

## **STATEMENT OF ENVIRONMENTAL EFFECTS**

Alterations and  
Additions to the  
Existing Dwelling

7 Crown Road,  
Queenscliff

Suite 1, 9 Narabang Way Belrose NSW 2085

Phone: (02) 9986 2535 | Fax: (02) 9986 3050 |

[www.bbfplanners.com.au](http://www.bbfplanners.com.au)

## Statement of Environmental Effects

### Proposed Alterations and Additions to the Existing Dwelling

**7 Crown Road, Queenscliff**

***By William Fleming***

**BS, MPLAN**

**Boston Blyth Fleming Pty Ltd**

**Town Planners**

(ACN 121 577 768)

Suite 1/9 Narabang Way  
Belrose NSW 2085

Tel: (02) 99862535

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## 1 Introduction

This Statement has been prepared as part of the documentation associated with a Development Application proposing alterations and additions to the existing dwelling at 7 Crown Road, Queenscliff

Specifically, the application seeks to create a dwelling of high amenity and design which takes advantage of the sites superior locational attributes and is sensitive to the constraints identified. The proposal has been developed through detailed site and contextual analysis to ensure that the proposal does not give rise to any adverse streetscape or residential amenity impacts in terms of views, solar access or privacy.

The final design has taken into consideration the advice obtained at a pre-lodgement meeting with Northern Beaches Council.

In addition to the Statement of Environmental Effects the application is also accompanied by the following:

- Survey Plan
- Architectural plans
- Basix Certificate
- Preliminary Geotechnical Assessment
- Landscape plan
- Heritage Impact Assessment

In preparation of this document, consideration has been given to the following:

- Environmental Planning and Assessment Act, 1979.
- Warringah Local Environmental Plan 2011, and
- Warringah Development Control Plan 2011

The proposal succeeds when assessed against the Heads of Consideration pursuant to section 4.15 of the Environmental Planning and Assessment Act, 1979 as amended. It is considered that the application, the subject of this document, is appropriate on merit and is worthy of the granting of development consent for the following reasons:

- The application has considered and satisfies the various relevant planning controls applicable to the site and the proposed development.
- The proposed dwelling is compatible with the streetscape and zone objectives for the locality.
- The proposed dwelling will have a satisfactory impact on the environmental quality of the land and the amenity of surrounding properties.
- The site is assessed as suitable for the proposal, having regard to the relevant land use and planning requirements.

## 2 Pre-Lodgement Meeting Minutes

A pre-lodgement meeting (PLM2021/0114) was held with Northern Beaches Council which identified some areas with the initial concept plans that have since been amended with the current scheme.

Council provided commentary relating to the RE1 zoned land which is land intended to be acquired for a public purpose. While the proposal is consistent with the control 5.1A within the LEP, in that there are no works proposed to the RE1 zoned land, it is considered that this area of land unreasonably burdens the property when it comes to the application of the Warringah Development Control Plan.

We note that the Warringah LEP did not adopt clause 4.5, calculation of floor space ratio and site area, which would've provided guidance as to how site area was to be calculated with regard to RE1 zoned public recreation land. As such, it is deferred to the site area definition within the LEP which states

***site area** means the area of any land on which development is or is to be carried out. The land may include the whole or part of one lot, or more than one lot if they are contiguous to each other, but does not include the area of any land on which development is not permitted to be carried out under this Plan.*

The whole site is to be included as part of site area. It would seem unreasonable to have a portion of land purchased by the owner and be burdened by more onerous DCP controls.

Notwithstanding, the portion of RE1 zoned land has yet to be entertained by Council as being potentially acquired. The fact is that by virtue of the environmental, topographical and heritage constraints present on the site the RE1 land will remain in its current form into the future. It will continue to provide screening and softening of the built form as well as ensuring the public will continue to utilise the rock shelf below.

The note that clause 4.15(3A) guides the consent authority to apply the DCP controls with a degree of flexibility. In this regard, we ask Council to apply the rear setback and landscape area controls with a degree of flexibility due to the constraints imposed by the RE1 zoned land. These controls have been addressed further in this statement.

### 3 Site Analysis

#### 3.1 Site Description and Location

The application relates to Lot 2 in DP 514296, 7 Crown Road, Queenscliff. A location map is included as **Figure 1**.



**Figure 1:** Site Location (Source: Six Maps)

The subject site is an irregular shaped allotment, similar to a battle-axe arrangement, with a frontage and address to Crown Road. The frontage of the site measures 10.26m, north-western side boundary of 67.4m, north-eastern side boundary of 53.345m and a rear boundary of 15.67m. The site measures 946m<sup>2</sup> in area. The site is located on the southern cliffs of Freshwater Beach and has a steep topography. The rear of the site includes rock outcrops and dense vegetation.

The existing development on the site contains a 2 & 3 storey dwelling with detached garage at street level and an elevated swimming pool. The dwelling is orientated towards the east to maximise the expansive water views. A survey extract is provided below:



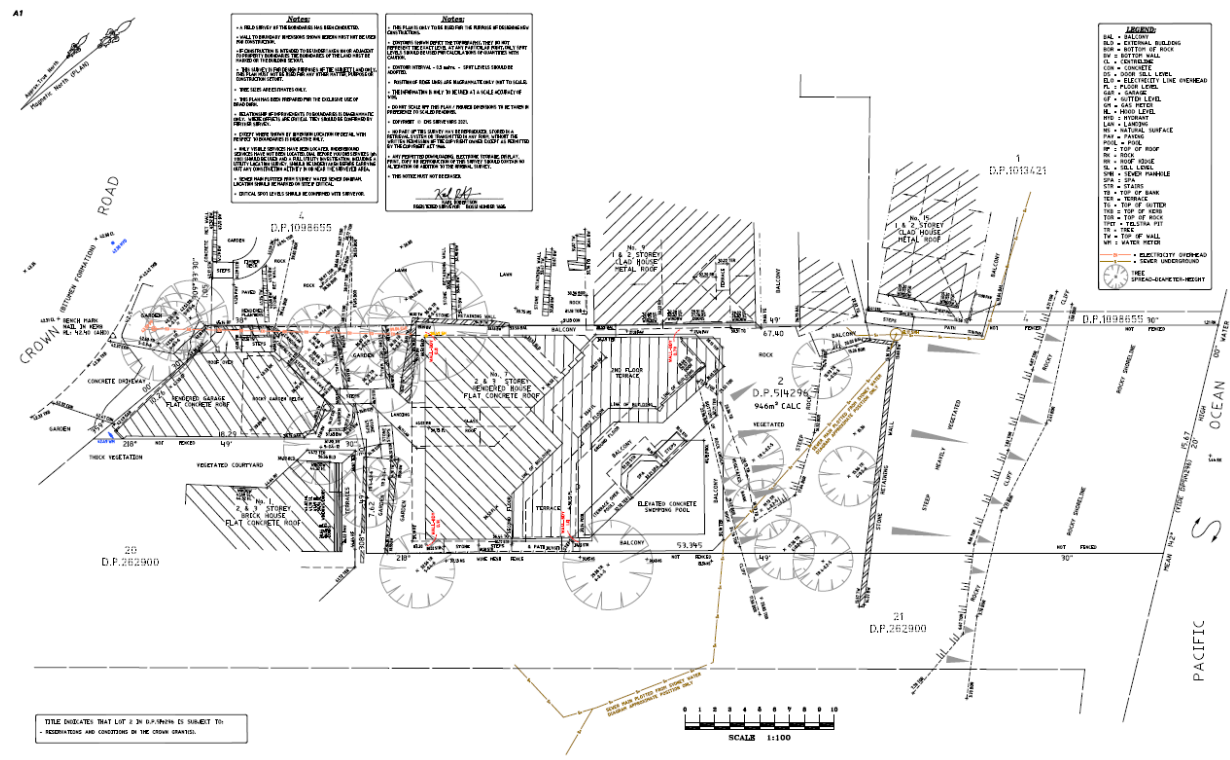


Image 2: Survey

Development along Crown Road consists of residential dwellings that step down the cliff towards the beach. Towards the south, along Pavilion Road, comprises a mix of residential flat buildings and single dwellings. The local area is well serviced with public recreation opportunities in close proximity. The following images gives more context to the existing development on site.





**Image 3:** View from rock shelf on the RE1 zoned land on title



**Image 4:** View of headland from Freshwater Beach

### 3.2 Zoning and Key Environmental Considerations

The site is zoned R2 Low Density Residential and RE1 Public Recreation pursuant to the Warringah Local Environmental Plan 2011. The site is mapped as being within Landslip Risk Area B & C and class 5 acid sulfate soils. The cliffs are also mapped as being a local heritage item, known as “coastal cliff significance”.

It is also identified as a wildlife corridor within the Warringah DCP.

## 4 Description of Proposed Development

### 4.1 Details of the Proposed Development

This application proposes alterations and additions to the existing dwelling and enhancement of landscaping on the site. Specifically, the works include:

#### **Garage Level:**

- Minor addition to the rear of the garage to include a lift and bin storage area
- Replacement of the concrete stairs

#### **Office Level**

- New office with W/C and kitchenette
- New internal staircase

#### **Level 01**

- New Gym which connects to the main house
- Partially infill the existing terrace to create a master bedroom with walk-in-robe and ensuite. New garden space to be included on the terrace
- Bedroom 2 with ensuite
- New glazing and sliding doors

#### **Level 00**

- Spa to be demolished
- Partially infill section of the terrace
- Demolition of existing façade around the proposed BBQ

#### **Pool Level**

- New pool steps
- Partially infill terrace with new sliding doors
- Additions to create a walk-in-robe for bedroom 3, new bathroom and new staircase with change room space to lower level.

#### **Wine Cellar Level Plan**

- New wine cellar and storage space
- Access to private open space deck area.

This application is accompanied by a detailed landscape plan and stormwater management plans. The extent of the works are depicted on the architectural plans prepared by Dorn Architecture.

## 5 Statutory Planning Framework

The following section of the report will assess the proposed development having regard to the statutory planning framework and matters for consideration pursuant to Section 4.15 of the Environmental Planning & Assessment Act, 1979 as amended. Those matters which are required to be addressed are outlined, and any steps to mitigate against any potential adverse environmental impacts are discussed below.

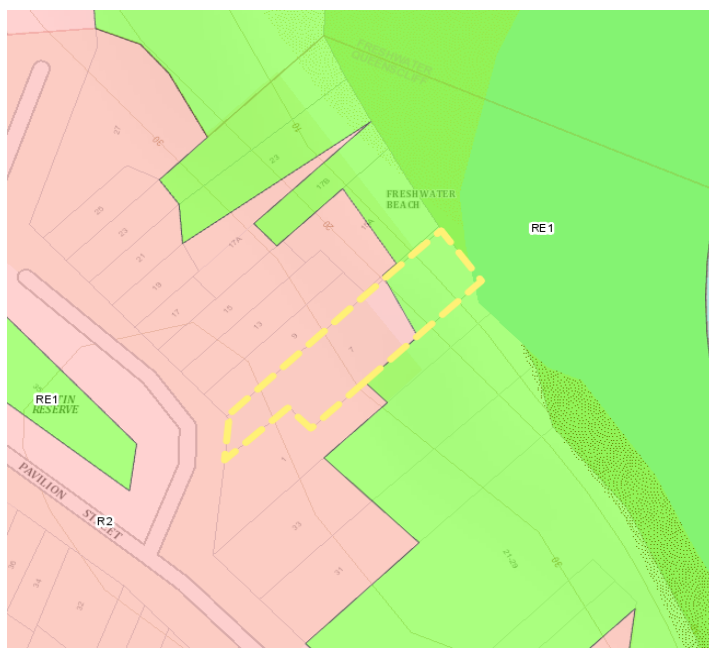
### 5.1 Warringah Local Environmental Plan 2011

The Warringah Local Environmental Plan 2011 is the principal local planning instrument applicable to the land. The relevant provisions of the LEP and the manner in which they relate to the site and the proposed development are assessed below.

#### 5.1.1 Zoning and Permissibility

The site has a split zoning of R2 Low Density Residential and RE1 Public Recreation pursuant to the provisions of the Warringah Local Environmental Plan 2011.

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*



**Image 3:** Land Use Zoning

As demonstrated above, the site is predominately zoned R2 with a section of the site at the rear which is zoned RE1 Public Recreation. We confirm that no works are proposed within the RE1 land and that the proposed works within the R2 zoned land are permissible with consent.

### 5.1.2 Height of Buildings

Pursuant to clause 4.3 WLEP the height of any building on the land shall not exceed 8.5 metres above existing ground level. The stated objectives of this clause are as follows:

- (a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
- (d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

The proposed works will extend above the 8.5m height plane and a clause 4.6 request to vary this development standard is provided as an annexure to this report.

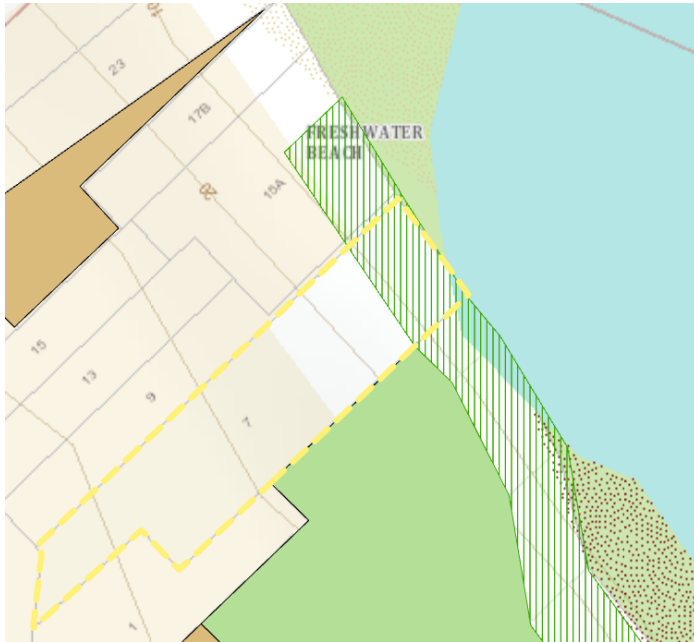
### 5.1.3 Development on Land Intended to be Acquired for a Public Purpose

Clause 5.1a of the Warringah DCP states development consent must not be granted to any development on land to which this clause applies other than development for a purpose specified for the RE1 zoned land.

The development does not propose any development within the RE1 zoned land and is consistent with this control.

### 5.1.4 Heritage Conservation

The subject site includes land identified as a local heritage item. The item is known as "coastal cliff significance" and is shown on the mapping below.



**Image 4:** Heritage mapping

No works are proposed to the RE1 zoned land which is reflective of the heritage mapping above. In this regard, the existing heritage value of the cliffs will be retained. The alterations and additions will not detract from the heritage item. A heritage impact assessment has been provided with this application.

#### 5.1.5 Development on Sloping Land

The site is identified as falling within Land Slip Risk Area B & C. The objectives of Clause 6.4 seek to:

- *Avoid significant adverse impacts on development and on properties in the vicinity of development sites resulting from landslides originating either on or near sloping land;*
- *Ensure the impacts of storm water runoff from development or near sloping land are minimised so as to not adversely affect the stability of the subject and surrounding land;*
- *To ensure subsurface flows are not adversely affected by development so as to not impact on the stability of existing or adjoining land.*

The preliminary geotechnical report provided concludes that provided good engineering and building practice are followed the risk to landslip is considered acceptable.

#### 5.2 Warringah Development Control Plan 2011

The proposal relates to alterations and additions to the existing dwelling and the following relevant DCP controls have been addressed with respect to consideration of the proposed subdivision application.

## 5.2.1 DCP Compliance Table

A table demonstrating compliance with the relevant provisions of the Warringah DCP 2011 is detailed as follows:

Control	Requirement	Proposed	Compliance
<b>Wall Height</b>  <b>DCP Control B1</b>	7.2 metres from ground level (existing) to the underside of the ceiling to the uppermost floor of the building (excluding habitable areas wholly located within a roof space).	<p>The proposed development will have varying wall heights which is reflective of the topography which makes strict compliance more challenging. This DCP control may be varied with slopes greater than a 20% gradient subject to a merit based assessment.</p> <p>The existing dwelling has sections that are non-compliant with the 7.2m control. The existing wall height circumstance will be largely retained with a minor extension being proposed to the wall.</p> <p>Particular attention has been given to the west elevation walls given the existing orientation of the dwelling and floor plate geometry. Landscaping treatments, articulation, fenestration and a range of materials and finishes will ensure that the wall massing will be broken and minimise any potential visual impact concerns.</p> <p>The resultant wall height do not give rise to any significant adverse amenity impacts with regard to view loss, privacy or overshadowing.</p>	No - minor non-compliance



Control	Requirement	Proposed	Compliance
<b>Side Boundary Envelope</b>  <b>DCP Control B3</b>	<p>Buildings must be sited within a building envelope determined by projecting planes at 45 degrees from a height above ground level (existing) at the side boundaries of 4 metres.</p>	<p>The development does result in some minor breaches to the building envelope however is considered to be reasonable on its merits.</p> <p>The design has made a concerted effort to provide side facing elevations include high levels of articulation to prevent long continuous wall plane. As mentioned above, landscaping treatments and range of materials and finishes</p> <p>The topography of the site and utilising the existing built form makes strict compliance unreasonable and unnecessary in this instance.</p>	<p>No – worth on merit</p>
<b>Side Boundary Setback</b>  <b>DCP Control B5</b>	<p>Development is to maintain a 900mm minimum setback from side boundaries.</p>	<p>The proposal generally maintains the established side setbacks with the existing dwelling.</p> <p>The concrete access stairs from Crown Street will be demolished and replaced in the same location and will minorly encroach within the 900mm. Additional planting will be included along the boundary to the stairs to minimise any visual impact. We note that no dwelling is directly adjacent to the staircase on the adjoining site.</p>	<p>No – worthy on merit.</p>

Control	Requirement	Proposed	Compliance
		<p>New additions creating the connection from the garage to the dwelling have been designed to be compliant with the 900mm side setback control and steps in where appropriate.</p> <p>It is considered that the side setbacks as presented are acceptable in this instance.</p>	
<b>Front Boundary Setback</b>  <b>DCP Control B7</b>	Development is to maintain a front setback of 6.5 metres.	The site has an existing garage within the front setback which is to be retained.	Yes – maintains existing
<b>Rear Boundary Setback</b>  <b>DCP Control B9</b>	Development is to maintain a minimum rear boundary setback of 6 metres.	<p>The minutes of the pre-lodgement meeting indicate that the rear setback is to be taken from the boundary with the RE1 zoned land, and not the true rear boundary on title.</p> <p>In this regard, it is considered that the proposal will have a technical non-compliance with the 6m rear setback control. We note that the non-compliance relates to proposed decking. This will have a rear setback of 2m at its closest point to the rear boundary of the R2 zoned land. The proposed lightweight pergola will be setback further than 6m, in compliance with the control.</p>	No – technical non-compliance.

Control	Requirement	Proposed	Compliance
		<p>Notwithstanding that the rear setback control is easily achieved when taken from the true rear boundary.</p> <p>Furthermore, the RE1 zoned land is heavily vegetated before dropping down steeply to the rock shelf below. As such, the proposed works within the rear setback will not be readily discernible from the beach or the rock shelf below. There is no adverse impact to the amenity of neighbouring dwellings, the heritage value of the cliffs will be preserved and will not result in any unreasonable visual impacts when viewed from the public domain.</p> <p>Should the RE1 zoned land be acquired by Council in the future it would make not change the context between the public and private space. The land is steep and heavily vegetated with little area for public recreation other than on the rock shelf below which the public already use. It also include heritage, environmental and, as mentioned, topographical constraints that would make any potential development virtually unachievable. It is considered that whether the land is publicly or privately owned, the proposed rear setback is entirely appropriate in this instance and does not</p>	

Control	Requirement	Proposed	Compliance
		create any unreasonable amenity or visual impacts.	
<b>Parking Facilities</b> <b>DCP Control C3</b>	2 off street parking spaces must be located behind the front building alignment.	The dwelling can provide 2 off-street parking spaces in the existing garage.	Yes
<b>Stormwater</b> <b>DCP Control C4</b>	To protect and improve the ecological condition of Warringah's beaches, lagoons, waterways, wetlands and surrounding bushland;  to minimise the risk to public health and safety;	Stormwater Management plans have been provided.	Yes
<b>Excavation and Landfill</b> <b>DCP Control C7</b>	Excavation and landfill works must not result in any adverse impact on adjoining land.	The geotechnical report details the proposed excavation and fill. The recommendations of the report are anticipated to being included as conditions of consent.	Yes
<b>Demolition &amp; Construction</b> <b>DCP Control C8</b>	A demolition and waste management plan must be satisfactorily completed and submitted.	Partial demolition of the existing dwelling will be required which is detailed on the architectural plans. The concrete roof the upper level and some concrete terracing will be demolished. Internal	Yes

Control	Requirement	Proposed	Compliance
		walls will be removed to facilitate the new layout.	
<b>Landscaped Open Space</b>  <b>DCP Control D1</b>	A minimum 40% landscaped open space is to be provided.	<p>As the same with the rear setback control, Council's pre-DA minutes indicate that the landscape area calculation is to exclude the RE1 zoned land.</p> <p>Calculations have been provided that proposed a 35% landscape area with the RE1 zoned land excluded. This is a minor reduction from 39% as per existing. With the RE1 zoned land included the landscape area is compliant at 57%.</p> <p>While this may present as a technical non-compliance it is considered reasonable in this instance. The land zoned RE1 has no real development potential and is reasonable to assume that Council has no intention of acquiring this land in the future. The RE1 zoned land will remain in its natural state.</p> <p>A landscape plan has been prepared which will see an enhancement of land which will utilise a range of native species. Landscaping treatments have been</p>	No – worthy on merit

Control	Requirement	Proposed	Compliance
		proposed to the façade of the dwelling to soften and screen the dwelling. Despite the technical non-compliance, the site will see an enhancement of landscaping throughout the site.	
<b>Private Open Space</b>  <b>DCP Control D2</b>	Dwelling houses with 3 or more bedrooms are to provide a minimum area of 60sqm of private open space.	>60m <sup>2</sup> achieved	Yes
<b>Access to Sunlight</b>  <b>DCP Control D6</b>	Pursuant to these provisions development is not to unreasonably reduce sunlight to surrounding properties. In the case of housing: <ul style="list-style-type: none"> <li>At least 50% of the required area of private open space of each dwelling and at least 50% of the required area of private open space of adjoining dwellings</li> </ul>	Shadow diagrams have been prepared and accompany this application. The diagrams show that compliant levels of solar access will be achieved with the proposed works.	Yes

Control	Requirement	Proposed	Compliance
	are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21.		
<b>Views</b>  <b>DCP Control D7</b>	<p>To allow for the reasonable sharing of views.</p> <p>To encourage innovative design solutions to improve the urban environment.</p> <p>To ensure existing canopy trees have priority over views.</p>	<p>The proposed works will not result in any unreasonable view loss for neighbouring dwellings. The works are consistent with the principals of view sharing pursuant to the planning principal <i>Tenacity vs Warringah Council</i>.</p> <p>Further detailed view loss assessment provided at the end of this table.</p>	Yes
<b>Privacy</b>  <b>DCP Control D8</b>	<p>Ensure the siting and design of buildings provides a high level of visual and acoustic privacy for occupants and neighbours.</p> <p>To encourage innovative design solutions to improve the urban environment.</p> <p>To provide personal and property</p>	<p>The dwelling will not have any significant adverse impact to the privacy of adjoining properties. Fenestration treatments have been minimised to side boundary facing walls with privacy screens to glazing proposed where appropriate.</p> <p>The existing pool terrace is to be maintained.</p>	Yes



Control	Requirement	Proposed	Compliance
	security for occupants and visitors.		
<b>Building Bulk</b> <b>DCP Control D9</b>	Encourage good design and innovative architecture to improve the urban environment. Minimise the visual impact of development when viewed from adjoining properties, streets, waterways and land zoned for public recreation purposes.	The architect has provided a dwelling that is highly articulated which utilises a range of materials and finished to limit its visual impact. The more substantial additions occur with the proposed connection from the garage to the dwelling. This is situated behind the main area of the dwelling and does not result in unreasonable additional bulk. The works proposed to the existing dwelling does not significantly alter the scale of the dwelling that it would be perceived as jarring within the existing escarpment setting.	Yes
<b>Building Colours and Materials</b> <b>DCP Control D10</b>	Ensure the colours and materials of new or altered buildings and structures are sympathetic to the surrounding natural and built environment.	A range of materials and finishes are proposed and detailed on the architectural plans provided.	Yes
<b>Roofs</b> <b>DCP Policy D11</b>	Roofs are to be designed to complement the local skyline.	Achieved.	Yes

Control	Requirement	Proposed	Compliance
<b>Provision and Location of Utility Services</b>  <b>D21</b>	<p>To encourage innovative design solutions to improve the urban environment.</p> <p>To ensure that adequate utility services are provided to land being developed.</p>	Existing connections will be retained.	Yes.
<b>Preservation of Trees or Bushland Vegetation</b>  <b>E1</b>	<p>To protect and enhance the urban forest of the Northern Beaches.</p> <p>To effectively manage the risks that come with an established urban forest through professional management of trees.</p>	<p>The arborist report by RainTree consulting details 5 prescribed trees to be removed. A further 12 exempt trees are permitted to be removed without the consent of Council.</p> <p>The report provides recommendations which is anticipated to be included as part of any consent issued.</p>	Yes
<b>Wildlife Corridor</b>  <b>E4</b>	<p>To provide natural habitat for local wildlife, maintain natural shade profiles and provide psychological &amp; social benefits.</p> <p>To retain and enhance native vegetation and the ecological functions of wildlife corridors.</p>	The site is mapped as being a wildlife corridor within the DCP. The proposal is accompanied by a landscape plan which details the enhancement of native species on the site and increased opportunities for habitat. Exempt and exotic species trees and vegetation are to be removed. The existing noxious weeds and under-storey exotic vegetation will be removed and replaced	yes

Control	Requirement	Proposed	Compliance
		<p>with native species. The existing rock outcrops are to be retained and undisturbed.</p> <p>In this regard, the landscaping works proposed will improve habitat for local wildlife.</p>	
<b>Landslip Risk DCP Policy E10</b>	<p>The site is identified as falling within Landslip Risk Area B</p> <p>The applicant must demonstrate that:</p> <ul style="list-style-type: none"> <li>• The proposed development is justified in terms of geotechnical stability; and</li> <li>• The proposed development will be carried out in accordance with good engineering practice.</li> </ul>	<p>This has been addressed in section 4.1.3 of this report.</p> <p>A preliminary geotechnical report is provided with this application.</p>	Yes

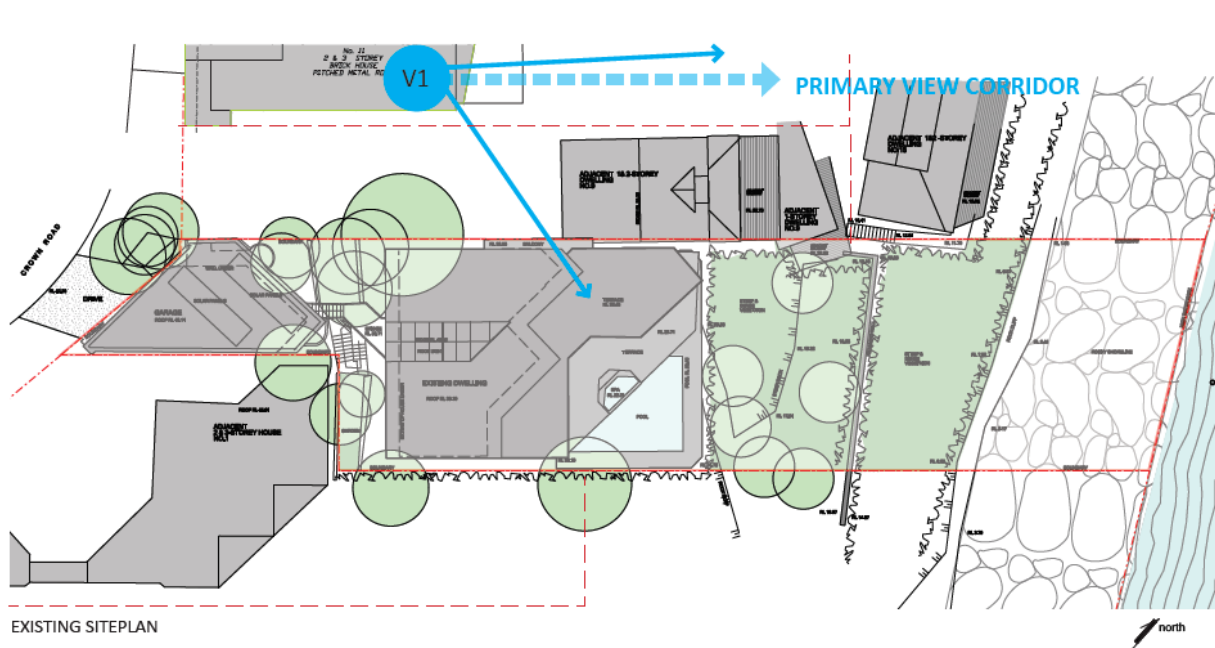
### 5.2.2 View Sharing Assessment

The methodology for assessing where reasonable view sharing is provided is described in the planning principle in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140. Preliminary view loss assessment has been undertaken with regard to 1 Crown Road and 13 Crown Road.

## 13 CROWN ROAD

### Step 1: Assess the views to be affected

13 Crown Road is situated to the west of the subject site. The views are accessed from the first floor balcony and primary living spaces. 13 Crown Road is orientated to the north to capture the views of Freshwater Beach. DORN Architecture have undertaken some preliminary view analysis which is shown below:



**Image 4: Aerial Context**



**Image 4: Existing view from Primary Living area and associated balcony**

### Step 2: Consider from what part of the property the views are obtained

The view are obtained from average eye height of 1.6m position from the primary living area. The views that will be potentially impacted are accessed across a side boundary which are considered harder to retain.

### Step 3: Assess the extent of the impact

The architect has provided a photo montage of the view impact and is provided below:



**Image 5:** View impacts with proposed works.

The view impact is considered to be minor. The reduction in water views accessed over the subject site, across a side boundary, is considered acceptable in this instance. The vast majority of the existing view will be retained with the valuable water and land interface of the headland will be retained. The panoramic water views obtained from this site will largely be retained.

### Step 4: Assess the reasonableness of the proposal

The architect has provided a skilful design on what is a challenging site with regard to the floor plate geometry and the steep topography. Design efforts have been made to pull back the existing dwelling in sections which will improve view corridors across the site in parts. The raising of roof heights to the upper levels seeks to improve internal amenity with the upper level being pushed back towards the slope to limit the breach to the 8.5m building height.

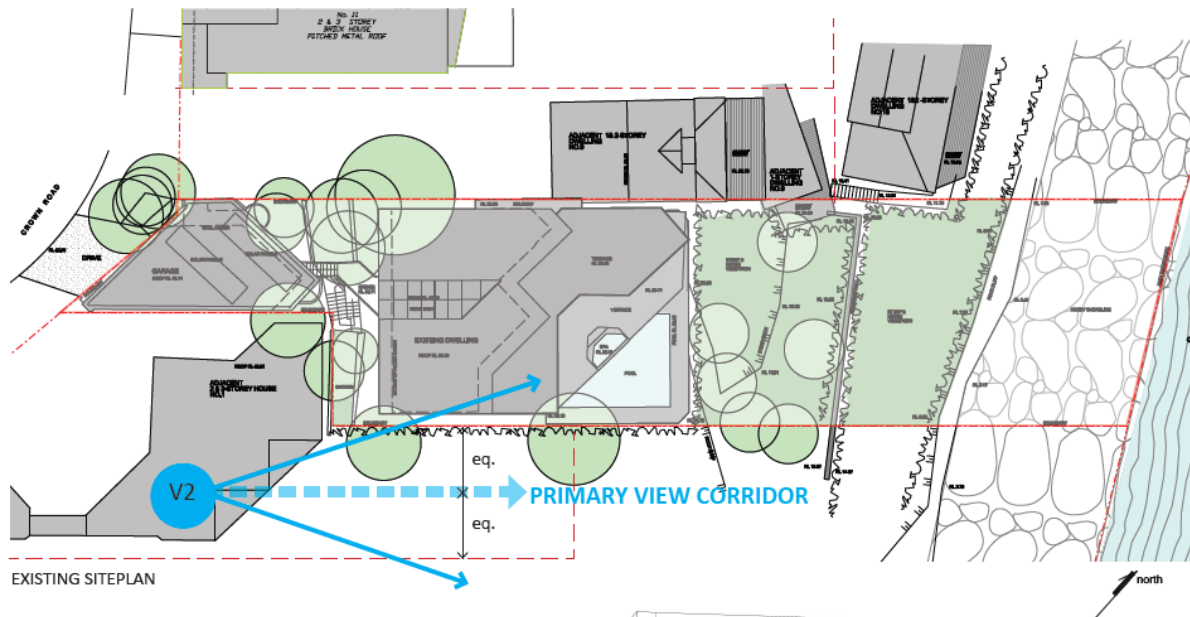
The architect has provided a scheme that will reasonably protect the water and land interface views for 13 Crown Road. Only a small section of water views will be impacted, noting that this view is accessed from a side boundary. In this regard it is considered a skilful design.

## 1 CROWN ROAD

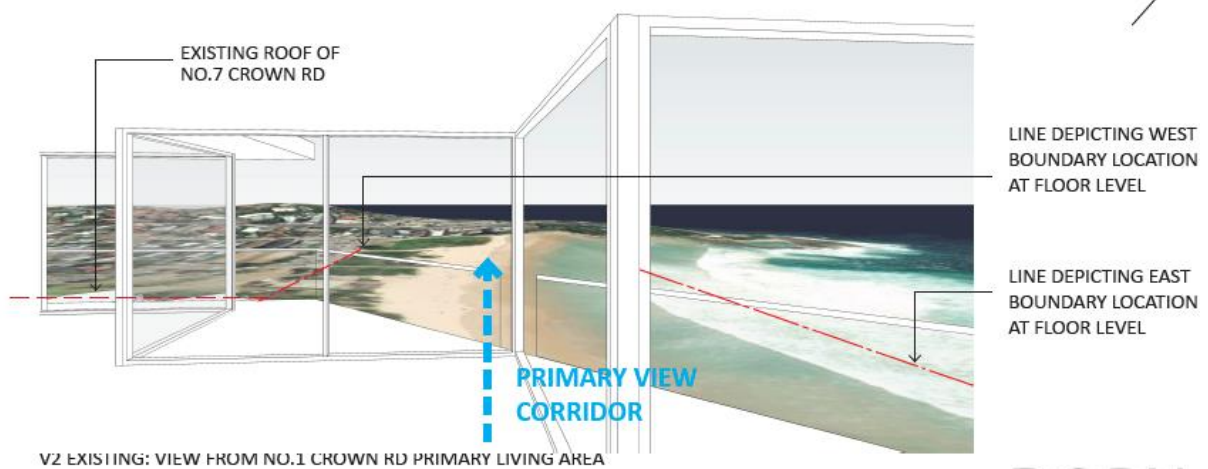
### Step 1: Assess the views to be affected

Views have been taken from the upper level living space and associated balconies. Views are from a standing position. 1 Crown Road is situated behind and slightly to the east of the subject site. 1 Crown

Road has been orientated to the east, similarly to the subject site, to capture the expansive water views. Aerial context is shown below:



**Image 6: Aerial Context**



DORN

**Image 7: Existing view from 1 Crown Road**

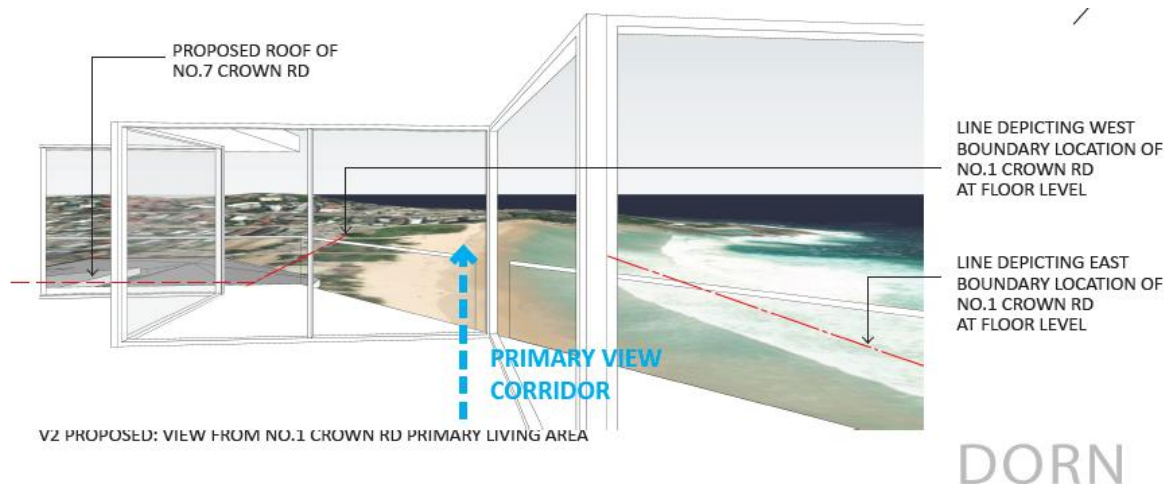
### Step 2: Consider from what part of the property the views are obtained

The views are obtained from primary habitable areas and balconies within the home. District views are taken over the subject site.

### Step 3: Assess the extent of the impact

The extent of the impact is considered minor with no impact to the valuable water views, Freshwater Beach and its interface with the land. The dwelling at 1 Crown Road has been designed to face the water to capture the expansive views. A montage is provided below detailing the impact on the district views.





**Image 8:** *Proposed view loss montage*

#### **Step 4: Assess the reasonable of the proposal**

As with 13 Crown Road, the architect has provided a skilful design on what is a challenging site with regard to the floor plate geometry and the steep topography. Design efforts have been made to pull back the existing dwelling in sections which will improve view corridors across the site in parts. The raising of roof heights to the upper levels seeks to improve internal amenity with the upper level being pushed back towards the slope to limit the breach to the 8.5m building height.

The architect has provided a scheme that will reasonably protect the water and land interface views for 1 Crown Road. Only a small section of district views will be impacted. In this regard it is considered a skilful design.

### **5.3 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004**

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies to the residential component of the development and aims to encourage sustainable residential development.

A BASIX certificate accompanies the development application and demonstrates that the proposal achieves compliance with the BASIX water, energy and thermal efficiency targets.

### **5.4 Matters for Consideration Pursuant to Section 4.15 of the Environmental Planning and Assessment Act 1979 as amended**

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15 of the Environmental Planning and Assessment Act 1979 (as amended). Guidelines (in *italic*) to help identify the issues to be considered have been prepared by the Department of Planning and Environment. The relevant issues are:



(i) The provision of any Planning Instrument

The proposed dwelling is permissible and consistent with the intent of the Warringah Councils Local Environmental Plan and Development Control Plan as they are reasonably applied to the proposed works given the constraints imposed by the sites location, environmental and topographical constraints.

(ii) Any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

N/A

(iii) Any development control plan

Warringah DCP applies

(iiia) Any Planning Agreement that has been entered into under section 7.4 or any draft planning agreement that a developer has offered to enter into under Section 7.4, and

N/A

(iv) The Regulations (to the extent that they prescribe matters for the purposes of this paragraph), and

N/A

(v) Any Coastal Zone Management Plan (within the meaning of the Coastal Protection Act 1979)

N/A

(b) The likely impacts of that development, including environmental impacts on both the natural and built environments and social and economic impacts in the locality,

*Context and Setting*

*i. What is the relationship to the region and local context in terms of:*

- *The scenic qualities and features of the landscape*
- *The character and amenity of the locality and streetscape*
- *The scale, bulk, height, mass, form, character, density and design of development in the locality*

- *The previous and existing land uses and activities in the locality*

The proposed new dwelling is entirely commensurate with that established by adjoining development and development generally within the sites visual catchment with no adverse residential amenity impacts in terms of views, privacy or overshadowing.

ii. *What are the potential impacts on adjacent properties in terms of:*

- *Relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)*
- *visual and acoustic privacy*
- *views and vistas*
- *edge conditions such as boundary treatments and fencing*

These matters have been discussed in detail earlier in this report. The works have been designed such that potential impacts are minimal and within the scope of the built form controls.

*Access, transport and traffic:*

*Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:*

- *Travel Demand*
- *dependency on motor vehicles*
- *traffic generation and the capacity of the local and arterial road network*
- *public transport availability and use (including freight rail where relevant)*
- *conflicts within and between transport modes*
- *Traffic management schemes*
- *Vehicular parking spaces*

The proposal provides for 2 off-street car spaces.

*Public Domain*

The proposed development will have no adverse impact on the public domain.

*Utilities*

Existing utility services will continue to service the dwelling house.

*Flora and Fauna*

Arborist report and landscape plan provided.

### *Waste Collection*

Normal domestic waste collection applies to the existing dwelling house.

### *Natural hazards*

A geotechnical report has been prepared.

### *Economic Impact in the locality*

The proposed development will not have any significant impact on economic factors within the area notwithstanding that it will generate additional employment opportunities through the construction period with respect to the proposed works.

### *Site Design and Internal Design*

i) *Is the development design sensitive to environmental considerations and site attributes including:*

- *size, shape and design of allotments*
- *The proportion of site covered by buildings*
- *the position of buildings*
- *the size (bulk, height, mass), form, appearance and design of buildings*
- *the amount, location, design, use and management of private and communal open space*
- *Landscaping*

These matters have been discussed in detail earlier in this report. The potential impacts are considered to be minimal and within the scope of the general principles, desired future character and built form controls.

ii) *How would the development affect the health and safety of the occupants in terms of:*

- *lighting, ventilation and insulation*
- *building fire risk – prevention and suppression*
- *building materials and finishes*
- *a common wall structure and design*
- *access and facilities for the disabled*
- *likely compliance with the Building Code of Australia*

The proposed development can comply with the provisions of the Building Code of Australia. The proposal complies with the relevant standards pertaining to health and safety and will not have any detrimental effect on the occupants.

### *Construction*

i) *What would be the impacts of construction activities in terms of:*

- *The environmental planning issues listed above*
- *Site safety*

Normal site safety measures and procedures will ensure that no safety or environmental impacts will arise during construction.

(c) The suitability of the site for the development

- *Does the proposal fit in the locality*
- *Are the constraints posed by adjacent development prohibitive*
- *Would development lead to unmanageable transport demands and are there adequate transport facilities in the area*
- *Are utilities and services available to the site adequate for the development*
- *Are the site attributes conducive to development*

The site is located in an established residential area. The adjacent development does not impose any unusual or impossible development constraints. The proposed development will not cause excessive or unmanageable levels of transport demand.

The site being of moderate grade, adequate area, and having no special physical or engineering constraints is suitable for the proposed works.

(d) Any submissions received in accordance with this act or regulations

It is envisaged that Council will appropriately consider any submissions received during the notification period.

(e) The public interest

The proposed works are permissible and consistent with the intent of the LEP and DCP controls as they are reasonably applied to the proposed alterations and additions. The development would not be contrary to the public interest.

## 6 Conclusion

The proposed works are permissible and consistent with the intent of the built form controls as they are reasonably applied to the proposed works. The areas of concern raised by Council at the pre-lodgement meeting have been considered and the plans amended to appropriately address these concerns. The alterations and additions are considered to be appropriate on merit and is worthy of the granting of development consent for the following reasons:

- The application has considered and satisfies the various relevant planning controls applicable to the site and the proposed development.
- The proposed works are compatible with development within the site visual catchment and development generally in the local area.
- The proposed works will have a satisfactory impact on the environmental quality of the land and the amenity of surrounding properties.
- The site is suitable for the proposal having regard to the relevant land use and planning requirements.

Having given due consideration to the matters pursuant to Section 4.15 of the Environmental Planning and Assessment Act, 1979 as amended, it is considered that there are no matters which would prevent Council from granting consent to this proposal in this instance.

## Attachment 1

### Clause 4.6 variation request - Height of buildings (clause 4.3 WLEP 2011)

#### 1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

#### 2.0 Warringah Local Environmental Plan 2013 (“WLEP”)

##### 2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Warringah Local Environmental Plan 2013 (WLEP) the height of a building on the subject land is not to exceed 8.5 metres in height. The objectives of this control are as follows:

- (a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) to minimise any adverse impact of development on the scenic quality of Warringah’s coastal and bush environments,*
- (d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

Building height is defined as follows:

***building height (or height of building)*** means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

Ground level existing is defined as follows:

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

The leading case authority which considers the definition of “ground level (existing)” is *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 which was followed in the recent decision of *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189.

In *Stamford Property Services*, the Court followed the reasoning adopted in *Bettar* and confirmed that “ground level (existing)” must relate to the levels of the site, and not to the artificially modified levels of the site as reflected by the building presently located on the land. In this regard the Court preferred the Council’s method to determining the “ground floor (existing)” from which building height should be measured. Council’s approach required that the proposed height be measured from the natural ground levels of the site where known, such as undisturbed levels at the boundary, and from adjacent undisturbed levels such as the level of the footpath at the front boundary of the site. These levels could then be extrapolated across the site reflecting the pre-development sloping topography of the land, consistent with the approach adopted in *Bettar*.

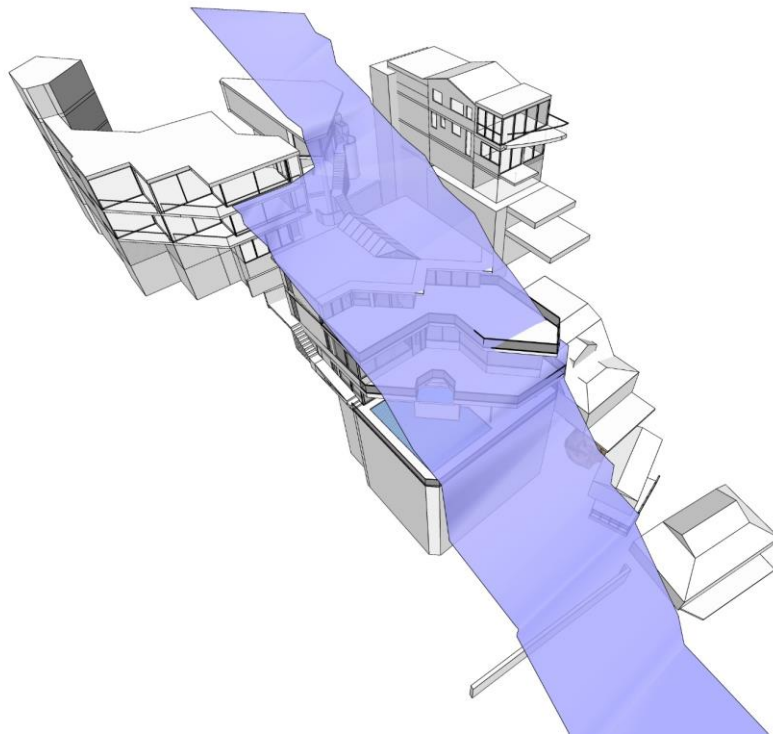
In these proceedings the Court was satisfied that even though there was limited survey information available for the site, there was enough information to determine the “ground level (existing)” for the site based on unmodified surveyed levels in the public domain (footpaths) which could be extrapolated across the site. In summary, the Court has confirmed that the definition of “ground level (existing)” from which building height should be measured:

- is not to be based on the artificially modified levels of the site such as the floor levels of an existing building. This includes the entrance steps of an existing building.
- is not to include the basement floor or the soil beneath the basement following construction of the building.
- is to be based on the existing undisturbed surveyed surface of the ground. For sites where access to the ground surface is restricted by an existing building, natural ground levels should be determined with regard to known boundary levels based on actual and surveyed levels on adjoining properties including within the public domain (footpaths).

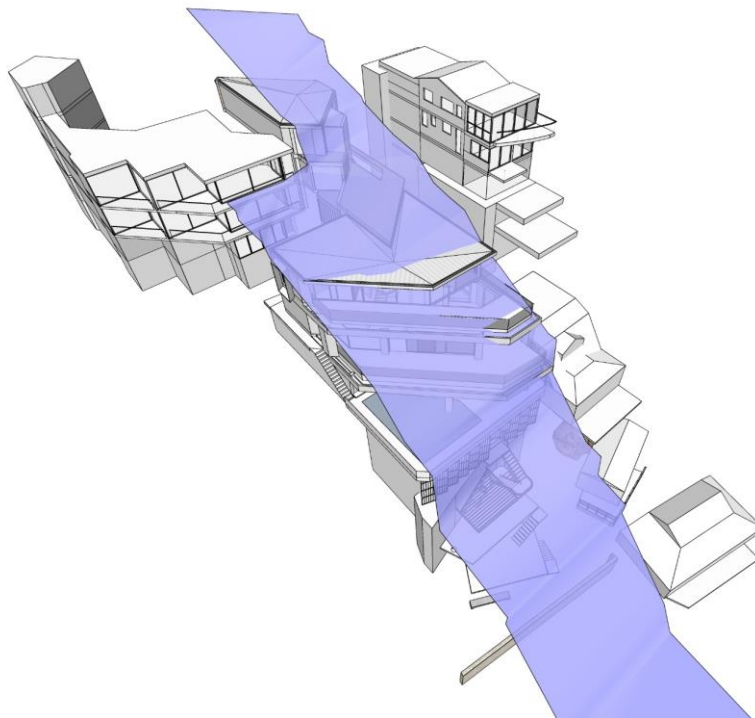
In this regard, it has been determined that the proposed works have a maximum building height of 9 metres at its highest point as depicted on the architectural plans and on the height plane drawing at Figure 5 below which exceeds the standard by 500mm or 5.88%.

Below is a height plane drawing detailing the existing and proposed non-compliances with the dwelling.





**Figure 1** – Plan extract showing existing dwelling non-compliance



**Figure 2:** Proposed height plan non-compliances.

I note that the areas of non-compliance are limited to the relatively small areas of roof form and reflect the topography of the site rather than an opportunistic increase in floor space. The existing non-compliance to the terrace will be pulled back with the proposed works representing a betterment in compliance.

## 2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP provides:

(1) *The objectives of this clause are:*

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

*Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

*“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of WLEP provides:

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

This clause applies to the clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) of WLEP provides:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request*

*from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed development does not comply with the height of buildings provision at 4.3 of WLEP which specifies a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of WLEP provides:

- (4) Development consent must not be granted for development that contravenes a development standard unless:*
  - (a) the consent authority is satisfied that:*
    - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
  - (b) the concurrence of the Director-General has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest **because** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence

for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of WLEP provides:

- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - (b) *the public benefit of maintaining the development standard, and*
  - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of WLEP from the operation of clause 4.6.

### 3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that*

*depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*

21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of WLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of WLEP?

## 4.0 Request for variation

### 4.1 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

#### Consistency with objectives of the height of buildings standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

- (a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

**Response:** The height and built form proposed are consistent with that established by the adjoining dwelling houses and the prevailing height of residential development generally within the site's visual catchment.

The works will not significantly alter the existing scale of development on the site. The proposed works will lift the roof height to the upper level to improve the amenity of internal spaces and utilise much of the dead terrace space currently on site. The dwelling will still as a multi storey that is reflective of the topography of the area. Development along this escarpment is characterised by multi storey dwellings which step down the steep topography.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191 I have formed the considered opinion that most observers would not find the proposed development by virtue of its roof form and building height offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment.

The proposal is consistent with this objective.

- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*

**Response:** The building form and height has been appropriately distributed across the site to minimise disruption of views to nearby residential development from surrounding public spaces. View analysis has been undertaken which demonstrates that existing water and land interface views enjoyed by neighbouring properties will be largely unaffected.

Having regard to the view sharing principles established by the Land and Environment Court of NSW in the matter of *Tenacity Consulting v Warringah* [2004] NSWLEC 140 as they relate to



an assessment of view impacts, the accompanying view analysis at Annexure 1 demonstrates that the proposed additions will not give rise to any unacceptable public or private view affectation with the ocean and horizon views maintained from all properties located to the south along Crown Road. View impacts have been minimised and a view sharing outcome achieved.

The works have also been designed to not give rise to any significant adverse amenity impacts with regard to privacy and overshadowing.

The proposal is consistent with this objective.

*(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

**Response:** The dwelling will not significantly alter the built form as it sits within the context of the coastal escarpment. The new addition creating a connection between the garage and the dwelling will be obscured behind the main dwelling and not give rise to any unreasonable visual impact concerns. The existing geometry of the floor plates have been redesigned to present a more coherent presentation and will improve the scenic quality of the coastal setting. The enhancement of landscaping on the site will soften and screen the dwelling when viewed from the public domain.

The proposal is consistent with this objective.

*(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

**Response:** As mentioned above, the works represent an improvement to the existing built form to present a more coherent floor plate geometry and cleaner lines which will reduce its visual impact. The upper level has raised its roof height and sits back towards the slope as to not be readily discernible from Freshwater Beach. The existing concrete walls beneath the pool will include new permeable screen to soften its current visual impact.

The proposal is consistent with this objective.

#### Consistency with zone objectives

The subject site is zoned R2 Low Density Residential pursuant to WLEP 2011 with dwelling houses permissible in the zone with consent. The stated objectives of the zone are as follows:

- *To provide for the housing needs of the community within a low density residential environment*

**Response:** The works relate to alterations and additions to an existing dwelling.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

**Response:** N/A

- To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.

**Response:** The works do not impact on the heritage value of the cliffs. A landscape plan has been providing detailing the enhancement of landscaping on the site and to the façade of the dwelling to ensure that it will sit within the natural environment.

The proposed works are permissible and consistent with the stated objectives of the zone.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the R2 Low Density Residential zone and the height of building standard objectives. Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be unreasonable and unnecessary.

#### **4.2 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?**

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

*The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

Sufficient environmental planning grounds exist to justify the height of buildings variation namely the topography of the land which limits the ability to distribute a compliant quantum of floor space across the site in a contextually appropriate manner whilst complying with the height of buildings standard.



In this regard, I consider the proposal to be of a skilful design which responds appropriately and effectively to the above constraints by appropriately distributing floor space, building mass and building height across the site in a manner which provides for appropriate streetscape and residential amenity outcomes including a view sharing scenario. Such outcome is achieved whilst realising the reasonable development potential of the land.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development represents good design (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

There are sufficient environmental planning grounds to justify contravening the development standard.

#### **4.3 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3A and the objectives of the R2 Low Density Residential zone**

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in *Initial Action* (Para 27) described the relevant test for this as follows:

*"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or*

*the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)."*

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

#### **4.4 Secretary's concurrence**

By Planning Circular dated 21<sup>st</sup> February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

#### **5.0 Conclusion**

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- (a) that the contextually responsive development is consistent with the zone objectives, and
- (b) that the contextually responsive development is consistent with the objectives of the height of buildings standard, and
- (c) that there are sufficient environmental planning grounds to justify contravening the development standard, and
- (d) that having regard to (a), (b) and (c) above that compliance with the building height development standard is unreasonable or unnecessary in the circumstances of the case, and
- (e) that given the developments ability to comply with the zone and height of buildings standard objectives that approval would not be antipathetic to the public interest, and
- (f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and

(g) Concurrence of the Secretary can be assumed in this case.

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

**Boston Blyth Fleming Pty Limited**

**William Fleming**

BS, MPLAN

**Planner**