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**Sent:** 19/04/2016 9:10:31 AM  
**Subject:** 1156 Barrenjoey Road Palm Beach  
**Attachments:** Building Insurance\_1946.jpg;

ATTN Erin Dyer  
Re-Development Application No. N0022/16  
Property 1156 Barrenjoey Road Palm Beach  
Dear Ms Dyer,

I am writing to you in regard to the above matter on behalf of the Benn Family, the owners of the subject site, in response to your recent correspondence with Mr Andrew Benn the applicant for the above development application.

Permissibility

Firstly, I note your concerns over the issue of permissibility of the residential use into the SP1 Zone which occurs as a consequence of the existing dwelling use and the proposed dwelling use being located in both zones applied to the subject site.

In addressing the issue of permissibility provide the following commentary on the applicability of existing use rights to the subject site.

The provisions of the current zoning of the subject site under the Pittwater Local Environmental Plan 2014 allow for dwellings to be erected within the E4 Environmental Living Zone however the provisions of the SP1 zone prohibit the use of that part of the subject site zoned in this way.

In order for me to address the issue of permissibility I provide the following commentary upon the subject site, its history and the relevant provisions of the Environmental Planning and Assessment Act and Regulations thereunder, in particular, Section 106 of the Act provides:

106 Definition of "existing use"

In this Division, existing use means:

*(a) the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4 of this Part, have the effect of prohibiting that use, and*

*(b) the use of a building, work or land:*

*(i) for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and*

*(ii) that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse.*

The applicant has sought access to Council records in order to address the particular aspect of the proposal whereby the issue of lawful purpose can be satisfied however councils records did not assist apart from providing recent records of current development consent is applicable to the subject site.

Notwithstanding this inability of Council to provide satisfactory records to address this issue, the applicant has diligently explored its own records and I have been provided with advice that written documentation is available in the form of an insurance policy issued in 1946 for the existing dwelling on the subject site. This was issued to the Benn family.

The presence of the existing dwelling on the subject site is confirmed by a continuous record in the form of aerial photographs dating from 1946 which show the existing dwelling in its current location which, as you are aware bridges across the dividing line between the two zones. These photographs will be forwarded to you tomorrow or Thursday.

In order to address the issue of lawfulness, the existing dwelling was a permissible use in 1946 when on the instruction of Part X11A of the Local Government Act 1945, general interim development provisions prescribed under division 7 of Part 12A on 12 July 1946, Warringah was proclaimed an Interim Development Area. The use of the subject site for residential purposes was a permissible use under this instrument.

The County of Cumberland Planning Scheme was gazetted on 27 July 1951. This scheme included a statutory zoning map of the Shire. This statutory zoning map confirmed that the use of the subject site for residential purposes remained a permissible use.

The above scheme was superseded by the Shire of Warringah Planning Scheme Ordinance, gazetted on 7th of June 1963. This planning scheme maintained the permissibility residential uses on the subject site.

Under the provisions of the Pittwater Local Environmental Plan 1993, the use of the entire site (part of which was zoned 9(d) Arterial Road Reservation in a manner identical to the existing split zoning) for the residential dwelling use was permissible however this permissibility was contingent upon Clause 28(30)(b) of the PLEP 1993 which require the concurrence of the road authority At the time. This was evidenced in the most recent development consent issued by Council for a garage structure and elevated driveway to serve the existing dwelling.

To establish an existing use right, the applicant must establish on the facts that the use was lawful and was not prohibited use in existence immediately prior to the commencement of the relevant planning instrument that proscribed the use.

The current Pittwater Local Environmental Plan 2014 applied a split zoning of the subject site which generally zoned the northern part of the subject site SP1 Special Purposes, a zoning which prohibited residential use on this part of the subject site whilst the remainder of the subject site is zoned E4 Environmental Living, zone that allows residential uses along with a significant range of other uses.

This chronology confirms that the use of the subject site for residential purposes has been lawful since at least 1946, however became a prohibited use upon the gazettal of the Pittwater Local Environmental Plan 2014.

Sections 107 and 108 of the Act provide as follows:

*107 Continuance of and limitations on existing use*

*(1) Except where expressly provided in this Act, nothing in this Act or an environmental planning instrument prevents the continuance of an existing use.*

*(2) Nothing in subsection (1) authorises:*

*(a) any alteration or extension to or rebuilding of a building or work, or*

*(b) any increase in the area of the use made of a building, work or land from the area actually physically and lawfully used immediately before the coming into operation of the instrument therein mentioned, or*

*(c) without affecting paragraph (a) or (b), any enlargement or expansion or intensification of an existing use, or*

*(d) the continuance of the use therein mentioned in breach of any consent in force under this Act in relation to that use or any condition imposed or applicable to that consent or in breach of any condition referred to in section 80A (1) (b), or*

*(e) the continuance of the use therein mentioned where that use is abandoned.*

*(3) Without limiting the generality of subsection (2) (e), a use is to be presumed, unless the contrary is established, to be abandoned if it ceases to be actually so used for a continuous period of 12 months.*

*108 Regulations respecting existing use*

*(1) The regulations may make provision for or with respect to existing use and, in particular, for or with respect to:*

*(a) the carrying out of alterations or extensions to or the rebuilding of a building or work being used for an existing use, and*

*(b) the change of an existing use to another use, and*

*(c) the enlargement or expansion or intensification of an existing use.*

*(d) (Repealed)*

*(2) The provisions (in this section referred to as the incorporated provisions) of any regulations in force for the purposes of subsection (1) are taken to be incorporated in every environmental planning instrument.*

*(3) An environmental planning instrument may, in accordance with this Act, contain provisions extending, expanding or supplementing the incorporated provisions, but any provisions (other than incorporated provisions) in such an instrument that, but for this subsection, would derogate or have the effect of derogating from the incorporated provisions have no force or effect while the incorporated provisions remain in force.*

*(4) Any right or authority granted by the incorporated provisions or any provisions of an environmental planning instrument extending, expanding or supplementing the incorporated provisions do not apply to or in*

*respect of an existing use which commenced pursuant to a consent of the Minister under section 89 to a development application for consent to carry out prohibited development.*

*If the use of the building on the subject property is an existing use for the purposes of Division 10 of Part 4 of the Act, then Clauses 41,42,43 and 44 of the Environmental Planning and Assessment Regulation 2000 apply-*

*Clause 41(1) of the Regulation states:-*

*(i) An existing use may, subject to this division:*

*(a) be enlarged, expanded or intensified, or*

*(b) be altered or extended, or*

*(c) be rebuilt, or*

*(d) be changed to another use, but only if that other use is a use that may be carried out with or without Development Consent under the Act.*

*Clause 42 of the Regulation states:-*

*(1) Development Consent is required for any enlargement, expansion or intensification of an existing use.*

*(2) The enlargement, expansion or intensification:*

*(a) must be for the existing use and for no other use and*

*(b) must be carried out only on the land on which the existing use was carried out immediately before the relevant date.*

*Clause 43 of the Regulation states:-*

*(1) Development consent is required for any alteration or extension of a building or work used for an existing use.*

*(2) The alterations or extension:*

*(a) must be for the existing use of the building or work and for no other use and*

*(b) must be erected or carried out only on the land on which the building or work was erected or carried out or immediately before the relevant date.*

*Clause 44 of the Regulation states:-*

*(1) Development consent is required for any rebuilding of a building or work used for an existing use.*

*(2) The rebuilding:*

*(a) must be for the existing use of the building or work and for no other use, and*

*(b) must be carried out only on the land on which the building or work was erected or carried out immediately before the relevant date.*

In my opinion, the Applicant has a legitimate claim to existing use rights for the subject land based on the earlier approvals and consents issued by Pittwater Council and its predecessors (lawful commencement) and the continuance of that use once the use became prohibited by the gazettal of the Pittwater Local Environmental Plan 2014. Further documentary evidence in the form of statutory declarations and aerial photographs can be provided to verify this claim, if required.

The use of the building on the subject property is an existing use for the purposes of Division 10 of Part 4 of the Act, and that the existing use is for the same purpose as the proposed development described in the Development Application, then there is power to grant development consent to the proposed development on that part of the subject site zoned SP1.

Height

I note that you have raised concern over the ridge height of the proposal and its apparent non-compliance with the 8.5 m development standard applicable to the subject site.

You will recall that a clause 4.6 request to vary the development standard for height was lodged with the development application as the proposal had a minor breach of the 8.5 m development standard. This request was lodged for abundant caution however it has since become apparent that the proposal incorporates a minor breach (210 mm) only. The applicant is submitting amended plans which reduce the overall height of the structure by 210 mm in order to satisfy your concerns.

It is also noteworthy that the proposal, although potentially exceeding the 8.5 m height limit is subject to the provisions of clause 4.3 (2D) due to the slope of the site.

*(2D) Despite subclause (2), development on land that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map may exceed a height of 8.5 metres, but not be more than 10.0 metres if:*

*(a) the consent authority is satisfied that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, and*

*(b) the objectives of this clause are achieved, and*

*(c) the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and*

*(d) the buildings are sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.*

The applicant however does not wish to press this matter as we are of the view that the proposal in terms of its height and its other attributes is well suited to its location and surrounding context.

LANCE DOYLE 

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# The MASTER BUILDERS' INSURANCE COMPANY LIMITED



SUM INSURED.

£ 200. 0. 0.

Premium - - £ : 13 : 2

Stamp Duty - £ : 1 : -

Total - - - £ : 14 : 2

Head Office:

London Assurance Buildings  
16-20 Bridge Street, Sydney

## FIRE POLICY

Policy No. 8799.

TERM.

From 9th October, 1946.

To 9th April, 1947.

at 4 p.m.

### Whereas

ALAN BENN

having paid to The Master Builders' Insurance Company Limited (hereinafter called the Company) the sum of Thirteen Shillings and Two Pence

(hereinafter called the Insured),

being the Premium on the sum insured by this Policy for the Insurance against Loss or Damage by Fire or Lightning of the Property hereinafter described, for the Amount hereinafter mentioned, not exceeding upon any one Article the sum specified on each item, namely:—

ON TIMBER whilst on ground in open air, situate

BARRENJOEY ROAD, PALM BEACH, NEAR SYDNEY.....£200

INSURED FOR THE SUM OF TWO HUNDRED POUNDS.