

DEVELOPMENT APPLICATION ASSESSMENT REPORT

Application Number:	DA2022/0925
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Responsible Officer:	Thomas Burns
Land to be developed (Address):	Lot 7 DP 14538, 1120 Barrenjoey Road PALM BEACH NSW 2108 Lot 8 DP 14538, 1120 Barrenjoey Road PALM BEACH NSW 2108
Proposed Development:	Alterations and additions to a dual occupancy to create a dwelling house
Zoning:	C4 Environmental Living
Development Permissible:	Yes
Existing Use Rights:	No
Consent Authority:	Northern Beaches Council
Delegation Level:	DDP
Land and Environment Court Action:	No
Owner:	Bruce Crosby Forster Janece Helene Blythe Forster
Applicant:	Drafting Help Pty Ltd

Application Lodged:	20/06/2022
Integrated Development:	No
Designated Development:	No
State Reporting Category:	Residential - Alterations and additions
Notified:	27/06/2022 to 11/07/2022
Advertised:	Not Advertised
Submissions Received:	0
Clause 4.6 Variation:	4.3 Height of buildings: 23.53%
Recommendation:	Approval

Estimated Cost of Works:	\$ 366,300.00
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EXECUTIVE SUMMARY

This report is submitted to the Northern Beaches Development Determination Panel (DDP) for consideration of Development Application DA2022/0925 for alterations and additions to an existing attached dual occupancy to create a dwelling house, including an upper floor addition to the building.

The maximum height of the proposed development is 10.5 metres above the existing ground level, which represents a 23.53% variation to Clause 4.3 of Pittwater LEP 2014, which limits the height of buildings to 8.5 metres. This occurs when taking the ground below the existing lower floor slab, which

has been excavated below the natural contours of the site, as 'existing ground level', in accordance with the recent NSW Land and Environment Court case of *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*. When extrapolating the ground levels around the building footprint in accordance with the NSW Land and Environment Court case of *Bettar v Council of City of Sydney [2014] NSWLEC 1070*, the maximum height of the development measures 8.9 meters, which complies with the 10.0 metre height exemption permitted for this sloping site, pursuant to Clause 4.3 (2D) of Pittwater LEP 2014. The application is referred to the DDP on the basis of the height breach exceeding 10% from the 8.5 metre development standard.

The application has been accompanied by a written request pursuant to Clause 4.6 of Pittwater LEP 2014 to justify the height breach. The applicant has demonstrated that compliance with the height standard is both unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the variation to Clause 4.3 of Pittwater LEP 2014. The height breach does not contribute to any unreasonable or excessive building bulk and scale or result in adverse amenity impacts to nearby properties with respect to view sharing, visual bulk or solar access.

When considered on its merits, the bulk and scale of the resulting development is considered to be acceptable in the circumstances of the case, noting that the 3 storey built form corresponds with nearby dwelling houses fronting Barrenjoey Road within the visual catchment of the site. The overall building massing steps down with the slope of the land to alleviate the building bulk and integrate with the landform and landscape.

The application was exhibited for 14 days and did not receive any submissions.

Therefore, it is recommended that the DDP approve the application, subject to the recommended conditions attached to this report.

PROPOSED DEVELOPMENT IN DETAIL

The applicant seeks development consent for the conversion of an existing attached two storey dual occupancy into a dwelling house, including an upper floor addition to create a third storey. Specifically, the works consist of:

Lower Ground Floor

- Removal of kitchen.
- Replacement of bedroom with storage.
- New internal lift to connect lower and ground floors.

Ground Floor

- Replacement of two bedrooms with study and tv room.
- Demolition of several internal walls to allow for an open-planned lounge, family, dining and tv room.
- Minor internal reconfiguration to allow for internal staircase to proposed first floor.

First Floor

- First floor addition to allow for relocated bedrooms from lower and ground floor, additional bedroom and bathrooms as well as a balcony facing the street frontage.

ASSESSMENT INTRODUCTION

The application has been assessed in accordance with the requirements of the Environmental Planning and Assessment Act 1979 and the associated Regulations. In this regard:

- An assessment report and recommendation has been prepared (the subject of this report) taking into account all relevant provisions of the Environmental Planning and Assessment Act 1979, and the associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon the subject site and adjoining, surrounding and nearby properties;
- Notification to adjoining and surrounding properties, advertisement (where required) and referral to relevant internal and external bodies in accordance with the Act, Regulations and relevant Development Control Plan;
- A review and consideration of all submissions made by the public and community interest groups in relation to the application;
- A review and consideration of all documentation provided with the application (up to the time of determination);
- A review and consideration of all referral comments provided by the relevant Council Officers, State Government Authorities/Agencies and Federal Government Authorities/Agencies on the proposal.

SUMMARY OF ASSESSMENT ISSUES

Pittwater Local Environmental Plan 2014 - 4.6 Exceptions to development standards

Pittwater 21 Development Control Plan - A4.12 Palm Beach Locality

Pittwater 21 Development Control Plan - D12.3 Building colours and materials

Pittwater 21 Development Control Plan - D12.6 Side and rear building line

Pittwater 21 Development Control Plan - D12.8 Building envelope

SITE DESCRIPTION

Property Description:	Lot 7 DP 14538 , 1120 Barrenjoey Road PALM BEACH NSW 2108 Lot 8 DP 14538 , 1120 Barrenjoey Road PALM BEACH NSW 2108
Detailed Site Description:	<p>The subject site consists of two (2) allotment located on the eastern side of Barrenjoey Road, Palm Beach.</p> <p>The site is irregular in shape with a combined frontage of 12.19 metres and a maximum depth of 38.945 metres. The site has a surveyed area of 457.7m².</p> <p>The site is located within the C4 Environmental Living zone pursuant to Pittwater LEP 2014 and accommodates a two storey attached dual occupancy comprising separate units on the ground and first floors.</p> <p>The site has a steep topography and experiences a fall of approximately 11.4 metres that slopes from the rear to the</p>

front.

The site contains a native canopy tree within the front yard. A large extent of landscaping is confined to the rear of the building footprint, where the site is densely vegetated and contains a number of canopy trees.

The site is environmentally constrained with landslip hazards, in addition to flooding hazards at the front of the property.

Description of Surrounding Development

Located directly to the south of the subject site are a number of commercial premises'. To the north and east of the site comprise low density residential development, typically 2 to 3 storeys in height. Located to the west of the site (i.e. opposite side of Barrenjoey Road) is the Pittwater waterway including the Palm Beach Ferry Wharf and a public recreation area.

Map:



SITE HISTORY

The land has been used for residential purposes for an extended period of time. A search of Council's records has revealed the following relevant history:

- **Development Application N0152/14** for addition of an upper-level balcony to the front of the dwelling approved by Council on 25 June 2014.
- **Development Application N0311/16** for construction of proposed hardstand car parking space and bin storage area at the front of the property approved by Council on 5 September 2016.

APPLICATION HISTORY

A site inspection was carried out on 18 August 2022.

An amended Clause 4.6 written request was submitted to correlate with Council's building height measurements, which considered the excavated ground level below the lower ground floor slab as 'existing ground level', as per the recent Land and Environment Court Case of *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSW LEC 1582*.

This information was subsequently received by Council. As no changes to the building were proposed, the application was not required to be re-notified, in accordance with the Northern Beaches CPP.

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

The relevant matters for consideration under the Environmental Planning and Assessment Act, 1979, are:

Section 4.15 Matters for Consideration	Comments
Section 4.15 (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on “Environmental Planning Instruments” in this report.
Section 4.15 (1) (a)(ii) – Provisions of any draft environmental planning instrument	There are no current draft environmental planning instruments.
Section 4.15 (1) (a)(iii) – Provisions of any development control plan	Pittwater 21 Development Control Plan applies to this proposal.
Section 4.15 (1) (a)(iia) – Provisions of any planning agreement	None applicable.
Section 4.15 (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2021 (EP&A Regulation 2021)	<p><u>Part 4, Division 2</u> of the EP&A Regulation 2021 requires the consent authority to consider "Prescribed conditions" of development consent. These matters have been addressed via a condition of consent.</p> <p><u>Clauses 36 and 94</u> of the EP&A Regulation 2021 allow Council to request additional information. Additional information was requested in relation to a revised Clause 4.6 written request for the proposed height breach.</p> <p><u>Clause 69</u> of the EP&A Regulation 2021 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This matter has been addressed via a condition of consent.</p> <p><u>Clause 69</u> of the EP&A Regulation 2021 requires the consent authority to consider the provisions of the Building Code of Australia (BCA). This matter has been addressed via a condition of consent.</p>
Section 4.15 (1) (b) – the likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality	<p>(i) Environmental Impact</p> <p>The environmental impacts of the proposed development on the natural and built environment are addressed under the Pittwater 21 Development</p>

Section 4.15 Matters for Consideration	Comments
	Control Plan section in this report. (ii) Social Impact The proposed development will not have a detrimental social impact in the locality considering the character of the proposal. (iii) Economic Impact The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.
Section 4.15 (1) (c) – the suitability of the site for the development	The site is considered suitable for the proposed development.
Section 4.15 (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs	No submissions were received.
Section 4.15 (1) (e) – the public interest	No matters have arisen in this assessment that would justify the refusal of the application in the public interest.

EXISTING USE RIGHTS

Existing Use Rights are not applicable to this application.

BUSHFIRE PRONE LAND

The site is not classified as bush fire prone land.

NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited from 27/06/2022 to 11/07/2022 in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2021 and the Community Participation Plan.

As a result of the public exhibition of the application Council received no submissions.

REFERRALS

Internal Referral Body	Comments
NECC (Bushland and Biodiversity)	The proposed development is within the existing dwelling footprint, and does not require the removal of trees or native vegetation. Therefore the development will not significantly impact the local biodiversity values, and complies with the biodiversity planning controls
NECC (Stormwater and Floodplain Engineering – Flood risk)	The proposed development is outside of the flood affected part of the property, which is only just inside the western boundary. No flood related development controls applicable.
Strategic and Place Planning (Heritage Officer)	HERITAGE COMMENTS
	Discussion of reason for referral

Internal Referral Body	Comments		
	<p>The proposal has been referred to Heritage as the site is within proximity to two heritage items</p> <p>Norfolk Island Pines - Pittwater Park, Palm Beach</p> <p>Palm Beach Wharf - 1149 and 1149A Barrenjoey Road, Palm Beach</p>		
	Details of heritage items affected		
	<p>Details of the items as contained within the Pittwater inventory is as follows:</p> <p>Norfolk Island Pines <u>Statement of Significance</u> The Norfolk Island Pines are of local historic and aesthetic significance as a fine representative example of the widespread use of this species for ornamental plantings in coastal areas.</p> <p><u>Physical Description</u> A fine planting of mature specimens of Araucaria heterophylla (Norfolk Island Pine) in Pittwater Park, adjacent to the public wharf at Palm Beach and across Barrenjoey Road from Barrenjoey House. The trees are along the western and southern edges of this park which includes a children's playground and car park. The trees provide welcome shade for picnickers using the Pittwater beach.</p> <p>Palm Beach Wharf <u>Statement of Significance</u> The Palm Beach Wharf has historic, aesthetic and social significance as a very early access point to the Pittwater area. It is associated with the early development and industry of the Northern Beaches and early transport systems to the region.</p> <p><u>Physical Description</u> Located at Pittwater Park, off Barrenjoey Road at Palm Beach. This wharf is a recreational, commuter and commercial wharf surrounded by picnic facilities, a playground area and a car parking area.</p>		
	Other relevant heritage listings		
	Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005	No	
	Australian Heritage Register	No	
	NSW State Heritage Register	No	
	National Trust of Aust (NSW) Register		
	RAIA Register of 20th Century Buildings of	No	

Internal Referral Body	Comments		
	Significance		
	Other	N/A	
	Consideration of Application		
	<p>The proposal seeks consent for a dwelling and a new level on top of the existing structure. The Norfolk Island Pine trees are located directly opposite the site while the wharf is to the north west of the site. Both items are separated from the site by Barrenjoey Road while also being located further west again within their respective properties. Given the physical separation, the proposal is considered to not impact upon the heritage items or their significance.</p> <p>Therefore Heritage raises no objections and requires no conditions.</p> <p>Consider against the provisions of CL5.10 of PLEP.</p> <p>Is a Conservation Management Plan (CMP) Required? No Has a CMP been provided? No Is a Heritage Impact Statement required? No Has a Heritage Impact Statement been provided? No</p>		

External Referral Body	Comments
Ausgrid: (SEPP Infra.)	The proposal was referred to Ausgrid who provided a response stating that the proposal is acceptable subject to compliance with the relevant Ausgrid Network Standards and SafeWork NSW Codes of Practice. These recommendations will be included as a condition of consent.

ENVIRONMENTAL PLANNING INSTRUMENTS (EPIs)*

All, Environmental Planning Instruments (SEPPs and LEPs), Development Controls Plans and Council Policies have been considered in the merit assessment of this application.

In this regard, whilst all provisions of each Environmental Planning Instruments (SEPPs and LEPs), Development Controls Plans and Council Policies have been considered in the assessment, many provisions contained within the document are not relevant or are enacting, definitions and operational provisions which the proposal is considered to be acceptable against.

As such, an assessment is provided against the controls relevant to the merit consideration of the application hereunder.

State Environmental Planning Policies (SEPPs) and State Regional Environmental Plans (SREPs)

SEPP (Building Sustainability Index: BASIX) 2004

A BASIX Certificate was included with this application (see BASIX Certificate No. A456932, dated 22 April 2022). A condition has been recommended to ensure compliance with the aforementioned BASIX Certificate.

SEPP (Transport and Infrastructure) 2021

Ausgrid

Section 2.48 of Chapter 2 requires the Consent Authority to consider any development application (or an application for modification of consent) for any development carried out:

- within or immediately adjacent to an easement for electricity purposes (whether or not the electricity infrastructure exists).
- immediately adjacent to an electricity substation.
- within 5.0m of an overhead power line.
- includes installation of a swimming pool any part of which is: within 30m of a structure supporting an overhead electricity transmission line and/or within 5.0m of an overhead electricity power line.

Comment:

The proposal was referred to Ausgrid who provided a response stating that the proposal is acceptable subject to compliance with the relevant Ausgrid Network Standards and SafeWork NSW Codes of Practice. These recommendations will be included as a condition of consent.

SEPP (Resilience and Hazards) 2021

Chapter 2 – Coastal Management

The site is located within the Coastal Environment Area and Coastal Use Area pursuant to this Chapter. Accordingly, an assessment is carried out against Divisions 3, 4 and 5 of this Chapter as follows:

Division 3 Coastal environment area

2.10 Development on land within the coastal environment area

- 1) *Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following:*
 - a) *the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,*
 - b) *coastal environmental values and natural coastal processes,*
 - c) *the water quality of the marine estate (within the meaning of the Marine Estate Management Act 2014), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,*
 - d) *marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,*
 - e) *existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,*
 - f) *Aboriginal cultural heritage, practices and places,*
 - g) *the use of the surf zone.*

- 2) *Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:*
- a) *the development is designed, sited and will be managed to avoid an adverse impact referred to in subsection (1), or*
 - b) *if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or*
 - c) *if that impact cannot be minimised—the development will be managed to mitigate that impact.*

Comment:

The application pertains to a change of use and upper floor addition to the existing building and will not have an adverse impact upon the environmental values of the Pittwater catchment, or impact upon native flora and fauna. Existing access arrangements to and along the foreshore will also be maintained. The proposal will also not adversely impact upon Aboriginal cultural heritage, practices and places.

Overall, it is considered that the development has been designed, sited and will be managed to avoid an adverse impact upon the matters referred to in subsection (1).

Division 4 Coastal use area

2.11 Development on land within the coastal use area

- 1) *Development consent must not be granted to development on land that is within the coastal use area unless the consent authority:*
- a) *has considered whether the proposed development is likely to cause an adverse impact on the following:*
 - i) *existing, safe access to and along the foreshore, beach, headland or rock*
 - ii) *platform for members of the public, including persons with a disability,*
 - iii) *overshadowing, wind funnelling and the loss of views from public places to*
 - iv) *foreshores,*
 - v) *the visual amenity and scenic qualities of the coast, including coastal headlands,*
Aboriginal cultural heritage, practices and places,
cultural and built environment heritage, and
 - b) *is satisfied that:*
 - i) *the development is designed, sited and will be managed to avoid an adverse*
 - ii) *impact referred to in paragraph (a), or*
 - iii) *if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or*
if that impact cannot be minimised—the development will be managed to mitigate that impact, and
 - c) *has taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.*

Comment:

Properties located to the rear (i.e. upslope) of the subject site are elevated significantly higher than the proposal due to the steep topography. Hence, existing view lines towards the Pittwater waterway will be maintained subsequent to the development. The proposal also does not result in wind funnelling or

overshadowing of the foreshore area.

The 3 storey built form is commensurate with nearby dwelling houses fronting Barrenjoey Road and thus, the proposal will not adversely detract from the visual amenity of the area as a consequence of the building's form and scale. As noted above, the proposal will not adversely impact on Aboriginal heritage or preclude access to or along the foreshore.

The site is located within the visual catchment of a number of items identified with local environmental heritage. Council's Heritage Officers have reviewed the application and raised no heritage related concerns.

The assessment has taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development and concluded that the development is acceptable in the context of this coastal setting.

Division 5 General

2.12 Development in coastal zone generally—development not to increase risk of coastal hazards

Development consent must not be granted to development on land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land.

Comment:

The building works are confined to the footprint of the existing building and the proposal is not likely to increase the risk of coastal hazards within the locality.

As such, it is considered that the application complies with the requirements of Chapter 2 of the State Environmental Planning Policy (Resilience and Hazards) 2021.

Chapter 4 – Remediation of Land

Sub-section 4.6 (1)(a) of Chapter 4 requires the Consent Authority to consider whether land is contaminated. Council records indicate that the subject site has been used for residential purposes for a significant period of time with no prior land uses. In this regard it is considered that the site poses no risk of contamination and therefore, no further consideration is required under sub-section 4.6 (1)(b) and (c) of this Chapter and the land is considered to be suitable for the residential land use.

Pittwater Local Environmental Plan 2014

Is the development permissible?	Yes
After consideration of the merits of the proposal, is the development consistent with:	
aims of the LEP?	Yes
zone objectives of the LEP?	Yes

Principal Development Standards

Standard	Requirement	Proposed	% Variation	Complies

Height of Buildings:	8.5m	10.5m	23.53%	No
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Note: For the purpose of this calculating building height the existing ground level is taken to be the excavated ground level below the lower ground floor slab, in accordance with the Land and Environment Court Case of *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*.

Compliance Assessment

Clause	Compliance with Requirements
1.9A Suspension of covenants, agreements and instruments	Yes
4.3 Height of buildings	No
4.6 Exceptions to development standards	Yes
5.10 Heritage conservation	Yes
5.21 Flood planning	Yes
7.1 Acid sulfate soils	Yes
7.2 Earthworks	Yes
7.6 Biodiversity protection	Yes
7.7 Geotechnical hazards	Yes
7.10 Essential services	Yes

Detailed Assessment

4.6 Exceptions to development standards

Description of non-compliance:

Development standard:	Height of Buildings
Requirement:	8.5 metres
Proposed:	10.5 metres
Percentage variation to requirement:	23.53%

Clause 4.3 of Pittwater LEP 2014 stipulates that the maximum height of buildings on the subject site must not exceed 8.5 metres, when measured from the existing ground level.

A recent judgement of the NSW Land and Environment Court has provided clarification for the calculation of building height (*Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582* 'Merman Case'). In that matter, the Court found that for brownfield sites the existing ground level should be taken from an excavated level below the natural ground level of a site. It is noted that the existing lower ground floor has been excavated below the natural contours of the site, creating an artificial ground level. When taking the ground below the existing lower floor slab as 'existing ground level', the maximum building height of the proposed development measures at 10.5 metres, thereby non-compliant with the height standard. Figure 1 below depicts the extent of the non-compliance.

Figure 1: area of building exceeding the 8.5m height plane when applying the Merman method for calculating building height



It is important to note that whilst the slope of the land under the building footprint exceeds 30%, the 10 metre exemption provision permitted by Clause 4.3(2D) of Pittwater LEP 2014 is not applicable to this assessment as the proposal exceeds the 10 metre height plane. Hence, the variation is considered against the development standard of 8.5 metres.

Assessment of request to vary a development standard:

The following assessment of the variation to Clause 4.3 - Height of Buildings development standard, has taken into consideration the recent judgement contained within *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*.

Clause 4.6 Exceptions to development standards:

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

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

(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.*

Comment:

Clause 4.3 - Height of Buildings development standard is not expressly excluded from the operation of this clause.

(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.

(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 Secretary has been obtained.

Clause 4.6 (4)(a)(i) (Justification) assessment:

Clause 4.6 (4)(a)(i) requires the consent authority to be satisfied that the applicant's written request, seeking to justify the contravention of the development standard, has adequately addressed the matters required to be demonstrated by cl 4.6(3). There are two separate matters for consideration contained within cl 4.6(3) and these are addressed as follows:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

Comment:

The Applicant's written request has demonstrated that the objectives of the development standard are achieved, notwithstanding the non-compliance with the development standard.

In doing so, the Applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by cl 4.6(3)(a).

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

Comment:

In the matter of Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Preston CJ provides the following guidance (para 23) to inform the consent authority's finding that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard:

'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.'

s 1.3 of the EPA Act reads as follows:

1.3 Objects of Act(cf previous s 5)

The objects of this Act are as follows:

(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
(c) to promote the orderly and economic use and development of land,
(d) to promote the delivery and maintenance of affordable housing,
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
(g) to promote good design and amenity of the built environment,
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,
(j) to provide increased opportunity for community participation in environmental planning and assessment.

The applicant's written request argues, in part:

"The subject site is identified to have a maximum building height of 8.5m. However it is also noted that Clause 4.3(2D) provides flexibility in the maximum height for land with a maximum building height when the slope of the land exceeds 16.7 degrees (or 30%) where the consent authority is satisfied that the portion of the building above the maximum height is minor.

In this instance the proposed development provides a maximum building height of 10.5m is proposed requiring a 2.0m variation to the 8.5m development standard however the subject site is noted to have steep topography which impacts the building height. The requested variation is restricted to the south-western corner of the proposed addition where there is a significant site fall. The area of the non-compliance relates to a small portion of the south-western corner of the dwelling, and will not detrimentally impact on the amenity of the adjoining properties and is in keeping with the established context of the streetscape.

The building height of the proposed development is large exacerbated by the existing excavation on the allotment which provides an artificial existing ground level for the calculation of building height, thus an overall building height of 10.5m. When applying the extrapolation method for determining building height this would result in a building height of 8.9m which is a lesser variation to the development standard.

The increase to the overall building height is considered to have minimal impact on the overall development in terms of bulk and scale appearance, due to the maximum building height positioned to the front of the dwelling and screened by suitable landscape planting forward of the building line. The proposed development is not considered to be excessive in size, having been designed to include extensive articulation, increased front setback from existing building line and the retainment of suitable existing landscaping that follows the topography of the allotment and softens the visual bulk of the development. The proposed development is in keeping with surrounding developments in an area where the overall height control appears to have been abandoned due to the topography of the allotments. Further the proposed development provides a suitably sized dwelling in keeping with developments of the surrounding area.

The proposed alterations and additions is considered to be a reasonable development for the site as three storey dwellings are considered to be a suitable use of the land. The variation directly relates to the topography of the land. Reducing the overall building height of the dwelling is not considered feasible as the reduction in height would detrimentally impact the amenity of the development through reducing ceilings heights that have been minimised as much as practical whilst considering the existing

dwelling. Reducing the proposed building height would also result in a development that does not complement the existing dwelling structure and design.

Despite the variation the proposed continuation of low density residential land use is considered to be an orderly and economic use and development of the land in an established residential area where increased residential dwelling has set a theme for dwellings in this area of Palm Beach.

The variation will result in a maximum increase in height by 2.0m from the permitted overall height. The development will not be visually excessive in size due to maintaining appropriate setbacks, stepping of the front façade, as well as suitable existing landscaping to screen the development from the streetscape and neighbouring properties. The proposed development provides a suitably sized addition to an existing dwelling in keeping with adjacent developments on Barrenjoey Road and in the surrounding area.

Whilst being numerically non-compliant with the height of buildings control the proposed development is not anticipated to detrimentally impact the streetscape or surrounding developments by way of solar access or privacy. In fact, the proposed development will result in an improved amenity and streetscape appearance as a result of the urban renewal development and by ensuring that the bulk and scale of the development is consistent with surrounding developments.

The proposed development relates to alterations and additions to an existing dwelling within a residential setting. Allowing alterations and additions to an existing dwelling, despite the numerical non-compliance with the height of buildings provisions, ensures that the dwelling can be retained on the site whilst providing improved internal amenity and an improvement to the life span of the built form. Further, allowing the increase in building height ensures that the existing dwelling is enhanced which is considered to promote orderly and economic use and development of the land.

Allowing the updating of existing dwellings through alterations and additions within residential area ensures that a range of dwelling and development types are available for residential occupation. The design of the proposed development is for the alteration and addition to an existing built form which promotes good design through improved functionality of the floor plan. Further the proposed alterations and additions provide increased areas within the design ensuring that the amenity of the development is enhanced as a result of the development.

The design of the proposed development has given consideration to the streetscape locality, surrounding development along with the orientation of the allotment during the design process. The development appropriately addresses the street frontage and provides visual bulk in keeping with recent development throughout the Palm Beach area. Consideration of these key aspects promotes good design through a high quality architectural development. Further the proposed alterations and additions has been designed to provide high level of amenity to the development and future occupants of the dwellings.

Whilst “environmental planning grounds” are not separately defined within the EP&A Act 1979 the proposed development is considered to provide orderly and economic use and development of the land through retention of an existing dwelling. Further the proposal meets good design principals and enhanced amenity of the dwelling through additional bedroom and living spaces without detrimentally impacting the surrounding development by way of visual bulk, privacy, amenity and solar access”.

Comment:

The justification provided by the applicant is well founded and is agreed with.

In particular, it is noted that when adopting the extrapolation method for calculating building height, as

per the NSW Land and Environment Court Case of *Bettar v Council of City of Sydney* [2014] NSWLEC 1070, the maximum building height of the proposed development is 8.9 metres, which would comply with the 10 metre exception provision permitted by Clause 4.3(2D) of Pittwater LEP 2014 for sites that have a slope greater than 30% under the building footprint. Hence, the proposal would be considered a 'compliant building height' in this regard and a Clause 4.6 variation request would not be required. The noncompliance is derived from an artificial ground level that has been created by previous excavation below the natural contours of the site and the proposal will present with a compliant building height when taking the natural contours around the perimeter of the building footprint. It is considered that enforcing strict compliance with the Merman approach for calculating building height would preclude orderly and economic use and development of the land, which is contrary to the objects of the Environment Planning and Assessment Act 1979 (EPA Act 1979).

Furthermore, it is noted that there are a number of three storey dwelling houses that front Barrenjoey Road on the eastern side of the road. The proposed three storey dwelling house is not out of character with these nearby developments within the visual catchment of the site.

In addition, the height non-compliance does not create any adverse amenity impacts to neighbouring properties in relation to view sharing, solar access, visual bulk or privacy.

In this regard, the applicant's written request has demonstrated that the proposed development is an orderly and economic use and development of the land, and that the structure is of a good design that will reasonably protect and improve the amenity of the surrounding built environment, therefore satisfying cls 1.3 (c) and (g) of the EPA Act.

Therefore, the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by cl 4.6 (3)(b).

Therefore, Council is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

Clause 4.6 (4)(a)(ii) (Public Interest) assessment:

cl 4.6 (4)(a)(ii) requires the consent authority to be satisfied that:

(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

Comment:

In considering whether or not the proposed development will be in the public interest, consideration must be given to the underlying objectives of the Height of Buildings development standard and the objectives of the C4 Environmental Living zone. An assessment against these objectives is provided below.

Objectives of development standard

The underlying objectives of the standard, pursuant to Clause 4.3 – 'Height of buildings' of the PLEP 2014 are:

(1) The objectives of this clause are as follows:

a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,

Comment:

The proposal responds well to the local context through providing a three storey appearance to Barrenjoey Road, which is consistent with nearby development within the visual catchment of the site. In addition, the building mass steps down in height with the slope of the land to mitigate the bulk and scale of the development. Overall, the proposal is considered to demonstrate consistency with the desired future character of the locality.

b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

Comment:

The height and scale of the proposed development is commensurate with nearby three storey dwelling houses fronting Barrenjoey Road.

c) to minimise any overshadowing of neighbouring properties,

Comment:

The adjacent properties to the south comprise commercial premises' and surrounding residential dwellings will maintain the required 3 hours of solar access to living rooms and private open space.

d) to allow for the reasonable sharing of views,

Comment:

Properties located to the rear (i.e. upslope) of the subject site are elevated significantly higher than the proposal due to the steep topography. Hence, existing view lines towards the Pittwater waterway will be maintained subsequent to the development. Furthermore, the proposal does not result in view impacts from the public domain.

e) to encourage buildings that are designed to respond sensitively to the natural topography,

Comment:

The building mass steps down in height with the slope of the land to mitigate the bulk and scale of the development and to ensure an appropriate response to the natural topography that falls steeply towards Barrenjoey Road from the east.

f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items,

Comment:

The site is located within the visual catchment of a number of items identified with local environmental heritage. Council's Heritage Officers have reviewed the application and raised no heritage related concerns. In addition, the height of the development will sit below the established tree canopy and the development will not have an adverse impact on the natural environment.

Zone objectives

The underlying objectives of the C4 Environmental Living zone are as follows:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

Comment:

The new building works are confined to the existing building footprint and the proposal does not necessitate the removal of prescribed vegetation or alter the site topography. The proposal is considered to constitute low-impact residential development within an environmentally sensitive area.

- *To ensure that residential development does not have an adverse effect on those values.*

Comment:

The proposal does not have an adverse effect on the ecological, scientific or aesthetic values of the locality.

- *To provide for residential development of a low density and scale integrated with the landform and landscape.*

Comment:

The three storey built form corresponds with surrounding residential development within the locality. The building mass also steps down with the natural topography to integrate with the landform and landscape.

- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*

Comment:

The proposal does not impact any riparian or foreshore vegetation.

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the C4 Environmental Living zone and Clause 4.3 of Pittwater LEP 2014.

Clause 4.6 (4)(b) (Concurrence of the Secretary) assessment:

cl. 4.6(4)(b) requires the concurrence of the Secretary to be obtained in order for development consent to be granted.

Planning Circular PS20-002 dated 5 May 2020, as issued by the NSW Department of Planning, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under

environmental planning instruments that adopt Clause 4.6 of the Standard Instrument. In this regard, given the consistency of the variation to the objectives of the zone, and in accordance with correspondence from the Deputy Secretary on 2 November 2021, Council staff under the delegation of the Development Determination Panel, may assume the concurrence of the Secretary for variations to the Height of buildings Development Standard associated with a single dwelling house (Class 1 building).

Pittwater 21 Development Control Plan

Built Form Controls

Built Form Control	Requirement	Proposed	% Variation*	Complies
Front building line	10m	11m (new elements of building)	-	Yes
Rear building line	6.5m	13.86m	-	Yes
Side building line	2.5m (north)	1.29m (consistent with existing)	48.4%	No
	1m (south)	1.18m (consistent with existing)	-	Yes
Building envelope	Merit Assessment as > 30% slope (north)	Acceptable on Merit	N/A	Acceptable on Merit - see discussion
	Merit Assessment as > 30% slope (south)	Acceptable on Merit	N/A	Acceptable on Merit - see discussion
Landscaped area	60%	no change	N/A	N/A

Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
A1.7 Considerations before consent is granted	Yes	Yes
A4.12 Palm Beach Locality	No	Yes
B1.2 Heritage Conservation - Development in the vicinity of heritage items, heritage conservation areas, archaeological sites or potential archaeological sites	Yes	Yes
B1.4 Aboriginal Heritage Significance	Yes	Yes
B3.1 Landslip Hazard	Yes	Yes
B3.6 Contaminated Land and Potentially Contaminated Land		
B3.11 Flood Prone Land	Yes	Yes
B4.4 Flora and Fauna Habitat Enhancement Category 2 and Wildlife Corridor	Yes	Yes
B5.15 Stormwater	Yes	Yes
B6.3 Off-Street Vehicle Parking Requirements	Yes	Yes
B8.1 Construction and Demolition - Excavation and Landfill	Yes	Yes
B8.3 Construction and Demolition - Waste Minimisation	Yes	Yes

Clause	Compliance with Requirements	Consistency Aims/Objectives
C1.1 Landscaping	Yes	Yes
C1.2 Safety and Security	Yes	Yes
C1.3 View Sharing	Yes	Yes
C1.4 Solar Access	Yes	Yes
C1.5 Visual Privacy	Yes	Yes
C1.6 Acoustic Privacy	Yes	Yes
C1.7 Private Open Space	Yes	Yes
C1.12 Waste and Recycling Facilities	Yes	Yes
C1.13 Pollution Control		
C1.23 Eaves	Yes	Yes
C1.25 Plant, Equipment Boxes and Lift Over-Run	Yes	Yes
D12.1 Character as viewed from a public place	Yes	Yes
D12.3 Building colours and materials	No	Yes
D12.5 Front building line	Yes	Yes
D12.6 Side and rear building line	No	Yes
D12.8 Building envelope	Yes	Yes
D12.14 Scenic Protection Category One Areas	Yes	Yes

Detailed Assessment

A4.12 Palm Beach Locality

Clause A4.12 of the Pittwater 21 DCP provides guidance on the form and scale of development anticipated for the Palm Beach Locality. The locality statement notes as follows:

"The Palm Beach locality will remain primarily a low-density residential area with dwelling houses in maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape. Secondary dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations. Any dual occupancy dwellings will be located on the lowlands and lower slopes that have less tree canopy coverage, species and habitat diversity and fewer other constraints to development. Any medium density housing will be located within and around commercial centres, public transport and community facilities. Retail, community and recreational facilities will serve the community.

Future development is to be located so as to be supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.

Future development will maintain a building height limit below the tree canopy and minimise bulk and scale whilst ensuring that future development respects the horizontal massing of the existing built form. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from

hazards.

The design, scale and treatment of future development within the commercial centres will reflect a 'seaside-village' character through building design, signage and landscaping, and will reflect principles of good urban design. Landscaping will be incorporated into building design. Outdoor cafe seating will be encouraged.

A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, to provide feed trees and undergrowth for koalas and other animals, and to enhance wildlife corridors.

Heritage items and conservation areas indicative of the Guringai Aboriginal people and of early settlement in the locality will be conserved.

Vehicular, pedestrian and cycle access within and through the locality will be maintained and upgraded. The design and construction of roads will manage local traffic needs, minimise harm to people and fauna, and facilitate co-location of services and utilities.

Palm Beach will remain an important link to the offshore communities".

Comment:

The proposed development results in a part 2-3 storey dwelling house, which exceeds the desired 2 storey built form envisaged for the locality. Whilst the locality statement calls for 2 storey development within low density residential areas, the proposed development is considered to achieve the overall objective of the desired future character statement for the following reasons:

- The 3 storey built form is consistent with established development along the immediate vicinity of Barrenjoey Road.
- The proposed development does not result in unreasonable alterations to the site topography and does not necessitate the removal of significant canopy trees.
- The upper floor façade has been recessed back from the lower floors to provide a degree of stepping with the slope.
- The development is serviced by essential services (i.e. stormwater, vehicular access and parking etc.).
- The hipped roof form and elevated front terraces reflects the desired 'seaside village' appearance.
- The resulting height, bulk and scale of the development is commensurate with surrounding residential development.

D12.3 Building colours and materials

The proposed alterations and additions have been colour matched to the existing building facade to create consistency throughout the site. The existing colours do not meet the 'dark and earthy tones' prescribed by this control. Nevertheless, given the existing colour scheme for the site this is considered reasonable in this circumstance. The existing colours also do not depart significantly from other buildings within the visual catchment of the site, where there are many examples of lighter coloured buildings.

D12.6 Side and rear building line

Description of non-compliance

The control requires development be setback at least 2.5 metres from one side boundary and 1 metre from the opposing side boundary. For the purpose of this assessment the 2.5 metre side setback is applied to the northern boundary, whereas the 1 metre side setback applied to the southern.

The northern elevation of the dwelling is setback 1.29 metres from the northern side boundary, which does not satisfy the numeric requirement. This proposed setback correlates with the lower floor.

Merit consideration

With regards to the consideration for a variation, the development is considered against the underlying outcomes of the control as follows:

- *To achieve the desired future character of the Locality.*

Comment:

As discussed earlier within this report, the proposal is consistent with the intent of the Palm Beach Desired Future Character Statement.

- *To bulk and scale of the built form is minimised.*

Comment:

The proposal responds well to the local context through providing a three storey appearance to Barrenjoey Road, which is consistent with nearby development within the visual catchment of the site. In addition, the building mass steps down in height with the slope of the land to mitigate the bulk and scale of the development.

- *Equitable preservation of views and vistas to and/or from public/private places.*

Comment:

Properties located to the rear (i.e. upslope) of the subject site are elevated significantly higher than the proposal due to the steep topography. Hence, existing view lines towards the Pittwater waterway will be maintained subsequent to the development. Furthermore, the proposal does not result in view impacts from the public domain.

- *To encourage view sharing through complimentary siting of buildings, responsive design and well-positioned landscaping.*

Comment:

As noted above, no views are unreasonably compromised by the proposed works.

- *To ensure a reasonable level of privacy, amenity and solar access is provided within the development site and maintained to residential properties.*

Comment:

North and south facing windows on the upper floor addition contain high sills to mitigate

adverse privacy impacts. Moreover, the elevated balcony is orientated towards Barrenjoey Road and does not prompt unreasonable privacy implications. The adjacent properties to the south comprise commercial premises' and nearby residential dwellings will maintain the required amount of solar access.

- *Substantial landscaping, a mature tree canopy and an attractive streetscape.*

Comment:

The proposal does not result in a reduction in landscaping on the site. The existing canopy trees on the site will soften the built form.

- *Flexibility in the siting of buildings and access.*

Comment:

It is considered that the proposed development is adequately sited to ensure an acceptable level of amenity and a reasonable visual presentation for the subject site and adjacent sites. Hence, flexibility is afforded with regards to the maintenance of the non-compliant side setback.

- *Vegetation is retained and enhanced to visually reduce the built form.*

Comment:

The proposal does not result in the removal of vegetation on the site.

- *To ensure a landscape buffer between commercial and residential zones is established.*

Comment:

The existing landscaping on the site provides a buffer to the commercial development to the south.

Conclusion

Having regard to the above assessment, it is concluded that the outcomes of the control are achieved. Therefore, the application is supported on merit in this particular circumstance.

D12.8 Building envelope

The slope of the land under the building footprint is 31%. For sites with a slope greater than 30% this control is applied on a merit basis. Elements of the upper floor at the front of the building protrude outside of the standard side building envelope for sites with slopes less than 30%. Notwithstanding, the proposal is considered to achieve the underlying outcomes of the control, as demonstrated below as follows:

- *Achieve the desired future character of the Locality.*

Comment:

As discussed earlier within this report, the proposal is consistent with the intent of the Palm Beach Desired Future Character Statement.

- *To enhance the existing streetscapes and promote a building scale and density that is below the height of the trees of the natural environment.*

Comment:

The resulting building height is situated well below the established tree canopy within the locality.

- *To ensure new development responds to, reinforces and sensitively relates to spatial characteristics of the existing natural environment.*

Comment:

The building appropriately steps up the land, while including a roof line that sensitively responds to the slope of the land.

- *The bulk and scale of the built form is minimised.*

Comment:

The proposal responds well to the local context through providing a three storey appearance to Barrenjoey Road, which is consistent with nearby development within the visual catchment of the site. Figure 2 below depicts 2x 3 storey dwelling houses (including one recently approved at 1130 Barrenjoey Road) located approximately 40 metres to the north of the subject site.

Figure 2: 3 storey dwelling houses in close proximity to the subject site



The height, bulk and scale of the proposed development is not inconsistent with these

developments.

In addition, the building mass steps down in height with the slope of the land to mitigate the bulk and scale of the development.

- *Equitable preservation of views and vistas to and/or from public/private places.*

Comment:

Properties located to the rear (i.e. upslope) of the subject site are elevated significantly higher than the proposal due to the steep topography. Hence, existing view lines towards the Pittwater waterway will be maintained subsequent to the development. Furthermore, the proposal does not result in view impacts from the public domain.

- *To ensure a reasonable level of privacy, amenity and solar access is provided within the development site and maintained to residential properties.*

Comment:

North and south facing windows on the upper floor addition contain high sills to mitigate adverse privacy impacts. Moreover, the elevated balcony is orientated towards Barrenjoey Road and does not prompt unreasonable privacy implications. The adjacent properties to the south comprise commercial premises' and nearby residential dwellings will maintain the required amount of solar access.

- *Vegetation is retained and enhanced to visually reduce the built form.*

Comment:

The proposal does not result in the removal of vegetation on the site.

Conclusion

Having regard to the above assessment, it is concluded that the outcomes of the control are achieved. Therefore, the proposed building envelope is found to be satisfactory on a merit basis.

THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES

The proposal will not significantly affect threatened species, populations or ecological communities, or their habitats.

CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN

The proposal is consistent with the principles of Crime Prevention Through Environmental Design.

POLICY CONTROLS

Northern Beaches Section 7.12 Contributions Plan 2022

The proposal is subject to the application of Northern Beaches Section 7.12 Contributions Plan 2022.

A monetary contribution of \$3,663 is required for the provision of new and augmented public infrastructure. The contribution is calculated as 1% of the total development cost of \$366,300.

CONCLUSION

The site has been inspected and the application assessed having regard to all documentation submitted by the applicant and the provisions of:

- Environmental Planning and Assessment Act 1979;
- Environmental Planning and Assessment Regulation 2021;
- All relevant and draft Environmental Planning Instruments;
- Pittwater Local Environment Plan;
- Pittwater Development Control Plan; and
- Codes and Policies of Council.

This assessment has taken into consideration the submitted plans, Statement of Environmental Effects, all other documentation supporting the application and public submissions, and does not result in any unreasonable impacts on surrounding, adjoining, adjacent and nearby properties subject to the conditions contained within the recommendation.

In consideration of the proposal and the merit consideration of the development, the proposal is considered to be:

- Consistent with the objectives of the DCP
- Consistent with the zone objectives of the LEP
- Consistent with the aims of the LEP
- Consistent with the objectives of the relevant EPIs
- Consistent with the objects of the Environmental Planning and Assessment Act 1979

Council is satisfied that:

1) The Applicant's written request under Clause 4.6 of the Pittwater Local Environmental Plan 2014 seeking to justify a contravention of Clause 4.3 Height of Buildings has adequately addressed and demonstrated that:

- a) Compliance with the standard is unreasonable or unnecessary in the circumstances of the case; and
- b) There are sufficient environmental planning grounds to justify the contravention.

2) The proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

PLANNING CONCLUSION

This proposal, for alterations and additions to an existing attached dual occupancy to create a dwelling house has been referred to the DDP due to the maximum height of the development measuring at 10.5 metres above the existing ground level, which represents a 23.53% variation to Clause 4.3 - Height of Buildings of Pittwater LEP 2014.

The application was publicly exhibited for 14 days and did not attract any submissions.

The critical assessment issue pertains to the significant height breach. However, the severity of the height non-compliance occurs when taking the ground below the existing lower floor slab, which has been excavated below the natural contours of the site, as 'existing ground level', in accordance with the recent NSW Land and Environment Court case of *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582. When extrapolating the ground levels around the building footprint in accordance with the NSW Land and Environment Court case of *Bettar v Council of City of Sydney* [2014] NSWLEC 1070, the maximum height of the development measures 8.9 meters, which complies with the 10.0 metre height exemption permitted for this sloping site, pursuant to Clause 4.3(2D) of Pittwater LEP 2014.

The applicant has provided sufficient justification for the departure from the development standard in that compliance with the standard is unreasonable in the circumstances of this highly constrained site and the encroachment does not result in any unreasonable impacts to surrounding residential properties.

In addition, the assessment of the proposed development against the provisions of the Pittwater 21 DCP has found that the proposal does not comply with the side setback requirement on the northern elevation. Given the constraints on the development by virtue of the steep topography and the retention of existing side elevations of the dwelling house, some flexibility in applying this control is necessary. There will not be any unreasonable amenity impacts on adjoining properties and the proposal will be consistent with the Desired Future Character Statement of the Palm Beach locality.

When considered on its merits, the bulk and scale of the resulting development is considered to be acceptable in the circumstances of the case, noting that the 3 storey built form corresponds with nearby dwelling houses fronting Barrenjoey Road within the visual catchment of the site.

Overall, the development is a high quality design that performs well against the relevant controls and will not result in unreasonable impacts on adjoining or nearby properties, or the natural environment. The proposal has therefore been recommended for approval.

Therefore, it is recommended that the DDP approve this application, subject to the recommended conditions attached to this report.

It is considered that the proposed development satisfies the appropriate controls and that all processes and assessments have been satisfactorily addressed.

RECOMMENDATION

That Northern Beaches Council as the consent authority vary Clause 4.3 Height of Building development standard pursuant to Clause 4.6 of the PLEP 2014 as the applicant's written request has adequately addressed the merits required to be demonstrated by subclause (3) and the proposed development will be in the public interest and is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

Accordingly Council as the consent authority grant Development Consent to DA2022/0925 for Alterations and additions to a dual occupancy to create a dwelling house on land at Lot 7 DP 14538, 1120 Barrenjoey Road, PALM BEACH, Lot 8 DP 14538, 1120 Barrenjoey Road, PALM BEACH, subject to the conditions printed below:

1. **Approved Plans and Supporting Documentation**

The development must be carried out in compliance with the endorsed stamped plans and documentation listed below, except as amended by any other condition of consent:

a) Approved Plans

Architectural Plans - Endorsed with Council's stamp		
Drawing No.	Dated	Prepared By
Sheet SP	26 April 2022	Drafting Help
Sheet 4	26 April 2022	Drafting Help
Sheet 5	26 April 2022	Drafting Help
Sheet 6	26 April 2022	Drafting Help
Sheet 7	26 April 2022	Drafting Help
Sheet 8	26 April 2022	Drafting Help
Sheet 9	26 April 2022	Drafting Help
Sheet 10	26 April 2022	Drafting Help
Sheet 11	26 April 2022	Drafting Help
Sheet 12	26 April 2022	Drafting Help
Sheet 13	26 April 2022	Drafting Help

Reports / Documentation – All recommendations and requirements contained within:		
Report No. / Page No. / Section No.	Dated	Prepared By
Geotechnical Assessment Ref. AG 22148	29 June 2022	AscentGeo Consulting Geotechnical Engineers
BASIX Certificate No. A456932	22 April 2022	Goal Zero Thermal Performance Assessors

b) Any plans and / or documentation submitted to satisfy the Conditions of this consent.

c) The development is to be undertaken generally in accordance with the following:

Waste Management Plan		
Drawing No/Title.	Dated	Prepared By
Waste Management Plan	31 May 2022	Drafting Help

In the event of any inconsistency between conditions of this consent and the drawings/documents referred to above, the conditions of this consent will prevail.

Reason: To ensure the work is carried out in accordance with the determination of Council and approved plans.

2. **Compliance with Other Department, Authority or Service Requirements**

The development must be carried out in compliance with all recommendations and requirements, excluding general advice, within the following:

Other Department,	EDMS Reference	Dated
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Authority or Service		
Ausgrid	Ausgrid Referral Response	not dated

(NOTE: For a copy of the above referenced document/s, please see Application Tracking on Council's website www.northernbeaches.nsw.gov.au)

Reason: To ensure the work is carried out in accordance with the determination and the statutory requirements of other departments, authorities or bodies.

3. **Approved Land Use**

Nothing in this consent shall authorise the use of site/onsite structures/units/tenancies as detailed on the approved plans for any land use of the site beyond the definition of a dwelling house. This land use is defined below as follows:

- ***dwelling house means a building containing only one dwelling.***

Any variation to the approved land use and/occupancy of any unit beyond the scope of the above definition will require the submission to Council of a new development application.

Reason: To ensure compliance with the terms of this consent.

4. **Prescribed Conditions**

- (a) All building works must be carried out in accordance with the requirements of the Building Code of Australia (BCA).
- (b) BASIX affected development must comply with the schedule of BASIX commitments specified within the submitted BASIX Certificate (demonstrated compliance upon plans/specifications is required prior to the issue of the Construction Certificate);
- (c) A sign must be erected in a prominent position on any site on which building work, subdivision work or demolition work is being carried out:
 - (i) showing the name, address and telephone number of the Principal Certifier for the work, and
 - (ii) showing the name of the principal contractor (if any) for any building work and a telephone number on which that person may be contacted outside working hours, and
 - (iii) stating that unauthorised entry to the work site is prohibited.

Any such sign is to be maintained while the building work, subdivision work or demolition work is being carried out, but must be removed when the work has been completed.
- (d) Residential building work within the meaning of the Home Building Act 1989 must not be carried out unless the Principal Certifier for the development to which the work relates (not being the Council) has given the Council written notice of the following information:
 - (i) in the case of work for which a principal contractor is required to be appointed:
 - A. the name and licence number of the principal contractor, and
 - B. the name of the insurer by which the work is insured under Part 6 of that Act,
 - (ii) in the case of work to be done by an owner-builder:
 - A. the name of the owner-builder, and
 - B. if the owner-builder is required to hold an owner-builder permit under that Act, the number of the owner-builder permit.

If arrangements for doing the residential building work are changed while the work is in progress so that the information notified under becomes out of date, further work must not be carried out unless the Principal Certifier for the development to which the work relates (not being the Council) has given the Council written notice of the updated information.

- (e) Development that involves an excavation that extends below the level of the base of the footings of a building on adjoining land, the person having the benefit of the development consent must, at the person's own expense:
- (i) protect and support the adjoining premises from possible damage from the excavation, and
 - (ii) where necessary, underpin the adjoining premises to prevent any such damage.
 - (iii) must, at least 7 days before excavating below the level of the base of the footings of a building on an adjoining allotment of land, give notice of intention to do so to the owner of the adjoining allotment of land and furnish particulars of the excavation to the owner of the building being erected or demolished.
 - (iv) the owner of the adjoining allotment of land is not liable for any part of the cost of work carried out for the purposes of this clause, whether carried out on the allotment of land being excavated or on the adjoining allotment of land.

In this clause, allotment of land includes a public road and any other public place.

Reason: Legislative requirement.

5. **General Requirements**

- (a) Unless authorised by Council:
Building construction and delivery of material hours are restricted to:

- 7.00 am to 5.00 pm inclusive Monday to Friday,
- 8.00 am to 1.00 pm inclusive on Saturday,
- No work on Sundays and Public Holidays.

Demolition and excavation works are restricted to:

- 8.00 am to 5.00 pm Monday to Friday only.

(Excavation work includes the use of any excavation machinery and the use of jackhammers, rock breakers, excavators, loaders and the like, regardless of whether the activities disturb or alter the natural state of the existing ground stratum or are breaking up/removing materials from the site).

- (b) Should any asbestos be uncovered on site, its demolition and removal must be carried out in accordance with WorkCover requirements and the relevant Australian Standards.
- (c) At all times after the submission the Notice of Commencement to Council, a copy of the Development Consent and Construction Certificate is to remain onsite at all times until the issue of an Occupation Certificate. The consent shall be available for perusal of any Authorised Officer.
- (d) Where demolition works have been completed and new construction works have not commenced within 4 weeks of the completion of the demolition works that area affected by the demolition works shall be fully stabilised and the site must be

maintained in a safe and clean state until such time as new construction works commence.

- (e) Onsite toilet facilities (being either connected to the sewer or an accredited sewer management facility) for workers are to be provided for construction sites at a rate of 1 per 20 persons.
- (f) Prior to the release of the Construction Certificate, payment of the Long Service Levy is required. This payment can be made at Council or to the Long Services Payments Corporation. Payment is not required where the value of the works is less than \$25,000. The Long Service Levy is calculated on 0.35% of the building and construction work. The levy rate and level in which it applies is subject to legislative change. The applicable fee at the time of payment of the Long Service Levy will apply.
- (g) The applicant shall bear the cost of all works associated with the development that occurs on Council's property.
- (h) No skip bins, building materials, demolition or excavation waste of any nature, and no hoist, plant or machinery (crane, concrete pump or lift) shall be placed on Council's footpaths, roadways, parks or grass verges without Council Approval.
- (i) Demolition materials and builders' wastes are to be removed to approved waste/recycling centres.
- (j) No trees or native shrubs or understorey vegetation on public property (footpaths, roads, reserves, etc.) or on the land to be developed shall be removed or damaged during construction unless specifically approved in this consent including for the erection of any fences, hoardings or other temporary works.
- (k) Prior to the commencement of any development onsite for:
 - i) Building/s that are to be erected
 - ii) Building/s that are situated in the immediate vicinity of a public place and is dangerous to persons or property on or in the public place
 - iii) Building/s that are to be demolished
 - iv) For any work/s that is to be carried out
 - v) For any work/s that is to be demolished

The person responsible for the development site is to erect or install on or around the development area such temporary structures or appliances (wholly within the development site) as are necessary to protect persons or property and to prevent unauthorised access to the site in order for the land or premises to be maintained in a safe or healthy condition. Upon completion of the development, such temporary structures or appliances are to be removed within 7 days.

- (l) A "Road Opening Permit" must be obtained from Council, and all appropriate charges paid, prior to commencement of any work on Council property. The owner/applicant shall be responsible for all public utilities and services in the area of the work, shall notify all relevant Authorities, and bear all costs associated with any repairs and/or adjustments as those Authorities may deem necessary.
- (m) The works must comply with the relevant Ausgrid Network Standards and SafeWork NSW Codes of Practice.
- (n) Requirements for new swimming pools/spas or existing swimming pools/spas affected by building works.
 - (1) Child resistant fencing is to be provided to any swimming pool or lockable cover to any spa containing water and is to be consistent with the following;

Relevant legislative requirements and relevant Australian Standards (including but not limited) to:

- (i) Swimming Pools Act 1992
 - (ii) Swimming Pools Amendment Act 2009
 - (iii) Swimming Pools Regulation 2018
 - (iv) Australian Standard AS1926 Swimming Pool Safety
 - (v) Australian Standard AS1926.1 Part 1: Safety barriers for swimming pools
 - (vi) Australian Standard AS1926.2 Part 2: Location of safety barriers for swimming pools.
- (2) A 'KEEP WATCH' pool safety and aquatic based emergency sign, issued by Royal Life Saving is to be displayed in a prominent position within the pool/spa area.
 - (3) Filter backwash waters shall be conveyed to the Sydney Water sewerage system in sewered areas or managed on-site in unsewered areas in a manner that does not cause pollution, erosion or run off, is separate from the irrigation area for any wastewater system and is separate from any onsite stormwater management system.
 - (4) Swimming pools and spas must be registered with the Division of Local Government.

Reason: To ensure that works do not interfere with reasonable amenity expectations of residents and the community.

FEES / CHARGES / CONTRIBUTIONS

6. **Policy Controls**

Northern Beaches Section 7.12 Contributions Plan 2022

A monetary contribution of \$3,663.00 is payable to Northern Beaches Council for the provision of local infrastructure and services pursuant to section 7.12 of the Environmental Planning & Assessment Act 1979 and the Northern Beaches Section 7.12 Contributions Plan 2022. The monetary contribution is based on a development cost of \$366,300.00.

The monetary contribution is to be paid prior to the issue of the first Construction Certificate or Subdivision Certificate whichever occurs first, or prior to the issue of the Subdivision Certificate where no Construction Certificate is required. If the monetary contribution (total or in part) remains unpaid after the financial quarter that the development consent is issued, the amount unpaid (whether it be the full cash contribution or part thereof) will be adjusted on a quarterly basis in accordance with the applicable Consumer Price Index. If this situation applies, the cash contribution payable for this development will be the total unpaid monetary contribution as adjusted.

The proponent shall provide to the Certifying Authority written evidence (receipt/s) from Council that the total monetary contribution has been paid.

The Northern Beaches Section 7.12 Contributions Plan 2022 may be inspected at 725 Pittwater Rd, Dee Why and at Council's Customer Service Centres or alternatively, on Council's website at www.northernbeaches.nsw.gov.au

This fee must be paid prior to the issue of the Construction Certificate. Details demonstrating compliance are to be submitted to the Principal Certifying Authority.

Reason: To provide for contributions in accordance with the Contribution Plan to fund the provision of new or augmented local infrastructure and services.

7. Security Bond

A bond (determined from cost of works) of \$2,000 and an inspection fee in accordance with Council's Fees and Charges paid as security are required to ensure the rectification of any damage that may occur to the Council infrastructure contained within the road reserve adjoining the site as a result of construction or the transportation of materials and equipment to and from the development site.

An inspection fee in accordance with Council adopted fees and charges (at the time of payment) is payable for each kerb inspection as determined by Council (minimum (1) one inspection).

All bonds and fees shall be deposited with Council prior to Construction Certificate or demolition work commencing, and details demonstrating payment are to be submitted to the Certifying Authority prior to the issue of the Construction Certificate.

To process the inspection fee and bond payment a Bond Lodgement Form must be completed with the payments (a copy of the form is attached to this consent and alternatively a copy is located on Council's website at www.northernbeaches.nsw.gov.au).

Reason: To ensure adequate protection of Council's infrastructure.

CONDITIONS TO BE SATISFIED PRIOR TO THE ISSUE OF THE CONSTRUCTION CERTIFICATE

8. Stormwater Drainage Disposal

The stormwater drainage systems for the development are to be designed, installed and maintained in accordance with Council's Water Management for Development Policy.

All stormwater drainage systems must comply with the requirements of Council's Water Management for Development Policy. Any recommendations identified within a Geotechnical Report relevant to the development are to be incorporated into the design of the stormwater drainage system. Details demonstrating compliance from a qualified and practising Civil Engineer and where relevant a Geotechnical Engineer must be submitted to and approved by the Principal Certifier prior to the issue of a Construction Certificate.

When the proposed discharge point for the development in this consent cannot strictly comply with the Water Management for Development Policy, the Applicant must apply to verify the proposed discharge point by gaining Council approval via a Stormwater Drainage Application. Council approval must be provided to the Principal Certifier prior to the issue of a Construction Certificate when a Stormwater Drainage Application is required. The Stormwater Drainage Application form can be found on Council's website.

Compliance with this condition must not result in variations to the approved development or additional tree removal.

Reason: To ensure satisfactory management of stormwater.

9. Geotechnical Report Recommendations have been Incorporated into Designs and Structural Plans

The recommendations of the risk assessment required to manage the hazards as identified in

the Geotechnical Report referenced in Condition 1 of this consent are to be incorporated into the construction plans.

Prior to issue of the Construction Certificate, Form 2 of the Geotechnical Risk Management Policy for Pittwater (Appendix 5 of P21 DCP) is to be completed and submitted to the Principal Certifier.

Details demonstrating compliance are to be submitted to the Principal Certifier prior to the issue of an Occupation Certificate.

Reason: To ensure geotechnical risk is mitigated appropriately.

10. **Compliance with Standards**

The development is required to be carried out in accordance with all relevant Australian Standards.

Details demonstrating compliance with the relevant Australian Standard are to be submitted to the Principal Certifier prior to the issue of the Construction Certificate.

Reason: To ensure the development is constructed in accordance with appropriate standards.

CONDITIONS TO BE COMPLIED WITH DURING DEMOLITION AND BUILDING WORK

11. **Removing, Handling and Disposing of Asbestos**

Any asbestos material arising from the demolition process shall be removed and disposed of in accordance with the following requirements:

- Work Health and Safety Act;
- Work Health and Safety Regulation;
- Code of Practice for the Safe Removal of Asbestos [NOHSC:2002 (1998)];
- Guide to the Control of Asbestos Hazards in Buildings and Structures [NOHSC: 3002 (1998);
- Clause 42 of the Protection of the Environment Operations (Waste) Regulation 2005; and
- The demolition must be undertaken in accordance with Australian Standard AS2601 – The Demolition of Structures.

Reason: For the protection of the environment and human health.

12. **Survey Certificate**

A survey certificate prepared by a Registered Surveyor at the following stages of construction:

(a) Commencement of perimeter walls columns and or other structural elements to ensure the wall or structure, to boundary setbacks are in accordance with the approved details.

(b) At ground level to ensure the finished floor levels are in accordance with the approved levels, prior to concrete slab being poured/flooring being laid.

(c) At completion of the roof frame confirming the finished roof/ridge height is in accordance with levels indicated on the approved plans.

Details demonstrating compliance are to be submitted to the Principal Certifier.

Reason: To determine the height of buildings under construction comply with levels shown on

approved plans.

13. Installation and Maintenance of Sediment Control

Prior to any works commencing on site, including demolition, sediment and erosion controls must be installed in accordance with Landcom's 'Managing Urban Stormwater: Soils and Construction' (2004). Techniques used for erosion and sediment control on site are to be adequately maintained and monitored at all times, particularly after periods of rain, and shall remain in proper operation until all development activities have been completed and the site is sufficiently stabilised with vegetation.

Reason: To protect the surrounding environment from the effects of sedimentation and erosion from the site.

14. Waste Management During Development

The reuse, recycling or disposal of waste during works must be done generally in accordance with the Waste Management Plan for this development.

Details demonstrating compliance must be submitted to the Principal Certifier.

Reason: To ensure demolition and construction waste is recycled or reused and to limit landfill.

15. Aboriginal Heritage

If in undertaking excavations or works any Aboriginal site or object is, or is thought to have been found, all works are to cease immediately and the applicant is to contact the Aboriginal Heritage Officer for Northern Beaches Council, and the Cultural Heritage Division of the Department of Planning and Environment.

Any work to a site that is discovered to be the location of an Aboriginal object, within the meaning of the National Parks and Wildlife Act 1974, requires a permit from the Director of the Department of Planning and Environment.

Reason: Aboriginal Heritage Protection.

**CONDITIONS WHICH MUST BE COMPLIED WITH PRIOR TO THE ISSUE OF THE
OCCUPATION CERTIFICATE**

16. Stormwater Drainage Disposal Certification

Certification from an appropriately qualified and practising Civil Engineer demonstrating the stormwater drainage systems have been designed and installed in accordance with the requirements of Council's Water Management for Development Policy and where relevant a Geotechnical Engineer shall be provided to the Principal Certifier prior to the issue of an Occupation Certificate, and;

If any on site stormwater detention system is installed the Applicant shall lodge the Legal Documents Authorisation Application with Council.

The application is to include the completed request forms (NSW Land Registry standard forms 13PC and/or 13RPA) and a copy of the Works-as-Executed plan (details overdrawn on a copy of the approved drainage plan), hydraulic engineers' certification. A guide to the process and associated Legal Document Authorisation Application form can be found on Council's website. The Applicant shall create on the Title a positive covenant in respect to the ongoing maintenance and restriction as to user over the on-site stormwater detention system within this development consent.

The terms of the positive covenant and restriction are to be prepared to Council's standard requirements at the applicant's expense and endorsed by Northern Beaches Council's delegate prior to lodgement with the NSW Land Registry Services. Northern Beaches Council shall be nominated as the authority to release, vary or modify such covenant. A copy of the certificate of title demonstrating the creation of the positive covenant and restriction as to user for the on-site stormwater detention system is to be submitted.

Details demonstrating compliance are to be submitted to the Principal Certifier prior to the issue of an Occupation Certificate.

Reason: To ensure satisfactory management of stormwater.

17. **Geotechnical Certification Prior to Occupation Certificate**

The Applicant is to submit the completed Form 3 of the Geotechnical Risk Management Policy (Appendix 5 of P21 DCP) to the Principal Certifier prior to issue of the Occupation Certificate.

Reason: To ensure geotechnical risk is mitigated appropriately.

18. **Consolidation of Lots 7 and 8**

The approved development occurs over allotments 7 and 8 of DP 14538. To ensure orderly development of land, these allotments are to be consolidated into one (1) new allotment. The new lot is to be registered prior to the issue of an Occupation Certificate.

Details demonstrating compliance must be submitted to the Certifying Authority prior to the issue of the Occupation Certificate.

Reason: To ensure orderly development of land.

ON-GOING CONDITIONS THAT MUST BE COMPLIED WITH AT ALL TIMES

19. **Geotechnical Recommendations**

Any ongoing recommendations of the risk assessment required to manage the hazards identified in the Geotechnical Report referenced in Condition 1 of this consent are to be maintained and adhered to for the life of the development.

Reason: To ensure geotechnical risk is mitigated appropriately.

20. **Noise - Lift**

All plant equipment must be installed and operated at times so as not to cause 'offensive noise'. It must be demonstrated that the noise level will not exceed 5dBA above background noise when measured from the nearest property boundary, as defined by the Protection of the Environments Operation Act 1997.

Reason: To ensure compliance with legislation and to protect the acoustic amenity of neighbouring properties.