

## APPLICATION FOR MODIFICATION ASSESSMENT REPORT

<b>Application Number:</b>	Mod2021/0654
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<b>Responsible Officer:</b>	Anne-Marie Young
<b>Land to be developed (Address):</b>	Lot 25 DP 5464, 2 Macpherson Street WARRIEWOOD NSW 2102
<b>Proposed Development:</b>	Modification of Development Consent DA2019/0887 granted for subdivision of land into 24 community title lots comprising 22 residential lots and 2 residue lots
<b>Zoning:</b>	R3 Medium Density Residential
<b>Development Permissible:</b>	Yes
<b>Existing Use Rights:</b>	No
<b>Consent Authority:</b>	Northern Beaches Council
<b>Delegation Level:</b>	DDP
<b>Land and Environment Court Action:</b>	No
<b>Owner:</b>	Karimbla Properties (NO. 32) Pty Ltd
<b>Applicant:</b>	Karimbla Constructions Services (NSW) Pty Ltd

<b>Application Lodged:</b>	27/08/2021
<b>Integrated Development:</b>	No
<b>Designated Development:</b>	No
<b>State Reporting Category:</b>	Refer to Development Application
<b>Notified:</b>	15/09/2021 to 29/09/2021
<b>Advertised:</b>	15/09/2021
<b>Submissions Received:</b>	0
<b>Clause 4.6 Variation:</b>	Nil
<b>Recommendation:</b>	Approval

### EXECUTIVE SUMMARY

The application seeks consent to modify the approved building envelope which formed part of the approval for the subdivision of the site into 22 residential lots and two residue lots pursuant to DA2019/0887.

The modification relates to the side setback of Lots 4-11 and 14-21 which seek consent for a zero setback to the northern boundary. The subject application has been amended to address issues regarding bulk, scale and amenity by reducing the extent of the side setback breach to apply only to the garage zone.

The modification also seeks consent for 100mm increase in the indicative building height from 7.8m to

7.9m which remains to be below the maximum 8m building height limit. There is a partial reduction in the setback of the upper floor to the street, however, it is noted that the front setback of the upper floor remains compliant. The application also increases the rear setback of the upper floors to Lots 4-9 and 16-21 which results in improved spatial building separation, reduced building bulk and improved amenity.

On balance the minor breach of the side setback control will have no unreasonable impacts on the desired future character of the Warriewood Valley Locality, the bulk and scale of the development, the visual quality of the streetscape or the amenity of the dwellings.

No submissions have been received and the Section 4.55 (2) application is being referred to the Development Determination Panel (DDP) as the original development application was previously determined by the DDP.

The application is recommended for approval subject to conditions.

## **PROPOSED DEVELOPMENT IN DETAIL**

The application seeks consent to vary the approved building envelopes / lot boundary setbacks established by DA2019/0887 for the subdivision of the site into 22 residential lots and two residue lots.

The variation of the envelope in respect of the setbacks applies to 16 allotments, namely Lots 4-11 and 14-21 located within the centre of the side and a 100mm increase in the building height. In detail, the proposal seeks consent for:

- Zero setback of the ground level garage zone on northern side to Lots 4-11 and 14-21,
- A 100mm increase in the height of the dwellings from 7.8m to 7.9m,
- A reduction in setback of the first floor to the street, and
- A 2.8m increase in the setback of the upper floors to the rear boundary to Lots 4-9 and 16-21.

## **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 21 Development Control Plan - C6.8 Residential Development Subdivision Principles  
Pittwater 21 Development Control Plan - D16.1 Character as viewed from a public place  
Pittwater 21 Development Control Plan - D16.7 Side and rear building lines

## SITE DESCRIPTION

<b>Property Description:</b>	Lot 25 DP 5464 , 2 Macpherson Street WARRIEWOOD NSW 2102
<b>Detailed Site Description:</b>	<p>The site is legally described as Lot 25, Section C, Deposited Plan 5464, and is commonly referred to as 2 Macpherson Street, Warriewood ('the site'). The site is irregular in shape, with a 126.96m wide frontage to Macpherson Street to the south and a total area of 2.327 Hectares. The site adjoins Narrabeen Creek, the centreline of which forms the northern and eastern boundaries of the site.</p> <p>The site was formerly used for the purpose of a market garden, however, the site has recently been cleared in preparation for works in association with the approved civil works DA. Whilst the central portion of the site appears to have been built up over time and is generally level (3.28 - 3.71m AHD), the perimeter of the site falls away in each direction towards the creekline, the western side boundary and the street.</p> <p>Macpherson Street is a two-lane roadway that was recently upgraded to alleviate impacts associated with flooding, and as a result, the roadway and adjacent footpath is elevated above natural grounds levels at a minimum RL of 4.16m AHD. Two access driveways have been constructed to provide vehicular and pedestrian access to the site.</p> <p>A Sydney Water Sewerage Treatment Plant is located opposite the site on the southern side of Macpherson Street, with a seniors housing development is located to the east, medium density residential to the north and an existing dwelling to the west. The site is identified as Buffer Area 1M of the Warriewood Valley Release Area, as shown on the Warriewood Valley Release Area Map of PLEP 2014.</p>

Map:



## SITE HISTORY

On 27 November 2014, Development Application N0431/14 was lodged with Council, seeking consent for the construction of thirty semi-detached dwelling houses and associated infrastructure at the subject site.

On 18 December 2014, Development Application N0431/14 was refused by Council for the following reasons:

1. *The proposed development is inconsistent with the objectives of clause 6.1 of Pittwater Local Environmental Plan 2014, specifically the need for development to be undertaken in accordance with the Warriewood Valley Strategic Review, which identifies that the subject site has no capacity for residential development.*
2. *The “no dwellings” yield prescribed by clause 6.1(3) of Pittwater Local Environmental Plan 2014 prohibits residential development on the site, and cannot be varied pursuant to clause 4.6 of Pittwater Local Environmental Plan 2014.*

On 24 December 2014, the Applicant lodged a Class 1 Appeal with the Land and Environment Court of NSW in regards to the refusal of Development Application N0431/14. The proceedings were ultimately listed for a separate ‘question of law’ hearing to address the following:

*Is the “no dwellings” specification for ‘Buffer area 1m’ in the table to clause 6.1(3) of the Pittwater Local Environment Plan 2014 (“PLEP”) a ‘development standard’ to which clause 4.6 of the PLEP applies?*

On 21 May 2015, the Justice Pain found in favour of Council and agreed that the “no dwellings” specification for the site in clause 6.1(3) of PLEP 2014 was in fact a prohibition and not a development standard.

On 17 November 2016, the Applicant lodged a Planning Proposal (PP0003/16), which seeks to amend the provisions of clause 6.1(3) of PLEP 2014 to provide for 22 dwellings on the subject site.

On 31 January 2017, Council resolved not to support the Planning Proposal for the following reasons:

- a. It is inconsistent with the relevant strategic study being the 'Warriewood Valley Strategic Review Report (2013)', endorsed by the former Director General of the Department of Planning and Infrastructure on 26 June 2013 and adopted by Pittwater Council on 12 June 2013.*
- b. It has not demonstrated adequate strategic merit or site-specific merit in line with the 'NSW Planning & Environment's Planning Proposals: A guide to preparing planning proposals (2016)'.*
- c. The information submitted to support the planning proposal for 2 Macpherson Street, Warriewood is substantially deficient.*
- d. It is inconsistent with Local Planning Direction '4.3 Flood Prone Land' (issued under Section 117(2) of the Environmental Planning and Assessment Act 1979) and insufficient justification has been provided to support the inconsistency.*

On 10 March 2017, Council received notice that a request for a Rezoning Review had been submitted for consideration by the Sydney North Planning Panel.

On 12 April 2017, the Sydney North Planning Panel determined that the Planning Proposal should proceed to Gateway determination.

On 30 June 2017, Council received notice from the delegate of the Greater Sydney Commission that the Planning Proposal should proceed, subject to condition in the Gateway Determination.

On 26 October 2018, the Planning Proposal was formally gazetted to permit 22 lots on the site including:

- The construction of a new road;
- Civil infrastructure associated with the new road;
- Creekline reconstruction; and
- Creekline rehabilitation/revegetation.

On 31 May 2019, development application N0398/17 for the civil works was approved by the Land and Environment Court.

On 22 July 2020, the DDP approved DA2019/0887 for the subdivision of land into 24 community title lots comprising 22 residential lots and 2 residue lots as per the assessment officers recommendation in addition to one further condition and the amendment of Conditions 21 and 22 to read "Prior to Subdivision Certificate".

On 28 July 2020, the Notice of Determination (the consent) was issued for DA2019/0887. It is noted that the sequencing of the conditions in the Notice of Determination is out of order from condition number 7 - 10. Despite this the numbering of the conditions and the order to which they apply is correct and there is no affect on the validation of the consent.

### **History of the subject application**

On 27 October 2021, a letter was sent to the applicant which raised issues with the bulk and scale of the development and amenity impacts as a result of non-compliant setbacks.

On 20 December 2021, the applicant submitted amended plans which reduces the extent of the zero setback to apply only to the garages located along the northern boundary of Lots 4-11 and 14-21.

**ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)**

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

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 and is attached taking into all relevant provisions of the Environmental Planning and Assessment Act 1979 and associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon all lands whether nearby, adjoining or at a distance;
- Consideration was given to all documentation provided (up to the time of determination) by the applicant, persons who have made submissions regarding the application and any advice given by relevant Council / Government / Authority Officers on the proposal;

In this regard, the consideration of the application adopts the previous assessment detailed in the Assessment Report for DA2019/0887, in full, with amendments detailed and assessed as follows:

The relevant matters for consideration under Section 4.55 (2) of the Environmental Planning and Assessment Act, 1979, are:

Section 4.55 (2) - Other Modifications	Comments
A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:	
(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and	<p>The development, as proposed, has been found to be such that Council is satisfied that the proposed works are substantially the same as those already approved under DA2019/0887 for the following reasons:</p> <p>The proposal seeks consent to alter the approved building envelope in respect of the side setbacks and height.</p> <p>The development, as proposed, has been found to be such that Council is not satisfied that the proposed works are substantially the same as those already approved under DA2019/0887.</p> <p>Consideration of whether a development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted, Justice Bignold established the following test in the Moto Projects (No 2) Pty Ltd v North Sydney Council (1999) 106 LGERA 289 where His Honour states:</p>

Section 4.55 (2) - Other Modifications	Comments
	<p><i>"[54] The relevant satisfaction required by s96(2)(a) to be found to exist in order that the modification power be available involves an ultimate finding of fact based upon the primary facts found. I must be satisfied that the modified development is substantially the same as the originally approved development.</i></p> <p><i>[55] The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is "essentially or materially" the same as the (currently) approved development.</i></p> <p><i>[56] The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted)."</i></p> <p>The applicant has provided the following justification to support their argument that the modifications are substantially the same:</p> <p><i>"The development, as proposed to be modified, is substantially the same development as that originally approved. The site will continue to be used for residential dwellings, albeit with some minor updates to the proposed building setbacks on 16 of the allotments. The proposed updates do not affect the ability for future residents to enjoy suitable area for recreation and amenity, nor limit internal amenity within the dwellings such as adequate solar and natural ventilation.</i></p> <p><i>The proposal has introduced zero-lot boundaries on 16 residential lots to accommodate a more efficient building footprint. [Note: The application has been amended to reduce the extent of the zero-lot boundaries to apply only to the garages.]</i></p> <p><i>The changes sought to the approved building envelopes will not affect the already approved subdivision layout. All parcels of land proposed to contain future dwellings remain unaltered and therefore substantially the same as that originally</i></p>

Section 4.55 (2) - Other Modifications	Comments
	<p><i>approved."</i></p> <p>Reviewing the above comments and the court judgement by Justice Bignold established in the <i>Moto Projects (No 2) Pty Ltd v North Sydney Council (1999) 106 LGERA 289</i> it is concurred that the proposed modification is consistent with the (original) consent and can be considered under Section 4.55 of the Act.</p>
<p>(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and</p>	<p>Development Application DA2019/0887 required concurrence from NSW Rural Fire Service (RFS) and NSW Natural Resources Access Regulator (NRAR).</p> <p>The subject modification was referred to NRAR have confirmed that the GTA's issued with the previous consent are adequate and remain valid for the purposes of the Water Management Act 2000.</p> <p>The subject modification was also referred to RFS on 29/10/2021, at the time of writing this report no response has been received and the conditions (GTAs) issued by RFS remain valid for the reasons discussed below.</p> <p>The modification solely relates to a minor change in the indicative building envelope in respect of the setbacks. The indicative envelopes (plans) form part of the original consent drawings. The conditions of the GTA's relate to Asset Protection Zones, Water and Utilities and Landscaping remain valid and will apply to the future development of the site and each respective lot.</p> <p>In addition, the future development applications for the detailed design of the dwellings on each lot will be referred to the RFS. Clause 62 of the EPA Reg's requires a concurrence authority to give notice to the consent authority of its decision on a development application. The clause specifically relates to a development application and not a modification. RFS have already given its decision and concurrence to the original DA, the subdivision has not changed and the GTAs remain valid.</p>
<p>(c) it has notified the application in accordance with:</p> <p>(i) the regulations, if the regulations so require,</p>	<p>The application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000, and the Northern Beaches Community Participation Plan. .</p>



Section 4.55 (2) - Other Modifications	Comments
<p>or</p> <p>(ii) a development control plan, if the consent authority is a council that has made a development control plan under section 72 that requires the notification or advertising of applications for modification of a development consent, and</p>	
<p>(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.</p>	<p>No submissions were received in relation to this application.</p>

### Section 4.15 Assessment

In accordance with Section 4.55 (3) of the Environmental Planning and Assessment Act 1979, in determining an modification application made under Section 96 the consent authority must take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application.

The relevant matters for consideration under Section 4.15 of the Environmental Planning and Assessment Act, 1979, are:

Section 4.15 'Matters for Consideration'	Comments
<p>Section 4.15 (1) (a)(i) – Provisions of any environmental planning instrument</p>	<p>See discussion on “Environmental Planning Instruments” in this report.</p>
<p>Section 4.15 (1) (a)(ii) – Provisions of any draft environmental planning instrument</p>	<p>Draft State Environmental Planning Policy (Remediation of Land) seeks to replace the existing SEPP No. 55 (Remediation of Land). Public consultation on the draft policy was completed on 13 April 2018. The conditions recommended by Health in the original DA relating to asbestos removal remain valid.</p>
<p>Section 4.15 (1) (a)(iii) – Provisions of any development control plan</p>	<p>Pittwater 21 Development Control Plan applies to this proposal.</p>
<p>Section 4.15 (1) (a)(iiia) – Provisions of any planning agreement</p>	<p>None applicable.</p>
<p>Section 4.15 (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&amp;A Regulation 2000)</p>	<p><u>Division 8A</u> of the EP&amp;A Regulation 2000 requires the consent authority to consider Prescribed conditions of development consent. These matters have been addressed via a condition in the original consent.</p> <p><u>Clause 50(1A)</u> of the EP&amp;A Regulation 2000 requires the submission of a design verification certificate from the building designer at lodgement of the development application. This clause</p>

Section 4.15 'Matters for Consideration'	Comments
	<p>is not relevant to this application.</p> <p><u>Clause 54 and 109</u> of the EP&amp;A Regulation 2000 allow Council to request additional information. Additional information was requested in relation to the non-compliance with the setback controls.</p> <p><u>Clause 92</u> of the EP&amp;A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This clause is not relevant to this application.</p> <p><u>Clause 93 and/or 94</u> of the EP&amp;A Regulation 2000 requires the consent authority to consider the upgrading of a building (including fire safety upgrade of development). This clause is not relevant to this application.</p> <p><u>Clause 98</u> of the EP&amp;A Regulation 2000 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This Clause is not relevant to this application.</p> <p><u>Clause 98</u> of the EP&amp;A Regulation 2000 requires the consent authority to consider the provisions of the Building Code of Australia (BCA). This matter has been addressed via a condition in the original consent.</p> <p><u>Clause 143A</u> of the EP&amp;A Regulation 2000 requires the submission of a design verification certificate from the building designer prior to the issue of a Construction Certificate. This clause is not relevant to this application.</p>
<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>	<p>(i) <b>Environmental Impact</b> The environmental impacts of the proposed development on the natural and built environment are addressed under the Pittwater 21 Development Control Plan section in this report.</p> <p>(ii) <b>Social Impact</b> The proposed development will not have a detrimental social impact in the locality considering the character of the proposal.</p> <p>(iii) <b>Economic Impact</b> The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.</p>
<p>Section 4.15 (1) (c) – the suitability of the site for the development</p>	<p>The site is considered suitable in principle for a residential subdivision. The proposed modification to the boundary however is not supported for the reasons discussed under Clause C16.7 of the PDCP.</p>
<p>Section 4.15 (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs</p>	<p>See discussion on “Notification &amp; Submissions Received” in this report. No submissions have been received.</p>
<p>Section 4.15 (1) (e) – the</p>	<p>This assessment has found the proposal to be contrary to the</p>

Section 4.15 'Matters for Consideration'	Comments
public interest	relevant requirement(s) of the <insert non-compliances/inconsistencies> and will result in a development which will create an undesirable precedent such that it would undermine the desired future character of the area and be contrary to the expectations of the community. In this regard, the development, as proposed, is not considered to be in the public interest.

## EXISTING USE RIGHTS

Existing Use Rights are not applicable to this application.

## BUSHFIRE PRONE LAND

The north-west parts of the site are mapped as containing Bush Fire Vegetation (Buffer to Category 2). The original application was referred to New South Wales Rural Fire Service (NSW RFS) issued who issued, General Terms of Approval (GTA). The GTA's relate to Asset Protection Zones, Water and Utilities and Landscaping.

The subject modification does not materially change the development consent to which the RFS issue the GTA's and the subdivision dwelling and road layout remain as per the original approval. The modification solely relates to a minor change in the indicative building envelope in respect of the setbacks. The indicative envelopes (plans) form part of the original consent drawings. The conditions of the GTA's remain valid and will apply to the future development of the site and each respective lot. In addition, the future development applications for the detailed design of the dwellings on each lot will be referred to the RFS. Despite this the modification was referred to the RFS on 29/10/2021, at the time of writing this report no response has been received.

Clause 62 of the Environmental Planning and Assessment Regulations 2000 requires:

*(1) A concurrence authority that has received a development application from a consent authority must give written notice to the consent authority of its decision on the development application—*

*(a) within 40 days (or a lesser period, if any, provided for in an environmental planning instrument) after receipt of the copy of the application, or*

*(b) in the case of development that is required to be advertised or notified under Schedule 1 to the Act, within 21 days after it receives—*

*(i) the last of the submissions made during the relevant submission period, or*

*(ii) advice from the consent authority that no submissions were made.*

The clause specifically relates to a development application and not a modification. It is noted that no submission have been received and no response from RFS within 40 or 21 days since the referral was issued. In summary, the sub-division dwelling and access layout remains the same as approved and the GTA's issued by the RFS remain to be valid.

## NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited from 15/09/2021 to 29/09/2021 in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the Community Participation Plan.

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

**REFERRALS**

Internal Referral Body	Comments
Building Assessment - Fire and Disability upgrades	<p><b>SUPPORTED SUBJECT TO CONDITIONS</b></p> <p>It is noted that proposed development may not comply with certain requirements of the Building Code of Australia or Premises Standards at this stage, however it is considered that these issues may be assessed and determined at Construction Certificate stage. Accordingly, there are no objections to the development subject to conditions.</p>
Landscape Officer	<p><b>SUPPORTED</b></p> <p>The application is for the modification of development consent 2019/0887, and proposes to amend the building envelope plan and seek the introduction of zero-lot boundaries on 16 of the approved residential lots (lots 4 to 11 and 14 to 21).</p> <p>The lot width proposed at 9.5 metres requires landscaped areas with a minimum of 4 metres to satisfy Pittwater 21 DCP control D16.5 Landscaped Area for Newly Created Individual Allotments, and both the front and rear of the proposed lots succeed in providing suitable landscape area. As such Landscape Referral raise no objections.</p> <p>The side setback deviation from Pittwater 21 DCP control D16.7 Side and rear building lines, is a matter for consideration by Planning.</p>
NECC (Development Engineering)	<p><b>SUPPORTED</b></p> <p>No objections to the proposed 455(2) modification no conditions are required as the changes are only to side boundary building envelopes.</p>
NECC (Stormwater and Floodplain Engineering – Flood risk)	<p><b>SUPPORTED</b></p> <p>The proposed modification is to increase the approved building envelope on the future residential allotment which are no longer identified as flood prone. As a result no flood related development controls are proposed.</p>
Strategic and Place Planning (Urban Design)	<p><b>SUPPORTED SUBJECT TO CONDITIONS</b></p> <p>A revised proposal dated 20 December 2021 was submitted to address the concerns below. The revised scheme is now generally acceptable except for Lots 10, 11, 14 and 15 which should have the rear upper floor setbacks applied as well similar to Lots 4 to 9 and 16 to 21. Lot 14 could be further improved by flipping the plan around with the driveway located to the north boundary side.</p> <p><u>Planners Comment:</u></p>

Internal Referral Body	Comments
	<p>The upper floor of Lots 10,11, 14 and 15 have a compliant 6m set back and it is therefore unreasonable to request a further setback of the upper floor. In addition, lots 10-15 are not as deep as the other lots and the request to have the upper floor set back a further 3m would mean that the dwelling would have a limited floor plate on the upper floor.</p> <p>The original application approved the layout of lot 14 to have the driveway to the southern boundary. The subject application does not seek to change the approved layout of lot 14 and it is therefore considered unreasonable to require the modification of the lot as suggested.</p> <p><b>Previous Comments</b></p> <p>The proposal is a Section 4.55 (2) modification application to vary the approved lot boundary setbacks established by DA2019/0887 for 16 allotments along with the corresponding changes in the conditions of consent. The affected 16 lots are located in the middle section of the development with frontages orientated toward east and west to the new accessway.</p> <p>The approved lot boundary setback is 900mm on both side boundaries of each dwelling to ground level, and 1500mm setback to the first storey creating a stepping back massing as building height increases.</p> <p>The proposed changes is 900mm on the southern side applying to both ground level and first storey with zero setback to ground level on northern side and maintaining 1500mm setback to first storey.</p> <p>The modifications cannot be supported for the following reasons:</p> <ol style="list-style-type: none"> <li>1. Building separation distances will be reduced resulting in less visual/ acoustic privacy, outlook, natural ventilation and daylight/ solar access.</li> <li>2. With 900mm separation between buildings, noise nuisance and visual privacy issues will be made worse.</li> <li>3. The future floor plans provided show window and door openings proposed on the zero boundary setback so compliance with building code is not achievable.</li> <li>4. The single storey on the street front setback has been replaced with a two storey built form which will remove the gradual building scale step-down effect to the street.</li> <li>5. The bulk and scale of the buildings will be increased resulting in a diminished and less appealing streetscape outcome compared to what was approved previously.</li> </ol>
Traffic Engineer	<b>SUPPORTED</b>

<b>Internal Referral Body</b>	<b>Comments</b>
	<p>The proposed modification does not result in any change to parking, traffic generation or access arrangements and the modification can therefore be supported on traffic grounds.</p> <p>All previous traffic conditions are to remain in place.</p>
Waste Officer	<p><b>SUPPORTED</b></p> <p>Recommendation - Acceptable, without conditions.</p> <p>No impacts on Waste Management services from the proposed modifications.</p> <p>All existing Waste Conditions of Consent from original DA to remain.</p>

<b>External Referral Body</b>	<b>Comments</b>
Integrated Development – NSW Rural Fire Service - Rural Fires Act (s100B Subdivisions and Special Fire Protection Purposes under)	<p>The north-west parts of the site are mapped as containing Bush Fire Vegetation (Buffer to Category 2).</p> <p>The original application was referred to New South Wales Rural Fire Service (RFS) who issued their General Terms of Approval (GTA). The subject modification was also referred to RFS for 21 days. No response and concurrence is therefore assumed. The GTA issue therefore remain valid.</p>
Nominated Integrated Development – Natural Resources Access Regulator - Water Management Act 2000 (s91 Controlled Activity Approval for works within 40m of watercourse)	<p>The Natural Resources Access Regulator (NRAR) has reviewed the application and considers that, for the purpose of Water Management Act 2000, previously issued GTA's are adequate, remain valid and no further assessment is necessary.</p>

## **ENVIRONMENTAL PLANNING INSTRUMENTS (EPIs)\***

All, Environmental Planning Instruments (SEPPs, REPs 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, REPs 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 55 - Remediation of Land**

Clause 7 (1) (a) of SEPP 55 requires the Consent Authority to consider whether land is contaminated.

The potential for contamination within the site has previously been investigated under Development Application N0398/17 and a Validation Report was submitted with the original application. The proposal to amend the building envelope has no implications on the previous assessment of contamination and the conditions applicable to N0398/17 remains to be valid.

## **SEPP (Infrastructure) 2007**

### **Ausgrid**

Clause 45 of the SEPP 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. No response has been received within the 21 day statutory period and therefore, it is assumed that no objections are raised and no conditions are recommended.

## **SEPP (Coastal Management) 2018**

The site is subject to SEPP Coastal Management (2018). Accordingly, an assessment under the SEPP has been carried out as follows:

### **10 Development on certain land within coastal wetlands and littoral rainforests area**

- (1) *The following may be carried out on land identified as “coastal wetlands” or “littoral rainforest” on the Coastal Wetlands and Littoral Rainforests Area Map only with development consent:*
- (a) *the clearing of native vegetation within the meaning of Part 5A of the Local Land Services Act 2013,*
  - (b) *the harm of marine vegetation within the meaning of Division 4 of Part 7 of the Fisheries Management Act 1994,*
  - (c) *the carrying out of any of the following:*
    - (i) *earthworks (including the depositing of material on land),*
    - (ii) *constructing a levee,*
    - (iii) *draining the land,*
    - (iv) *environmental protection works,*
  - (d) *any other development.*

#### Comment:

The subject application seeks consent for a minor modification of the approved indicative building envelope approved under DA2019/0887. The application will not result in any additional biodiversity impacts including impacts to the coastal wetland.

## **11 Development on land in proximity to coastal wetlands or littoral rainforest**

- (1) *Development consent must not be granted to development on land identified as “proximity area for coastal wetlands” or “proximity area for littoral rainforest” on the Coastal Wetlands and Littoral Rainforests Area Map unless the consent authority is satisfied that the proposed development will not significantly impact on:*
- (a) *the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or littoral rainforest, or*
  - (b) *the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland or littoral rainforest.*

### Comment:

Refer above.

## **13 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 subclause (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:

Conditions have been imposed in the original DA that will ensure that the integrity of the biophysical, hydrological and ecological environment can be protected. These conditions remain valid. The proposal will not impact on foreshore access or aboriginal heritage.

## **14 Development on land within the coastal use area**

- (1)



- (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 platform for members of the public, including persons with a disability,
  - (ii) overshadowing, wind funnelling and the loss of views from public places to foreshores,
  - (iii) the visual amenity and scenic qualities of the coast, including coastal headlands,
  - (iv) Aboriginal cultural heritage, practices and places,
  - (v) cultural and built environment heritage, and
- (b) is satisfied that:
- (i) the development is designed, sited and will be managed to avoid an adverse impact referred to in paragraph (a), or
  - (ii) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or
  - (iii) 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:

As above.

**15 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 modification to the indicative building envelopes will not increase the risk of coastal hazards.

As such, it is considered that the application complies with the requirements of the State Environmental Planning Policy (Coastal Management) 2018.

**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

Development Standard	Requirement	Approved	Proposed	% Variation	Complies
Minimum subdivision lot size. The site is zoned within the Warriewood Urban Valley	Clause 6.1(3) of PLEP allows for a	22 residential lots which vary in size from 220sqm to 388sqm. The remaining 2 lots	No change	N/A	Yes

Release Area and is identified as Buffer 1m:	max of 22 dwellings are permitted	are for the private access loop road and the inner creek buffer corridor lot.			
Height of Buildings:	8.5m	Indicative envelopes have been submitted which show 7.8m	7.9m	N/A	Yes

### Compliance Assessment

Clause	Compliance with Requirements
1.9A Suspension of covenants, agreements and instruments	Yes
2.6 Subdivision - consent requirements	Yes
6.1 Warriewood Valley Release Area	Yes
7.1 Acid sulfate soils	Yes
7.3 Flood planning	Yes
7.6 Biodiversity protection	Yes
7.10 Essential services	Yes

### **Pittwater 21 Development Control Plan**

#### Built Form Controls

Built Form Control	Requirement	Approved	Proposed	Complies
Front building line	<ul style="list-style-type: none"> <li>- Machperson Street - 5m to articulation zone / 6.5m to garage and dwelling.</li> <li>- All other dwellings 1.5m to articulation zone 4m to garage.</li> <li>Corner lots 1 m to articulation zone and 2m to garage</li> </ul>	<ul style="list-style-type: none"> <li>6.5m to dwelling</li> <li>Lots 4- 11, 21- 14 = 4m to articulation zone</li> <li>4.5m to 6m to garage</li> </ul>	Unaltered	Yes
Rear building line	<ul style="list-style-type: none"> <li>- Lots with a depth of 20m or less - 4m for ground floor and upper floor</li> <li>- Lots with a depth greater or equal to 20m - 4m ground floor and 6m upper floor</li> </ul>	<ul style="list-style-type: none"> <li>Lots 4- 11, 21- 14 = 6m</li> <li>Lots 2,3, 22 and 23 = 6.5</li> </ul>	Unaltered	Yes
Landscaped area	20sqm	20sqm	Unaltered	Yes

## Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
A1.7 Considerations before consent is granted	Yes	Yes
A4.16 Warriewood Valley Locality	Yes	Yes
B3.6 Contaminated Land and Potentially Contaminated Land	Yes	Yes
B3.11 Flood Prone Land	Yes	Yes
B6.3 Off-Street Vehicle Parking Requirements	Yes	Yes
B8.3 Construction and Demolition - Waste Minimisation	Yes	Yes
C1.13 Pollution Control	Yes	Yes
C6.3 Ecologically Sustainable Development, Safety and Social Inclusion	Yes	Yes
C6.8 Residential Development Subdivision Principles	Yes	Yes
D16.1 Character as viewed from a public place	No	Yes
D16.7 Side and rear building lines	No	Yes

## Detailed Assessment

### C6.8 Residential Development Subdivision Principles

Clause C6.8 requires:

*The location of a zero lot line dwelling is to be determined with regard to the allotment orientation and ability to achieve the solar access provisions within this DCP. The location of a zero lot line dwelling should only occur on the southern side boundary of east-west allotments and on either side boundary of north-south allotments.*

*The location of all nominated zero lot lines must be identified on the proposed Plan of Subdivision (refer to control C6.10 Residential Subdivision Approval Requirements).*

*Where a zero lot line is nominated, the following is to be ensured:*

*a Section 88B instrument is to be applied to both the benefited lot and the burdened lot and shall include a notation identifying the potential for a building to have a zero lot line;*  
*the burdened lot is to include an easement for access and maintenance on the burdened boundary in accordance with the following:*  
*900mm for single storey zero lot walls; or*  
*1200mm for two storey zero lot walls;*  
*the easement is to enable servicing, construction and maintenance of the adjoining dwelling;*  
*the Section 88B instrument is to be worded so that Council is removed from any dispute resolution process between adjoining allotments; and*  
*no overhanging eaves, gutters or services (including rainwater tanks, hot water units, air conditioning units, downpipes, electrical conduits or the like) of the dwelling on the benefited lot will be permitted within the easement.*

### Comment:

The applicant has submitted envelope solar access diagrams which demonstrate that despite the zero setback of the garage zone to the northern boundary adequate solar access is provided to the future dwellings. No windows are proposed at ground floor that have zero setback to the northern boundary

as this portion of the development relates to the garage zone. A condition is included in the recommendation to ensure this. Council's Urban Designer has confirmed that these issues in respect of solar access, ventilation, outlook and visual and acoustic privacy have been addressed.

The application was referred to Council's Development Engineer who offered no objections to the changes to the side setbacks and advised that no additional conditions are required.

### **D16.1 Character as viewed from a public place**

As the subject modification seeks consent only for a modification of the indicative building envelopes a full assessment of clause D16.6 will be considered under the detailed application for the dwellings. Notwithstanding this the following sub-sections of Clause D16.6 are relevant to the subject application:

- The bulk and scale of buildings must be minimised.
- Garages, carports and other parking structures including hardstand areas must not be the dominant site feature when viewed from a public place, and
- Garage door widths are to be in accordance with the following:
  - Lot Dimension - Area >225sqm or 9m-12.5m wide - single with a second hardstand area in front of the garage, 3m wide garage door not exceeding 40% of the lot width, whichever is less.
  - Lot Dimension - Area >225sqm or 9m-12.5m wide - single with a second hardstand area in front of the garage, 3m wide garage door not exceeding 40% of the lot width, whichever is less.

#### Comment:

The proposal involves a modification of the side setbacks to lots 4-11 and lots 14-21 which will result in a zero setback of the garage zone to the northern boundary. The zero setback of the garage zone will result in an increase in the width of the garage zone from 4.5m to 4.6m - 4.7m which represents 53%-54% of the lot width. The applicant has described this garage zone as comprising the future garage and a washroom / toilet. The garage zone is recessed behind the building line and set back between 5m - 7m from the frontage in excess of the 4m setback requirement which will help reduce the visual impacts of the garages in the streetscape. In order to ensure the intent of the control is maintained a condition is included in the recommendation requiring the garage door not to exceed 40% of the lot width.

In addition, Council's Urban Designer has identified that the layout of Lot 14 could be improved by flipping the plan around with the driveway located to the north. It is noted that DA2019/0887 approved lot 14 to have the driveway to the southern boundary. The application does not seek to modify the approved layout and it is therefore not reasonable to request a condition requiring this change, refer to discussion in the Referral section of this report.

### **D16.7 Side and rear building lines**

The control requires the following setbacks of the side and rear building lines for detached dwellings:

- *Side setbacks for lots between 9m and 14m in width = 900mm side setback at ground level and 1500mm for the upper floor.*
- *Rear setbacks for lots with a depth of less than 20m = 4m setback at both ground and the upper floor. Lots with a depth greater or equal to 20m = 4m rear setback at ground level and 6m on the upper floor.*

#### Comment

The amended indicative envelope breaches the control as detailed below:

The side setback to Lots 4-11 and 14-21 to zero along the garage zone on the northern boundary which represents a length of 7.8m. Conversely, the proposal increased the rear setback of the upper floor to Lots 4-9 and 16-21 by 2.8m which will improve the spatial separation of the dwellings, reduce the bulk and massing and enhance amenity between the dwellings.

On balance, despite the minor partial breach of the side and rear setback control the spatial separation between the dwellings is assessed as adequate and the proposal generally meets the outcome of the control as discussed below.

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

Comment:

The indicative envelopes demonstrate that the future dwellings on the site will achieve the desired future character of the Warriewood Valley Locality. It is noted the built form controls for Warriewood Valley allow a greater density of the development than that normally permitted within an R2 Low density zone in the PLEP.

- *The area of site disturbance is minimised and soft surface is maximised.*

Comment:

The minor encroachment of the side setback to 16 lots will not impact on the area of site disturbance.

- *The bulk and scale of the built form is minimised and the impact of the proposed development on the adjoining properties is minimised.*

Comment:

The proposal generally complies with the sub-division principles and is noted to exceed the numerical requirements in some areas. On balance the minor (partial) breach of the side setback will not have an unreasonable impact on the bulk and scale of the envelopes approved. Further, the minor change to the indicative building envelope will not have unreasonable impacts on neighbouring amenity in terms of privacy, solar access or access to ventilation.

The setback of the upper floors of lots 10,11, 14 and 15 all have compliant 6m setbacks it is therefore considered unreasonable to request a further 3m setback as suggested by Council's Urban Designer, refer to discussion in the Referral Section of this report. It is also noted that the proposal amends the the upper floor rear setback of Lots 4-9 and 16-21 exceeds the minimum 6m upper floor setback measuring 8.9m which on balance can be argued to reduce any concerns relating to bulk, massing and amenity.

- *To create meaningful breaks between adjoining buildings and regular rhythm of built form, particularly with regard to the built forms presentation to public places.*

Comment:

The minor encroachment of the side setback will not result in unreasonable visual impacts on the streetscape in terms of breaks between buildings and the rhythm and pattern of built form fronting the new accessway. The portion of the dwelling that is in breach of the side setback control, the garage zone, is recessed behind the front facade and setback between 5m to 7m which exceeds the 4m

minimum setback.

Despite the breach the amended envelope allows for appropriate built form which allows for articulation of the dwellings with breaks between all dwellings.

- *To create usable curtilage areas around buildings for viable access, landscaping and open space.*

Comment:

The zero side setback has been amended to apply only to the garage zone thereby allowing for the retention of useable space along the northern curtilage of the future dwellings for access and landscaping.

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

Comment:

The minor variation of the building envelope will not impact on views.

- *Vegetation and natural features of the site is retained and enhanced within the development site design to screen the visual impact of the built form.*

Comment:

The modification will not have any impacts on any existing vegetation or natural features of the site or the approved landscape zones.

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

Comment:

The minor changes to the side setback will not result in any unreasonable impacts on neighbouring amenity.

## **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.

## **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 2000;
- 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

The modification of the indicative building envelope relates to the side setback to lots 4-11. In addition, the application increases the rear setback of the upper floors to lots 4-9 and 16-21 by 2.8m which results in improved spatial building separation, reduced building bulk and improved amenity.

On balance the minor breach of the side setback controls will have no unreasonable impact on the desired future character of the Warriewood Valley Locality, the resultant built form or the bulk, scale and density of the development, the visual quality of the streetscape or the amenity of the future dwellings.

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

**RECOMMENDATION**

THAT Council as the consent authority grant approval to Modification Application No. Mod2021/0654 for Modification of Development Consent DA2019/0887 granted for subdivision of land into 24 community title lots comprising 22 residential lots and 2 residue lots on land at Lot 25 DP 5464,2 Macpherson Street, WARRIEWOOD, subject to the conditions printed below:

**A. Add Condition No.2A - Modification of Consent - Approved Plans and supporting Documentation to read as follows:**

The development must be carried out in compliance (except as amended by any other condition of consent) with the following:

a) Modification Approved Plans

<b>Architectural Plans - Endorsed with Council's stamp</b>		

<b>Drawing No.</b>	<b>Dated</b>	<b>Prepared By</b>
DA000 Rev C Coversheet	20.12.2021	Meriton
DA001 Rev E Building Envelope	20.12.2021	Meriton
DA002 Rev E Driveway and Garage Locations	20.12.2021	Meriton
DA003 Rev E Private Open Space	20.12.2021	Meriton
DA004 Rev E Setbacks	20.12.2021	Meriton
DA005 Rev E Indicative Elevation	20.12.2021	Meriton

b) Any plans and / or documentation submitted to satisfy the Deferred Commencement Conditions of this consent as approved in writing by Council.

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

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

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

**B. Modify Condition 8 - Amendments to the approved plans to read as follows:**

(a) The sewer service line shown on Drawing reference C070 Rev E (Service and Utilities Coordinate Plan) prepared by AT&L dated 30 January 2020 shall not traverse private property.

(b) The garage doors to Lots 4-11 and 14-21 shall be limited to a maximum of 40% of the lot width.

(c) There shall no windows along the garage zone portion of the dwellings which have a zero setback to Lots 4-11 and 14-21

Reason: To ensure that the garages and hardstand do not dominate the streetscape and to protect neighbouring amenity.

**C. Add Condition 49 - Fire Safety Certificate**

At the completion of all works, a Fire Safety Certificate will need to be prepared which references all the Essential Fire Safety Measures applicable and the relative standards of Performance (as per Schedule of Fire Safety Measures). This certificate must be prominently displayed in the building and copies must be sent to Council and Fire and Rescue NSW.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of the Occupation Certificate (or where applicable, relating to the part of the building, being the subject of this Consent).

Each year the Owners must send to the Council and Fire and Rescue NSW, an annual Fire Safety Statement which confirms that all the Essential Fire Safety Measures continue to perform to the original design standard.

Reason: Statutory requirement under Part 9 Division 4 & 5 of the Environmental Planning and Assessment Regulation 2000.