

14 May 2019

Chief Executive Officer
Northern Beaches Council
725 Pittwater Road
DEE WHY NSW 2099

BY EMAIL AND POST

Attention: Mr Kent Bull

Dear Chief Executive Officer

**1178 BARRENJOEY ROAD PALM BEACH - DA2019/0334 - CHANGE OF
USE OF EXISTING 'STUDIO' TO SECONDARY DWELLING**

We act for Jan Wagner ('our client') in relation to Development Application DA2019/0334 ('the DA'). We have received our instructions from Jan's son, Leon Wagner.

The DA seeks consent to a change of use of an existing 'studio' to a secondary dwelling on the land known as 1178 Barrenjoey Road, Palm Beach ('the site').

1.0 Purpose of this letter

The purpose of this letter is to respond to the issues raised by:

- John and Lea Gattorna (submissions dated 29 April 2019 and 1 May 2019 [the latter sent on 30 April 2019]); and
- Ms Mary Rose Kupferman (submission dated 30 April 2019).

2.0 The submissions

The issues raised in the submissions are as follows:

Submissions of John and Lea Gattorna

There are two submissions dated 29 April 2019 and 1 May 2019. The two submissions are essentially the same and raise a number of planning issues.

However, the submission of 1 May 2019 raises a legal issue as well, namely, that Development Consent N0266/05 granted by the former Pittwater Council on 4 November 2005 (being the endorsed date of consent), as modified on 7 December 2005, provides in Condition E4 that, prior to the issue of the occupation certificate, a covenant is to be created on the title of the land, at the applicant's expense, the terms of which clearly denote that the structure (namely, the studio) is 'not to be used for separate residential purposes, nor is it ever to be modified so as to incorporate cooking or laundry facilities'.

Submission of Mary Rose Kupferman

Concern is expressed that the change of use should not trigger an increase in the bulk of the existing building from its current use as a studio and associated vegetative landscaping and further development [presumably of the studio].

The objector enquires as to the reason for the proposed change of use, namely, is it for subdivision/change of use or change of title?

3.0 Response to the submissions

We will now proceed to address the issues raised in the submissions.

Submissions of John and Lea Gattorna

Legal issue

As mentioned above, Condition E4 of Development Consent N0266/05, as modified on 7 December 2005, provides that, prior to the issue of the occupation certificate, a covenant is to be created on the title of the land, at the applicant's expense, the terms of which clearly denote that the structure (namely, the studio) is 'not to be used for separate residential purposes, nor is it ever to be modified so as to incorporate cooking or laundry facilities'.

In our opinion, Condition E4, to the extent that it fetters the consent of Council as consent authority to assess, consider and determine any

subsequent development application for the carrying out of development that is otherwise permissible with consent, notwithstanding that the development may be contrary to the terms of the Condition, is *ultra vires* (beyond power).

It is well established in law that a council must not fetter itself in advance as to how it will exercise its statutory discretion, whether by way of contract, estoppel, consent or otherwise: see *NSW Trotting Club Ltd v Glebe Municipal Council* (1937) 37 SR (NSW) 288; *Wilkinson v Tamarang Shire Council* (1932) 50 WN 23; *Doran Developments Pty Ltd v Newcastle City Council* (1984) 13 APA 436; *Bruce Kerr Pty Ltd v Gosford City Council* (SC(NSW), Cohen J, No 4057/93, 7 July 1994, unreported).

A condition of development consent cannot, as a matter of law, purport to impose a restriction or prohibition of the kind in question, relevantly, that the consent shall never be modified in a certain specified manner. A council must examine in detail each matter before it on the merits. In this case, the proposed development is permissible with consent and the law has changed since the granting of the original consent. Accordingly, a change of use of the kind proposed is lawfully capable of being made the subject of a grant of development consent.

Condition E4 purports to prevent Council from ever modifying the consent in a certain way. Such a purported prohibition is an authorised fetter on Council's statutory discretion.

Be that as it may, assuming for the moment that Condition E4 is valid as respects its purported prohibition on Consent N0266/05 ever being modified so as to incorporate cooking or laundry facilities, the fact is that the DA lodged with Council is **not a modification** application. It is a development application that seeks consent to a proposed change of use. It is well established in law that where there is an existing development consent, whether or not subsequently modified, there are two ways legally open to the applicant to change the scope of the permitted development:

- firstly, an application for modification of the consent can be submitted to Council; and/or
- secondly, a fresh development application may be lodged with Council.

See *Shell Company Australia Ltd v Parramatta City Council [No 2]* (1972) 27 LGRA 102; *Progress and Securities Pty Ltd v North Sydney Municipal Council* (1988) 66 LGRA 236.

Now, in accordance with the law in relation to statutory instruments and document construction, a later instrument (in this case, a development consent) prevails over an earlier instrument (in this case, Consent

N0266/05) to the extent of any inconsistency: see eg *Argyll (Duke) v Inland Revenue Commissioners* (1913) 109 LT 893 at 895 per Scrutton J (as he then was); *Kariapper v Wijesinha* [1968] AC 716; *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 34 per Gibbs J.

Insofar as the *Environmental Planning and Assessment Act 1979* ('EPAA') is concerned, section 4.17(1)(b) of the EPAA provides that a condition of consent may be imposed if, relevantly:

- (b) it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 4.11 in relation to the land to which the development application relates, or
- (c) it requires the modification or cessation of development (including the removal of buildings and works used in connection with that development) carried out on land (whether or not being land to which the development application relates)[.]

Thus, if Council, as consent authority, is minded to grant development consent to the proposed development, Council may, if it so chooses, impose a condition of consent requiring the modification of Consent N0266/05 and, relevantly, Condition E4 of that consent to the extent to which it purports to prevent the carrying out of the proposed development. In our view however this is unnecessary, as the fresh consent will prevail over an earlier consent to the extent of any inconsistency.

Planning issues raised

Bulk and Scale

John and Lea Gattorna's submission has raised issues regarding the bulk and scale of the development. The proposed development is essentially a change of use of an existing studio to a secondary dwelling. The Council granted development consent for the construction of the existing studio in 2005 under DA N0266/05. No changes to the existing building envelope are proposed. Therefore, the proposed development does not cause any adverse impacts concerning building bulk and scale.

Privacy

The existing building has incorporated highlight windows, per the condition of consent in N0266/05: *The windows on the western elevation are to be "highlight". The sill level must be 1.7m above the floor level of the studio.* Installation of highlighted windows prevents direct overlooking at the neighbouring property. Further, existing vegetation on the western boundary help to ensure that the proposed development does not result in privacy impacts to nearby neighbours. Due to the topography of the site, there is no

usable space at the immediate west of the building. Please see below photograph for further confirmation. The main private open space area is also proposed at the front of the secondary dwelling and is enclosed by privacy screens. Therefore, the proposed development will cause no privacy impact on objectors' dwelling.



Permissibility and suitability

The site is zoned E4 Environmental Living under the relevantly applicable local environmental plan. Secondary dwellings are nominately permissible with development consent, on land zoned E4. The proposed development sits well within the relevant planning controls. The architectural plans and the statement of environmental effects submitted with the development application provide sufficient information about a proposed privacy screen to

satisfy Council. Therefore, the objectors' assertion concerning insufficient information about a privacy screen is a fallacious argument.

Assertions relating to purported use of the premises for short term holiday rental is irrelevant to the assessment of this application. In any case the proposal does not incorporate holiday rental. It is a proposal for a secondary dwelling. The development application currently with the Council is suitable for the site and permissible with consent, per the relevant planning controls.

Submission of Mary Rose Kupferman

As stated above, the development does not increase nor alter the existing building envelope. The proposed building works include minor internal changes and a privacy screen. The proposed privacy screen will be installed on an existing hard paved largely impervious area at the front of the building. Therefore, the proposal will not affect vegetation in any way.

4.0 Conclusion

In our opinion, the submissions raise nothing of any substance that would prevent Council, as consent authority, from granting conditional consent to the DA on its own merits.

The DA is for a change of use. The site is zoned E4 Environmental Living under Pittwater Local Environmental Plan 2014 ('PLEP') and secondary dwellings **are nominately permissible with development consent** on land so zoned. The development proposal is consistent with such of the zone objectives as are of relevance to the subject-matter of the proposal. In addition, the development proposal satisfies the essential elements and features, and otherwise comes within the 'four corners' of, the definition of a 'secondary dwelling' in PLEP.

The proposal will not materially affect the views from any neighbouring properties. The existing design of the building is such that all existing views from adjoining properties will be maintained. In addition, the proposed secondary dwelling is located away from the street and neighbouring properties, thus assisting in maintaining acoustic and visual privacy for all parties. The topography and the existing vegetation on the western boundary help to ensure that the proposed development does not result in privacy impacts to nearby neighbours. Furthermore, the existing building includes highlight windows on the west elevation in order to prevent direct overlooking of neighbouring property.

On behalf of our client we submit that the proposal succeeds on its merits and, as explained above, there is no legal impediment to a grant of consent to the proposed development.

We look forward to an early determination of the DA.

Yours faithfully

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