From:	[redacted]
Sent:	10/04/2024 3:28:53 PM
To:	Council Northernbeaches Mailbox
Cc:	Titus; Anthony Ng
Subject:	TRIMMED: DA 2022 1848; 173A SEAFORTH CRESCENT SEAFORTH NSW 2092 WRITTEN SUBMISSION: LETTER OF OBJECTION SUBMISSION: TULLOCH
Attachments:	173a SEAFORTH WS APRIL 24.pdf;

Kind regards,

Bill Tulloch BSc[Arch]BArch[Hons1]UNSW RIBA Assoc RAIA
[redacted]

S U B M I S S I O N

a written submission by way of objection

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

prepared for

TITUS THESEIRA & ANTHONY NG, 173 SEAFORTH CRESCENT SEAFORTH NSW 2092

10 APRIL 2024

NORTHERN BEACHES COUNCIL
725 PITTWATER ROAD,
DEE WHY
NSW 2099

council@northernbeaches.nsw.gov.au

RE: DA 2022 1848;
173A SEAFORTH CRESCENT SEAFORTH NSW 2092
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].

This DA was submitted 17 months ago. I contend that Council have given the applicant an enormous amount of time to resolve these matters, however there is still matters of numerical non-compliance and unreasonable amenity loss, that must now lead to a **REFUSAL**.

The Council requested amendments. The applicant has now submitted Amended Plans some 11 months later to address those matters.

This submission is in response to those Amended Plans listed as follows:

- **SketchArc** drawings dated 4 April 2024
- **Palmland** drawings dated 2 February 2024

Council will note that the **SketchArc** drawings have presented the EGL under the existing dwelling at a height that does not accord with photography within the HIS. I contend that the HOB exceeds the standard, and no Clause 4.6 Variation has been submitted. Council will also note ongoing non-compliances to Wall Height and Setbacks. There are no Registered Surveyors survey marks shown under the existing

dwelling on the Survey, despite access being available. I contend that this has not been provided as it would clearly show the non-compliant HOB.

Council will note that the **Palmland** drawings do not accord with the DA submission requirements for a Landscape Plan. There is no schedule of the plants to be provided, and no indication of mature height, numbers of species, and other detail. Existing trees are not identified. The excessive canopy heights will impact harbour views. The Palmland plans do not accord with the SketchArc Plans – they appear to be of a different layout proposal.

NEW STRUCTURE NOT ALTERATIONS & ADDITIONS
COOREY V MUNICIPALITY OF HUNTERS HILL [2013] NSWLEC 1187

My clients contend that the proposed development must be considered as a new structure. The qualitive and quantitative issues defined within Coorey v Municipality of Hunters Hill [2013] NSWLEC 1187 clearly identify the proposed development as a new structure.

In respect to the 'Qualitative' issues, I contend that the appearance of the existing building is to be substantially changed when viewed from public places. The proposed demolition is so extensive to cause that which remains to lose the characteristics of the form of the existing structure.

In respect to the 'Quantitative' issues, the extent of the site coverage proposed is to be substantially changed. The extent of the existing non-compliances with numerical controls is significantly increased by the proposal. The extent of the building envelope proposed is to be substantially changed. The extent of boundary setbacks proposed is to be substantially changed. The extent of the existing floor space ratio will be altered, and GFA will be increased. The extent of changes in the roof form are substantial. The proportion of the retained building bears little relationship to the proposed new development.

The new works are so extensive as to be properly characterised as a redevelopment of the subject site. The proposal should comply fully with the relevant LEP and DCP controls. The description of the DA within the DA Application is incorrect and there is a lack of statutory power to continue the assessment of the DA by Council.

REQUEST TO VARY PURSUANT TO CLAUSE 4.6 OF THE LEP

The development application should be refused as the proposal exceeds the HOB development standard prescribed by the LEP and it has not been supported by a request to vary pursuant to clause 4.6 of the LEP.

HERITAGE

The Heritage Referral Response dated 10 May 2023 made it abundantly clear to the applicant:

"….the original main roof is retained and to make sure that the first floor addition is recessively placed, free from the main roof and does not dominate the original built form.'

This has not been resolved, or adequately actioned by the applicant.

The proposed development removes all the structure above the pressed metal ceiling, and therefore the press metal ceiling would need to be removed as well. This action may permanently damage the pressed metal ceiling. The remainder of the heritage items of the Cinema Room would then be totally exposed to the elements during the rebuild. There is no heritage report to describe how this would occur. A substantial temporary structure would need to be built to protect the Cinema Room, and a very clear and precise method used. This is undefined by the applicant. The proposed stair would be exposed into the Cinema Room as the upper stairs [21& 22 risers] cut into the ceiling zone.

There has been no revised HIS to respond to NBC Heritage Referral.

My client asks Council to consider listing the subject site either Local or State.

The 112-year-old house called 'Nelma' was built in 1911 for theatrical property manager George Phillips and his wife Elizabeth. 'Nelma' retained strong connections

to the theatrical establishment in Sydney pre and post WW1. I refer to my earlier submissions.

I refer to my submission dated 3 May 2023 and 17 November 2022.

The 17 November 2022 Submission clearly stated the strong concerns of my client:

"The design of the dwelling does not ensure that the existing high levels of amenity to our property is retained.

The proposal is considered to be inappropriate within the context of the surrounding dwellings.

The subject site is zoned C3 Environmental Management 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 our property.

- *View loss*
- *Visual Bulk*
- *Solar Loss*
- *Built form positioned on our title*

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

- *Building Height: Proposed 10.0m v Control 8.5m [18% non-compliance]*
- *Wall Height: Proposed 9.4m v Control 7.2m [30% non-compliance]*
- *Front Setback: major encroachment on Neighbours land*
- *Side Setback East: Proposed 0.9m v 2.2m Control [240% non-compliance]*

The SEE has incorrectly calculated Height of Building and Wall Height.

The SEE has not addressed unauthorized built form on neighbour's land. The SEE has not addressed the proposed works on neighbour's land without the adjoining owner's consent.

The SEE has not addressed the 1972 Easement & Restrictions instrument on height and boundary setback.

The SEE has not ensured that a Demolition Traffic Management Plan and Construction Traffic Management Plan is submitted as part of the DA on a significantly constrained site."

Since those submissions NBC Heritage Officer has filed their Referral dated 10 May 2023, that states: [my highlighting underlined]:

HERITAGE REFERRAL RESPONSE 10 MAY 2023

The existing property is not listed, and not in a heritage conservation area. It is however, a property of significant remaining integrity, with its retained intact built form, main roof form and the original fabric including the internal features in the main theatre room located under the main roof. Therefore, it is considered that the application should take this opportunity to create a design for an extension that maintains this significant heritage value - original fabric and the built form, while enabling the house to have ongoing, viable life that responds to the contemporary needs of the owners.

Having the first floor extension over the main roof is considered to diminish the character of the original building and it is irreversible. New work must recognise and support the heritage significance of the building with a carefully considered design that allows the retention of the significant built form and allows the interpretation of the original building. The extension could be located to the southwest section of the site/existing property to allow the original main roof is retained and to make sure that the first floor addition is recessively placed, free from the main roof and does not dominate the original built form. The proposed hipped roof form is supported as long as it is kept low but preferably with matching pitch to the main roof.

It is considered, that the proposal, in its current form, does not recognise and support the heritage significance of the existing building, however it is possible to have a better response that supports the heritage values of the building and better relates to its context. Considerations should be given to comply with the relevant controls of Manly DCP 2013, specifically Section 3.2 Heritage Considerations - 3.2.1.2 Potential Heritage Significance.

Therefore, Heritage require amendments to the proposal.

I refer Council to my heritage concerns raised within my submission 3 May 2023.

OVERDEVELOPMENT OF 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 proposal fails to achieve an acceptable view sharing outcome,
- The proposal fails to achieve an acceptable visual bulk and scale outcome,
- The proposal fails to achieve an acceptable landscape outcome

MISLEADING DRAWINGS: 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.

In accordance with recent caselaw via the NSW Land and Environment Court (*Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*), building height is to be taken from the existing ground level, whether disturbed or undisturbed.

Insufficient information has been provided to establish the exact height of building proposed. The ground level of the existing dwelling houses is not provided on sections.

My clients contend that *ground level (existing)* on the subject site has not been assessed correctly.

- In accordance with recent caselaw via the NSW Land and Environment Court (*Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*), building height is to be taken from the existing ground level, whether disturbed or undisturbed.

Insufficient information has been provided to establish the exact height of building proposed. The ground level of the existing dwelling houses is not provided

Council will note the existing ground levels under the dwelling as depicted within photography of the HIS.

Image 54

Subfloor

Image taken – 30 March 2023

Image 56

Subfloor

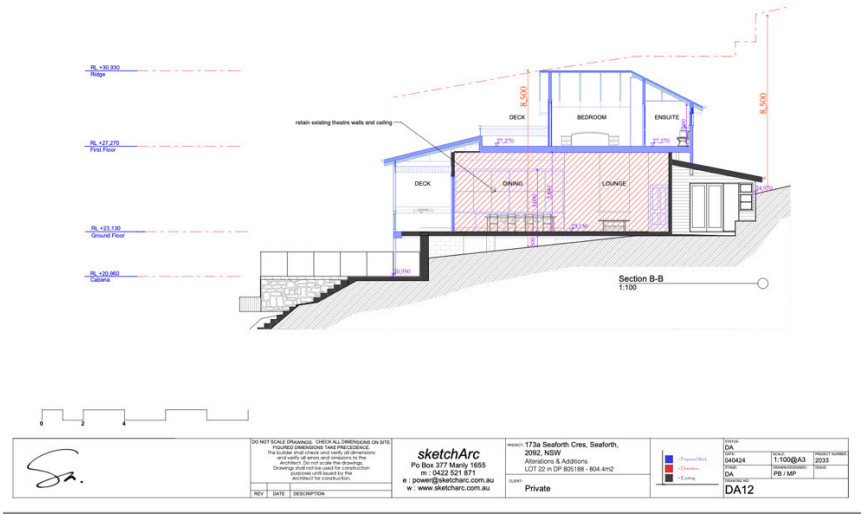
Image taken – 30 March 2023

Image 57

Subfloor

Image taken – 30 March 2023

I ask Council for the '*ground level existing'* levels throughout this zone to be accurately measured by the Applicant's Registered Surveyor, so an accurate HOB can be assessed.



Council can easily assess that the sub floor shown on DA 12, has no similarity to the subfloor shown on the HIS photographs. The Section on DA 12 suggests a 0.5m distance from FFL to the EGL – the photography suggests that this height would be 2.0m+. No survey has been provided to areas that are clearly accessible. HOB would clearly by >10m.

ONGOING NON-COMPLIANCE

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

- Building Height: Proposed >10.0m v Control 8.5m, as the incorrect EGL has been shown under the proposed upper level [18% non-compliance] – no Clause 4.6 Variation submitted
- Wall Height: Proposed 9.4m v Control 7.2m, as the incorrect EGL has been shown under the proposed upper level [30% non-compliance]
- Southern Setback: major encroachment on Neighbours land, and minimal 0.9m setback to Bedroom 4
- Side Setback East: Proposed 0.9m for the proposed 6.5m Wall Height, equates to a 2.2m Control [240% non-compliance]

IMPACTS UPON ADJOINING PROPERTIES: ADVERSE VIEW SHARING 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 proposal is inconsistent with the objectives of the DCP.

No View Loss Assessment has been prepared by the applicant.

Heights Poles with verification from the Registered Surveyor for the Amended Plan scheme have not been provided.

Height Poles for proposed high canopy trees have not been provided.

For these reasons Council does not have before them sufficient material to assess the DA. The DA must be REFUSED.

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

- The proposal is inconsistent with objectives of the DCP regarding views;
- The proposal is inconsistent with objective and controls of the DCP regarding views and view sharing;
- The proposal is inconsistent with the DCP, as the proposal fails under the fourth Tenacity Step, Point 3 [a]: *For complying proposals: (a) "whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact*".
- The application documentation has failed to accurately and comprehensively consider and document view loss impacts on affected neighbours;
- 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 whether a more skilful design could reduce the impact on views of neighbours.
- The proposal is inconsistent with the decision made by NSWLEC Commissioner Walsh in *Furlong v Northern Beaches Council [2022] NSWLEC 1208* in considering that if a more skilful design could be achieved arriving at an outcome that achieved '*a very high level of amenity and enjoy impressive views*', and the proposal had not taken that option, then a proposal had gone too far, and must be refused.

In terms of view loss, I contend that the proposal fails under the fourth Tenacity Step, Point 3 [a]:

Point 3 - For complying proposals: (a) "whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact".

I contend that the question to be answered is whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact upon views of neighbours.

I contend that the view impact is considered above a moderate impact from the respective zones within the property given the significant proportion of the views which are impacted. The aspect is considered whole, prominent coastal views, perhaps iconic views, which are certainly worthy of consideration and at least partial protection. The proposal to remove the vast majority of these views is considered overall to be above a moderate view impact.

As Council will recall, in respect to Point 3, NSWLEC Commissioner Walsh in Furlong v Northern Beaches Council [2022] NSWLEC 1208 referenced Wenli Wang v North Sydney Council [2018] NSWLEC 122, in considering that if a more skilful design could be achieved arriving at an outcome that achieved '*a very high level of amenity and enjoy impressive views*', then a proposed development has gone too far, and must be refused.

I contend that the proposed development has '*gone too far*' and the '*more skilful design*' solution identified in this Submission, achieves '*a very high level of amenity and enjoy impressive views*' for the applicant.

The '*more skilful design*' solution identified in this Submission, gives the applicant a potentially larger GFA than what is being sort, a very high level of amenity, and would enjoy spectacular and impressive views.

The development results in a loss of private views enjoyed by the neighbouring properties.

The development does not satisfy the objectives and planning controls of the DCP in respect to view loss.

The development exceeds the maximum quantum of development for the site by contravening development standards and planning controls.

The reduction of private views enjoyed by the neighbouring properties is attributed to the breaches of statutory development standards and planning controls that regulate the building envelope.

The proposed scale and design are not considered to take into account site or area planning to protect available water views. The proposed height, design and roof form are not considered to promote or maximise the opportunity of achieving the '*reasonable sharing of views*' and some view access to be maintained for neighbours. It is considered that design options do exist, in terms of '*innovative design solutions*' to improve the urban environment, including maintaining view access in the area and tapering built form with the sloping topography. The application does not detail whether or which 'skilful' design options have been considered in accordance with the Planning Principle established by the Land and Environment Court in *Tenacity Consulting v Warringah Council* (2004) NSWLEC 140. The principle seeks to achieve a development whilst allowing reasonable view access. The available information does not provide current height poles or a view montage to clearly quantify the views blocked or protected by the current design. At a reduced height, with a lower roof form, the building could potentially allow some view across. It is considered reasonable to request a revised design in order to protect the public interest.

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

View impact photographs are to be taken from my client's property and public places.

View impact photomontages prepared in accordance with the Land and Environment Court policy on the use of photomontages are to be prepared from the view impact photographs.

I consider that my clients' view loss is greater than moderate.

For proposed developments where there is the potential for view loss from nearby or adjoining properties, consideration must be given to the view sharing principles detailed in the judgement handed down by the NSW Land and Environment Court under *Tenacity Consulting v Warringah Council.*

In relation to principle four of this judgement (being the 'assessment of the reasonableness of the proposal that is causing the impact'), it is considered that a development which complies with all planning controls would be deemed more reasonable than one that is non-compliant. The proposal, as it currently stands, presents numerous non-compliances to the planning controls listed under the LEP and DCP. This brings into question as to whether a more 'skilful' (or sensitive) design would achieve an improved and acceptable outcome, and as such allowing for an acceptable level of view sharing.

In this instance, it must be strongly recommended that the proposed upper floor is redesigned to respond to, and address, principle four of *Tenacity Consulting v Warringah Council*, which would provide the Applicant with a similar amenity while also reducing the view impact to an acceptable level on adjoining properties. An alternative design outcome could be achieved involving a reduction to the internal floor space of the proposed upper level.

In this instance, alternative design outcomes are encouraged to appropriately and satisfactorily address the four-part assessment of *Tenacity Consulting v Warringah Council*.

The proposed development when considered against the DCP and the NSW Land and Environment Court Planning Principle in *Tenacity Consulting Pty Ltd v Warringah Council (2004) NSWLEC* will result in an unacceptable view impact and will not achieve appropriate view sharing.

The proposed development will result in unacceptable additional view impacts. The view impact is greater than moderate when considered against the *Tenacity* planning principle. The view impact could reasonably be avoided by a more considered design that retains the amenity of the proposal, whilst limiting the impact upon the neighbouring property.

The built form proposed blocks scenic, iconic or highly valued items or whole views as defined in *Tenacity* terms.

The proposed development will unreasonably obstruct views enjoyed by my clients' property from highly used rooms and from entertainment balconies, resulting in inconsistency with the requirements and objectives of the DCP.

The proposed development has not considered the strategic placement of canopy trees to avoid further view loss impacts upon existing view corridors.

The Applicant has not provided an adequate View Impact Analysis which details the extent to which existing water views from my clients' property, and other impacted dwellings, are obstructed under the current proposal. The existing documentation accompanying the application is insufficient to undertake a detailed analysis of the proposal against the relevant DCP and NSWLEC guidelines.

In Tenacity, [Tenacity Consulting v Warringah Council 2004], NSW LEC considered Views. Tenacity suggest that Council should consider:

"A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable."

The development breaches multiple planning controls and is unreasonable.

We contend that the impact on views arises as a result of non-compliance with one or more planning controls, and the view loss from the highly used rooms and decks is considered unreasonable.

APPLICATION OF TENACITY PLANNING PRINCIPLE

An assessment in relation to the planning principle of Roseth SC of the Land and Environment Court of New South Wales in Tenacity Consulting v Warringah [2004] NSWLEC 140 - Principles of view sharing: the impact on neighbours (Tenacity) is made.

The steps in Tenacity are sequential and conditional in some cases, meaning that proceeding to further steps may not be required if the conditions for satisfying the preceding threshold is not met.

STEP 1 VIEWS TO BE AFFECTED

The first step quoted from the judgement in Tenacity is as follows:

The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

An arc of view is available when standing at a central location in the highly used zones including entertainment decks, highly used rooms, and private open spaces on our property.

The composition of the arc is constrained over the subject site boundaries, by built forms and landscape. The central part of the composition includes the subject site. Views include scenic and valued features as defined in Tenacity. The proposed development will take away views for its own benefit. The view is from our highly used rooms towards the view. The extent of view loss exceeds moderate and the

features lost are considered to be valued as identified in Step 1 of Tenacity.

STEP 2: FROM WHERE ARE VIEWS AVAILABLE

This step considers from where the affected views are available in relation to the orientation of the building to its land and to the view in question. The second step, quoted, is as follows:

The second step is to consider from what part of the property the views are obtained. For example, the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.

The views in all cases are available across the boundary of the subject site, from standing and seated positions. An arc of view is available when standing at highly used zones on our property.

The proposed non-compliant height and non-compliant setback will unreasonably remove harbour views.

STEP 3: EXTENT OF IMPACT

The next step in the principle is to assess the extent of impact and the locations from which the view loss occurs.

Step 3 as quoted is:

The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

As we rate the extent of view loss is above moderate in our opinion the threshold to proceed to Step 4 of Tenacity is met.

STEP 4: REASONABLENESS

The planning principle states that consideration should be given to the causes of the visual impact and whether they are reasonable in the circumstances.

Step 4 is quoted below:

The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

NSWLEC Commissioner Walsh in Balestriere v Council of the City of Ryde [2021] NSWLEC 1600 in relation to the Fourth Step:

There are three different points to the fourth Tenacity step, concerned with assessing the reasonableness of the impact, which I summarise as follows:

Point 1 - Compliance, or otherwise, with planning controls.

Point 2 - If there is a non-compliance, then even a moderate impact may be considered unreasonable.

Point 3 - For complying proposals: (a) "whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact", and (b) "if the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable".

In respect to Point 3, NSWLEC Commissioner Walsh in Furlong v Northern Beaches Council [2022] NSWLEC 1208 referenced *Wenli Wang v North Sydney Council* [2018] NSWLEC 122, in considering that if a more skilful design could be achieved arriving at an outcome that achieved '*a very high level of amenity and enjoy impressive views', then a proposed development has gone too far, and must be refused.*

As the proposed development does not comply with outcomes and controls, that are the most relevant to visual impacts, greater weight would be attributed to the effects caused.

In our opinion the extent of view loss considered to be the greater than moderate, in relation to the views from our highly used zones of our dwelling. The view is from a location from which it would be reasonable to expect that the existing view, particularly of the view that could be retained especially in the context of a development that does not comply with outcomes and controls. The private domain visual catchment is an arc from which views will be affected as a result of the construction of the proposed development. The proposed development will create view loss in relation to our property. The views most affected are from our highly used zones and include very high scenic and highly valued features as defined in Tenacity. Having applied the tests in the Tenacity planning principle we conclude that we would be exposed to a loss greater than moderate from the highly used rooms. The non-compliance with planning outcomes and controls of the

proposed development will contribute to this loss. Having considered the visual effects of the proposed development envelope, the extent of view loss caused would be unreasonable and unacceptable.

The proposed development cannot be supported on visual impacts grounds. The proposal incorporates a significant departure from controls, which helps contain building envelope. Additionally, the siting of the proposed development and its distribution of bulk does not assist in achieving view sharing objectives. Where the diminishing of private views can be attributed to a non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. Our assessment finds that view sharing objectives have not been satisfied.

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.

There are architectural solutions that maintains our view, by proposing development that maintains our view, and we identify the precise amendments necessary to overcome this loss.

The built form can be reduced in scale to fall within the 8.5m height control, or the Master Bedroom could be located elsewhere on the site, giving the Applicant the same amenity outcome.

As noted by his Honour, Justice Moore of the Court in Rebel MH Neutral Bay Pty Ltd v North Sydney Council [2018] NSWLEC 191 (Rebel),

"*the concept of sharing of views does not mean, for the reasons earlier explained, the creation of expansive and attractive views for a new development at the expense of removal of portion of a pleasant outlook from an existing development. This cannot be regarded as "sharing" for the purposes of justifying the permitting of a non-compliant development when the impact of a compliant development would significantly moderate the impact on a potentially affected view*".

The same unreasonable scenario in Rebel applies to the current DA. The proposed breaching dwelling will take away views from our property (and possibly other adjoining properties) to the considerable benefit of the future occupants of the proposed dwelling. This scenario is not consistent with the principle of View Sharing enunciated by his Honour, Justice Moore in Rebel. The adverse View Loss from our property is one of the negative environmental consequences of the proposed development. The proposed development cannot be supported on visual impacts grounds.

These issues warrant refusal of the DA.

We contend that the proposed development when considered against the DCP and the NSW Land and Environment Court Planning Principle in *Tenacity Consulting Pty Ltd v Warringah Council (2004) NSWLEC* will result in an unacceptable view impact and will not achieve appropriate view sharing.

We contend that the proposal is contrary to Section 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979* in that it does not satisfy the view sharing controls of the DCP.

IMPACTS UPON ADJOINING PROPERTIES: VIEW SHARING 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 ensure view sharing and avoid amenity loss.

The proposal is inconsistent with the objectives of the DCP.

My clients are concerned that new trees are positioned within the Tenacity Viewing Corridors to my clients' view, and those new trees are unreasonable as they will severely affect my client's view.

My clients ask that:

- To maintain view sharing, the proposed trees and plants over 3m in height shall be deleted in the landscape plan. Tree planting shall be located to minimise impacts on view loss, with no trees or landscape species removing water views

Hong v Mosman Municipal Council [2023] NSWLEC 1149

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.

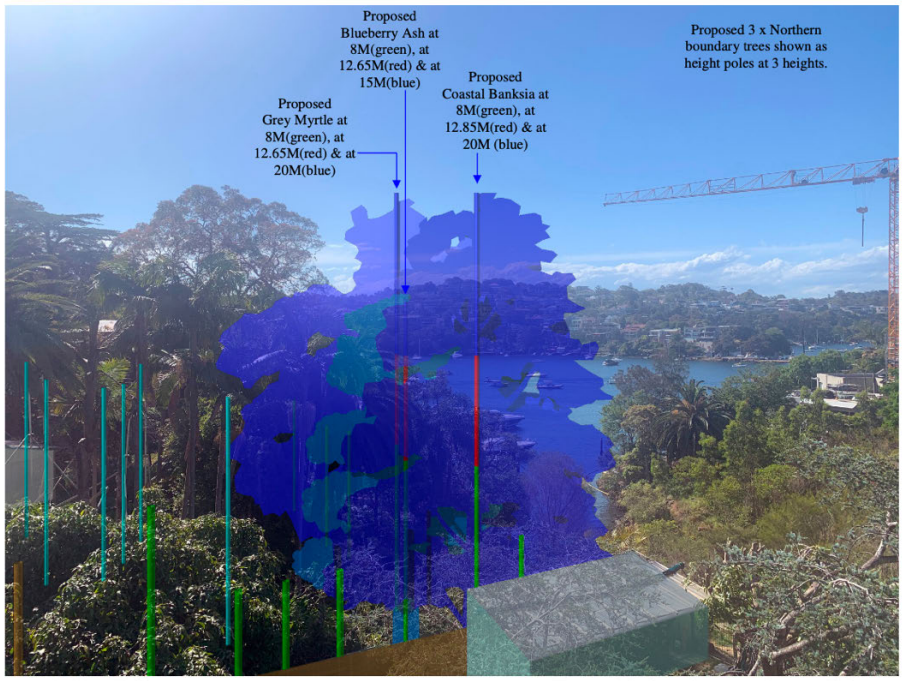
The Revision C drawings required 9 high canopy trees to be deleted and replaced by 3m high species. The condition of consent required a further four transplanted palms to be deleted from the Landscape Plans.

I represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council and the Court on this Appeal.

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

View Point 1



Photograph Ref:7253-taken 13 Dec 2022 at 11:19am with 35mm focal length

Photomontage by Pam Walls
Based on S.J.Surveying Services Height Pole Sketch#247319:24/10/2022
Selena Hanna Landscape Drawings#LP03-B:22/02/2022

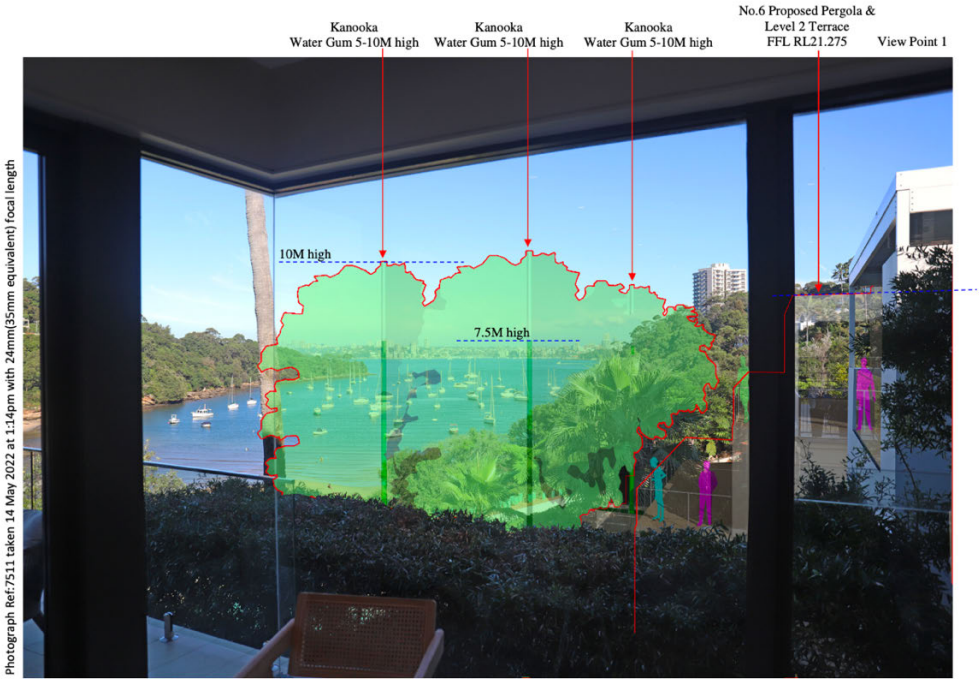
Proposed 3 x boundary trees shown as 50% transparency
View from No.12 main living balcony
Objection to 10 Julian St, Mosman

Zubani v Mosman Municipal Council [2022] NSWLEC 1381

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 represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council and the Court on this Appeal.



Photomontage by Pam Walls
Based on True North Surveys Survey Ref:7917-15/07/2016
Fab Siqueira Architect DA Drawings Issue D-21/04/2021

View with 3D computer model of proposed No.6 overlaid as 50% transparency
View from No.8 Curlew Camp Rd, Mosman main living room
Objection to 6 Curlew Camp Rd, Mosman-DA008.2021.00000136.001

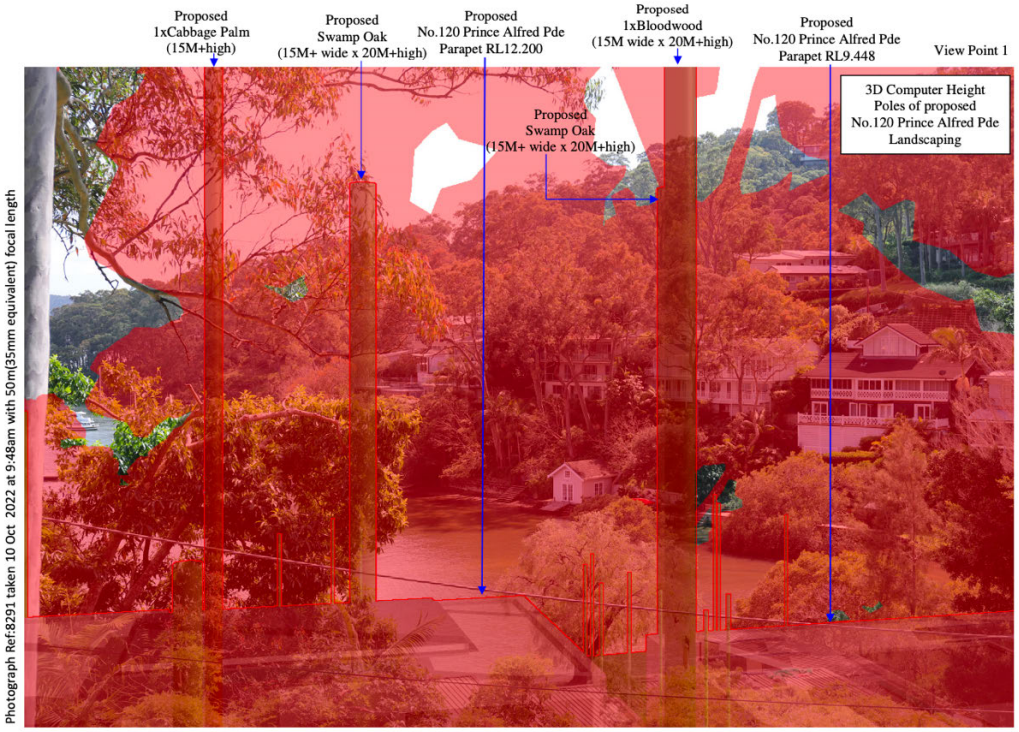
Zubani v Mosman Municipal Council [2022] NSWLEC 1381
View Loss caused by excessive landscape in the street setback zone

DA 2022 0246 at 120 Prince Alfred Parade

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*"

I represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council and the Court on this Appeal.



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

DA 2022 2280 at 47 Beatty Street Balgowlah

At the recent NBC DDP decision, DA 2022 2280 at 47 Beatty Street Balgowlah in July 2023, the Panel agreed to delete trees higher than 6.0m in the viewing corridor as recommended by Council's Assessment Report. The NBC DDP Panel Members were Daniel Milliken, Maxwell Duncan and Neil Cocks.

The condition imposed stated that the trees:

"…shall be replaced with a species with a maximum mature height of 6m."

The Panel also deleted a roof terrace that obstructed harbour views.

View Point 1

Photomontage by Pam Walls
Based on True North Survey Ref:1091-17/02/2022
ESS Lifestyle DA Drawings Ref:0158-25/05/2022

View with 3D solid block computer model of proposed No.47 and indicative landscaping
View from 18 Tutus St, Balgowlah main external living balcony
Objection to 47 Beatty St, Balgowlah-DA2022/2280

The roof terrace, retractable awning, stairs, balustrading, stairwell wall and raised parapet wall shall be deleted from the roof level. The roof level shall consist of roof planting, with species consistent with the submitted landscape plan, and have no structures exceeding RL 36.2 placed on the roof (apart from landscaping).

I represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council.

Petesic v Northern Beaches Council [2022] NSWLEC

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].

My clients are very concerned that new trees are positioned within the Tenacity Viewing Corridors to my clients' view. The loss of view caused by the canopy will create view loss that is severe to devastating in outcome.

REQUEST FOR AMENDED PLANS TO BE SUBMITTED TO BETTER ADDRESS IMPACTS UPON ADJOINING PROPERTIES

- The existing roof is to remain, and all works proposed above the existing roof form are to be deleted

- To maintain view sharing, the proposed trees and plants over 3m in height shall be deleted in the landscape plan. Tree planting shall be located to minimise impacts on view loss, with no trees or landscape species removing water views

REASONS FOR REFUSAL

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

Contentions that the application be refused as listed within this submission.

REQUEST TO VARY PURSUANT TO CLAUSE 4.6 OF THE LEP

The development application should be refused as the proposal exceeds the HOB development standard prescribed by the LEP and it has not been supported by a request to vary pursuant to clause 4.6 of the LEP.

NEW STRUCTURE NOT ALTERATIONS & ADDITIONS
COOREY V MUNICIPALITY OF HUNTERS HILL [2013] NSWLEC 1187

The proposed development must be considered as a new structure. The qualitive and quantitative issues defined within Coorey v Municipality of Hunters Hill [2013] NSWLEC 1187 clearly identify the proposed development as a new structure.

1. 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
- Height of Buildings [HOB] – exceeds 8.5m above EGL under existing house
- Exceptions to Development Standards – No Clause 4.6 HOB
- Heritage – not complying with NBC Heritage Referral

2. 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 [WH] – exceeds 7.2m above EGL under existing house
- Unacceptable Setbacks
- Poor Strategic Positioning of Tree Canopy removing harbour view
- Heritage Conservation Concerns – not complying with NBC Heritage Referral
- Impacts Upon Adjoining Properties: View Loss – no assessment prepared by the applicant
- Impacts Upon Adjoining Properties: Visual Bulk – Non-Compliant HOB, WH, Setbacks

3. 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. Dimensions to boundaries have not been shown in all locations of all proposed built elements. Levels on all proposed works have not been shown. No survey of the zones under the existing house have been provided. The EGL on DA drawings do not accord with the photography provided within the HIS relating to EGL. Insufficient survey.
4. 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
5. 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.
6. 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.
7. The proposals are unsuitably located on the site pursuant to Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979*.

8. 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. No View Loss Assessment is provided.
9. 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.

CONCLUSION

As the Applicant has had nearly a year to resolve the problems, and has chosen not to do so, I contend the DA be **REFUSED** for the above reasons.

Yours faithfully,

Bill Tulloch

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