
Sent: 22/02/2021 10:31:25 AM
Subject: RE: URGENT: DA2020/1596: 6 Mitchell Road, Palm Beach - Application for Demolition of Existing House and Construction of New Residence: Letter of Objection
Attachments: Submission to Council - 22 February 2021.pdf;

Hi Lashta and Anne-Marie

I refer to Lashta's email dated 9 February (below), granting an extension for submissions to be made up to 22 February 2021 in respect of DA2020/1596.

Please now find attached letter of objection, prepared by Tomasy Planning, together with a legal opinion obtained by Paul Vergotis, Lawyer, from Dr Steven Berveling, Barrister, and a report prepared by Taylor Consulting, Structural and Civil Engineers.

Could you please acknowledge this submission has been received.

On behalf of our clients, we sincerely appreciate the granting of extension of time for submissions as this DA is quite complex and it was essential to obtain legal advice on the validity of the application and engineering advice. We would welcome the opportunity of discussing this matter with you during the assessment process.

Kind regards
Denis

Denis Smith
Director, Planning and Property



Suite 1, Level 1 ph: 02 8456 4754
1073 Pittwater Road m: 0400 777 115
Collaroy Beach, NSW 2097 e: denis.smith8@bigpond.com

From: Lashta Haidari <Lashta.Haidari@northernbeaches.nsw.gov.au>
Sent: Tuesday, 9 February 2021 11:03 AM
To: denis.smith8@bigpond.com
Subject: RE: URGENT: DA2020/1596: 6 Mitchell Road, Palm Beach - Application for Demolition of Existing House and Construction of New Residence

Hi Denis,

I happy to grant the extension for the submissions to be made up to 22 February 2021.

In respect of obtaining a copy of the PLM notes, that you need to go through GIPA.

Feel free to contact if you require any further assistance in this respect.

Regards

Lashta Haidari

Principal Planner

Development Assessment

t 02 8495 6485 m 0416 849 070

lashta.haidari@northernbeaches.nsw.gov.au

northernbeaches.nsw.gov.au



From: denis.smith8@bigpond.com <denis.smith8@bigpond.com>

Sent: Monday, 8 February 2021 4:49 PM

To: Lashta Haidari <Lashta.Haidari@northernbeaches.nsw.gov.au>

Cc: Council Mailbox <council@northernbeaches.nsw.gov.au>

Subject: URGENT: DA2020/1596: 6 Mitchell Road, Palm Beach - Application for Demolition of Existing House and Construction of New Residence

Importance: High

Good afternoon, Lashta

I refer to our discussions last Friday regarding the above Development Application, which involves the building of part of the development on land zoned RE1 Public Recreation, which abuts the heritage site known as The Bible Garden.

This application also involves the demolition of an existing dwelling, which is partly located under an elevated, private road which leads to our clients' property known as No 15 Florida Avenue, Palm Beach. Our clients have direct access by way of a right-of-carriageway from Mitchell Road to their garaging facilities.

Our clients have engaged the services of Paul Vergotis, Principal, McCabe Curwood, Lawyers, to advise on the validity of the DA as it relates to the use of the land zoned for RE1 Public Recreation to accommodate part of the residential dwelling that is proposed under the subject DA.

Our clients have also engaged the services of Taylor Consulting Engineers to advise on civil engineering aspects, including structural stability relating to the subject DA.

Our client have respectfully requested that Council grant an extension of time for lodgement of a submission in respect of this DA and request Council to permit submissions to be received up until CoB on Monday, 22 February. Due to the complexity of the DA, both the lawyers and engineers require additional time to review DA documentation and carry out further site inspections of the premises and, in particular, the private road and that part of the site subject to the zoning issue (use of land zoned for private recreation).

It is noted in the SoEE that supports the DA that a previous pre-DA meeting was held with Council. Our lawyers and consultants have requested a copy of the pre-DA meeting notes as they are considered to be pertinent to this exercise to better understand those matters raised by Council. Are you able to email me a copy of these pre-

DA meeting notes or do you require GIPA to be lodged?

I appreciate your assistance and advice.

Kind regards
Denis

Denis Smith
Director, Planning and Property



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1073 Pittwater Road m: 0400 777 115
Collaroy Beach, NSW 2097 e: denis.smith8@bigpond.com

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Northern Beaches Council

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22 February 2021

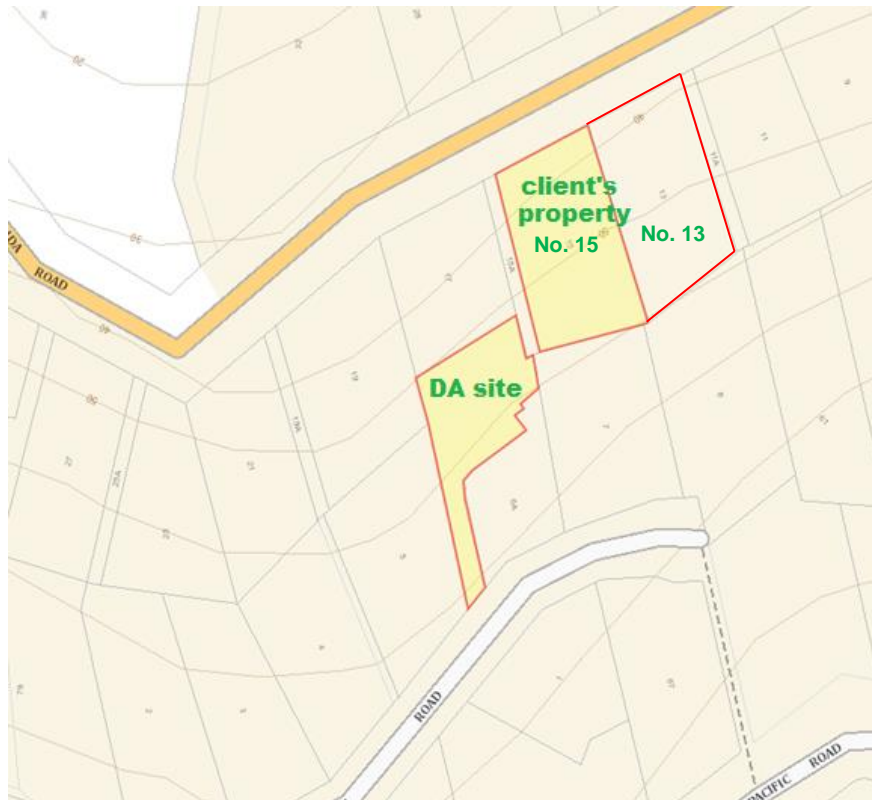
Ms Lashta Haidari
Principal Planner
Northern Beaches Council
DEE WHY, NSW 2099

Dear Lashta

**Re: Letter of Objection to DA 2020/1596 – Lot 1 in DP 1086858
Property: 6 Mitchell Road, Palm Beach
Demolition of the existing house and construction of a new residence,
including extensive works and structures on land zoned RE1**

Tomasy Planning has been engaged by Jason and Jodie Smith, the owners of Nos 15 and 13 Florida Street, Palm Beach, to lodge a formal submission in respect to the above Development Application. It is noted that Council, in its email dated 9 February did grant an extension of time for the lodgement of a submission up until CoB Monday, 22 February 2021. This was confirmed by Lashta Haidari, Principal Planner on 9 February 2021.

Our client's property is accessed directly from Mitchell Road by way of a right-of-way 4.57m, wide which leads to their garaging accommodation as part of their principal residence. The site plan below shows the relationship between our client's property and the land, the subject of the Development Application.



Source: <https://maps.six.nsw.gov.au>



Client's subject property in relation to 6 Mitchell Road, Palm Beach

Source: <https://maps.six.nsw.gov.au/>

In preparing this submission, consideration has been given to the following:

- *Environmental, Planning and Assessment Act 1979;*
- *Environmental, Planning and Assessment regulations 2000;*
- *Pittwater LEP 2014;*
- *Pittwater DCP 21;*
- Development Application 2020/1596 and supporting documentation shown on Council's website which includes:
 - Architectural Plans prepared by Stephen Lesiuk Architects;
 - Survey Plan prepared by DP Surveying dated 11 September 2018;
 - Statement of Environmental Effects dated 19 January 2021 prepared by The Planning Hub;

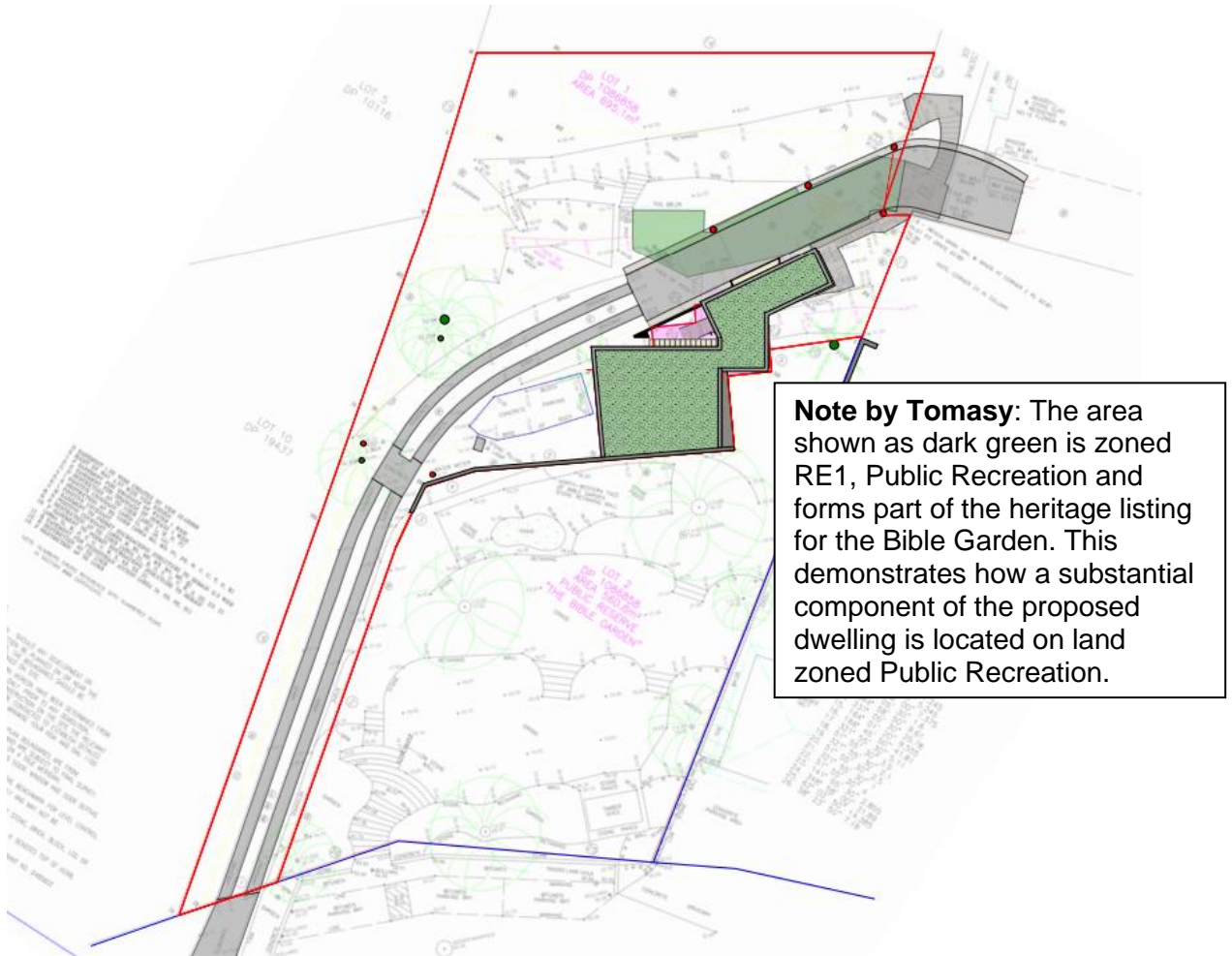
- Geotech Report prepared by Crozier Geotechnical Consultants dated 14 August 2020;
- Heritage Impact Statement by Weir Phillips dated September 2020;
- Legal advice from Shaw Reynolds Lawyers dated 4 March 2019;
- Letter from the Committee of the Friends of the Palm Beach Bible Garden dated August 2020;
- Engineering Plans prepared by NB Consulting Engineers dated October 2019;
- Waste Management Plan prepared by Stephen Lesiuk Architect;
- Northern Beaches Council Pre-DA notes PLM2019/0108 dated 18 June 2019
- Inspection of client's property and immediate locality.
- Legal opinion from Dr Steven Berveling, Barrister on behalf of client dated 18 February 2021.
- Structural civil engineering report from Taylor Consulting (structural/civil engineers) dated 19 February 2021.

The proposed development, as described in the various documents submitted with the DA, is set out below:

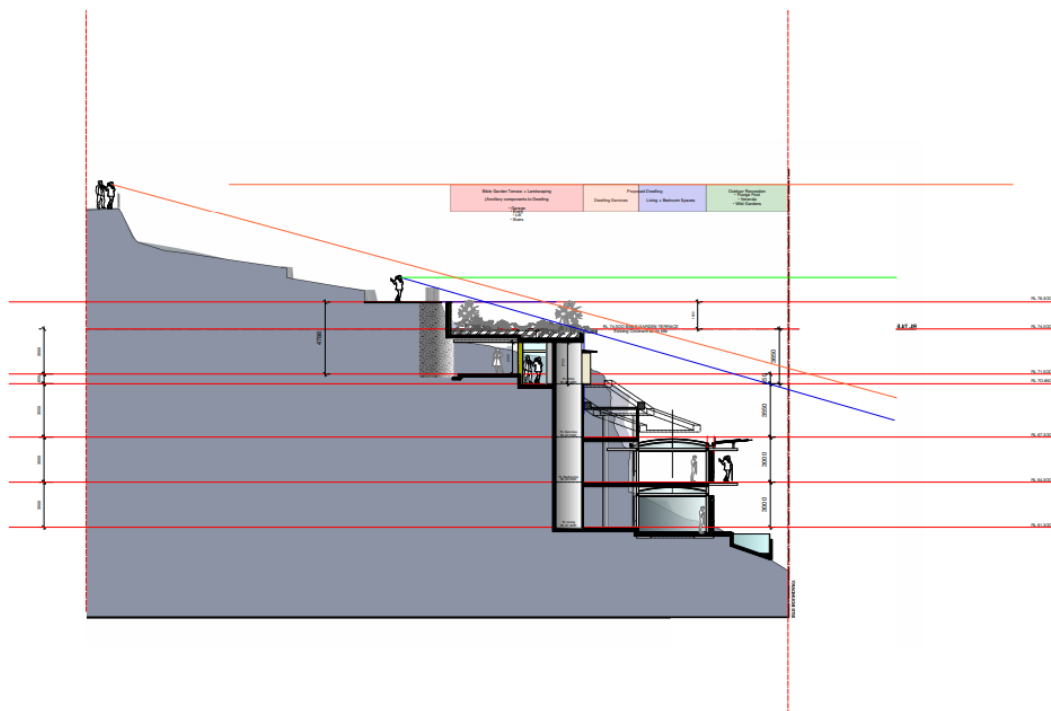
- The demolition of the existing dwelling and associated structures, which are located in the main, under the existing elevated section of the private road;
- The removal of two trees;
- The construction of a four-bedroom dwelling with study, living room, dining room, kitchen, laundry, family room and decks;
- A two-car garage facility with access directly off the shared private road – this component of the development, together with an entry to the new dwelling, new lift and access facilities are all constructed within land zoned RE1, Public Recreation.
- A swimming pool with access off the ground floor of the proposed dwelling;
- The construction of a new balustrade for the Bible Garden together with minor repair works to the existing bible garden paved areas;
- The provision of landscaping including the provision of a landscaped roof over the proposed garage (non-trafficable roofed area).

Details of the relevant plans to demonstrate our client's objection to the subject development are set out over the page.

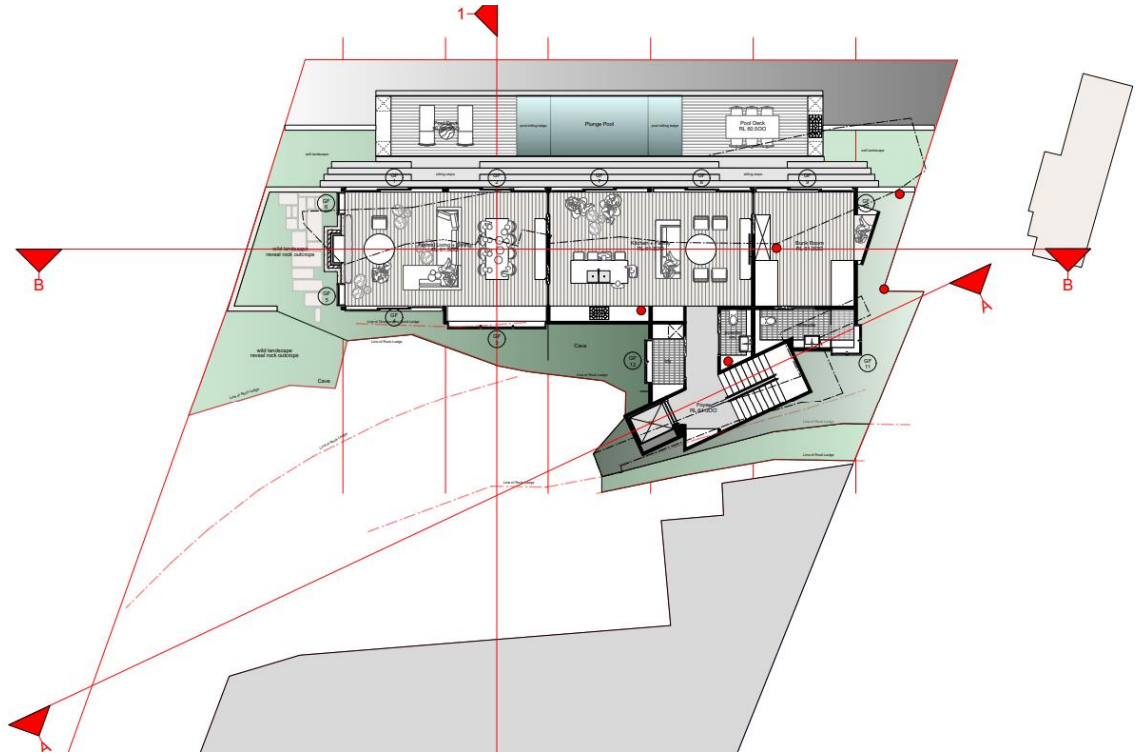
It is important to note that our clients have not been approached or consulted by Roger Bain (owner) or his architects in respect of the subject application.



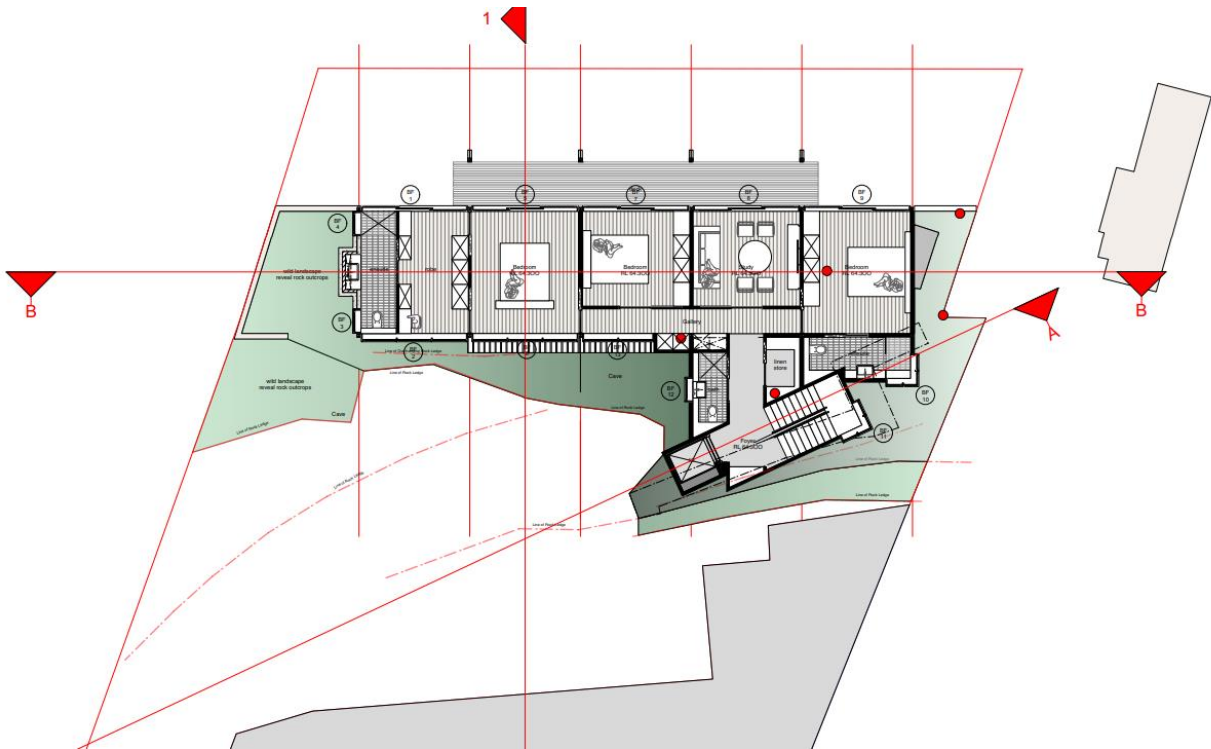
Source: Excerpt from Stephen Lesiuk drawings



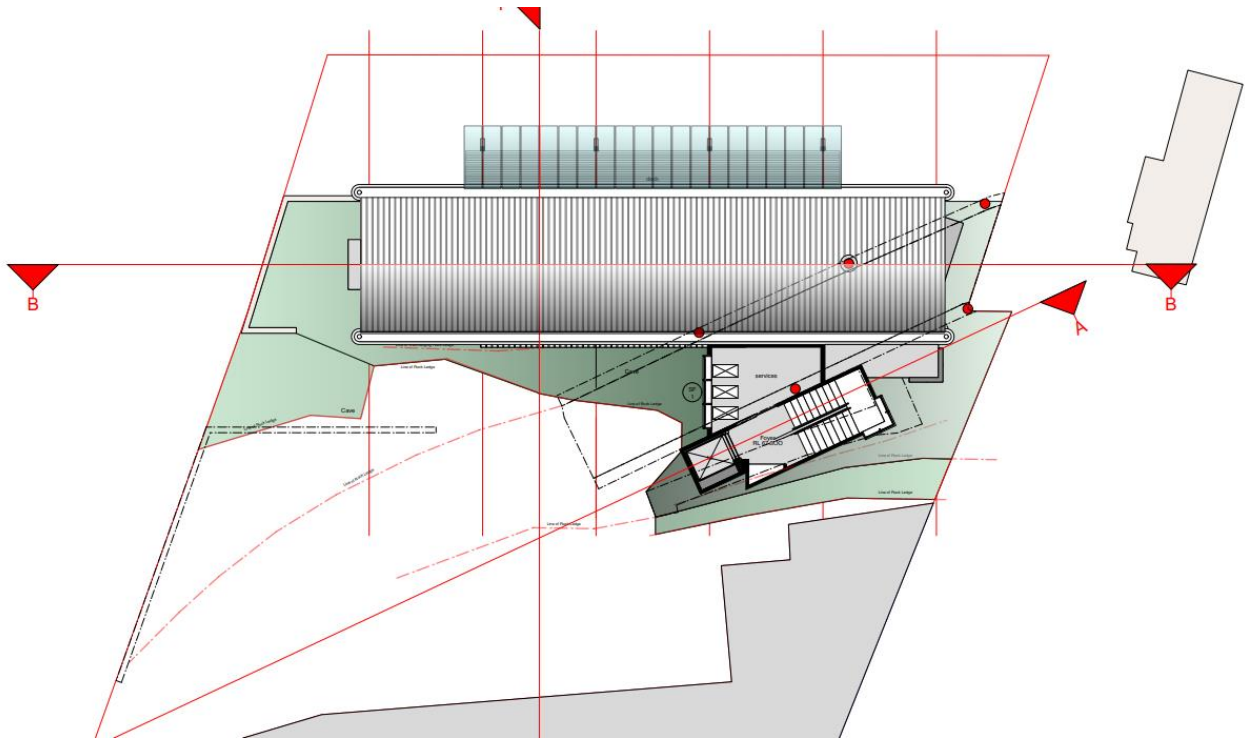
Source: Excerpt from Stephen Lesiuk drawings



Source: Drawing D006 – Ground Floor Plan - Stephen Lesiuk architect

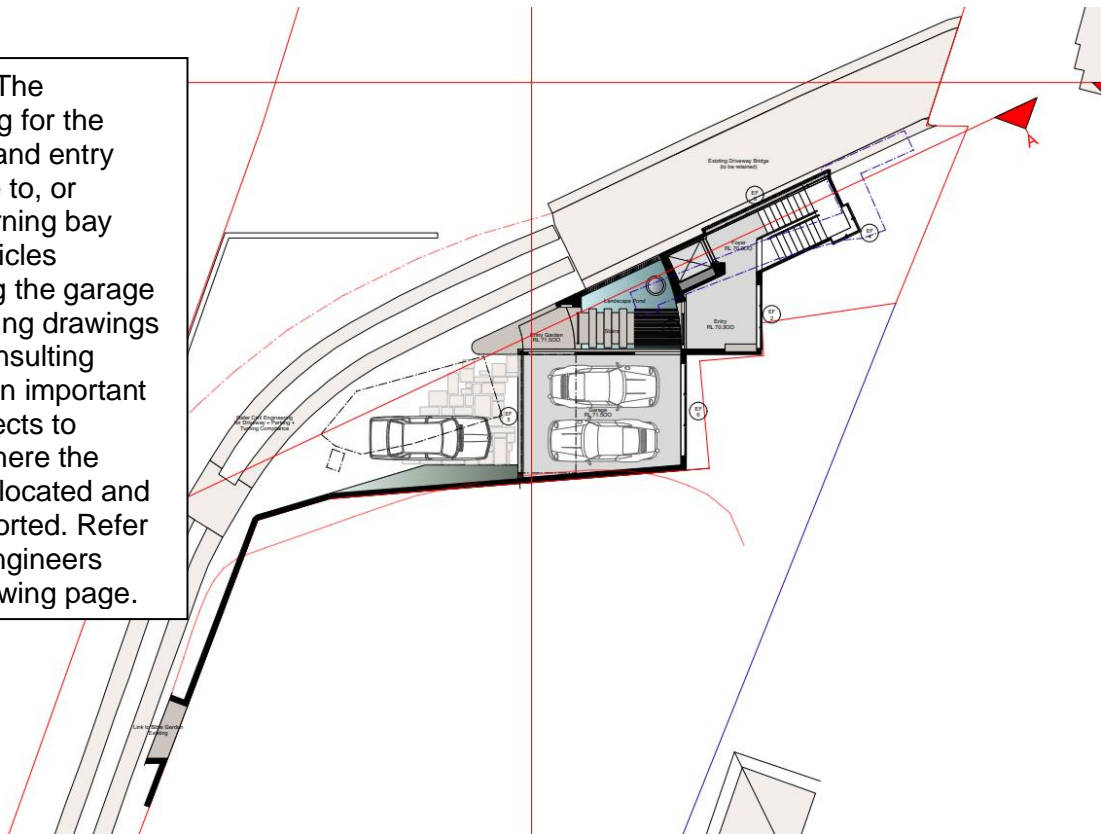


Source: Drawing D007 – First Floor Plan Stephen Lesiuk architect



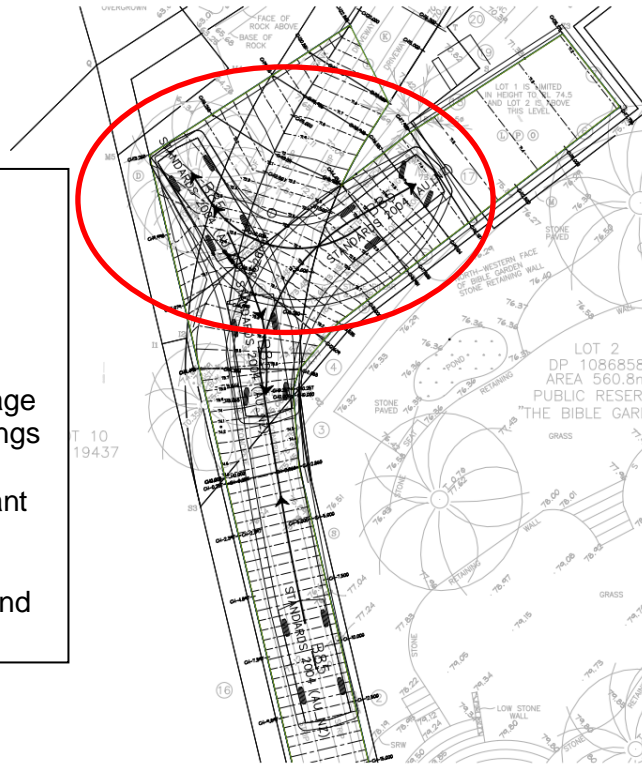
Source: Drawing D008 – Services Floor Plan Stephen Lesiuk architect

Note by Tomasy: The architectural drawing for the garaging, lift, foyer and entry makes no reference to, or provision for, the turning bay associated with vehicles entering and leaving the garage as per the engineering drawings prepared by NB Consulting Engineers. This is an important failure by the architects to accurately depict where the turning bay is to be located and how it is to be supported. Refer to NB Consulting Engineers drawing on the following page.



Source: Drawing D009 – Entry + Garage Floor Plan - Stephen Lesiuk architect

Note by Tomasy: The architectural drawing for the garaging, lift, foyer and entry makes no reference to, or provision for, the turning bay associated with vehicles entering and leaving the garage as per the engineering drawings prepared by NB Consulting Engineers. This is an important failure by the architects to accurately depict where the turning bay is to be located and how it is to be supported.



THREE (3) POINT TURN

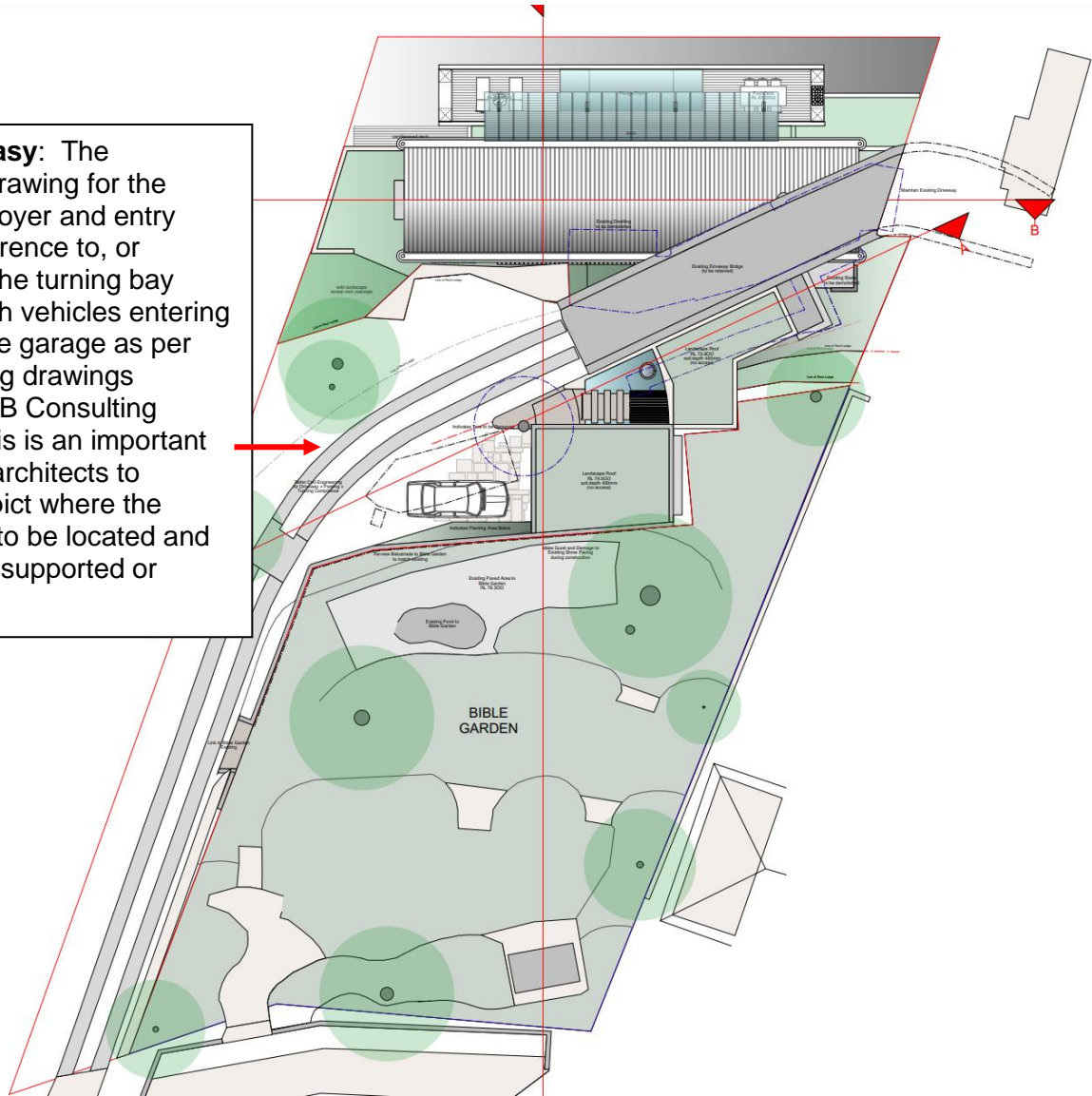
SWEPT PATHS FOR B85 FROM DRIVEWAY 1 GARAGE AREA INTO TURNING BAY

REFER AS/NZS 2890.1:2004

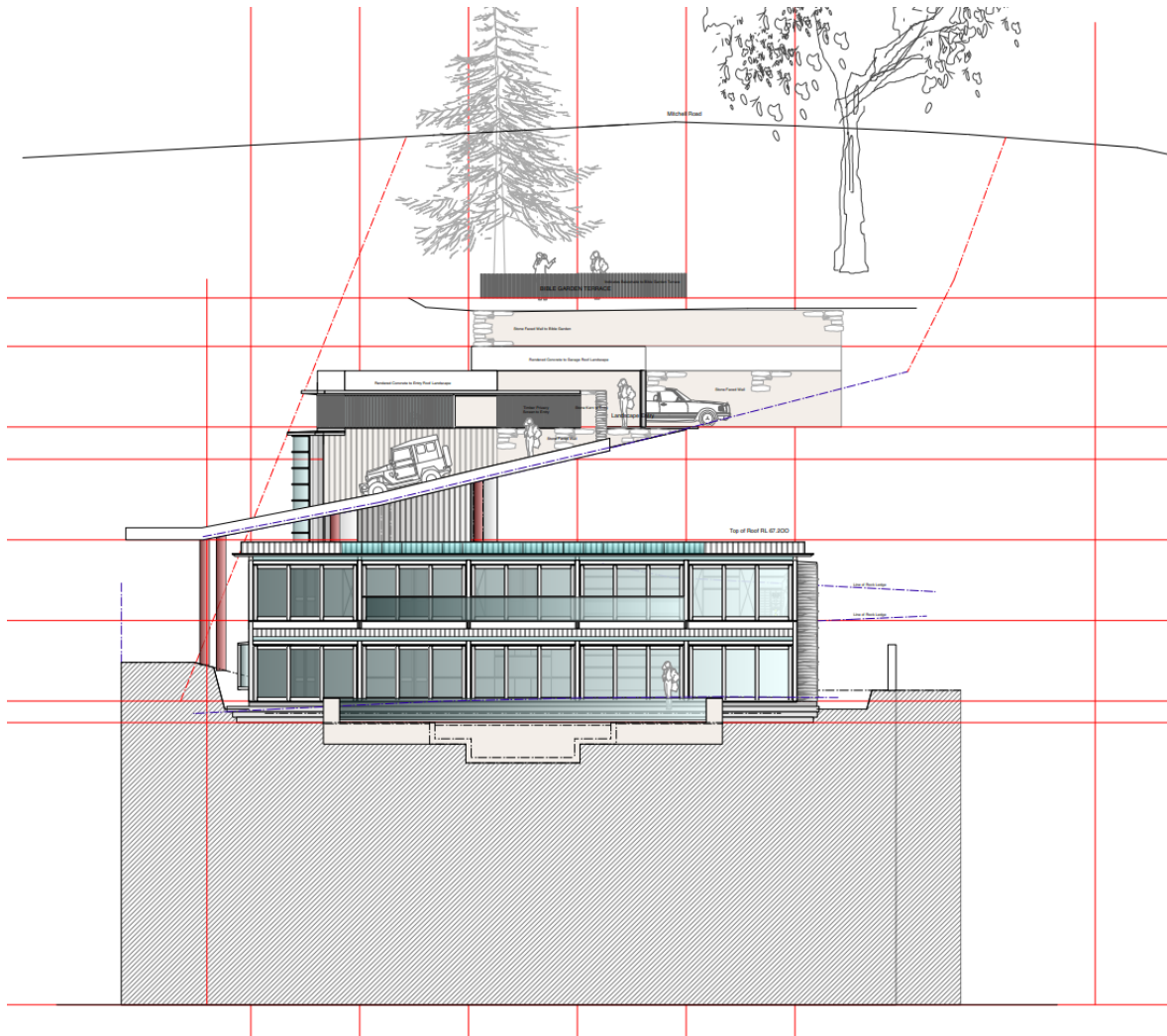
SCALE - NTS

Source: NB Consulting Engineers Drawing No C30 – Swept Path Analysis

Note by Tomasy: The architectural drawing for the garaging, lift, foyer and entry makes no reference to, or provision for, the turning bay associated with vehicles entering and leaving the garage as per the engineering drawings prepared by NB Consulting Engineers. This is an important failure by the architects to accurately depict where the turning bay is to be located and how it is to be supported or constructed.



Source: Drawing D0011 – Site Plan Stephen Lesiuk architect



Source: Drawing D020 – North Elevation - Stephen Lesiuk architect

Based upon Tomasy’s review of the Statement of Environmental Effects (SoEE), architectural plans and associated reports, we consider that the Development Application for the demolition of the existing house and construction of a new residence, which includes part of the dwelling to be located on land zoned RE1, Public Recreation (part of a heritage listed site), is deficient in a number of areas and the application should be refused. The deficiencies include, but are not limited to, the following:

ITEM 1 – CONFLICTS WITH PLANS BETWEEN ARCHITECTURAL DRAWING AND CIVIL ENGINEERING

The architectural drawings in our opinion reflect significant inconsistency between the civil engineering drawings and the floor plans for the entry and garage floor level. There is no provision on the plans for a turning bay which appears on the civil engineering plans to be an illusion only for the suspended structure. It is evident from the civil engineering plans that this turning bay is essential to enable vehicles to enter and leave the garaging facilities in a safe way. It is submitted that the design shown on the engineering drawings should be reviewed by a certified traffic consultant to ensure there is compliance with the Australian standards and consistent with what Council would require under the relevant sections of the DCP.

The architectural plans also demonstrate the substantial works that are to be carried out to create a double garaging facility and the provision for entry to the new dwelling, new foyer, lift and access facilities. **All of these important components of the dwelling house are located on land zoned as Public Recreation and are cited within the area defined as**

a **heritage item** (Bible Garden) under Pittwater LEP 2014. The legality of the use of this land for this purpose has been the subject to legal advice from our client's specialist planning and property lawyer and barrister.

From a planning perspective, this will be further addressed under the heading – Statutory Provisions.

ITEM 2 – STATUTORY PLANNING PROVISIONS

The subject site is zoned part RE1 – Public Recreation and part E4 – Environmental Living under Pittwater LEP 2014. An extract of the zoning is shown below:



Source: NSW Planning Portal - 2021

ZONE RE1 PUBLIC RECREATION

1 Objectives of zone

- To enable land to be used for public open space or recreational purposes.
- To provide a range of recreational settings and activities and compatible land uses.
- To protect and enhance the natural environment for recreational purposes.

- To allow development that does not substantially diminish public use of, or access to, public open space resources.
- To provide passive and active public open space resources, and ancillary development, to meet the needs of the community.

2 Permitted without consent

Building identification signs; Environmental protection works; Horticulture; Markets; Roads

3 Permitted with consent

Aquaculture; Centre-based childcare facilities; Community facilities; Environmental facilities; Information and education facilities; Kiosks; Public administration buildings; Recreation areas; Recreation facilities (indoor); Recreation facilities (outdoor); Respite day care centres; Restaurants or cafes; Signage; Take away food and drink premises; Water recreation structures

4 Prohibited

Any development not specified in item 2 or 3

Comment:

Objective 1 - To enable land to be used for public open space or recreational purposes.

Comment: The subject proposal fails to achieve this objective in that the land zoned as Public Recreation will not result in any use of the property as public open space or recreational purposes. This objective is aimed at achieving land which has this zoning to be open to the public for open space and recreational purposes. The proposal intends to use this component of the land for the erection of a double garage, entry foyer, lift and other access facilities - all integral components of a residential dwelling.

Objective 2 - To provide a range of recreational settings and activities and compatible land uses.

Comment: The proposal fails this objective also in that the development to be constructed on this land does not fall within the parameters of a recreational setting and activities which are commonplace within a public recreation area.

Objective 3 - To protect and enhance the natural environment for recreational purposes.

Comment: The proposal also fails this objective in that there is no protection or enhancement of the natural environment. The proposal represents a direct contradiction of protecting and enhancing the natural environment as it involves excavation of a significant amount of cliff face rock and other vegetation that currently provides an effective scenic quality value and contributes to the landscaped values of this important heritage listed Bible Garden area. It is important to recognise that the land zoned for public recreation purposes is part of the heritage classification for the Bible Garden.

Objective 4 -To allow development that does not substantially diminish public use of, or access to, public open space resources.

Comment: The proposal again fails this objective in that the development does not permit any access to the site and substantially diminishes the opportunity of public use of any of the land zoned for public recreation purposes.

Objective 5 - To provide passive and active public open space resources, and ancillary development, to meet the needs of the community.

Comment: The development does not provide for any passive or active public open space resources, nor does it meet the needs of the community. It serves solely to accommodate development associated with the erection of a residential dwelling on the subject site.

In summary, it is submitted that the proposed development does not meet ANY of the prescribed objectives set out above. It is also submitted that residential accommodation is not a permissible land use on land zoned RE1 – Public Recreation. Residential accommodation includes a dwelling house which is defined in the Pittwater LEP dictionary in terms of the following:

residential accommodation means a building or place used predominantly as a place of residence, and includes any of the following—

- (a) attached dwellings,
- (b) boarding houses,
- (c) dual occupancies,
- (d) dwelling houses,
- (e) group homes,
- (f) hostels,
- (g) multi dwelling housing,
- (h) residential flat buildings,
- (i) rural workers' dwellings,
- (j) secondary dwellings,
- (k) semi-detached dwellings,
- (l) seniors housing,
- (m) shop top housing,

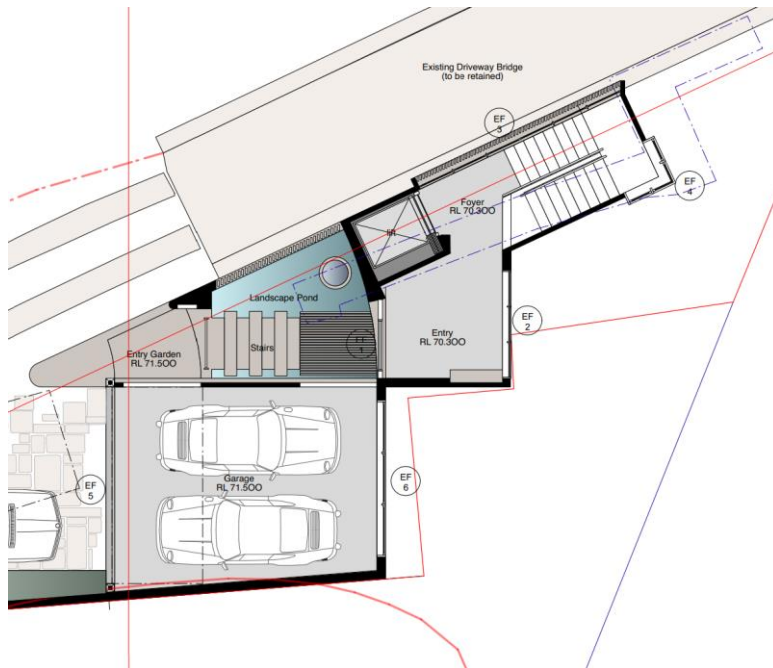
but does not include tourist and visitor accommodation or caravan parks.

dwelling house means a building containing only one dwelling.

Note—

Dwelling houses are a type of **residential accommodation**—see the definition of that term in this Dictionary.

One cannot deny that the use of part of the subject land, which is zoned RE1 Public Recreation and part of a heritage listed site, comprises components that are part of a dwelling house, such as double garaging, lift access, landscaped pond and entry garden, entry foyer and access facilities.



Source: Architectural Drawing D009 – Entry + Garage Floor Plan

The construction strategy set out in the architectural documentation shows that a crane and associated storage area for building purposes will be accommodated on land zoned as public open space. Again, it is reiterated that this is a direct contradiction of the utilisation of land zoned for public open space purposes. The location of the crane and associated building storage facilities is an integral component of the dwelling house.

It is noted that a Pre-DA meeting was held with Northern Beaches Council on 18 June 2019 and Council issued notes of the meeting under PLM2019/0108. The following is an excerpt from Council's Pre-DA notes are considered relevant having regard to the permissibility of using land zoned RE1 Public Recreation for the purpose of development directly associated with a dwelling house. The applicants at the pre-DA meeting made reference to two options which are described below in Council's Pre-DA notes:

"These options are responded to as follows:

Proposed Option 1: Development Consent Not Required

This option presents that roads are permitted without development consent within the RE1 zone, in accordance with the Land Use Table of the PLEP 2014. PLEP 2014 defines 'road' as follows:

road means a public road or a private road within the meaning of the Roads Act 1993 and includes a classified road.

The Roads Act 1993 defines 'road' as follows:

road includes:

- (a) the airspace above the surface of the road, and*
- (b) the soil beneath the surface of the road, and*
- (c) any bridge, tunnel, causeway, road-ferry, ford or other work or structure forming part of the road.*

The Applicant proposes that any other structures to facilitate the use of the road would be considered ancillary to the permissible use of the private road, in accordance with part (c) above. The viewing platform would then make use of the roof of the garage structure.

Proposed Option 2: Garage as Ancillary Development

The Applicant cites Foodbarn Pty Ltd v Solicitor-General (1975) 32 LGRA 157. In this, the Court found that, where part of premises are used for a prohibited purpose that is serving a dominant purpose, it is legitimate to disregard the prohibited purpose and to treat the dominant purpose as that for which the whole premises are being used. The Applicant provides two versions of this approach:

- The garage, on RE1 zoned land, is ancillary to the dwelling house on E4 zoned land. The garage's purpose is to serve the dwelling house, being the dominant, permissible purpose.*
- The garage is ancillary to the viewing platform, which sits fully within the RE1 zoned land. With consent, the understorey of the viewing platform (being the supporting structure) could facilitate the use of a garage, and be ancillary to the viewing platform, being the dominant, permissible purpose.*

Recommendation:

The 'Development Consent Not Required' option is not applicable in this case, as a garage does not form part of a road and does not facilitate a road in the same way the items listed under part (c) of the definition of road, like a tunnel or bridge, etc.

The 'Garage as Ancillary Development' option is also not considered to be applicable in this case. Whilst it is appreciated that relevant case law provides that prohibited development may be permissible by virtue of being ancillary to a dominant permissible use, the proposed garage is not a component that serves the dominant recreation use and is not ancillary to the proposed viewing platform. Although physically located below the viewing platform, the garage serves its own residential purpose that is not in any way associated with the recreational use of the site, and as such, is prohibited within the RE1 zone.

Note: *These notes relate only to the permissibility of the proposed garage structure within the RE1 zoned land. Advice on the proposed dwelling house is as per Council's correspondence in relation to PLM2018/0291."*

The above comments from Council's senior planning team support the Tomasy proposition that the proposed development within the land zoned RE1 public recreation is prohibited development and therefore the application should be refused.

It is important to acknowledge that the DA currently before Council does not provide for a viewing platform on top of the garage roof. The landscaped garage roof is to be non-trafficable. This further reinforces the view that the proposal has no relationship to the objectives of the public recreation zoning.

Zone E4 Environmental Living

1 Objectives of zone

- To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.
- To ensure that residential development does not have an adverse effect on those values.
- To provide for residential development of a low density and scale integrated with the landform and landscape.
- To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.

2 Permitted without consent

Home businesses; Home occupations

3 Permitted with consent

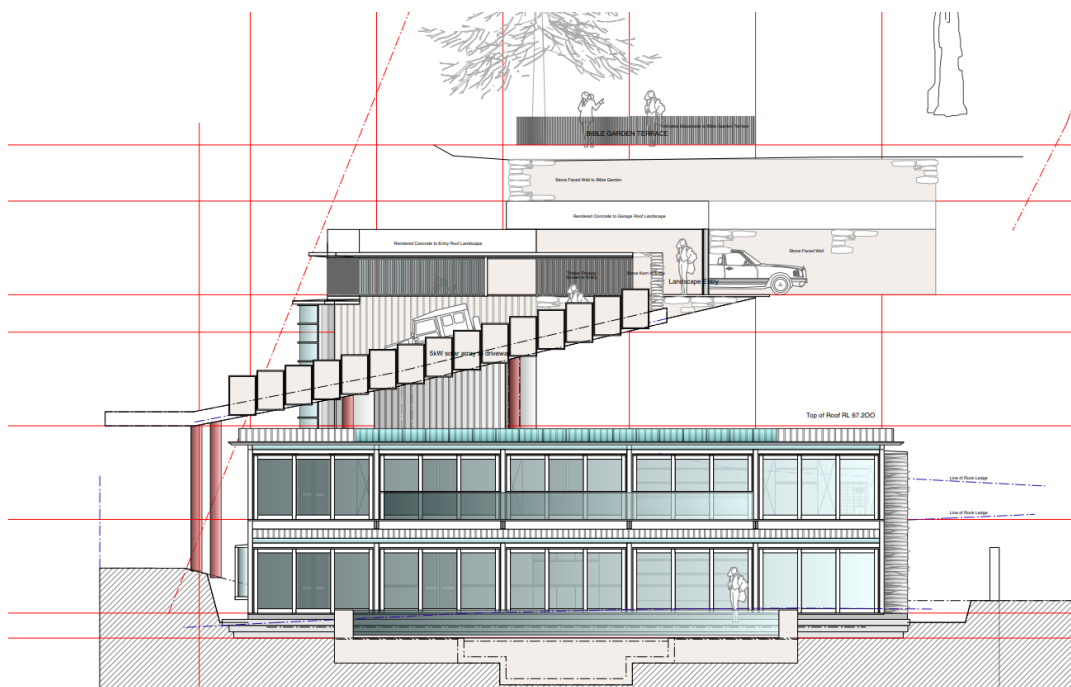
Bed and breakfast accommodation; Boat sheds; Building identification signs; Business identification signs; Centre-based childcare facilities; Community facilities; Dwelling houses; Environmental protection works; Group homes; Health consulting rooms; Home-based childcare; Home industries; Jetties; Oyster aquaculture; Places of public worship; Pond-based aquaculture; Respite day care centres; Roads; Secondary dwellings; Tank-based aquaculture; Water recreation structures.

4 Prohibited

Industries; Service stations; Warehouse or distribution centres; Any other development not specified in item 2 or 3.

Comment: It is acknowledged that a dwelling house is a permissible land use with the E4 Environmental Zone; however, under the relevant objectives, the development is considered to be in conflict with the following:

- The proposal does not provide for a low impact residential development in an area which does have special aesthetic and heritage values. An integral component of the proposal involves significant excavation into land and rockface and associated vegetation which forms part of the Bible Garden heritage listing and contrary to objective one above.
- The development does, in our opinion, have an adverse visual impact when viewed from a public place and, in this regard, it is suggested that the installation of 15 solar vertical solar panels along the private driveway, for some 18m, is a blight on both the natural and built environments of this area. The installation of these panels does not in any way integrate with the natural environment and, in particular, the rockface and associated landscape features of the land that abuts the actual Bible Garden area. This impact is demonstrated in the image over the page that has been described as Solar Array on drawing DA020(b) by Stephen Lesiuk. The manner in which these panels have been displayed on the northern elevation along the private driveway structure represents a proliferation of visual clutter which results in a negative impact on both the scenic and visual aesthetics that prevail in this special precinct (the heritage listed Bible Garden).



Source: Solar Array - drawing DA020(b) by Stephen Lesiuk

ITEM 3 – LEGAL OPINION BY DR STEVEN BERVELING, BARRISTER, ON PERMISSIBILITY OF DEVELOPMENT

Our clients engaged the services of Mr Paul Vergotis, Principal, McCabe Curwood Solicitors to obtain a legal opinion on the permissibility of certain parts of the proposal at 6 Mitchell Road. The barrister was also requested to review the advice by Shaw Reynolds Lawyers, dated 4 March 2019, which accompanied the subject development application DA2020/1596.

A legal opinion has been obtained from Dr Steven Baveling, who is a highly respected barrister specialising in planning, property and environmental matters.

A copy of Dr Baveling's advice is attached as supporting documentation to this letter (**Annexure A**).

Set out below is a summary of his opinion, together with his conclusion:

“Summary of opinion.

- 2) For reasons set out below, it is my opinion that:
 - a) The Shaw Reynolds advice contemplates a development different from the DA and therefore the Shaw Reynolds advice cannot be relied upon.
 - b) The Shaw Reynolds advice is incorrect:
 - i) that part of the driveway between the right-of-way and the garage, is not a road;
 - ii) the garage and the entry structure are not ancillary to a recreational facility; and
 - iii) the garage, entry structure and that part of the driveway between the right-of-way and the garage are prohibited if within the RE1 Public Recreation zone.
 - c) The location of some of the components proposed to be constructed is unclear relative to the boundary between the 2 zones on the Site. This has a significant impact on their permissibility.
 - d) Based on my understanding that the garage, the entry, and the part of the driveway between the right-of-way and the garage, are all within the RE1 Public Recreation zone, then each of them is prohibited.
 - e) All components of the proposed development are development for the purpose of a dwelling house, and it is incorrect to suggest that any part of the driveway is development for the purpose of a road.
 - f) It appears that the driveway along the right-of-way is proposed to be reconstructed between Mitchell Road and the elevated part of the driveway. That will preclude access to lots 7 and 8 DP 10167 (15 Florida Road, Palm Beach). Such inability to access would amount to serious interference with the right-of-way and would be a matter to be taken into consideration pursuant to section 4.15(1)(b) and (e).”

“Conclusion.

- 30) For reasons set out above, it is my opinion that:
- a) The Shaw Reynolds advice contemplates a development different from the DA and therefore the Shaw Reynolds advice cannot be relied upon.
 - b) The Shaw Reynolds advice is incorrect:
 - i) the garage and that part of the driveway between the right-of-way and the garage, are not a road;
 - ii) the garage and the entry structure are not ancillary to a recreational facility; and
 - iii) the garage, entry structure and that part of the driveway between the right-of-way and the garage are prohibited if within the RE1 Public Recreation zone.
 - c) The location of some of the components proposed to be constructed is unclear relative to the boundary between the 2 zones on the Site. This has a significant impact on their permissibility. -
 - d) Based on my understanding that the garage, the entry, and the part of the driveway between the right-of-way and the garage, are all within the RE1 Public Recreation zone, then each of them is prohibited.
 - e) All components of the proposed development are development for the purpose of a dwelling house, and it is incorrect to suggest that any part of the driveway is development for the purpose of a road.
 - f) It appears that the driveway along the right-of-way is proposed to be reconstructed between Mitchell Road and the elevated part of the driveway. That will preclude access to lots 7 and 8 DP 10167 (15 Florida Road, Palm Beach). Such inability to access would amount to serious interference with the right-of-way and would be a matter to be taken into consideration pursuant to section 4.15(1)(b) and (e).”

Source: Letter to P Vergotis, McCabe Curwood, dated 18 February 2021

Based upon the advice from our client’s lawyers, barrister and Tomasy Planning, it has been demonstrated that the part of the development that falls within the RE1 Public Recreation zone which includes the double garage, entry facilities, and lift is prohibited development under the Provisions of Pittwater Local Environmental Plan 2014.

ITEM 4 – SAFETY ISSUES

Tomasy Planning has concerns that relate to the construction of a four-storey building at the entrance to the driveway of No. 15 Florida Road, which represents a danger to pedestrians and vehicles entering and leaving their residence. Concerns have also been expressed by our consultant engineer that the current driveway, where it is elevated above the natural ground level, is non-compliant with the Australian standards in that there should be a barrier wall with a minimum height of 600mm with a balustrade/handrail 1.1m high off the RL of the driveway. The current structure does not have a barrier or any handrail that would be compliant with the current Australian standards. It is submitted that if this development were to be approved by Council, the owner of No. 6 should be required to ensure that the elevated driveway meets the current Australian standards including provision along the driveway for a pedestrian refuge. Our consultant engineer has also

questioned the compliance of the existing driveway that leads from Mitchell Road to the section of the private road that is elevated above. It is noted that the civil engineering drawings intend to carry out works to the alignment and structure. The structural and civil engineering components of the proposal have been reviewed, together with a site inspection by Taylor Consulting, who has prepared a stand-alone report (**Annexure B**), which forms part of the supporting documentation for this submission.

In respect to the comments relating to safety, at present our clients have a clear view of sight when they drive out of their garage up the elevated private driveway. This clear view of sight will be replaced with a four-storey structure and will immediately result in a dangerous situation. It is important for Council to acknowledge that they have a duty of care and liability to ensure that any development that is approved meets the prescribed Australian standards.

The montage produced in the master set of architectural documentation clearly demonstrates the validity of the matters raised above. In place of low-scale vegetation, our clients will be faced with a four-storey structure creating a dangerous blind spot. It is important for Council to understand that this right of carriageway is used for the purpose of both vehicular and pedestrian movements. Our clients frequently use the private driveway as a pedestrian means to walk to Mitchell Road. Our clients, based upon the montage below, will have no means of safe passage (either on foot or in a vehicle, if approved).



Source: Rendered East elevation – Architectural Plans

ITEM 5 - SITE WORKS, CONSTRUCTION, AND TRAFFIC MANAGEMENT

Pittwater 21 Development Control Plan, Section B8.1, Construction and Demolition – Excavation and Landfill, lists the following outcomes:

“Outcomes

Site disturbance is minimised

Excavation, landfill and construction not to have an adverse impact

Excavation and landfill operations not to cause damage on the development or adjoining property”.

Further, Section B8.6 Construction and Demolition – Traffic Management, list the following outcomes and controls:

“Outcomes:

Minimal disturbance to the residential community.

Protection of Roads.

Controls:

For all development where either excavated materials to be transported from the site or the importation of fill material to the site is 100m³ or greater, a Construction Traffic Management Plan indicating truck movements and truck routes is to be provided and approved by Council....”

All transport works must not cause adverse disruption or nuisance to adjoining residences, businesses or the street system.”

Comments in respect of the above Outcomes and Controls

It is submitted that Mitchell Road in its current design and configuration is extremely narrow and when there is one vehicle parked on the eastern side of the roadway, there is a bare minimum for other vehicles (cars) to pass in a safe manner. To consider the use of Mitchell Road for the purpose of accommodating workers’ vehicles, delivery of materials, concrete trucks or the like is absurd. This would present a serious safety issue to the numerous residents who use Mitchell Road to access their property by both vehicular and pedestrian means.

The Development Application comprises a waste management plan, with some hypothetical statements relating to how demolition material from the existing dwelling and excavation of the rock and associated material associated to the Bible Garden area would be transported. The statement contained in the waste management lacks substance and fails to demonstrate how traffic control could be administered for vehicles associated with the demolition of the existing residence, excavation and removal of the material adjacent to the heritage-listed Bible Garden, and deliveries of materials associated with the construction of the proposed dwelling.

It would be an onerous, if not impossible, task to create a dedicated work zone in Mitchell Road as an integral component of the demolition of the existing dwelling and the construction of the proposed dwelling. It is also of paramount importance that Council appreciates that this road acts as a pedestrian corridor for local residents and, in particular, children who reside in this unique residential precinct.

The Development Application shows a construction plan prepared by the project architect with that part of the land zoned RE1 Public Recreation and part of the land classified as a heritage item to be used to accommodate a tower crane and construction zone. The use of that part of the land zoned RE1 Public Recreation to accommodate a construction zone together with a tower crane is completely contrary to the Objectives prescribed under the LEP for an RE1 Public Recreation area. The use of this land for the purpose of

accommodating construction infrastructure is directly associated with the subject dwelling house.

The plan on the next page, as prepared by the architects, depicts part of the boom of the crane overhanging the Bible Garden and also over the land the subject of a right-of-way which is used by the occupants of No 15 Florida for both pedestrian and vehicle access. This alone creates a dangerous precedent and should not, under any circumstances, be endorsed by Council.

It is submitted that the proposal from a construction and traffic management perspective is inconsistent with the prescribed outcomes under Section B8.1 and Section B8.6 of Pittwater 21 DCP by way of the following:

- the proposal represents significant site disturbance to the existing landform and landscape;
- no evidence has been produced that would give confidence to the surrounding residents that the excavation associated with this proposal would not “cause harm on the development or adjoining development”;
- no construction traffic management plan has been produced which would guarantee the proposed construction works and associated vehicular movements (deliveries, concrete trucks, workers) would not result in adverse disruption, nuisance or the creation of safety issues to residents using Mitchell Road as a pedestrian and vehicular thoroughfare.
- no evidence has been produced in the Construction Management Plan (which, at best, could only be described as vague) that addresses the existing traffic movements associated with people using the Bible Garden for various events including weddings which generate varying degrees of traffic on Mitchell Road.



ITEM 9 – RECONSTRUCTION OF PART OF RIGHT-OF-WAY

“Reconstruction of Right-of-Way

In accordance with the legal advice prepared by Dr Berveling, the following clauses of the advice are deemed relevant in support of this objection to the subject development:

- 26) The proposed reconstruction of the driveway along the right-of-way between Mitchell Road and the elevated part of the driveway suggests that access will not be possible to Lots 7 and 8 DP 10167.
- 27) This would amount to a serious interference with the right-of-way and thus would be contrary to the terms of a right-of-way.
- 29) The absence from the DA of a document by which access to lots 7 and 8 DP 101670 (Nos 13 and 15 Florida Road, Palm Beach) is maintained during construction (if approved) is a matter to be taken into consideration pursuant to section 4.15(1)(b) - the likely impacts of the development, as well as s. 4.15(1)(e) - the public interest. Continued access to Nos 15 and 13 Florida Road is of itself of such importance that it may well cause the DA to be refused for that reason alone.”

ITEM 10 – CIVIL ENGINEERING REPORT – TAYLOR CONSULTING

Taylor Consulting Engineers have been retained by the owners of Nos 15 and 13 Florida Avenue, Palm Beach, to review the validity of the proposed development and to ensure the ongoing amenity of their own property is protected. A copy of the report prepared by Taylor Consulting is annexed (Annexure B) to this submission as supporting documentation.

Relevant sections of the report are set out below:

“The existing partially suspended concrete right of access driveway services the subject site and also 15 and 13 Florida Road, Palm Beach. Analysis of the existing driveway with reference to AS2890.1 2014 Off-Street Parking, found compliance and safety issues that will be exacerbated due to increased traffic loading which would result from the proposed development. We note that the existing concrete crash barrier and galvanised steel handrails either side of the driveway are in a poor state of repair and non-compliant.

“The width and grade of the existing right of access driveway are noted to be non-compliant with over 25% longitudinal fall in the steepest sections. Proposed amendments to the driveway by Northern Beaches Engineers dated October 2019 do not appear to satisfactorily resolve the transitions through the existing grades and it is the opinion of this office that the proposed turning bay, shown some 7 metres above the ground below is, as drawn, impossible to safely construct.

“Due to the width and grade of drive, it is currently very difficult to safely turn a vehicle and safely pass by a parked vehicle. As this right of access also serves as pedestrian access to the 3 properties, the drive width, grade and difficult line of sight mean access by foot is currently hazardous to pedestrians.

“The proposed amendments to the right of access do not satisfactorily address these safety issues.

“Swept paths provided by NB Consulting on drawing number C30A show a vehicle reversing into the right of access from the proposed garage without any line of sight to traffic entering or exiting the drive from above or below the proposed development. This proposal poses a significant risk to both pedestrians and other vehicles sharing the right of access.

“Longitudinal sections of the proposed driveway show the reconstructed section of the right of access being completely demolished and rebuilt. Note that this is the primary vehicular

and pedestrian access for the owners of 15 and 13 Florida Road, and the owners of these properties will not have safe access to their homes for the duration of proposed construction. Should the concrete structure be retained, an analysis of the structure and certification by a registered Structural Engineer should be provided including allowable maximum vehicle loads.”

Source: Taylor Consulting Engineers, 21 February 2021

ITEM 11 – THE PUBLIC INTEREST

Council has a duty of care in determining an application to give due consideration to Section 4.15(1)(e) – Public Interest under the Provisions of the EP&A Act. In this regard, it is important to understand that the land known as the Bible Garden is situated on public land zone RE1 Public Recreation. It would appear from the letter from the Committee of the Friends of the Palm Beach Bible, dated August 2020, that the Committee provided conditional support to the proposal which involves land that is part of the heritage-listed Bible Garden.

It is interesting to note that the part of the proposed dwelling house that is to be located on land zoned RE1 Public Recreation and included in the heritage-listed item known as the Bible Garden has been granted support from the Committee, notwithstanding the devastating impact this proposal will have on the scenic landscape values of the material to be excavated at the base of the Bible Garden. If this development were to be approved, it would completely change the scenic backdrop that prevails as an integral component of the Bible Garden heritage-listed site.

As part of the construction details set out in the DA documentation, it would appear there will be a temporary fence for at least 18-24 weeks along the common boundary of the Bible Garden and No 6 Mitchell Road. This fence would be required to isolate the construction zone at the base of the Bible Garden viewing area to enable excavation to take place. Surely, this structure would significantly impede the benefits associated with having a wedding ceremony that currently enjoys magnificent coastline ocean views. Instead, a construction fence 1.8m high would dominate. This component of the proposal is definitely not in the public interest as the public would be adversely affected in favour of the developer.

It is indeed hard to reconcile how a committee that should represent the general public could be so blinded in granting conditional approval to this proposal as this committee proports to be the primary caretaker of a heritage-listed site. The committee’s excuse is that the final determination of the DA is in the hands of Northern Beaches Council and not the committee. It would be fair and reasonable to assume the committee is there to protect the views of the wider community in preserving the unique conservation and scenic values that embrace the Bible Garden. We trust that Council will also commit to consider the wider community and, in particular, the submissions made against this proposal to use land zoned for public recreation for the erection of a dwelling.

CONCLUSIONS

It is respectfully submitted that the subject application should be refused and, to support this position, the following grounds of refusal are deemed relevant and valid:

1. Permissibility

Based upon Tomasy’s review of the applicant’s SoEE, architectural plans and associated reports including the engineering analysis, we consider the Development Application for the demolition of the existing house and construction of a new residence which includes part of that dwelling being constructed on land zoned RE1 Public Recreation (part of a heritage-listed site) is a prohibited land use under the Provisions of RE1 Public Recreation Zone under Pittwater Local Environment Plan 2014.

Tomasy Planning's position, as outlined above, is supported by the following comments contained within the legal opinion provided by Dr Steven Berveling, Barrister:

“Conclusion.

- 30) For reasons set out above, it is my opinion that:
- a) The Shaw Reynolds advice contemplates a development different from the DA and therefore the Shaw Reynolds advice cannot be relied upon.
 - b) The Shaw Reynolds advice is incorrect:
 - i) the garage and that part of the driveway between the right-of-way and the garage, are not a road;
 - ii) the garage and the entry structure are not ancillary to a recreational facility; and
 - iii) the garage, entry structure and that part of the driveway between the right-of-way and the garage are prohibited if within the RE1 Public Recreation zone.
 - c) The location of some of the components proposed to be constructed is unclear relative to the boundary between the 2 zones on the Site. This has a significant impact on their permissibility. -
 - d) Based on my understanding that the garage, the entry, and the part of the driveway between the right-of-way and the garage, are all within the RE1 Public Recreation zone, then each of them is prohibited.
 - e) All components of the proposed development are development for the purpose of a dwelling house, and it is incorrect to suggest that any part of the driveway is development for the purpose of a road.
 - f) It appears that the driveway along the right-of-way is proposed to be reconstructed between Mitchell Road and the elevated part of the driveway. That will preclude access to lots 7 and 8 DP 10167 (15 Florida Road, Palm Beach). Such inability to access would amount to serious interference with the right-of-way and would be a matter to be taken into consideration pursuant to section 4.15(1)(b) and (e).”

Source: Letter to P Vergotis, McCabe Curwood, dated 18 February 2021

2. Conflict with Plans between Architectural Drawings and Civil Engineering

The architectural drawings in our opinion reflect inconsistency between the civil engineering drawings and the floor plans for the entry, garage floor level. There is no provision on the architectural plans for a turning bay which appears on the civil engineering plans to be a suspended structure. It is evident from the civil engineering plans that this turning bay is essential to enable vehicles to enter and leave the garaging facilities in a safe way. Due to the inadequacy of the architectural drawings, it is impossible to determine how this turning bay and supporting structure would impact upon the scenic and landscape qualities of this unique site which, in part, is listed as a heritage item.

3. Compliance with the Objectives of Zone RE1 Public Recreation and Zone 4 Environmental Living

As detailed in this submission, the proposed development does not meet any of the prescribed Objectives of the RE1 Public Recreation zoning. In particular, Council's attention is drawn to:

Objective 1: To enable land to be used for public open space or recreational purposes.

Comment: The subject proposal fails to achieve this objective in that the land zoned as Public Recreation will not result in any use of the property as public open space or recreational purposes. This objective is aimed at achieving land which has this zoning to be open to the public for open space and recreational purposes. The proposal intends to use this component of the land for the erection of a double garage, entry foyer, lift and other access facilities - all integral components of a residential dwelling.

Objective 3: To protect and enhance the natural environment for recreational purposes.

Comment: The proposal also fails this objective in that there is no protection or enhancement of the natural environment. The proposal represents a direct contradiction of protecting and enhancing the natural environment as it involves excavation of a significant amount of cliff face rock and other vegetation that currently provides an effective scenic quality value and contributes to the landscaped values of this important heritage listed Bible Garden area. It is important to recognise that the land zoned for public recreation purposes is part of the heritage classification for the Bible Garden.

In respect of the Zone E4 Environmental Living Objectives, the proposal, in our opinion, fails to achieve the primary objectives of this zone, in terms of the following:

- The proposal does not provide for a low impact residential development in an area which does have special aesthetic, scenic, landscape and heritage values. An integral component of the proposal involves significant excavation into land and rockface and associated vegetation which forms part of the Bible Garden heritage listing and is contrary to the Objective that requires "low-impact residential development in areas with special ecological, scientific or aesthetic values". It is our opinion the proposal would result in a total devastation of the existing landscape and scenic qualities of this unique site, which abuts the Bible Garden.
- The development does, in our opinion, have an adverse visual impact when viewed from a public place and, in this regard, it is suggested that the installation of 15 solar vertical solar panels along the private driveway, for some 18m, is a blight on both the natural and built environments of this area. The installation of these panels does not, in any way, integrate with the natural environment and, in particular, the rockface and associated landscape features of the land that abuts the actual Bible Garden area. This impact is demonstrated in the northern elevation on architectural drawing DA020(b) prepared by Stephen Lesiuk. The manner in which these panels have been displayed on the northern elevation along the private driveway structure represents a proliferation of visual clutter which results in a negative impact on both the scenic and visual aesthetics that prevail in this special precinct (the heritage listed Bible Garden).

4. Safety and Construction Issues

Taylor Consulting Engineers have documented their concerns that:

- "The existing partially suspended concrete right of access driveway services the subject site and also 13 and 15 Florida Road, Palm Beach. Analysis of the existing driveway

with reference to AS2890.1 2014 Off-Street Parking, found compliance and safety issues that will be exacerbated due to increased traffic loading which would result from the proposed development. We note that the existing concrete crash barrier and galvanised steel handrails either side of the driveway are in a poor state of repair and non-compliant. “

- “The width and grade of the existing right of access driveway are noted to be non-compliant with over 25% longitudinal fall in the steepest sections. Proposed amendments to the driveway by Northern Beaches Engineers dated October 2019 do not appear to satisfactorily resolve the transitions through the existing grades and it is the opinion of this office that the proposed turning bay, shown some 7 metres above the ground below is, as drawn, impossible to safely construct.
- “Due to the width and grade of drive, it is currently very difficult to safely turn a vehicle and safely pass by a parked vehicle. As this right of access also serves as pedestrian access to the 3 properties, the drive width, grade and difficult line of sight mean access by foot is currently hazardous to pedestrians.
- “The proposed amendments to the right of access do not satisfactorily address these safety issues.
- “Swept paths provided by NB Consulting on drawing number C30A show a vehicle reversing into the right of access from the proposed garage without any line of sight to traffic entering or exiting the drive from above or below the proposed development. This proposal poses a significant risk to both pedestrians and other vehicles sharing the right of access.
- “Longitudinal sections of the proposed driveway show the reconstructed section of the right of access being completely demolished and rebuilt. Note that this is the primary vehicular and pedestrian access for the owners of 15 and 13 Florida Road, and the owners of these properties will not have safe access to their homes for the duration of proposed construction.”

It is evident from the above expert advice that the development, as submitted, would create a severe safety risk to our clients when the right-of-way is used for both vehicle and pedestrian traffic.

In respect of works associated with the demolition of the existing dwelling and construction of a new dwelling, the documentation that supports the current DA, lacks any substance by way of site works, construction and traffic management. The proposal is inconsistent with Pittwater 21 DCP, Section B8.1, Construction, Demolition and Excavation, and Section B8.6, Construction and Demolition, Traffic Management.

No evidence has been produced that adequately addresses just how this development could be implemented without causing adverse disruption and nuisance to Nos 7, 13 and 15 Florida Road, and the other residents in Mitchell Road.

Mitchell Road, with its current design and configuration, is extremely narrow and when there is one vehicle parked on the eastern side of the roadway, there is a bare minimum for other cars to pass in a safe manner. To consider the use of Mitchell Road for the purpose of accommodating workers' vehicles, delivery of materials, concrete trucks and the like is absurd and a complete contravention of the DCP Provisions which embrace the requirements for adequate documentation to be produced by an applicant for construction, demolition, excavation and associated activities. To use Mitchell Road to accommodate the proposed construction activities would present a serious safety issue to those residents who use Mitchell Road to access their property by both vehicular and pedestrian means and also to members of the public who wish to visit the Bible Garden and in particular those

associated with weddings and other ceremonies that are regularly held in this public recreation facility.

5. Denial of access to no 15 Florida Avenue (client's property) during reconstruction of part of right-of-way

In respect of this matter, legal advice from Dr Steven Berveling has been obtained and is set out below:

- "26) The proposed reconstruction of the driveway along the right-of-way between Mitchell Road and the elevated part of the driveway suggests that access will not be possible to Lots 7 and 8 DP 10167.
- 27) This would amount to a serious interference with the right-of-way and thus would be contrary to the terms of a right-of-way.
- 29) The absence from the DA of a document by which access to lots 7 and 8 DP 101670 (15 Florida Road, Palm Beach) is maintained during construction (if approved) is a matter to be taken into consideration pursuant to section 4.15(1)(b) - the likely impacts of the development, as well as s. 4.15(1)(e) - the public interest. Continued access to 15 Florida Road is of itself of such importance that it may well cause the DA to be refused for that reason alone."

Based upon the legal advice obtained from Dr Berveling, it is respectfully submitted that this matter is of such importance that may justify the refusal by Council of the DA for this reason alone.

It is essential that our clients have continuous, unimpeded, safe vehicular and pedestrian access along the right-of-carriageway from the Mitchell Road entrance to No 15 and No 13 Florida Road.

For the reasons outlined above, which are supported by a legal opinion, expert engineering and planning advice, the Development Application – DA2021/1596 for No 6 Mitchell Road, Palm Beach, should be refused by Council.

We would welcome the opportunity of discussing this submission with Council's officers and attend any meeting with them, or a panel hearing.

Yours sincerely



Denis Smith
Principal

Annexure A: Legal advice from Dr Steven Berveling, Barrister
Annexure B: Report by Taylor Consulting Engineers

Annexure A: Legal Advice from Dr Steven Berveling, Barrister

18 February 2021

McCabe Curwood
Solicitors
level 38, MLC Centre
19 Martin Place
SYDNEY NSW 2000

Attention: Mr P Vergotis

By email

Dear Sirs

Brief to advise

Development application 2020/1596 - 6 Mitchell Road, Palm Beach

Your client: Jason Smith of 15 Florida Road Palm Beach

- 1) I confirm your request for an opinion regarding:
 - a) the permissibility of certain parts of the proposed development at 6 Mitchell Road; and
 - b) a review of the advice by Shaw Reynolds Lawyers dated 4 March 2019.

Summary of opinion.

- 2) For reason set out below, it is my opinion that:
 - a) The Shaw Reynolds advice contemplates a development different from the DA and therefore the Shaw Reynolds advice cannot be relied upon.
 - b) The Shaw Reynolds advice is incorrect:
 - i) that part of the driveway between the right-of-way and the garage, is not a road;
 - ii) the garage and the entry structure are not ancillary to a recreational facility; and

- iii) the garage, entry structure and that part of the driveway between the right-of-way and the garage are prohibited if within the RE1 Public Recreation zone.
- c) The location of some of the components proposed to be constructed is unclear relative to the boundary between the 2 zones on the Site. This has a significant impact on their permissibility.
- d) Based on my understanding that the garage, the entry, and the part of the driveway between the right-of-way and the garage, are all within the RE1 Public Recreation zone, then each of them is prohibited.
- e) All components of the proposed development are development for the purpose of a dwelling house, and it is incorrect to suggest that any part of the driveway is development for the purpose of a road.
- f) It appears that the driveway along the right-of-way is proposed to be reconstructed between Mitchell Road and the elevated part of the driveway. That will preclude access to lots 7 and 8 DP 10167 (15 Florida Road, Palm Beach). Such inability to access would amount to serious interference with the right-of-way and would be a matter to be taken into consideration pursuant to section 4.15(1)(b) and (e).

Relevant facts.

- 3) I am instructed as follows:
 - a) On or about 25 January 2021, a development application was lodged with Northern Beaches Council¹ for the “demolition of existing dwelling and construction of a new dwelling, garage and swimming pool” **(the DA)** on land known as 6 Mitchell Road, Palm Beach (Lot 1 DP 1086858) **(the Site)**.
 - b) The Site is subject to a right of way which, relevantly, benefits lots 7 and 8 DP 10167, being your client Jason Smith’s land (known as 15 Florida Road, Palm Beach).
 - c) The right-of-way is partly elevated above the ground level of the Site, in particular in its northern/north north-eastern section.

¹ Council numbered the DA as DA 2020/1596.

- d) The plans for the DA are numerous² and, relevantly propose the following:
1. a garage and entry to the dwelling house south of the right-of-way;
 2. a landscaped roof on both those structures;
 3. a driveway between the garage and the right-of-way, for vehicular access to the garage;
 4. reconstruction of the driveway along the right-of-way from Mitchell Road to the western end of the elevated part of the right of way;³
 5. a 4-story dwelling house partly beneath, and partly to the north of the right-of-way;
 6. swimming pool to the north of the dwelling house; and
 7. associated landscaping.
- e) The Site is zoned partly E4 Environmental Living, and partly RE1 Public Recreation pursuant to Pittwater Local Environmental Plan 2014 (**the LEP**).
- f) Relevantly:
- i) development for the purpose of (a) dwelling houses and (b) roads are permissible within the E4 Environmental Living zone but are prohibited within the RE1 Public Recreation zone, and
 - ii) development for the purpose of recreation areas⁴ are permissible within the RE1 Public Recreation zone.

² The document on Council's DA Tracking webSite entitled "development application + statement of environmental effects" and comprising 88 sheets; part 5 entitled "development application drawings".

³ The DA drawings DA 009, DA 010, DA 011 contain a notation "existing Driveway Bridge (to be retained)". However, it also contains another notation "Refer Civil Engineering for Driveway + Parking + Turning Compliance". The civil engineering drawings proposed reconstruction of the remainder of the driveway (between Mitchell Road and the elevated part) are to be constructed.

⁴ **Recreation Area** is defined in the dictionary to the LEP as meaning "**recreation area** means a place used for outdoor recreation that is normally open to the public, and includes—

- (a) a children's playground, or
- (b) an area used for community sporting activities, or
- (c) a public park, reserve or garden or the like,

and any ancillary buildings, but does not include a recreation facility (indoor), recreation facility (major) or recreation facility (outdoor).

OPINION.

Proposed development relative to zone boundary.

- 4) It is not clear from the plans for the DA which parts of the proposed development are within the RE1 Public Recreation zone and which parts are within the E4 Environmental Living zone.
- 5) This should be confirmed by a Surveyor's plan outlining the footprint of the proposed development overlaid with the zone boundary within the Site. This is necessary given the prohibition of various components of the proposed development when they are within one zone rather than the other.
- 6) As I understand it:
 - a) the right-of-way is within the E4 Environmental Living zone;
 - b) those parts of the dwelling house north of the right of way, and beneath the right of way, are within the E4 Environmental Living zone;
 - c) the garage and entry to the dwelling house south of the right of way are within the RE1 Public Recreation zone; and
 - d) the driveway access to the proposed garage (i.e. between the garage and the right-of-way) is within the RE1 Public Recreation zone.

Permissibility of the driveway access to garage.

- 7) I understand that the proposed use of the garage will be for the occupants of the proposed dwelling house. Therefore, that part of the driveway between the right of way and the garage will also be used by those occupants, and its construction is part of the development for the purpose of a dwelling house.
- 8) However, development for the purpose of a dwelling house is prohibited on that part of the Site within the RE1 Public Recreation zone. As mentioned above, I understand that the proposed driveway access to the garage is on that part of the Site within the RE1 Public Recreation zone. Accordingly, it is prohibited development.
- 9) I note the suggestion in the Shaw Reynolds advice that the part of the driveway between the right of way and the garage could be considered as a road, and reference is made to the 1988 decision of *Argyropoulos v Canterbury Municipal Council*.⁵
- 10) However, the legislative matrix has changed significantly since the time of the *Argyropoulos* decision (23 June 1988), most relevantly with (a) the enactment of the *Roads Act 1993* and (b) the change of environmental planning

⁵ *Argyropoulos v Canterbury Municipal Council* (1988) 66 LGRA 202.

instruments with their different definition of road.⁶ With respect, those current definitions do not assist beyond what is considered the ordinary definition of road (i.e. a way, usually open to the public, for the passage of vehicles, persons and animals). In ordinary parlance, we separate a road from a driveway.

11) Furthermore, in *Chamwell Pty Ltd v Strathfield Council*⁷ Preston CJ had to consider the permissibility of a supermarket with its various components (shops, walkways, carparking areas, driveways, travel letters, loading docks etc). An argument was raised that the driveways in and for the supermarket were roads.

12) Preston CJ held (omitting case references):

27 In planning law, use must be for a purpose. The purpose is the end to which land is seen to serve. It describes the character which is imparted to the land at which the use is pursued.

28 . . . The use of land involves no more than the “physical acts by which the land is made to serve some purpose.

29 . . .

30 . . .

31 The physical acts involved in the erection of the [supermarket] building including the construction of the car park, driveways, access ways and the landscaped forecourt are the means by which the land is made to serve the retail purpose of the supermarket. The supermarket could not function on the land without the car park, driveways, access ways and landscaped forecourt.

32 Viewed this way, all of the land on, in or under which the applicant’s proposed retail development is to be carried out, including Lot D, can be

⁶ The Dictionary to the LEP contains the following definition for “road”:

road means a public road or a private road within the meaning of the *Roads Act 1993*, and includes a classified road.

The Dictionary to the *Roads Act* contains relevantly the following definitions:

private road means any road that is not a public road.

public road means—

- (a) any road that is opened or dedicated as a public road, whether under this or any other Act or law, and
- (b) any road that is declared to be a public road for the purposes of this Act.

road includes—

- (a) the airspace above the surface of the road, and
- (b) the soil beneath the surface of the road, and
- (c) any bridge, tunnel, causeway, road-ferry, ford or other work or structure forming part of the road. This

⁷ *Chamwell Pty Ltd v Strathfield Council* (2007) 151 LGERA 400.

seen to be intended to be used and will be used for the purpose of the supermarket.

- 33 . . .
- 34 However, the nature of the use needs to be distinguished from the purpose of the use. Uses of different natures can still be seen to serve the same purpose.
- 35 In this case, the use of the car park, driveways, access ways and landscaped forecourt are each designed to serve the end of enabling the supermarket to be carried on. That is their purpose and that purpose imparts to the land on which those uses are pursued the character of shop, including the supermarket. The end to which the parts of the land in Lot D is to serve is not roads.
- 36 The characterisation of the purpose of a use of land should be done at a level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on, not in terms of the detailed activities, transactions or processes.
- 13) Accordingly, Preston CJ concluded that the driveways were development for the purpose of shops (the supermarket). In the present case, the driveway is development for the purpose of a dwelling house.
- 14) On the basis of the above, it is my opinion that the advice in the Shaw Reynolds advice about the driveway being development for the purpose of a road cannot be maintained, if it ever could.

Permissibility of the proposed garage.

- 15) As mentioned previously, I understand that the proposed use of the garage will be for the occupants of the proposed dwelling house.
- 16) In my opinion, pursuant to the reasoning in *Chamwell*, the garage would be development for the purpose of the dwelling house. Accordingly, it is incorrect to consider the principle referred to in *Foodbarn Pty Ltd & Ors v Solicitor-General*.⁸
- 17) In any event, even if one were to consider the concept of ancillary development, note must be taken of the elaboration by Glass JA in *Foodbarn* immediately after him expressing the general principle:

[in *Mayo v Sydney City Council*] there was a cottage used as the residents of 8 acre of the premises plant and produce. The purpose of the cottage

⁸ *Foodbarn Pty Ltd & Ors v Solicitor-General* (1975) 32 LGRA 157, in which Glass JA (with whom Hutley and Samuels JJA agreed) set out (at 160-161) the "general proposition that, where premises are used for two purposes, that which is not dominant is for planning purposes to be disregarded."

was held to be industrial being ancillary to the dominant purpose gathered from a consideration of the character of the whole enterprise.

- 18) Accordingly, in the present case *Foodbarn* merely confirms the use of the garage as being for residential purposes.
- 19) Furthermore, in *Foodbarn* there was no consideration of a premises being within more than one zone, and *Foodbarn* does not assist in overcoming the prohibition of development for residential purposes within the RE1 Public Recreation zone.
- 20) In my opinion, *Foodbarn* does not assist in the present case, and the ancillary use of the garage for residential purposes remains prohibited on that part of the Site within the RE1 Public Recreation zone.
- 21) I note the argument in the Shaw Reynolds advice that the garage could be considered as ancillary to the viewing platform (referred to in that advice as being proposed of the roof of the garage) by reason of being the supporting structure for that viewing platform.
- 22) The proposal set out in the Shaw Reynolds advice is different from the current plans which (on drawings DA 010 and DA 011) note that there be no access to the rooftop gardens on top of the garage and entry structure.
- 23) Accordingly, that argument in the Shaw Reynolds advice has been superseded and is no longer relevant.
- 24) In any event, with respect, the argument that the garage be an ancillary to any viewing platform on top of the garage is an incorrect characterisation of the garage, the primary purpose of which is for the garaging of vehicles for the occupants of the dwelling house, rather than as a supporting structure for the viewing platform. It is development for the purpose of the dwelling house; not for a recreational facility.

Permissibility of the entry to the dwelling house.

- 25) If, as I understand it, the entry structure for the dwelling house⁹ is proposed to be erected on that part of the Site within the RE1 Public Recreation zone, then it is prohibited.

⁹ i.e. the structure south of the elevated right-of-way and north-north-east of the proposed garage.

Reconstruction of the right-of-way.

- 26) The proposed reconstruction of the driveway along the right-of-way between Mitchell Road and the elevated part of the driveway suggests that access will not be possible to Lots 7 and 8 DP 10167.
- 27) This would amount to a serious interference with the right-of-way and thus would be contrary to the terms of a right-of-way.
- 28) I note clause 1.9A of the LEP, which precludes the application of an agreement such as the right-of-way affecting the Site, but only if that right-of-way restricts the carrying out of development and then only to the extent necessary to enable that development to be carried out. However, in the present case, the right-of-way does not restrict the carrying out of the proposed development subject of the DA, as can be seen in the plans.
- 29) The absence from the DA of a document by which access to lots 7 and 8 DP 101670 (15 Florida Road, Palm Beach) is maintained during construction (if approved) is a matter to be taken into consideration pursuant to section 4.15(1)(b) - the likely impacts of the development, as well as s. 4.15(1)(e) - the public interest. Continued access to 15 Florida Road is of itself of such importance that it may well clause the DA to be refused for that reason alone.

Conclusion.

- 30) For reason set out above, it is my opinion that:
 - a) The Shaw Reynolds advice contemplates a development different from the DA and therefore the Shaw Reynolds advice cannot be relied upon.
 - b) The Shaw Reynolds advice is incorrect:
 - i) the garage and that part of the driveway between the right-of-way and the garage, are not a road;
 - ii) the garage and the entry structure are not ancillary to a recreational facility; and
 - iii) the garage, entry structure and that part of the driveway between the right-of-way and the garage are prohibited if within the RE1 Public Recreation zone.
 - c) The location of some of the components proposed to be constructed is unclear relative to the boundary between the 2 zones on the Site. This has a significant impact on their permissibility.

- d) Based on my understanding that the garage, the entry, and the part of the driveway between the right-of-way and the garage, are all within the RE1 Public Recreation zone, then each of them is prohibited.
- e) All components of the proposed development are development for the purpose of a dwelling house, and it is incorrect to suggest that any part of the driveway is development for the purpose of a road.
- f) It appears that the driveway along the right-of-way is proposed to be reconstructed between Mitchell Road and the elevated part of the driveway. That will preclude access to lots 7 and 8 DP 10167 (15 Florida Road, Palm Beach). Such inability to access would amount to serious interference with the right-of-way and would be a matter to be taken into consideration pursuant to section 4.15(1)(b) and (e).

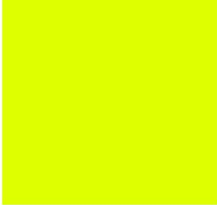
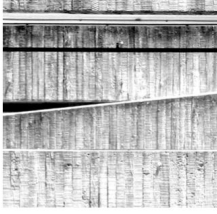
Should you have any queries please do not hesitate to contact me.

Yours faithfully

A handwritten signature in black ink, appearing to read 'S M Berveling', written in a cursive style. The signature is positioned above a solid horizontal line that extends to the right.

S M Berveling

Annexure B: Report by Taylor Consulting Engineers



21 February 2021

Manager, Development Assessments
Northern Beaches Council
PO Box 82
MANLY NSW 1655

Dear Sir/Madam

Re: Development Application – 6 Mitchell Road, Palm Beach

Taylor Consulting Engineers has been retained by the owners of 15 Florida Road, Palm Beach, the site directly to the east of the subject site, to review the validity of the proposed development and to ensure the ongoing amenity of their own property is protected.

A site inspection and review of the publicly available, preliminary design information prepared by Northern Beaches Consulting Engineers (NB Consulting) and Stephen Lesiuk (Architect) was conducted and the following is a summary of our findings.

The existing partially suspended concrete right of access driveway services the subject site and also 13 and 15 Florida Road, Palm Beach. Analysis of the existing driveway with reference to *AS2890.1 2014 Off-Street Parking*, found compliance and safety issues that will be exacerbated due to increased traffic loading which would result from the proposed development. We note that the existing concrete crash barrier and galvanised steel handrails either side of the driveway are in a poor state of repair and non-compliant.

The width and grade of the existing right of access driveway are noted to be non-compliant with *over 25%* longitudinal fall in the steepest sections. Proposed amendments to the driveway by Northern Beaches Engineers dated October 2019 do not appear to satisfactorily resolve the transitions through the existing grades and it is the opinion of this office that the proposed turning bay, shown some 7 metres above the ground below is, as drawn, impossible to safely construct.

Due to the width and grade of drive, it is currently very difficult to safely turn a vehicle and safely pass by a parked vehicle. As this right of access also serves as pedestrian access to the 3 properties, the drive



width, grade and difficult line of sight mean access by foot is currently hazardous to pedestrians.

The proposed amendments to the right of access do not satisfactorily address these safety issues.

Swept paths provided by NB Consulting on drawing number C30A show a vehicle reversing into the right of access from the proposed garage without any line of sight to traffic entering or exiting the drive from above or below the proposed development. This proposal poses a significant risk to both pedestrians and other vehicles sharing the right of access.

Longitudinal sections of the proposed driveway show the reconstructed section of the right of access being completely demolished and rebuilt. Note that this is the primary vehicular and pedestrian access for the owners of 15 & 15a Florida Road, and the owners of these properties will not have safe access to their homes for the duration of proposed construction. Should the concrete structure be retained, an analysis of the structure and certification by a registered Structural Engineer should be provided including allowable maximum vehicle loads.

Attached to this report, in the appendix, are excerpts from the architectural and engineering documents referred to within.

Should you require any further information please contact the undersigned.

Yours faithfully
TAYLOR CONSULTING

A handwritten signature in black ink, appearing to read 'D M Schaefer', written in a cursive style.

D M SCHAEFER - Director
B.E. Civil (Hons) M.I.E. Aust

APPENDIX

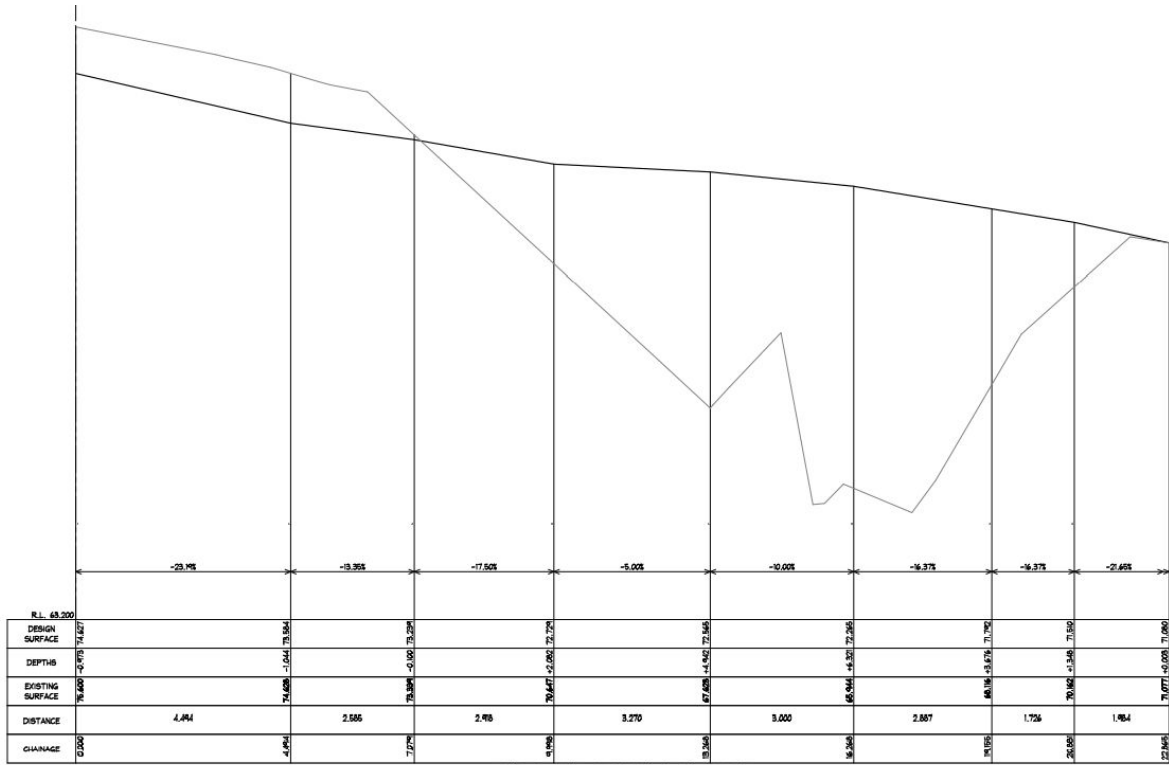




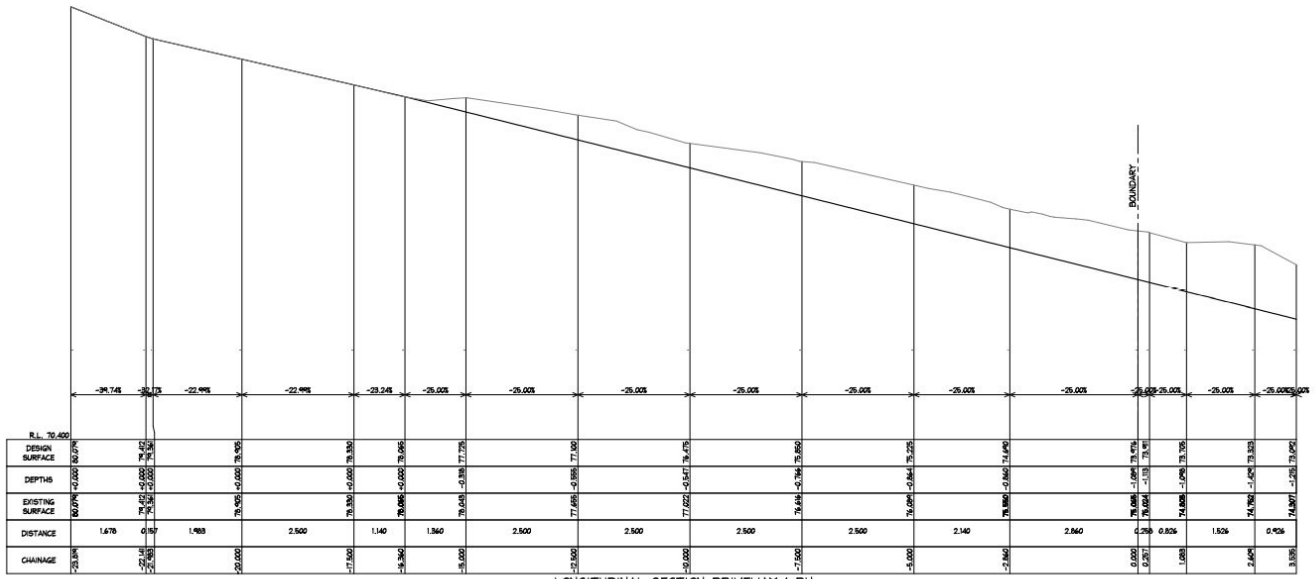








LONGITUDINAL SECTION TURNING BAY
 FROM CH: 0.000 TO CH: 22.865
 SCALES: HORIZONTAL 1:50 VERTICAL 1:50
 SECTION 05
 C02



LONGITUDINAL SECTION DRIVEWAY 1 RH
 FROM CH: 23.814 TO CH: 52.596
 SCALES: HORIZONTAL 1:50 VERTICAL 1:50