
From: Anna Williams
Sent: 23/08/2022 4:49:14 PM
To: Council Northernbeaches Mailbox; Stephanie Gelder
Cc: Brett Duell; [REDACTED]
Subject: Submission objecting to 38 The Drive Freshwater DA2022/1128
Attachments: Draft Submission 9 Lodge Lane for 38 The Drive.pdf;

CEO Northern Beaches Council

Attention Stephanie Gelder

Please find attached a submission objecting to DA2022\1128 38 The Drive Freshwater on behalf of the residents at No. 9 Lodge Lane.

Please feel free to call me to discuss if required.

Regards,

Anna Williams, Director
Blackwattle Planning
E: anna@blackwattleplanning.com.au
T: 0418622598

The CEO
 Northern Beaches Council
council@northernbeaches.nsw.gov.au

Dear Sir,

22 August 2022

RE: DA2022/1128 New Dwelling at 38 The Drive Freshwater

We are advising John and Amanda Duell, owners of 9 Lodge Lane Freshwater. Thankyou for the opportunity to respond to this matter.

Context

No. 9 Lodge Lane adjoins the subject site to the west. It supports a dwelling over two levels with an east west orientation. Lodge Lane runs north south on the ridge above Freshwater and dwellings in the vicinity enjoy panoramic and highly valued ocean views.



Figure 1: Location of No. 9 Lodge Lane immediately to the west of No. 38 The Drive Freshwater

38 The Drive is steep at its eastern end and through the middle of the site. At its western end the site plateaus and the rear part of the site provides the functional private open space for the existing 2 storey dwelling. The proposed new dwelling has located a large proportion of its bulk and scale at this upper level, to maximise its unimpeded 180 degree water views to the east, north and south.

Our objections to the proposal

We have reviewed the Development Application documentation online and have undertaken a site visit at 9 Lodge Lane to understand the impacts upon our clients immediately adjoining dwelling and rear yard. If the proposed dwelling were to be approved, loss of views from No. 9 Lodge Lane will be devastating to most of that dwelling's primary living areas, to the kitchen and dining room, and to the master bedroom.

We also hold significant concerns about the scale of the proposed dwelling, the concentration of massing at the highest and most prominent point on the site, and the subsequent inability to mitigate these impacts.

The site is considered highly sensitive given its coastal location and hillside prominence. Whilst the topography of the site is challenging, the site itself is large and wide, and there is significant scope for development of a generous dwelling which responds appropriately to the constraints of the topography whilst minimising impact upon neighbours.

In particular we find unreasonable the expansive nature of the structures proposed on the rear of the site which breach three major built form controls of the relevant planning framework and result in significant impacts on neighbours. There is every opportunity on this site to design a dwelling which avoids both the non-compliances and the impacts that arise, without compromising development potential.

We invite Council's assessing officer, and all members of the determining Panel to attend the site and inspect the impacts upon No. 9 Lodge Lane as a critical step in the assessment and decision making process.

Height of Buildings - Clause 4.3 (WLEP 2011)

The application concedes the breach of the Height of Buildings Development Standard, identifying a building height of 9.9m at the north eastern end of the ground floor. The height breach is identified on Section C-C (9.28m to top of first floor) and Section D-D (9.9m to the top of the ground Floor), reproduced below from the applicants Clause 4.6 document.



Figure 2: Extracts of Sections C-C and D-D taken from the Clause 4.6 Request for variation prepared by **Vaughan Milligan Development Consulting**.

We believe the extent of the height breach is not fully disclosed within the drawings provided in the Clause 4.6 or the plans accompanying the application. The north eastern roofline of the upper most level of the building (referred to as the first floor, or level 5) is at RL 54.2. From the detailed survey it is apparent that the ground line below the building on the northern side of the site is at approximately contour 44 or below.

As the site experiences cross fall from south to north, we believe the height of the building on its northern side has been underestimated and that the northern side of the upper most level is significantly above the height limit, and likely to be around 10.2m high (or higher) at its leading edge.

We also see that natural ground levels immediately below the sitting room of the upper most floor are at approximately RL 45.6 meaning the roof form over this area reaches 8.9m. When examined in detail we believe the first floor level to be significantly breaching the height limit across the whole width of its footprint, ranging between 5-20%. This is in addition to the applicants admission of non-compliance of up 21.4% at the ground level below.

As the request for variation does not fully reflect the extent of variation proposed by the design, Council should not rely upon the rationale provided. Representing the 8.5m height limit through a 3 dimensional overlay would allow a true representation of the height breach, which we think extends across a significant proportion of the upper level master bedroom, ensuite and sitting area.

We consider the Clause 4.6 Request for variation to not be well founded for the following reasons:

- **Height breach not identified** - The full extent of the height breach has not been identified in the Clause 4.6 request. The Clause 4.6 request identifies 2 points which are considered the maximum height above ground level, as follows:

The proposed development presents a maximum height of 10.32m at the north-eastern extremity of the roof of the Ground Floor front balcony, and a maximum height of 9.3m at the north-eastern extremity of the roof of the First Floor front balcony. The non-compliances represent variations of 1.82m or 21.4% and 0.8m or 9%, respectively.

The variation should be identified not only at points where it is at its maximum, but also by the extent of the incidence of non-compliance ie. where it is 8.6m or above.

- **Objectives of the standard not achieved** - Compliance with the development standard cannot be considered unreasonable or unnecessary because the objectives of the standard are not achieved despite the non-compliance.

In particular we dispute the applicants position that objective (b) of the height standard is achieved. Objective (b) requires development to:

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

We cannot agree with the applicant that the *'the height non-compliances are limited to the north- eastern corners of the front upper-floor balconies, and do not attribute to excessive bulk and scale'*. As outlined above, the applicants survey information indicates that the 8.5m height limit will be breached across the full width of the upper most level, including through the eastern portion of the ensuite and sitting room. This breach results in meaningful disruption of valued ocean views and we think that the upper level of the design should not be supported given this circumstance.

A genuine attempt to achieve this objective would choose to accommodate floor space at lower levels of the site. Such alternatives would not require the floor space to compromise its own view lines.

Additionally, we cannot agree that objective (c) of Clause 4.3 is achieved, which reads as follows:

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

Again, we cannot agree with the applicants position that the non-compliance is limited to the north east corners of the front decks. Examining the survey levels in the vicinity of the piers supporting the first floor sitting room and ensuite area, it is apparent that the ground lines are below RL 45.7, and therefore the structure above these levels which is at RL54.2 will be breaching the height limit. The location of the piers and the immediate ground levels surrounding these locations are shown on the below excerpt from the applicant's lower floor plan.

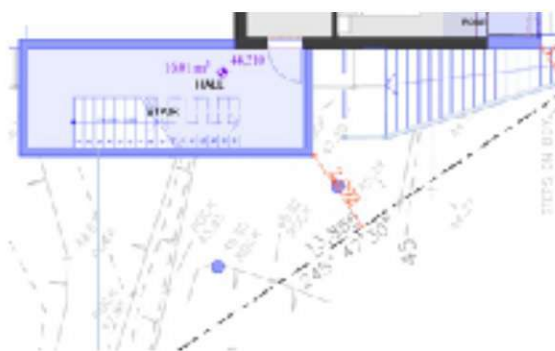


Figure 3: Ground levels below the sitting room and ensuite are below RL45.7 indicating a height breach.
Source: Excerpt from lower ground level plan **sketchArc**

In any event, it is the expansive nature of the footprint together with its excessive height which results in the clear adverse impact on the scenic quality of the headland in this location. The visual catchment of both the first and ground floor levels (both of which breach the height limit) cannot be intervened appropriately with landscaping given their excessive height. The prominence of the location coupled with the height breach results in a jarring structure in the landscape that fails to integrate appropriately with the coastal environment.

- **Sufficient environmental planning grounds not demonstrated** - We do not consider the planning grounds relied upon by the applicant to be sufficient or well founded. Each of the grounds offered by the Clause 4.6 request are addressed in their stated order below:
 - The size of the site and land available for building is generous at 985.7sqm, and options exist for achieving floor space with commensurate views at lower levels on the site without breaching the height limit.
 - The comparative assessment of the proposal with the Pittwater LEP 2014 is not a relevant consideration to this matter which must be assessed under WLEP. In anywise, the relevant Clause of Pittwater LEP is subject to separate tests which would not be met by this proposal.
 - As outlined previously, we believe the extent of non-compliance referred to does not fully reflect the actual extent of breach of the standard.
 - Given that the non-compliance extends over two of the four levels of the proposed primary dwelling, we cannot agree with the applicants statement that the majority of the dwelling is maintained well below the maximum height limit.
 - We are concerned that reliance upon the scale of surrounding dwellings that may not have been approved under WLEP 2011 is a position that should not be accepted as sufficient planning grounds to justify contravening the development standard. Such a position would defeat the purpose of the Local Environmental Plan.
 - As discussed earlier, we do not agree that the non-compliant proposal is consistent with the objectives of the standard.

Given that in our view the extent of breach is not fully identified and that objectives (b) and (c) of the Height of Buildings development standard are not achieved, Council could not conclude that compliance is unreasonable or unnecessary in the circumstances. Additionally, the planning grounds offered by the applicant appear insufficient. Subsequently, we consider that the Clause 4.6 request for variation should not be granted.

Side Boundary Envelope - Control B3 WDCP 2011

The proposed design significantly breaches the side boundary envelope control of Warringah DCP 201. The breaches have not been properly identified on the elevational diagrams. Sectional diagrams provided do not bisect the proposed design at points that identify the breaches. This is particularly the case for the side boundary envelope breaches that occur on the south eastern elevation, where the 45 degree angle above 5m above the boundary will intersect the proposal at a height of 6m.

We estimate that the elevation of the sitting room is up to 8.9m high above ground level. The side boundary envelope breach will be extensive on this elevation, and up to 2.9m in

height. The proposal cannot meet the numerical requirements and is clearly unable to meet the objectives noting the impact of additional bulk and scale presented to No. 9 Lodge Lane, which will view the leading edge of the non-compliant sitting room and entertaining area. In particular, the following objectives are clearly not met:

- *To ensure that development does not become visually dominant by virtue of its height and bulk.*

Additional and unacceptable bulk and scale is presented to No. 6 Lodge Lane as viewed from the primary living areas and master bedroom from the side boundary envelope breach. A compliant design would reduce the bulk of the proposed sitting room and entertaining areas of the upper most level by either removing that level altogether, or setting it significantly back from the south eastern boundary. Given the downward viewing angle from No. 9 Lodge Lane, this would reduce the visual dominance created by the non-compliance and reduce the loss of views.

- *To ensure that development responds to the topography of the site.*

As is clear from the upper level floor plate and southern and eastern elevations, the sitting room does not respond to the topography of the site by maintaining only a 1m setback despite a fall in the land over over 3m. The additional bulk, including expanse of roof and projecting leading edge that arises is unacceptable and unreasonable given that other options for floor space stepped lower on the site are available. Significant reductions in the scale of this area of the design should be sought.

Wall height - Control B1 of WDCP 2011

Control B1 of WDCP 2011 requires that:

Walls are not to exceed 7.2 metres from ground level (existing) to the underside of the ceiling on the uppermost floor of the building (excluding habitable areas wholly located within a roof space).

The proposal cannot comply with this requirement and again, the area of the south eastern elevation presents additional scale that impacts the views and amenity of No. 9 Lodge Lane. The objectives cannot be met by the design, as follows:

- *To minimise the visual impact of development when viewed from adjoining properties, streets, waterways and land zoned for public recreation purposes.*

The view of the expansive roof and leading edge of the upper level of the design has not been minimised as viewed from 9 Lodge Lane. Compliance with the wall height control would require this level to be reduced in size. Noting that this area of the design fails to comply with the Height of Buildings Development standard, the side boundary envelope and wall height controls in the DCP, we think it is clear that

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the visual impact has been maximised as the design seeks to maximise its floor space at the upper level.

- *To provide a reasonable sharing of views to and from public and private properties.*

Views are not shared as is observed by the analysis of the Tenacity v Warringah Planning principle elsewhere in this submission. Reasonableness has a direct correlation with the extent of compliance with planning controls, and given the numerous controls that are breached by the south eastern and north eastern elevations of the design, we cannot agree that a reasonable sharing of views has been achieved.

- *To minimise the impact of development on adjoining or nearby properties.*

This submission sets out the impacts of the wall height breach on No. 9 Lodge Lane in that the south eastern portion of the upper floor results in significant additions bulk and associated visual impact and loss of views.

- *To ensure that development responds to site topography and to discourage excavation of the natural landform.*

A breach of up to 1.5m indicates to us that the dwelling at the splayed south eastern elevation is not stepped over the 8m length of the sitting room. The size of the sitting room demonstrates no attempt to step the building as the ground levels fall away, and we do not accept that the slope of the land is therefore the reason for the breach.

Building Bulk - D9 WDCP

The DCP requires the following requirements which are not able to be met by the proposed design, as follows:

Side and rear setbacks are to be progressively increased as wall height increases.

The splayed south eastern elevation maintains a 1m setback for its entire 8m length. No attempt to set in this part of the building has been made. Appropriately increasing setbacks along this elevation would reduce the extent of bulk and associated visual impacts and view loss occurring at 9 Lodge Lane.

Large areas of continuous wall planes are to be avoided by varying building setbacks and using appropriate techniques to provide visual relief; and,

Building height and scale needs to relate to topography and site conditions.

These requirements are not met. A design that more appropriately responds to the topography would reduce the associated impacts upon No. 9 Lodge Lane. The DCP communicates this concept very clearly with the below diagram.

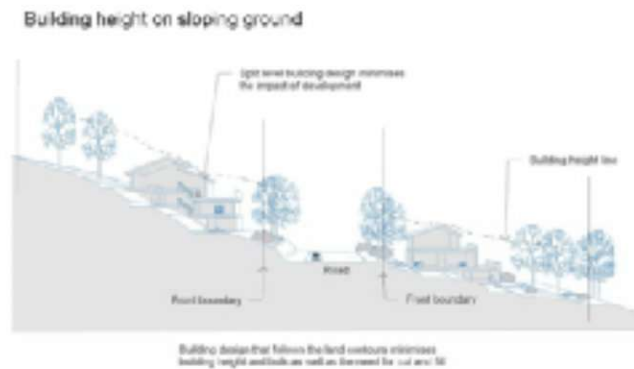


Figure 4: Excerpt from D9 Building Bulk, WDCP 2011

Views - D7 WDCP 2011

Below are photographs identifying the loss of views at 9 Lodge Lane arising from the proposed development. We ask Council to confirm that the existing height poles have been certified by a registered surveyor as accurate in their location and height relative to the proposed plans under assessment. We also request that Council make available to the community the location of the height poles and their maximum RL's on the DA tracking portal.

The DCP requires that view sharing be maintained. View sharing is a concept that is the subject of a NSW Land and Environment Court Planning Principle continued in the judgement of *Tenacity v Warringah Council*. In accordance with the practice of Northern Beaches Council, we provide the following assessment of the view impacts upon No. 9 Lodge Lane under the suggested structure of the Planning Principle.

Step 1: assessment of views to be affected.

*The **first step** is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

Primary indoor living areas at No. 9 Lodge Lane are located at the upper level of the dwelling, and are largely open plan to capture the views of the Tasman Sea throughout the dwelling. The views take in a large expanse of the ocean. Current views to the south east exist over a site under construction, however these views were not available prior to construction and will not be maintained upon construction of the newly approved

dwelling. These south east views should not be taken into account in relation to view sharing analysis.

Figure 5: Ocean views enjoyed from the primary living area of No. 9 Lodge Lane



Step 2: consider from what part of the property the views are obtained.

*The **second step** is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.*

The currently enjoyed views are obtained over the butterfly roof of the existing dwelling on 38 The Drive. Views at No. 9 Lodge Lane will be lost from the east facing primary living area, kitchen and dining rooms, and the master bedroom. The photo below shows the views available throughout the open plan living areas and kitchen of No. 9 Lodge Lane.

The views are available from both a sitting and a standing location, and it is noted that impact of the loss increases as one moves westward in the dwelling, such that standing views will be impacted throughout the majority of this level of the dwelling.



Figure 6: Views available throughout the open plan upper level of No. 9 Lodge Lane.

Step 3: assess the extent of the impact.

*The **third step** is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*

The views to be lost are obtained over the rear boundary, and not across side boundaries. These views are of a significant expanse of ocean which is highly valued and are enjoyed from the primary areas of the dwelling receiving the most use. The loss will impact upon approximately 75% of the floor space of the dwelling. Further loss will also occur from the rear yard.

Given these circumstances, the extent of the impact is considered to be severe to devastating.

Step 4: assess the reasonableness of the proposal that is causing the impact.

*The **fourth step** is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable.*

The facts of this matter are that view loss occurs as a result of non-complying built form. Primarily it is the Height of Buildings breaches at the upper most level that create the impact. This significant variation to the legislated controls is reinforced by the multiple breaches of the DCP built form controls in the same areas of the proposed dwelling.

Given the extent the non-compliance and the extent of the impacts arising, we have no difficulty in planning terms concluding that the proposal is unreasonable. Challenging topography does not account for the extent of non-compliance or impact. Clear opportunities on the site remain for floor space to be redistributed from the upper level to lower levels, where view impacts are more appropriately managed, if not avoided.

A view sharing outcome is not achieved by this proposal. We urge Council and the Local Planning Panel to reject this proposed design on this basis, noting that to mitigate the impacts to an acceptable extent will require substantial redesign.

Visual Impact Assessment by Urbane Design Group

We are concerned as to the veracity and completeness of the visual impact assessment undertaken. The rationale provided for the conclusions reached in this document appear to be flawed on a number of grounds, as follows:

- The view loss analysis as it related to No. 9 Lodge Lane has not been undertaken from an actual position inside the dwelling. Drone footage only has been utilised, and the analysis therefore does not account for the extensive nature of the view impact given the open plan and multiple viewpoints within the dwelling. The analysis also does not contemplate the sitting view, which is clearly an important aspect of the affected lounge area.
- The Visual Impact Assessment relating to No. 9 Lodge Lane relies on images and montages taken from an RL of 55.79. Being 1.8m above the living room floor level, we consider these images to be a significant understatement of the impact of the proposal, as very few people will have an eye height at 1.8m above finished floor level. We do not think that Council should rely on these images and the analysis and conclusions arising given that impacts are not properly represented in the document.
- We note the following excerpt from the commentary within the Visual Impact Assessment:

The development has been designed to comply with the requirements of the WLEP 2011 & the controls of the Warringah Development Control Plan. In certain areas, the design relies on the DCPs flexibly to allow reasonable alternative solutions to achieve the objectives of DCP standards.

With respect, this is not factually true. The conclusion reached does not appear to acknowledge the substantial breach of WLEP 2011. That the visual impact assessment has relied upon this assertion brings into question its conclusions. Similarly, we note the following additional comments:

The new proposal is partially non-compliant, relative to the Warringah DCP. However, it is not as a result of elements in these areas that the visual impact and view loss are caused, or increased.

Any considered understanding of the plans and planning framework would result in a conclusion that the view loss is occurring as a result of the leading edge and height of the upper floor level. The statement of environmental effects confirms that this is the case. We are concerned that the visual impact assessment can take this position given the photomontages that clearly show impact occurring as a result of the upper level of dwelling. We ask that Council disregard this conclusion on this basis.

Furthermore, the analysis makes the following comment:

The non-compliance would invoke stage 4 of the Tenacity ruling, requiring consideration being given to the relative skillfulness of the design and whether a more skillful design would result in a diminished visual impact. In this situation, it can be reasonably argued that this would not be the case.

Clearly the Visual Impact Assessment supporting this application analysis is in error in its application of the Planning Principle, as step 4 of the Planning Principle is in fact invoked only once a proposal is complying. The non-compliance of the proposal is not disputed by the Statement of Environmental Effects, and is obviously conceded with the inclusion of a clause 4.6 request for variation. As such, the proposed development fails the initial part of Step 4, and the further guidance provided relating to complying proposals is not applicable. The relevant Planning Principle step is reproduced below, (our emphasis added):

With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.'

We ask that Council and the determining authority disregard the conclusions reached by the Visual Impact Assessment which do not accord with the facts of the matter as outlined within the applicants own Statement of Environmental Effects and are in error in their application of the NSW Land and Environment Court Planning Principle.

Privacy - D8 WDCP 2011

Levels of privacy within No. 9 Lodge Lane will be impacted given the sight lines that will arise from the new dining patio and entertaining areas proposed. The DCP provides the following objective in relation to privacy:

To ensure the siting and design of buildings provides a high level of visual and acoustic privacy for occupants and neighbours.

We are concerned that the extensive living and entertaining areas of the proposal are oriented towards the primary living areas of No. 9 Lodge Lane. Insufficient consideration has been given to direct sight lines between these areas of neighbours and inadequate landscaping is proposed to mitigate the impact. As a result, we cannot accept that a high level of visual and acoustic privacy is achieved by the design.

Conclusions

Overall, we are concerned that the design proposed has not given adequate regard to the relevant planning framework of WLEP 2011 and WDCP 2011. In relation to the application of the DCP, Clause 4.15 3(A) requires that flexibility be applied to the application of standards, however this must not come at the expense of achieving the objects of those standards. Our submission demonstrates that the objects of the DCP controls are not met despite the non-compliance with the standards set by the DCP. It is open to the determining authority to refuse this application on the basis that the proposal cannot meet these objectives.

Flexibility with respect to the variation of the Height of Buildings Development standard is only permitted where the relevant tests under Clause 4.6 of the Act are demonstrated. We have demonstrated there are clear failures of the proposal and the rationale offered by the applicant in this regard, and the upholding of the written request and an approval of the current scheme could render a consent open to challenge.

We ask Council and the determining authority to reject this application.

Please feel free to contact us on 0418 622 598 or at anna@blackwattleplanning.com.au.

Regards,



Anna Williams,
Director

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anna@blackwattleplanning.com.au