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Chief Executive Officer
Northern Beaches Council
725 Pittwater Road
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Our Ref: MM:09636
Your Ref: DA2019/0393,
Mod2019/0169

16 July 2019

BY EMAIL

Dear Mr Brownlee,

**Objection to DA2019/393 and Mod2019/0169
Proposed subdivision of 7 Trentwood Park Avalon Beach**

I have been engaged by Mr Inge and Mrs Elizabeth Sodahl to make this submission on their behalf.

This submission relates to the following applications which are yet to be determined by Council:

- DA2019/0393 for a Torrens title subdivision of proposed lot 2 approved in Land and Environment Court proceedings 2017/202349 into 2 lots; and
- Mod2019/0169 to modify the lot boundaries and access for the approved 3 lot subdivision of lot 1 DP 202857 in Land and Environment Court proceedings 2017/202349 (“the 2017 Court approval”).

I am also aware that 2 further development applications have submitted by the owners of 7 Trentwood Park for dwelling houses on the approved lots. This submission does not address those applications.

Mr and Mrs Sodahl own and occupy the dwelling at 43C Chisholm Avenue, Avalon, which adjoins the northern boundary of proposed lot 4 in DA2019/0393. Mr and Mrs Sodahl request Council consider the following legal matters prior to determining either DA2019/0393 or Mod2019/0169.

Conflicting and Confusing Information

The information submitted with **both applications** and placed on public exhibition contains conflicting and confusing information that does not enable a proper assessment of the differences between the proposed modifications and the 2017 Court approval.

The modifications proposed in Mod2019/0169 are not particularised. The application form describes the modification as “boundary adjustment on driveway”. The statement of environmental effects submitted with Mod2019/0169 refers to amendments as shown on the plan prepared by Gartner

Trovato plan A01(H). The only plan available for inspection on Council website in relation to Mod2019/0169 is a plan prepared by Adam Clerke surveyor reference 11713DP_4. That plan shows substantially more details than a boundary adjustment for a driveway. The plan shows a proposed 4 lot subdivision, whereas the Court approval was to create 3 lots. There also appears to be changes to boundaries between approved lots 2 and 3, the extent of which cannot be determined because the subdivision as approved is not shown on the amended plan. The proposal as shown on the plans submitted with Mod2019/0169 is in the nature of a new 4 lot subdivision rather than a modified 3 lot subdivision.

Without proper particulars and a plan showing the differences between the Court approval and the proposed modification the Sodahls cannot confidently determine the extent of additional impact on their property. More importantly, Council cannot make a proper assessment of whether the consent as modified is substantially the same development as the Court approval, which it must do under section 4.55(2) of the EP&A Act (assuming that is the path chosen by the applicant).

Without sighting a copy of the plan prepared by Gartner Trovato plan A01(H) the impacts cannot be properly understood nor can there be any confidence that the statement of environmental effects submitted with Mod2019/0169 contains a reliable assessment of the impacts of the proposed modification. The author of the statement may have assessed a different plan.

Similar issues arise with DA2019/0393. The form submitted with the application describes the proposed development as subdivision of 1 lot into 4 lots. This contradicts the statement of environmental effects submitted with DA2019/0393 which describes the proposed development as "Torrens Title Subdivision of an approved but unregistered allotment (approved Lot 2) to create an additional allotment (proposed Lot 4) and the creation of a service handle to the Trentwood Park frontage through approved Lot 1."

The statement refers to a subdivision as shown on plan S.01 prepared by Gartner Trovato Architects. There are two subdivision plans available for inspection on Council website in relation to DA2019/0393. The first is a plan prepared by Gartner Trovato described as plan A100 Rev A which shows a proposed 3 lot subdivision of the whole of lot 1 DP 202857. The other is a plan by Adam Clerke Surveyor reference 11713DP_4, showing a proposed 4 lot subdivision of the whole of lot 1 DP 202857. Neither shows a proposed two lot subdivision. Although it appears from the Clerke plan that the intention is to seek consent for subdivision of previously approved lot 2 to create proposed lots 2 and 4, the outer boundaries of proposed lots 2 and 4 do not conform with the boundary of lot 2 in the Court approval.

The arborist report accompanying DA2019/0393 does not contain a plan showing the proposed building envelope overlaid on the survey plan, which is required in order for the Sodahls to accurately identify the trees affected by the development. The report refers to trees identified on a plan contained in a previous arborist's report which was not prepared for the purpose of the current development application.

As with the modification application, without proper particulars of the proposed subdivision the Sodahls cannot make an informed submission, nor can they be satisfied that the statement of environmental effects submitted with DA2019/0393 contains a reliable assessment of the impacts of the proposed subdivision.

Legal Consequences of Multiple Applications

It is clear that the applicant has lodged DA2019/0393 as a development application rather than a modification application for the sole purpose of avoiding the test in section 4.55(3) of the EP&A Act, that the consent as modified must be substantially the same development as the development for which consent was originally granted. There is no other apparent reason why the proposed 2 lot subdivision is omitted from Mod2019/0169. The modifications that are proposed in Mod2019/0169 are designed to accommodate the proposed subdivision.

Council can and should consider the totality of the impacts of both applications together with the terms of the Court approval in its assessment of DA2019/0393 and Mod2019/0169 under section 4.15 of the EP&A Act. The assessment of DA2019/0393 cannot legally be divorced from Mod2019/0169 or the Court approval, for the following reasons.

Firstly, the Court approval is a relevant matter for consideration in the assessment of both DA2019/0393 and Mod2019/0169 under the public interest in section 4.15(1) of the EP&A Act. The Court approval, and the reasons for imposition of the strict conditions on that approval, are an important part of the history of the site. The conditions contained in the Court approval, particularly in relation to tree retention, were no doubt designed to address the significant impacts of the approved 3 lot subdivision.

It is clear from the Council assessment report that led to the refusal of DA N0530/15 that impact on trees was a significant issue. The terms of the Court approval were designed to address tree loss arising from the development by retention of the remaining trees. The further tree loss arising from DA2019/0393 combined with the tree loss from the Court approval will have a significant impact on the character of the locality and on the Sodahl's property, as explained in their separate letter of objection to DA2019/0393. In other words, the tree loss occasioned by DA2019/0393 will turn a marginally acceptable 3 lot subdivision as approved by the Court into an unacceptable 4 lot subdivision.

Secondly, the Court approval is relevant to the assessment of DA2019/0393 because if approved, DA2019/0393 will **directly conflict** with conditions 1 and 10 of the Court approval. Condition 10 requires retention of trees that will be removed within the proposed new building envelope under DA2019/0393. If DA2019/0393 is approved, compliance with the Court approval will be impossible and condition 10 will be breached by the carrying out of the approved 2 lot subdivision. Council will need to consider whether that conflict should be resolved either by refusal of DA2019/0393 or imposition of a condition under section 4.17(1)(b) of the EP&A Act requiring modification of the Court approval. The Sodahls suggest refusal is the most appropriate option given the importance placed on the retention of trees in the Court approval.

Thirdly, DA2019/0393 is relevant to the assessment of Mod2019/0169 because the proposed 2 lot subdivision is a likely impact of the proposed modification. The proposed modifications to the boundary of approved lot 2 are designed to facilitate the proposed 2 lot subdivision. An environmental impact which is a likely consequence of the development needs to be considered, even though it results from activity which is not itself the subject of the development application, for the purposes of section 4.15 of the EP&A Act (*Hoxton Park Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349). The proposed subdivision is a likely consequence of Mod2019/016.

The Sodahls request Council refuse consent to both DA2019/0393 and Mod2019/0169.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Mantei', with a small dot at the end.

Michael Mantei
Lawyer Director – Planning Law Solutions
Accredited Specialist Local Government and Planning Law