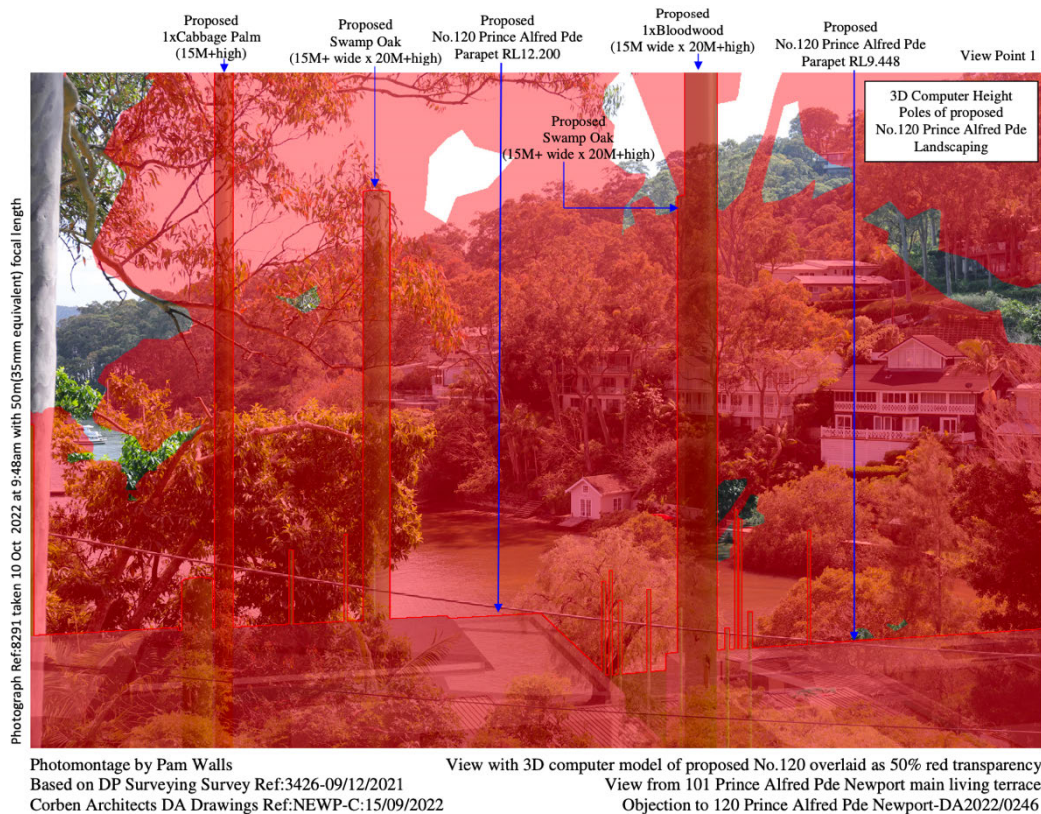


*Zubani v Mosman Municipal Council [2022] NSWLEC 1381*  
View Loss caused by excessive landscape in the street setback zone

At the recent NSWLEC case, *Petesic v Northern Beaches Council [2022] NSWLEC*, decision dated 30 May 2022, view loss caused by excessive landscape was a key issue. Northern Beaches Council's SOFAC filed 16 September 2021, prepared by Louise Kerr, Director Planning and Place at NBC, in B2 Item 7, called for '*strategic positioning of canopy trees*' to avoid view loss. Proposed Trees were lowered and repositioned as a result. Commissioner Chilcott referred to the matter in 49[5].

At the recent NBLPP decision, DA 2022 0246 at 120 Prince Alfred Parade, Newport on 8 December 2022, the Panel agreed to delete trees higher than 8.5m in the viewing corridor as recommended by Council's assessment Report, and imposed the additional condition that the trees "*shall be maintained so that they do not exceed 8.5 metres in height measured from the ground at the base of the tree*"





NBLPP: DA 2022 0246 120 Prince Alfred Parade, Newport on 8 December 2022  
 View Loss caused by excessive landscape

#### 19. IMPACTS UPON ADJOINING PROPERTIES: PRIVACY

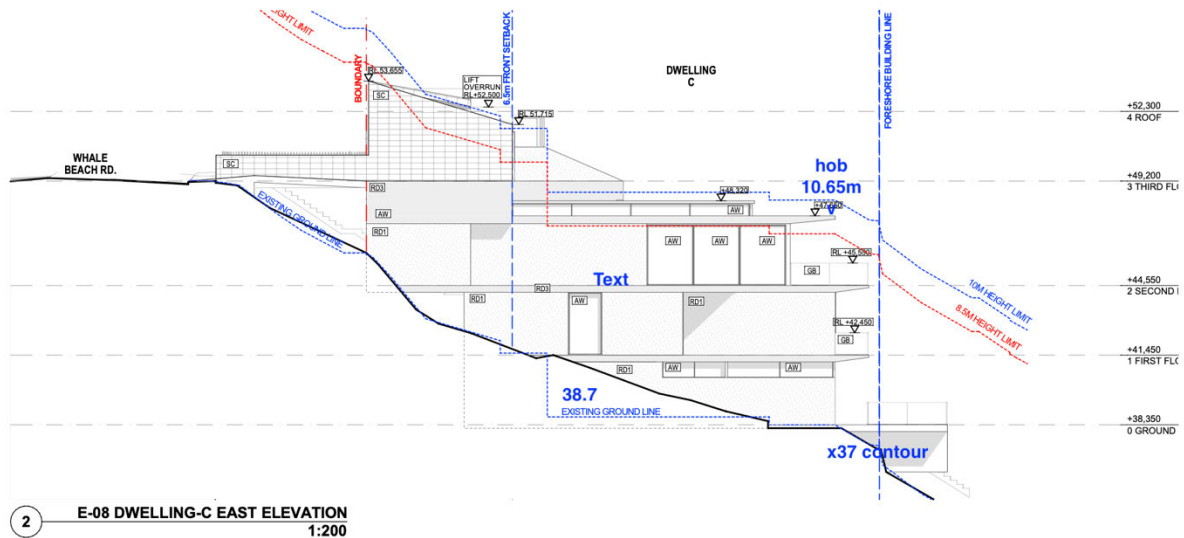
The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it will have unacceptable impacts upon the amenity of neighbours' property, specifically with regard to visual privacy.

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

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

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





There is excessive full height glazing facing the side boundary to Lot C facing my clients' property.

All glazing must have 1.7m high sills.

All decks must have 1.7m high privacy screens.

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

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

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

*Principle 2: Privacy can be achieved by separation. The required distance depends upon density and whether windows are at the same level and directly facing each other. Privacy is hardest to achieve in developments that face each other at the same level. Even in high-density development it is unacceptable to have windows at the same level close to each other. Conversely, in a low-density area, the objective should be to achieve separation between windows that exceed the numerical standards above. (Objectives are, of course, not always achievable.)*

Response: The proposed development results in a privacy impact with the proposed windows facing neighbours without sufficient screening devices being provided, considering the proposed windows are directly opposite my clients' windows and balconies.

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

Response: The windows in question are windows of the main circulation zones and living areas, it is considered that the living areas will result in an unacceptable privacy breach. The proposed windows and decks facing the rear private open spaces for the neighbouring dwelling and will result in an unacceptable level of privacy impact.

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

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

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

Response: It is considered that the private open space of the neighbouring dwellings could be better protected. My clients ask Council to consider the most appropriate privacy screening measures to be imposed on windows and decks facing my clients' property, including landscaping

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

Response: As mentioned above, the use of privacy devices would reduce the impact of the dwelling.

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

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

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

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

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

In the context of the above principles, the application can be considered to violate the reasonable expectation that the habitable rooms and private open space at

my clients' property will remain private. It is therefore reasonably anticipated that the application does not comply with the DCP.

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

## 20. PRECEDENT

The Development Application should be refused because approval of the proposal will create an undesirable precedent for similar inappropriate development in the area.

## 21. PUBLIC INTEREST

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

## **D. CONTENTIONS THAT RELATE TO INSUFFICIENT & INADEQUATE INFORMATION**

The applicant has not submitted sufficient and/or adequate information as requested by Council under Part 6, Division 1 Clause 54 of the EPA Regulation 2000 to enable a reasonable assessment under the applicable legislation.

The application lacks sufficient detail to make an informed assessment particularly with respect to determining the extent of the following matters and the relationship and impact to adjoining neighbours.

### **Biodiversity Protection: Flora & Fauna Assessment**

The site is identified on the Biodiversity Map of PLEP 2014. There is no Assessment prepared by the Applicant.

### **View Impact Analysis**

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

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

### **Privacy Impact Analysis**

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

### **Visual Bulk Analysis**

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

### **Existing and Finished Ground Levels**

Spot levels and contour lines from the Registered Surveyors drawings have not been transferred to the proposed DA drawings of plans, sections, and elevations to enable an assessed of height and the relationship and impact to adjoining neighbours. Neighbour's dwellings have not been accurately located on plans,

sections and elevations, including windows and decks, to enable a full assessment of the DA.

## Geotechnical

The site is identified within Area H1 on the Geotechnical Hazard Map of PLEP 2014.

The site is located within the Cliff/Bluff Instability area of the Coastal Risk Planning Map of PLEP 2014.

The Applicant has not provided adequate protection to my clients' property from excessive excavation and potential land slip and damage to my clients' property, including excessive vibration limits, lack of full-time monitoring of the vibration, incomplete dilapidation report recommendations, incomplete attenuation methods of excavation, exclusion of excavation in the setback zone, exclusion of anchors under my clients' property, and incomplete consideration of battering in the setback zone. The geotechnical requirements referred to earlier must be added to the Geotechnical Report. My clients ask for the Geotechnical Report to be updated to include these matters, and the recommendations of the risk assessment required to manage the hazards as identified in the Geotechnical Report are to be incorporated into the construction plans.

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

A compliant building design would reduce the amenity impacts identified.

Prepare and submit further supporting information and amendments to the assessing officer directly addressing the issues.

My clients contend that the proposed development is REFUSED as the subdivision creates unacceptable amenity outcomes to the streetscape.

Any proposed dwelling facing my client's property must comply with the following:

Reduce the proposed development as follow:

### **1. REDUCTION OF BUILT FORM**

- Reduce the Building Height to 8.5m, with limited zones to 10m.
- Reduce the Wall Height to DCP controls
- Increase Side Setback to 2.5m
- Delete all built form within Side Boundary Envelope
- Increase Front Setback to 6.5m
- Decrease excavation, with no excavation or fill in side setback zone
- Position stormwater grated surface inlet pits along the boundary, at 4m centres, to collect surface and sub surface stormwater
- Solar panels to lie flat of the roof and not to exceed maximum roof height

### **2. PRIVACY DEVICES**

- Privacy screening to a height of at least 1.7m measured from the FFL level is to be incorporated along the full extent of all windows to the side elevations, and to all balconies at the first floor which face the side boundary. Privacy screening to be fixed obscured glazing or fixed panels or battens or louver style construction (with a maximum spacing of 20mm), in materials that complement the design of the approved development.

### **3. LANDSCAPING**

- Landscaping. To maintain view sharing, the proposed trees and plants over 8m in height shall be deleted in the landscape plan. Tree canopy planting must be located at least 3m from buildings and 5m from common boundaries, to avoid excessive canopy protruding over neighbour's property. An amended Landscape Plan prepared by a qualified landscape designer to a scale of 1:100 and conditions of this Consent shall be submitted to Council's satisfaction with the Construction Certificate. The plan shall show: a north point; existing and proposed finished ground levels; the location of all existing and proposed landscape features; proposed streetscape works adjacent to the property boundary; existing trees to be retained, removed or transplanted (including species and dimensions); and tree protection zones for trees (on or

near the property) that are to be retained and are liable to impacts from the proposed development. Predominantly locally indigenous plant species shall be specified in the Plant Schedule. All plantings shall be of local species not to exceed 8m in height.

- Landscaping: additional tree canopy planting with 2 new canopy trees per lot on the front setback zone located at least 3 metres from buildings and 1.5m from common boundaries to offset loss of tree canopy, and reduce the built form and establish an appropriate setting where landscape is prominent
- Landscaping: additional 8m high planting for screening along the boundaries adjacent to the proposed built form, to reduce the built form and establish an appropriate setting where landscape is prominent
- Landscaping: increase garden width between the proposed driveway ramp wall and the side boundary of the adjoining property to adequately support planting and at least 2500mm is considered necessary to support columnar shrub screen planting,
- Landscaping: A continuous deep soil landscape strip, of a minimum 2.5m width is to be provided along the east boundary to enable suitable screen planting.

#### 4. CONDITIONS OF ANY CONSENT

My client asks for a complete set of Conditions to be included within any consent, including, but not limited to, the following:

Conditions which must be satisfied prior to the demolition of any building or construction

- Acoustic Certification of Mechanical Plant and Equipment
- Arborists Documentation and Compliance Checklist
- BASIX Commitments
- Checking Construction Certificate Plans – Protecting Assets Owned by Sydney Water
- Construction Certificate Required Prior to Any Demolition
- Demolition and Construction Management Plan
- Electric vehicle circuitry and electric vehicle charging point requirements
- Engineer Certification
- Establishment of Tree Protection Zone (TPZ) Fence
- Geotechnical and Hydrogeological Design, Certification and Monitoring
- Ground Anchors
- Identification of Hazardous Material
- Light and Ventilation
- No Underpinning works
- Noise Control - Acoustic Protection of adjoining residential units-Operation of Air Conditioning Plant
- Noise Control - Swimming pool/spa pool pumps and associated equipment
- Parking Facilities
- Payment of Long Service Levy, Security, Contributions and Fees
- Professional Engineering Details
- Public Road Assets Prior to Any Work/Demolition
- Road and Public Domain Works
- Soil and Water Management Plan – Submission and Approval

- Stormwater Management Plan
- Swimming and Spa Pools – Backwash
- Swimming and Spa Pools – Child Resistant Barriers
- Tree Management Plan
- Ventilation - Internal Sanitary Rooms
- Utility Services Generally
- Waste Storage – Per Single Dwelling

Conditions which must be satisfied prior to the commencement of any development work

- Adjoining Buildings Founded on Loose Foundation Materials
- Building - Construction Certificate, Appointment of Principal Certifier, Appointment of Principal Contractor and Notice of Commencement (Part 6, Division 6.3 of the Act)
- Compliance with Building Code of Australia and insurance requirements under the
- Dilapidation Reports for Existing Buildings
- Erosion and Sediment Controls – Installation
- Establishment of Boundary Location, Building Location and Datum
- Home Building Act 1989
- Notification of Home Building Act 1989 requirements
- Security Fencing, Hoarding (including 'Creative Hoardings') and Overhead Protection
- Site Signs
- Toilet Facilities
- Works (Construction) Zone – Approval and Implementation

Conditions which must be satisfied during any development work

- Asbestos Removal Signage
- Check Surveys - boundary location, building location, building height, stormwater drainage system and flood protection measures relative to Australian Height Datum
- Classification of Hazardous Waste
- Compliance with Australian Standard for Demolition
- Compliance with BCA and Insurance Requirements under the Home Building Act 1989
- Compliance with Council's Specification for Roadworks, Drainage and
- Compliance with Geotechnical / Hydrogeological Monitoring Program
- Miscellaneous Works, Road Works and, Work within the Road and Footway
- Critical Stage Inspections
- Disposal of Site Water During Construction
- Disposal of Asbestos and Hazardous Waste
- Dust Mitigation
- Erosion and Sediment Controls – Maintenance
- Footings in the vicinity of trees
- Hand excavation within tree root zones
- Hours of Work –Amenity of the Neighbourhood



- Installation of stormwater pipes and pits in the vicinity of trees
- Level changes in the vicinity of trees
- Notification of Asbestos Removal
- Maintenance of Environmental Controls
- Placement and Use of Skip Bins
- Prohibition of Burning
- Public Footpaths – Safety, Access and Maintenance
- Replacement/Supplementary trees which must be planted
- Requirement to Notify about New Evidence
- Site Cranes
- Site Waste Minimisation and Management – Construction
- Site Waste Minimisation and Management – Demolition
- Support of Adjoining Land and Buildings
- Tree Preservation
- Vibration Monitoring

Conditions which must be satisfied prior to any occupation or use of the building  
(Part 6 of the Act and Part 8 Division 3 of the Regulation)

- Amenity Landscaping
- Certification of Electric Vehicle Charging System
- Commissioning and Certification of Public Infrastructure Works
- Commissioning and Certification of Systems and Works
- Occupation Certificate (section 6.9 of the Act)
- Letter Box
- Swimming and Spa Pools – Permanent Child Resistant Barriers and other Matters
- Swimming Pool Fencing

Conditions which must be satisfied prior to the issue of the Occupation Certificate for the whole of the building

- Fulfillment of BASIX Commitments – clause 154B of the Regulation
- Landscaping
- Positive Covenant and Works-As-Executed Certification of Stormwater Systems
- Removal of Ancillary Works and Structures
- Road Works (including footpaths)

Conditions which must be satisfied during the ongoing use of the development

- Maintenance of BASIX Commitments
- Noise Control
- Noise from mechanical plant and equipment, including swimming pool plant
- Ongoing Maintenance of the Onsite Stormwater Detention (OSD) System, Rain Garden and Rainwater Tank
- Outdoor Lighting – Residential
- Outdoor Lighting – Roof Terraces
- Swimming and Spa Pools – Maintenance

## Advising

- Asbestos Removal, Repair or Disturbance
- Builder's Licences and Owner-builders Permits
- Building Standards - Guide to Standards and Tolerances
- Commonwealth Disability Discrimination Act 1992
- Criminal Offences – Breach of Development Consent and Environmental Laws
- Dial Before You Dig
- Dilapidation Report
- Dividing Fences
- Lead Paint
- NSW Police Service and Road Closures
- Pruning or Removing a Tree Growing on Private Property
- Pruning or Removing a Tree Growing on Private Property
- Recycling of Demolition and Building Material
- Release of Security
- Roads Act 1993 Application
- SafeWork NSW Requirements
- Workcover requirements

## F. REASONS FOR REFUSAL

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

1. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of the Environmental Planning and Assessment Act 1979
2. Adverse visual impacts to adjoining properties. The proposal raises the potential for adverse visual impacts and associated view impacts to the adjoining properties. In this regard, the proposal is contrary to the provisions of the aims of the LEP
3. Adverse solar impacts to adjoining properties. The proposal raises the potential for adverse visual impacts and associated solar impacts to the adjoining properties. In this regard, the proposal is contrary to the provisions of the aims of the LEP.
4. Adverse visual and acoustic privacy impacts to adjoining properties. The proposal does not demonstrate effective mitigation of overlooking to adjoining properties from balconies and windows.
5. The extent of excavation is excessive. The proposal is contrary to objective of the DCP, in that it does not minimise excavation and has potential adverse impacts on existing and proposed vegetation.
6. Council is not satisfied that under clause 4.6 of the LEP seeking to justify a contravention of the development standard that the development will be in the public interest because it is inconsistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.
7. The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy objectives and planning controls of LEP:
  - Aims of Plan
  - Zone Objectives
  - Minimum Lot Size: Width
  - Minimum Lot Size: Slope
  - Height of Buildings
  - Exceptions to Development Standards
  - Earthworks
  - Stormwater
  - Biodiversity Protection: Flora & Fauna Assessment

- Geotechnical Hazards
  - Limited Development on Foreshore Area
8. The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy objectives and planning controls of DCP:
- Excessive Wall Height & Number of Storey
  - Unacceptable Building Separation
  - Insufficient Landscape Areas
  - Excessive Removal of Native Trees
  - Poor Strategic Positioning of Tree Canopy
  - Poor Garage Design
  - Excessive Swimming Pool Envelope
  - Excessive Excavation & Geotechnical Concerns
  - Stormwater Concerns
  - Poor Streetscape Outcomes
  - Impacts Upon Adjoining Properties: View Loss
  - Impacts Upon Adjoining Properties: Privacy
  - Impacts Upon Adjoining Properties: Visual Bulk
9. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that the plans and documentation are misleading as they do not clearly portray the true extent of works proposed. The plans include inaccuracies and inconsistencies and insufficient information has been provided in order to enable a detailed assessment.
10. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that the proposal would not satisfy the matters for consideration under Biodiversity & Conservation SEPP 2021 and Resilience & Hazards SEPP 2021
11. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that it will have an adverse impact through its bulk, scale and siting on the built environment, and through lack of landscape provision, and adverse impact on the natural environment. The proposed development will have a detrimental impact on the visual amenity of the adjoining properties by virtue of the excessive building bulk, scale and mass of the upper floor and its associated non-compliant envelope.
12. The site is not suitable for the proposal pursuant to Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979* in that this area of the site is unsuitable for a development of such excessive bulk and scale.
13. The proposals are unsuitably located on the site pursuant to Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979*.
14. The proposal does not satisfy Section 4.15(1)(d) of the *Environmental Planning and Assessment Act 1979* in that the proposal does not adequately address the amenity of neighbours
15. The proposal is contrary to the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*. The proposed development is not in the public interest as the development is inconsistent with the scale and intensity of development that the community can reasonably expect to be provided on this site by nature of the applicable

controls. The development does not represent orderly development of appropriate bulk, scale or amenity impact in the locality and approval of such a development would be prejudicial to local present and future amenity as well as desired future character and therefore is not in the public interest. The proposed development will have a detrimental impact on the amenity of adjoining residential properties, and for this reason is contrary to the public interest.

## G. CONCLUSION

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

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

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

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

*"The following questions are relevant to the assessment of impacts on neighbouring properties:*

*How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?*

*How reasonable is the proposal causing the impact?*

*How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?*

*Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?*

*Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?"*

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

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

- The application has not adequately considered and does not satisfy the various relevant planning controls applicable to the site and the proposed development.
- The proposed dwelling is incompatible with the existing streetscape and development in the local area generally.
- The proposed dwelling will have an unsatisfactory impact on the environmental quality of the land and the amenity of surrounding properties.
- The site is assessed as unsuitable for the proposal, having regard to the relevant land use and planning requirements.

It is considered that the public interest is not served.

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

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

The proposed development represents an overdevelopment of the site and an unbalanced range of amenity impacts all of which would result in adverse impacts on my clients' property. Primarily,

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss
- The development does not minimise visual impact

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

- Inconsistent with the zone objectives of the LEP
- Inconsistent with the aims of the LEP
- Inconsistent with the objectives of the DCP
- Inconsistent with the objectives of the relevant EPIs
- Inconsistent with the objects of the EPAA 1979

It is considered that the proposed development does not satisfy the appropriate controls and that all processes and assessments have been satisfactorily addressed.

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

We ask that if Council in their assessment of this application reveals unsupported issues, which prevent Council from supporting the proposal in its current form, and writes to the applicant describing these matters, we ask for that letter to be forwarded to us.

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

Yours faithfully,

*Bill Tulloch*

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