Sent:	7/03/2022 1:30:31 PM
Subject:	Submission - Modification Application No. Mod2021/1009 [MCR-W.FID4054884]
Attachments:	65658936_1 - Email - Louise Kerr- Re_ 82-84 Bower Street, Manly _ Modification Application No. Mod2021_1009.PDF;

Dear Ms Kerr and Mr Croft

Please see the **attached** submission made in respect of Modification Application No. Mod2021/1009.

Kind Regards

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Your reference Mod2021/1009

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7 March 2022

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Dear Ms Kerr

Re: 82-84 Bower Street, Manly | Modification Application No. Mod2021/1009

1 This objection is made in relation to the abovementioned modification application submitted to Council on 1 February 2022 (**the Modification**).

2 We make this submission on behalf of Mr and Mrs Lavender (**our client**) as the owners of 86 Bower Street, Manly in relation to the development of 82-84 Bower Street, Manly (**the Property**).

Summary of Objection

3 In summary, our client strongly objects to the approval of the Modification for the following key reasons:

(a) having regard to the reasons given by the Northern Beaches Council Local Planning Panel (**Panel**) for the granting of consent to Development Application DA2020/0211 and Modification Application No.Mod2021/0317, there can be no doubt that the imposition of Condition 8 in its current form was considered critical by the Panel to the acceptability of the development;

(b) the Modification is inconsistent with the objectives of clause 3.4.2 of the Manly Development Control Plan (**MDCP**), in that the Modification:

(i) contrary to Objective 1, will directly contribute to an increase in the loss of privacy in respect of two main living areas, the kitchen, the bathroom and main bedroom for no purpose other than to expand already expansive views enjoyed from the living room and balcony area of 84 Bower Street;

(ii) contrary to Objective 2, is not proposed in response to any genuine or reasonable need to increase the Property's access to light and air (which is already generous) and does not seek to balance outlook and views from habitable rooms with the need for the preservation of privacy;

(iii) having regard to Objective 3, is not proposed for the purpose of encouraging awareness or facilitating neighbourhood security.

(c) the Statement of Environmental Effects (**SEE**) submitted in support of the Modification fails to take into account the use of the spaces where the overlooking into our client's property would occur if the Modification was approved, nor the times and frequency these spaces are being

used having regard to the planning principles concerning the protection of visual privacy established in *Meriton v Sydney City Council* [2004] NSWLEC 313 (discussed in further detail below);

(d) the SEE incorrectly characterises the concept of 'view sharing' in seeking to justify the acceptability of the Modification; and

(e) for the above reasons, approval of the Modification is not in the public interest and constitutes a misuse of section 4.55 of the EP&A Act and 'development creep'.

Development History

4 Council is no doubt aware of the history associated with the redevelopment of the Property and in particular the consistent privacy concerns held by our clients in respect of this. Despite this, Council is urged to revisit the previous submissions made by and on behalf of our client, noted at **Annexure A,** when undertaking its assessment of the Modification.

Consideration of the reasons given by the consent authority for the grant of the consent that is sought to be modified (s. 4.55(3) of the EP&A Act)

5 In accordance with section 4.55(3) of the EP&A Act, the consent authority must take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

6 The Panel's reasons for imposing Condition 8 is identified in the Consent as follows:

> *"To preserve and maintain visual privacy and amenity to the immediate adjoining property to the west at No. 86 Bower Street, Manly and to also maintain design consistency with the similar edge type screening along the adjoining dwelling."*

7 As Council noted in its Assessment Report prepared in respect of Modification Application No. Mod2021/0317:

> *"Due to the proximity of the balcony to the boundary and lack of alternative mitigation measures proposed, the planter box and screening is conditioned to extend along the full length of the balcony in order to achieve consistency with Objective 1* [of clause 3.4.2 of MDCP] *and maintain a comparable level of privacy to that afforded by condition 8. The timber screens to the balcony edge are required to be solid up to 1.5m above FFL, consistent with the design of the window screens."*

8 When a determination of Modification Application No. Mod2021/0317 was then ultimately made by the Panel, Condition 8 as proposed by Council was modified by the Panel who required a more stringent version of that condition as follows:

> *"Any subsequent construction certificate application is to incorporate the provision of a planter box and timber screens to the Ground Floor Balcony of No. 84 Bower Street, Manly in accordance with Approved Modified Plans referenced in Condition 2A of this modified consent and subject to the following amendment:*
>
> > *a. The planter box and screens are to extend the full length of the western elevation of the Ground Floor Balcony. The screen panels to the balcony shall be solid up to 1.6m above the FFL of the balcony.*
> >
> > *The planter box and screens are to be retained for the life of the development and are to be in place prior to the issue of any Occupation Certificate. The Approved Modified*

Plans shall be amended to reflect this condition and submitted to Council prior to the issue of the Construction Certificate.

Reason: To preserve and maintain visual privacy and amenity to the immediate adjoining property to the west at No. 86 Bower Street, Manly."

9 Approval of the Modification will undermine the objectives that Condition 8 seeks to achieve as it will not only enable but invite persons to look directly into our client's main living room spaces. This is so because the reduction in the length of the screening that is proposed will inevitably enable persons to stand on that unscreened portion of the western edge of the balcony where, naturally and casually, they will able to stand or sit comfortably and freely look over and into our client's main living areas (amongst other rooms and the pool area). This natural inclination would not result if the screening extends, in accordance with the current requirements of Condition 8, to the edge of the balcony as people would have to purposefully lean over the balcony edge to look back into our client's property.

10 Having regard to Figures 1 and 2 of the SEE, it is also observed that the extent of the louvered privacy screening proposed by the Modification is misleadingly presented as leaving approximately half of the balcony unscreened. In reality (as is shown on the amended plans accompanying the Modification) the distance between the dwelling and yellow line depicted in these figures is less than half the length of the balcony such that there will be a more considerable distance of unscreened space available along the western edge than they indicated for multiple persons to stand and look over and directly into our client's property should the Modification be approved.

Inconsistency with Objectives of MDCP

11 The Modification is inconsistent with the privacy and security objectives of clause 3.4.2 of the MDCP having regard to the following matters.

12 Firstly, with respect to the notation that the SEE references in support of the Modification, in our opinion the application of this note to the Modification adopted in the SEE is incorrect. The note provided at clause 3.4.2 provides as follows:

'Note: Considerations of privacy are typically balanced with other considerations such as views and solar access. The degree of privacy impact is influenced by factors including the use of the spaces where overlooking occurs, the times and frequency theses spaces are being used, expectations of occupants for privacy and their ability to control overlooking with screening devices.'

13 Having regard to this note, the SEE asserts that Condition 8 of the Consent (as modified) fails to achieve any balance because it results in"

"…absolute blinkered privacy between the subject property and the adjoining property to the west and in doing so results in severe view impacts from the principal living areas and adjacent private open space terrace area of the subject property."

14 This statement fails to acknowledge the retention of the extraordinary water views maintained with the imposition of Condition 8 in its current form, views which are enjoyed from the principal living areas and adjacent private open space terrace area of the Property. These are the exact same views that are able to be enjoyed from the living rooms and kitchens of both of the Property's adjoining dwellings, yet the proponent feels entitled to more whatever the cost. Furthermore, the reference to "absolute blinkered privacy" between the Property and our client's adjoining property is misleading as, even with the imposition of Condition 8 in its current form, residents of the Property are able to readily look straight above the 1.6m solid panels and directly into our client's property.

15 The SEE seems to infer that the Property is entitled to a greater expanse of views despite the deleterious privacy impacts this would result in for our clients and that this somehow achieves a more acceptable "balance" between the relevant privacy and view related considerations. In reaching these conclusions, we note that the SEE gives no genuine consideration to the use of the spaces where the overlooking from the Property would occur, nor the times and frequency theses spaces are being used, or expectations of occupants for privacy and their ability to control overlooking with screening devices. Rather, the SEE's main focus is on the so called 'iconic' views that the proponent will not be able to readily access from their living rooms. Irrespective of whether or not it is agreed that such a view towards Manly Beach constitutes an 'iconic view' (noting that this is akin to comparing a view of Manly Beach to the Opera House, the Harbour Bridge), any loss of this view previously enjoyed is not the product of any other development than that which was proposed by the proponent of the Modification.

16 We refer to Objective 1 of the MDCP which seeks:

> *'To minimise loss of privacy to adjacent and nearby development by:*
>
> - *appropriate design for privacy (both acoustical and visual) including screening between closely spaced buildings;*
> - *mitigating direct viewing between windows and/or outdoor living areas of adjacent buildings'*

17 The Modification seeks to strip back the design measures imposed by Condition 8 which are intended to minimise the loss of privacy resulting from the development that has been approved on the Property. Approval of the Modification will actively facilitate direct viewing from the balcony of the Property into the outdoor and main living room areas of our client's property through removal of the full extent of screening required by Condition 8.

18 We refer to Objective 2 of the MDCP that seeks to:

> *'To increase privacy without compromising access to light and air. To balance outlook and views from habitable rooms and private open space'*

19 The Proposal decreases privacy for the identified purpose of further enhancing the already breathtaking views that are able enjoyed from the Property's living room and outdoor spaces. This is despite the Property's immediate neighbours not having the benefit of such a view and there being no such entitlement to this view at the unnecessary and avoidable detriment to the privacy of the adjoining property.

20 We finally refer to Objective 3 of the MDCP which is intended to:

> *'To encourage awareness of neighbourhood security'*

21 The Modification does not encourage awareness of neighbourhood security. The sole objective of the Proposal is to increase the views already enjoyed by the Property, regardless of the consequences it will have on the privacy of our client's adjoining property. To the contrary, the Proposal arguably undermines the security of the neighbourhood by enabling a greater number of persons the ability to more readily and directly see into our client's home.

Incorrect application of 'View Sharing' principles

22 In summary, the notion of 'view sharing' is only invoked in circumstances where a property enjoys existing views and a new development is proposed that would seek to share that view by taking some of it away for its own enjoyment (per *Tenacity Consulting v Waringah [2004]* NSWLEC 140 at [25]). In this case, whilst it is recognised that the previous dwelling situated on the Property (existing prior to the

granting of the Consent) had the benefit of views from the balcony area towards Manly Beach, this is not relevant for the purpose of the approved development which is the subject of the Consent (as modified). It remains our opinion that the significant nature of the so-called '*alterations and additions*' to the former dwelling which were approved by the Consent constitutes a new development and the presence of previous impacts associated with the former development on the Property does not justify a continuation of these impacts where this new development has been proposed and approved.

23 It is also critical to note that the proponent of the Consent and Modification has not applied the notion of 'view sharing' where it is actually relevant, that is, in respect of the attached dwelling on the Property (i.e. No. 82 Bower Street) which is to have a solid wall separating it from the balcony of 84 Bower Street to the fullest extent (despite the resulting loss of views in a north-westerly direction that are associated with this which might otherwise have been enjoyed by the residents of No.82 Bower Street). Despite the resulting reduced views, the length and nature of this wall on the balcony area between 82 and 84 Bower Street was no doubt considered appropriate by the proponent in order to ensure privacy for the residents of 84 Bower Street so that residents of 82 Bower Street are not able to readily see directly into their main living room areas. Similarly, it is important to note that between 80 and 82 Bower Street, full height fixed louvres are required for the purpose of preserving the privacy of the residents of 82 Bower Street.

24 It is confounding that the proponent appears to be unwilling to afford its neighbours (our clients) the same level of privacy that it has ensured (through the design of its proposal) it will enjoy.

25 The SEE further and misleadingly states that:

> *"…the site's immediate built form context orientates all surrounding development to the north to take advantage of views and outlook with dwelling houses designed to maximise views in a northerly direction towards the Pacific Ocean and the Northern Beaches Peninsula beyond, views in a north-easterly direction, across the rear of the adjoining properties to the east, towards Fairy Bower and the surf zone at its northern point and views in a north-westerly direction, across the rear of the adjoining properties to the west, towards iconic Manly Beach and its immediate environs."*

26 Whilst it is accepted that the built form of the large majority of surrounding dwellings is orientated towards the north or north-west, what the SEE fails to acknowledge or consider are the privacy measures that have been implemented in respect of each of these dwellings nor the actual use of the living spaces that are affected by any such overlooking that may result from this.

27 By way of example, as has been emphasised in previous submissions made by and on behalf of our client, our client's property features privacy screening for the full length of the western boundary. The effect of this is that our client is unable to view Manly Beach or other views in this proximity without walking to the very edge of their balcony to look west towards this view.

Not in the Public Interest

28 The proponent is seeking to re-agitate issues which have, as a matter of substance, already been the subject of significant debate and consideration by Council and the Panel prior to the decision ultimately being made to impose Condition 8 in its current form. Where none of the circumstances which warranted the imposition of Condition 8 have changed and only 6 months have passed since the Panel made its decision in this regard, it is (understandably) incredibly distressing for our clients to find themselves yet again at risk of being exposed to a significant and unreasonable reduction in the privacy and amenity they should be entitled to enjoy having regard to all the circumstances and basic planning principles.

Deficiencies associated with current conditions

29 Rubbing salt into the wound for our client is the fact that the conditions of the Consent in their current form (as modified), including Condition 8, unfortunately fail to properly achieve the privacy objectives intended. This is because, despite the conditions, persons inside the Property are still able to look North from their kitchen and living room areas onto a key area of private open space at 86 Bower Street (i.e. directly onto our client's deck adjoining the swimming pool). Furthermore, we are instructed that the solid timber batons within each panel (solid up to 1.6m) do not impede direct vision up into our client's main living area, nor our client's bedroom and bathroom. We note that had the solid timber batons been conditioned as being required to reach 1.9m in height (as our client previously submitted in representations made to Council and the Panel), this would have effectively reduced the privacy impacts associated with the development of the Property without undermining the Property's water views or access to sunlight.

30 In these circumstances, it follows that the further degradation of Condition 8 that is proposed by the Modification is simply unacceptable.

Conclusion

31 Condition 8 of the Consent (as modified) is required to protect our client's visual privacy and amenity. The Modification will undermine the core objective of this condition based on what is a misguided application of the Court's view sharing principles. The application prepared in support of the Modification suggests that where an applicant may be able to secure access to desirable views in connection with a proposed development (or even more desirable views as is the case here) that they should be entitled to do so, regardless of the privacy impacts this poses to adjoining neighbours. This approach is entirely at odds with the widely accepted planning principles adopted by the NSW Land and Environment Court and acceptance of this by the consent authority would establish an incredibly undesirable precedent.

32 If you have any queries regarding this submission, please do not hesitate to contact me on (02) 8241 5610.

Yours sincerely

Patrick Holland
Partner

Annexure A

Summary of recent development history of the Property:

(i) Development Application No. DA168/2017

- Sought approval for alterations and additions to the existing dual occupancy.
- See our client's submission dated 21 August 2017
- See our client's submission dated 23 August 2017
- On 14 November 2017 Council determined to approve DA168/2017.

(ii) Development Application No. DA2020/0211 (the Consent) and Building Information Certification Application No. 2020/0048

- Sought retrospective approval for the reconstruction of walls/structures that were to be retained in accordance with DA168/2017 but which were unlawfully demolished, and for the use of walls/structures that were to be retained but which were also demolished and rebuilt.
- See our client's submission dated 25 March 2020
- See our client's submission dated 25 March 2020
- On 15 September 2020, the Panel determined to approve DA2020/0211.

  Relevantly, the Consent was granted subject to the imposition of conditions, including two carefully constructed conditions of consent, being Conditions No.7 and No. 8 which reflected the Panel's recognition of the need to preserve and protect the visual privacy and amenity of our client's property.
- On 25 September 2020, Council determined to issue the Building Information Certificate in respect of the unauthorised reconstruction of existing walls and floors.

(iii) Modification Application No. Mod2021/0317

- Sought approval for he reconstruction of walls/structures that were to be retained and have been demolished, and for the use of walls/structures that were to be retained, but had been demolished and rebuilt.
- See correspondence from Panel member, Mr Paul Vergotis, to Council dated 17 February 2021
- See our client's submission dated 24 June 2021 that also encloses all the abovementioned previous submissions made by our client (**Annexure B**)
- Approval was granted by the Panel to this modification subject to the modification of Conditions No.7 and 8.

Annexure B

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Our reference	PSH:174443-00002
Your reference	Mod2021/0317

Lawyers | McCullough Robertson

24 June 2021

Anna Williams
Manager Development Assessment
Northern Beaches Council
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Dee Why NSW 2099

Email anna.williams@northernbeaches.nsw.gov.au

Dear Ms Williams

Re: 82-84 Bower Street, Manly | Modification Application No. Mod2021/0317

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1 This objection is made in respect of the abovementioned modification application submitted to Council on 3 June 2021 (**the Modification**).

2 We make this submission on behalf of Mr and Mrs Lavender (**our client**) as the owners of 86 Bower Street, Manly in relation to the development of 82-84 Bower Street, Manly (**the Property**).

Summary of Objection

3 In summary, our client objects to the approval of the Modification for the following key reasons:

(a) the Modification is not of minimal environmental impact. Such satisfaction is a precondition for the consent authority's exercise of the power to modify the consent pursuant to section 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**). Accordingly, that power cannot be exercised and the Modification must be refused.

(b) having regard to the reasons given by the Northern Beaches Council Local Planning Panel (**Panel**) for the granting of consent to DA2020/0211 (**the Consent**) to which the Modification relates, it is clear that the Consent was granted subject to essential conditions of consent which were imposed to ensure the protection of our client's visual privacy and amenity. Without the imposition of these conditions in their current form, being Conditions No. 7 and No. 8 (**the Conditions**), the Consent is unlikely to have otherwise been granted in its current form.

(c) there is no reasonable basis to justify depriving our client of their privacy through enabling a situation where overlooking from the Property directly into their living room, kitchen, lounge room, main bedroom, bathroom and private open space (swimming pool) areas can occur. Such an outcome is particularly objectionable in circumstances where the primary motivation for the Modification is to increase existing and already expansive water views which occupants of the Property already benefit from under the Consent. Taking into account the severity of the view obstruction that is alleged by the Applicant as a result of the Conditions and the planning principle concerning the protection of visual privacy published in *Meriton v Sydney City Council* [2004] NSWLEC 313, it is plain that the important privacy role that the screening imposed by the Conditions plays takes precedent over the Applicant's desire to ruthlessly capitalise on the Modification to secure a greater expanse of water views.

(d) A further discretionary consideration that must also weigh strongly against the granting of approval for the Modification is the conduct of the Applicant in accepting the full benefit of the

Consent and now seeking to be relieved of the minor burden created by the imposition of Conditions which serve the important purpose of ensuring the protection our client's visual privacy and amenity.

Background

4 The consent authority responsible for assessing and determining the Modification should be aware of the history associated with the development of the Site overtime and the exhaustive efforts to which our client has gone to preserve their visual privacy and amenity. We therefore provide the following outline of the relevant history associated with the development of the Property in recent years and our client's involvement and experience with the planning process since 2017. So as to avoid duplication, we note that some attachments in the submissions referenced below have been excluded from this submission in the relevant annexures.

- **Development Application No. DA168/2017**

  - Sought approval for alterations and additions to the existing dual occupancy.

  - See our client's submission dated 21 August 2017 [**Annexure A**]

  - See our client's submission dated 23 August 2017 [**Annexure B**]

  - Amongst other matters, our client's submissions objected to the approval of DA168/2017 due to its serious breaches to development standards established under the *Manly Local Environmental Plan* 2013 (**MLEP 2013**). The development proposed significant non-compliances with the maximum FSR and height of buildings controls, inadequate setbacks and, relevantly for the purposes of this submission, the creation of increased overlooking opportunities which were the result of poor design and the excessive bulk and scale of the proposed building.

  - On 14 November 2017, to our client's dismay and detriment, Council determined to approve DA168/2017. This approval was granted despite the serious visual privacy impacts and associated loss of amenity our client's property would suffer, which were not addressed in the Applicant's proposal or through the imposition of conditions of consent.

- **Development Application No. DA2020/0211 (the Consent) and Building Information Certification Application No. 2020/0048**

  - Sought retrospective approval for the reconstruction of walls/structures that were to be retained in accordance with DA168/2017 but which were unlawfully demolished, and for the use of walls/structures that were to be retained but which were also demolished and rebuilt.

  - See our client's submission dated 25 March 2020 [**Annexure C**]

  - See our client's submission dated 25 August 2020 [**Annexure D**]

  - Once again, in these submissions our client raised its serious concerns in relation to the visual privacy and amenity impacts which remained unresolved by the development proposed by the Consent. Our client noted that its key concerns were that the development would result in considerable privacy issues through enabling overlooking – both north west onto our client's pool deck and private open space area, and also south west directly into our client's main living room areas, including the kitchen, lounge room, bathroom and bedroom.

  - On 15 September 2020, the Northern Beaches Local Planning Panel determined to approve DA2020/0211. Importantly however, the Consent was granted subject to the imposition of conditions, including two carefully constructed conditions of consent, being conditions No.7

and No. 8 which reflected the Panel's recognition of the need to preserve and protect the visual privacy and amenity of our client's property.

- On 25 September 2020, Council determined to issue the Building Information Certificate in respect of the unauthorised reconstruction of existing walls and floors.

More than minimal environmental impact

5 The Modification is not of minimal environmental impact.

6 The exercise of the power in section 4.55(1A) requires the consent authority to first be satisfied of a number of pre-conditions. The first precondition is section 4.55(1A)(a), that "*the proposed modification is of minimal environmental impact*", and the second is section 4.55(1A)(b), that "*the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted*".

7 The Statement of Environmental Effects (**SEE**) which accompanies the Modification fails to adequately consider and establish that the Modification involves only minimal environmental impact. The SEE fails to acknowledge that the adverse privacy impact of the Modification constitutes an environmental impact that is more than 'minor'. There is no Visual Impact Assessment which accompanies the Modification which would otherwise enable the consent authority to properly understand the visual privacy impacts. Rather, much of the SEE is largely preoccupied by an unhelpful focus on the consistent application of Council's Development Control Plan (**DCP**) controls. This exercise is of no relevance or assistance to the consent authority's ability to determine whether the Modification is of minimal environmental impact and serves as an unhelpful distraction from the relevant threshold matters that must be satisfied before the consent authority's jurisdiction to determine the Modification can be enlivened.

8 In *Dravin Pty Ltd v Blacktown City Council* [2017] NSWLEC 38 at [57], it was determined that the task required by section 4.55(1A)(a) of the EP&A Act demands a comparative assessment of the environmental impacts of the development as originally approved and the development as modified. This is a task requiring comparative assessment and is not to be done in a "sterile vacuum" by comparing the bare terms of the consent as originally granted and the consent as modified. Rather, it is to involve an appreciation, qualitative as well as quantitative, of the developments and the environmental impacts of those developments. When such a comparative assessment is undertaken, it is clear that the Modification will result in a significant and unacceptable loss of privacy to the main living room and private open space areas of our client's property.

9 The SEE misleadingly suggests at page 9 that the purported inconsistent application of Council's DCP controls in the locality serves as a legitimate reason for the consent authority to disregard the privacy impacts that would result from approval of the Modification. This is an ill-founded proposition to which the consent authority should give no weight. The test provided by section 4.55(1A) of the EP&A Act requires the consent authority to be satisfied that the Modification is of minimal environmental impact. In the circumstances the consistency of Council's application of the DCP controls is irrelevant and remains so until this requirement has been met.

10 For the same reasons noted above, the SEE's focus on the reasonableness of the imposition of Conditions No.7 and No.8 is also irrelevant where the Applicant has failed to demonstrate that the Modification is of minimal environmental impact. Notwithstanding this and those statements made on pages 13-14 of the SEE, for completeness we confirm that there can be no doubt that the Conditions were validly imposed pursuant to section 4.17(1) of the EP&A Act. This is on the basis that the Conditions directly relate to matters referred to in sections 4.15(1) of the EP&A Act which are of relevance to the development that was the subject of the Consent. For example, the Conditions seek to:

- achieve compliance with the objective of clause 3.4.2 (Privacy and Security) of the Manly DCP, that is, to minimise the loss of privacy through appropriate screening design given the non-compliant side setback that exists between the Property and our client's property to mitigate

direct overlooking and viewing between windows and outdoor living areas of adjacent buildings (s 4.15(1)(iii));

- address the likely impacts visual privacy and amenity impacts of the development, which includes environmental impacts on both the natural and built environments (s 4.15(1)(b));
- respond to multiple submissions made in accordance with the EP&A Act and the regulations (s 4.15(1)(d)); and
- have regard to the public interest (s 4.15(1)(e)).

11 Further to the above, section 4.17(2) of the EP&A Act confirms that a consent may be granted subject to a condition that a specified aspect of the development that is ancillary to the core purpose of the development is to be carried out to the satisfaction, determined in accordance with the regulations, of the consent authority or a person specified by the consent authority. It follows that, regardless of whether the development application documentation that was submitted in respect of the Consent endeavoured to strategically exclude this component of the development, the balconies and terraces are an ancillary component of the core residential purpose of the development to which the Consent relates.

Panel's granting of approval subject to imposition of specific conditions

12 Upon reaching the satisfaction of these two pre-conditions mentioned above, section 4.55(1A)(3) then provides:

> "*In determining an application for modification of a consent under this section, 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 consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified****."*

13 The Panel's reasons for imposing the conditions, which form part of the reasons for the granting of consent for DA2020/0211 are clearly set out in the Consent as follows:

> *"To preserve and maintain visual privacy and amenity to the immediate adjoining property to the west at No. 86 Bower Street, Manly."* (Condition 7)
>
> *"To preserve and maintain visual privacy and amenity to the immediate adjoining property to the west at No. 86 Bower Street, Manly and to also maintain design consistency with the similar edge type screening along the adjoining dwelling."* (Condition 8)

14 In relation to Condition 8, there can be no doubt that the Panel's intention for imposing this condition was to "*provide a privacy device for the full length of the balcony to the western (seaward) extremity so the indoor and outdoor use was screened*." This is confirmed by the email correspondence from Panel member, Mr Paul Vergotis dated 17 February 2021 [see **Annexure E**] and is consistent with the correspondence our client received from Council dated 19 October 2020 [see **Annexure F**].

15 Noting that there has been no change to the circumstances or context to which approval of the Consent was granted, it must be assumed that the Panel's reasons for imposing the Conditions remain unchanged and as important as they were when originally imposed. It follows that there is no sound explanation that can be provided by the Applicant which could justify the alteration or removal of the Conditions.

Prioritising preservation of privacy over enjoyment of greater range of views

16 In considering the reasonableness of the Conditions, we urge the consent authority to have regard to the important planning principle concerning the protection of visual privacy published by the NSW Land and Environment Court (**Court**) in *Meriton v Sydney City Council* [2004] NSWLEC 313. As was explained by then Senior Commissioner Roseth at [46]:

- *"**The use of a space determines the importance of its privacy**. Within a dwelling, the privacy of living areas, including kitchens, is more important than that of bedrooms. Conversely, **overlooking from a living area is more objectionable than overlooking from a bedroom where people tend to spend less waking time**.*
- ***Overlooking of neighbours that arises out of poor design is not acceptable**. A poor design is demonstrated where an alternative design, that provides the same amenity to the applicant at no additional cost, has a reduced impact on privacy.*
- *Where the whole or most of a private open space cannot be protected from overlooking, the part adjoining the living area of a dwelling should be given the highest level of protection.*
- ***Apart from adequate separation**, the most effective way to protect privacy is by the skewed arrangement of windows and th**e use of devices such as fixed louvres,** high and/or deep sills and planter boxes. The use of obscure glass and **privacy screens, while sometimes being the only solution,** is less desirable.*
- ***Landscaping should not be relied on** as the sole protection against overlooking. While existing dense vegetation within a development is valuable, planting proposed in a landscaping plan should be given little weight.*
- *In areas undergoing change, **the impact on what is likely to be built on adjoining sites, as well as the existing development, should be considered**."*

17 If the Modification was approved, overlooking into our client's property will be readily achievable. Future occupants of the Property will be able to view all the primary living areas of our client's home, including the ensuite bathroom, lounge room and main bedroom (on the second storey), in addition to the kitchen, dining room, private open space (including the pool deck), main living and dining room (on the first storey). These rooms could be observed not only from the Property's balcony, but also from their kitchen and living areas. The photographs behind **Annexure G** provide an indication of the direct views into our client's kitchen and living room areas that could be observed if the Conditions were not imposed.

18 We have also observed that the architectural plans which accompany the Modification appear to fail to comply with the Conditions. The Conditions specify that:

> *"The 'Ground & Level 1 Revision B' plan and 'Elevations Revision B' plan are conditionally amended so that any subsequent construction certificate application is to indicate that the West Elevation Ground Floor windows accessible from the kitchen, dining and living areas of No. 84 Bower Street, Manly are fitted with external screens which shall have vertical angled fins that cover the windows. The individual vertical fins shall have a width of 200mm and be positioned top to bottom at an angle of 20 degrees orientated to the north with 50mm overlaps **so as there can be no vision and overlooking onto the adjoining property to the west No. 86 Bower Street, Manly**"*

19 Based on our review of the architectural plans, including in particular the screening design depicted on Sheet No. 15_117_ S4.55-A-202 of the Perspectives and Sheet 15_117_S4.55-A-201 of the Master Plan set prepared by Smith & Tzannes Architects, the timber privacy screens depicted are entirely inconsistent with the specific design requirements and objectives described in the Conditions. We note

that these plans feature notable gaps within each panel and the panels themselves are not effectively overlapping. As a result of this alternative design that is depicted in the Modification plans, future occupants of the dwelling would be able to see clearly through and into our client's property from both their living room and balcony areas. It is important to note that the Conditions were imposed not only to prevent overlooking from the balcony area, but also from the internal living area windows. The Modification's proposed removal of the vertical louvres on the balcony area and the reduction in the scale of the privacy screens required in relation the internal living area windows would completely undermine their effectiveness. Any non-compliances in the Applicant's plans which conflict with the specific design requirements and objectives set out by the Conditions must be addressed prior to the issuing of an occupation certificate.

20 The comment in the SEE (on page 14) which suggests that our client should endeavour to independently "*ameliorate claimed privacy impacts*" is evidence of the Applicant's blatant disregard for our client's concerns, the legitimacy of which has been supported by the Assessment Report that Council submitted to the Panel in respect of the Consent and by the Panel through their decision to impose the Conditions. Similarly, the relevance of the SEE's reference to the existence of the small sailcloth that was in place in our client's private open space area is highly questionable. It would be obvious to most that the sailcloth depicted in photographs provided in the SEE provided no privacy screening to our client's internal living areas and served only to offer a small area of shade for the pool deck area.

21 The Modification's proposal to include 'potted privacy planting to the balcony edge' instead of extending the required screening to the full extent of the western edge of the external balcony is unacceptable Equally, the proposed changes to the screening design for the windows in the living room areas cannot be supported. The Conditions were imposed to ensure there could be no vision and overlooking into our client's property from either the Property's balcony or living room areas and the proposed design changes to the louvres and screening required by the Conditions (including the planter box), fails to achieve this objective. In relation to the proposed planter box, having regard to the abovementioned planning principle espoused in *Meriton v Sydney City Council* [2004] NSWLEC 313, it is submitted that whilst in some contexts a planter box may be a suitable means of protecting privacy, such a proposal is not suitable in the present case. Not only is the viability of any planting placed in the box highly questionable given the strong prevailing winds affecting the balcony area, but the effectiveness of the planter box's ability to prevent overlooking into our client's property relies heavily on the occupants of the Property proactively attending to the plant's maintenance and not shifting or removing the planter box in the future. The ability to enforce the plant's maintenance to ensure it has adequate growth to obscure vision into our client's property (to the very limited extent in which it may be capable) is also problematic. In the circumstances, the nature of the screening required by the Conditions is the only solution which will adequately ensure the preservation of our client's visual privacy and amenity.

22 As was held by the Court in *Super Studio v Waverley* [2004] NSWLEC 91 at [5], the acceptability of an impact depends not only on the extent of the impact but also on reasonableness of, and necessity for, the development that causes it. In the present circumstances, where despite the imposition of the Conditions future occupants of the Property will retain the benefit of the same expansive ocean views that all properties on this side of Bower Street enjoy, in addition to views to the west when they stand on the edge of the deck (towards the southern end of Manly Beach), there is no sound reason that could justify the removal or amendment of the Conditions, particularly on grounds of necessity or unreasonableness.

23 It should be noted that our client's property faces the same minor view limitations which confront the Property as a result of the Conditions. This is because our client's own building has been designed to preserve the visual privacy of their immediate neighbour at 98 Bowers Street, Manly. In exactly the same position as our client's own deck, there is a solid brick wall that has been erected which ensures protection of the privacy of our client's neighbours on that side. Similarly, we note that the Applicant's dwelling on the Property at 82 Bower Street has been conditioned to ensure privacy screening has been imposed. Condition 8 of the Consent specifically refers to this fact where it states one of the reasons for its imposition is to "*maintain design consistency with the similar edge type screening along the adjoining dwelling*". It is unacceptable that the Applicant clearly intends to ensure the privacy and amenity of its

own dwellings on the Property, yet is unwilling to provide its neighbour at 86 Bower Street the same level protection.

Taking the full benefit of the Consent without accepting minor burden

24 Approval of the Modification is not in the public interest, having regard to all the circumstances which had lead to the granting of the Consent.

25 After securing the benefit of the Consent and carrying out works in connection with this, the Applicant now seeks to rid itself of the minor burden that the Conditions impose. The Modification does not relate to any unforeseeable circumstances which have emerged following the issuing of the Consent or circumstances where compliance with the Conditions are no longer capable of being achieved. Nor does the Modification respond to changes in well established development standards, controls and planning principles.

26 We refer to page 37 of the SEE which states that the Modification will "*reduce the perceived bulk of the building when viewed from the public waterway along the ocean foreshow. This will be consistent with developments in the locality*". Noting that the Applicant applied for and Council determined to approve DA168/2017 and the Consent notwithstanding the egregious breaches to Council's FSR, height of buildings standards and setback controls, all of which the Applicant has benefited from, the supposed attempt by the Applicant to reduce the bulk and scale of the building would be futile at this point in time, especially when it now comes at the cost of our client's visual privacy and amenity. Approval of the Modification would ultimately have an imperceptible impact on the bulk and scale of the building.

Conclusion

27 The only equitable outcome that the Modification warrants is a determination by way of refusal. Our client trusts that the consent authority will ensure the preservation of its visual privacy and amenity and that the Conditions imposed by the Panel will remain unchanged. Further, our client expects that strict compliance with the Conditions will be appropriately monitored and enforced by Council if and as required.

28 Noting that a final occupation certificate cannot be issued for the Property unless and until the preconditions to the issuing of the certificate have been complied with, Council is urged to ensure it takes all reasonable steps within its power to ensure the Property remains unoccupied until full compliance with the Conditions has been demonstrated. In this regard, we understand that Council is taking proactive steps to liaise with the Certifying Authority in an effort to ensure the Conditions are interpreted and applied correctly.

29 If you have any queries regarding this submission, please do not hesitate to contact me on (02) 8241 5610.

Yours sincerely

Patrick Holland
Partner

62553850v1 | 23 June 2021

ANNEXURE A

TOWN PLANNERS
Suite 2301, Quattro Building 2
Level 3, 4 Daydream Street
WARRIEWOOD NSW 2102

Turnbull
PLANNING INTERNATIONAL PTY LIMITED

21 August 2017

Chief Executive Officer
Northern Beaches Council
1 Belgrave Street
MANLY NSW 1655

Dear Chief Executive Officer,

DEVELOPMENT APPLICATION NO DA168/07
PROPERTY: 82-84 BOWER STREET MANLY
PROPOSED ALTERATIONS AND ADDITIONS TO THE EXISTING DWELLINGS

We are consultant town planners and act on behalf of Tess and Wil Lavender, who reside at No 86 Bower Street, Manly ('our clients' property').

1.0 BACKGROUND AND INTRODUCTION

Our clients' property, which was once owned by the former NSW Premier Sir Robert Askin, is the site of an iconic oceanfront residence forged into the cliffs of Fairy Bower. The property is right next door to the property known as Nos 82-84 Bower Street (the 'subject property'), looks north-east across a marine sanctuary, and has magnificent beach and coastal views.

Council is currently considering Development Application No DA168/17 (the 'Development Application') in respect of the subject property which seeks development consent for alterations and additions to the existing dwellings situated on the land (the 'proposed development').

This submission constitutes an objection to the Development Application as lodged.

2.0 SITE LOCATION AND DESCRIPTION

The subject property is located on the northern side of Bower Street and has a north easterly aspect towards the Pacific Ocean (Cabbage Tree Bay) and Manly Beach.

The subject property is a long rectangular shaped parcel of land with a dual street frontage, facing Bower Street which lies to the south and Marine Parade (pedestrian access only) to the north.

Situated on the subject property is a pair of semi-detached dwellings. In 2016 Council granted development consent for alterations and additions to the semi-detached dwelling on No 82 Bower Street (refer Development Application No 34/2016), including new upper level internal reconfiguration and new roof, reconstruction of the existing ground floor entry, partial demolition of the rear of the dwelling, new plunge pool, terrace, new double garage and landscaping.

The locality in which the subject property is situated can best be described as a dormitory area, with a somewhat green leafy character. Manly is a diverse residential neighbourhood where smaller shops and community facilities cater for local residents as well as tourists. The precinct contains dramatic topography, with attractive tree lined streetscapes and these elements combined with the eclectic scale and style of the predominantly well-presented dwellings, contribute to the high aesthetic quality of the neighbourhood. Many properties on the northern side of Bower Street have 'dual access', with vehicle access provided from Bower Street and pedestrian access provided from Marine Parade.

The residential allotment pattern and orientation in the immediate vicinity comprises long lots of sloping land running in a south-north direction giving rise to significant potential for environmental impacts as between neighbours.

3.0 THE DEVELOPMENT PROPOSAL

The Development Application proposes alterations and additions to the existing dwellings on the subject property. In general terms, the development proposal involves the demolition of existing salient elements on the northern facade, a new terrace and plunge pool on No 82 Bower Street, internal reconfiguration and enlargement of floor areas, the installation of lifts to both dwellings, a new garage structure on No 82 Bower Street, and landscaping and privacy screens.

4.0 NATURE OF SUBMISSION

Having considered the subject property and its surrounds and the details of the Development Application currently before Council, it is our view that the proposal, in its present form, does not warrant support and we are of the view that amendments should be made prior to Council determining the application. As mentioned above, this submission constitutes an objection to the Development Application as lodged.

This submission details the various ways the proposal lacks finesse and reasonable consideration for the amenity of surrounding properties, particularly our client's property.

The objection is based on various grounds detailed in the following paragraphs.

5.0 STATUTORY AND MDCP PROVISIONS

The relevantly applicable local statutory environmental planning instrument is *Manly Local Environmental Plan 2013* ('MLEP'). The subject property is zoned E3 Environmental Management under MLEP.

The erection of a dwelling house is permissible with development consent in the subject zone, subject to the discretion of Council and based on a merit-based assessment having regard to the matters for consideration set out in section 79C of the *Environmental Planning and Assessment Act 1979* (NSW) (the 'EPA Act'), the relevantly applicable development controls and zone objectives.

By virtue of MLEP, the maximum permissible height of a building that may be erected on the subject property is 8.5m and the maximum permissible floor space ratio (FSR) of any such building is 0.45:1.

The proposal results in non-compliances with **both** statutory development standards and the provided Clause 4.6 Variation Request does not include adequate justification for such significant departures from the standards.

The E3 zone under MLEP is a zone in which any development must respond sensitively to environmental constraints including as regards ecological and aesthetic issues. Such is not the case in relation to the current proposal as is shown in the paragraphs following. Our opinion is assertion is exemplified by the fact that the proposal is not consistent with relevant E3 zone objectives as regards permitting only 'low impact residential uses'…. 'to ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses'.

In this case, the proposed built form is of a scale that is incompatible with dwellings in the locality. The proposal seeks to provide built elements outside of the relevant planning controls (see below) and will not provide an appropriate or indeed desirable planning outcome.

The proposed development will, by incorporating the additional floor space, height and reduction in planting cause unsatisfactory building bulk for a significant portion of the site abutting both the eastern and western

boundaries. This would render the development inconsistent with the zone objectives and therefore inappropriate at this most fundamental level.

The proposed development will result in numerous non-compliances with the relevantly applicable planning controls. Details of the non-compliances are set out and detailed in the section below.

The subject property is within a Foreshore Scenic Protection Area. That fact, in and of itself, raises additional concerns in terms of the nature and scale of the proposed purported 'alterations and additions', by reason of the fact that, for all intents and purposes, the so-called alterations and additions are tantamount to a *demolition* of the existing structure and its *replacement* by a new building which, we respectfully submit, needs to be environmentally assessed as such. That matter is discussed in greater detail below.

The proposed development includes non-compliances with the MLEP and the subordinate controls. Details of those non-compliances are set out and discussed below.

Scenic quality and architectural character

The MDCP states that development should 'compliment the predominant building form, distinct building character … and architectural style in the locality'. Whilst the development in this area has no one clear style or character, most dwellings on the southern side of Bower Street are two storeys in height, have a pitched roof form, and are well setback from the street frontage. The same cannot be said for the subject application which proposes a level roof, an increased built upon area, non-compliances with FSR and height controls as well as built elements encroaching into the front setback area (Marine Parade).

In our opinion, the proposed development would not only exacerbate the lack of 'architectural fit' that the building presently enjoys, but would lengthen and add bulk to the building, resulting in an increase in the oppressive nature of the eastern and western facades towards the north of the property.

The statement of environmental effects lodged as part of the Development Application package states that 'the proposed alterations and additions are of a contemporary appearance, with an emphasis on horizontal elements, matching the evolving architectural character and language of the adjacent attached dwelling'. We disagree with this assertion. The adjoining built form is integrated into the land form with hipped roofing elements and terraced areas to soften the built form impact as regards this highly environmentally sensitive location.

Height of buildings

The development proposal does not comply with a fundamental development standard of MLEP, this being floor space ratio.

Clause 4.1.2.2 of the MDCP provides that a maximum of two storeys is permitted in terms of development on this site. The subject proposal is for a three storey dwelling house. There is a variation in the DCP to allow for an 'understorey'. The MDCP also provides that a 'storey' must satisfy the meaning of 'basements' in the MLEP (Clause 4.1.2.2(c)(ii)). The MLEP defines a basement as 'the space of a building where the floor level for that space is predominantly below ground level (existing) and where the floor level of the storey immediately above is less than 1 metre above ground level (existing)'.

The 'lower ground level' of the development proposal does not fall within the definition of 'basement' within the meaning of MLEP. Furthermore, there are no significant physical constraints in respect of this site to warrant an exception to the provision.

The height of buildings control works in conjunction with the MLEP provisions to minimise bulk and scale of buildings and consequent overshadowing and privacy impacts. Any non-compliance with this control has a direct impact on the neighbouring residence to the west of the property resulting in a feeling of oppression when viewed from these dwellings. Another consequence is that aural and visual privacy impacts will occur as discussed in detail below.

In terms of height, the excessive box-like design of the building would tower over our clients' property and dominate the scenic character of the sensitive locality.

Floor space ratio

The development proposal also does not comply with another fundamental development standard of MLEP, being floor space ratio. The cumulative impact of the non-compliances with the height of buildings control and the floor space ratio control would result in excessive bulk and scale of the two dwellings.

Insofar as the proposed FSR for the dwellings is concerned, the submitted clause 4.6 MLEP variation request states that the proposed FSR is to be 0.55:1 whereas the submitted plans clearly indicate that the proposed FSR is 0.66:1. We question the legal ability of Council to consider the clause 4.6 variation request when an incorrect FSR appears to have been stated.

Despite this error, the Development Application goes on to state that the proposal will include architecture which will match the evolving architectural character of the adjoining dwellings. This is a misleading statement and is incorrect. The proposal will result in a significantly large and bulky building set forward from our clients' dwelling house. The proposed development will result in the creation of a building that will dominate the natural environment and will not contribute in a positive manner to the character and built form of the neighbourhood as has been asserted to be the case in the clause 4.6 variation request.

6.0 'ALTERATIONS AND ADDITIONS' TANTAMOUNT TO DEMOLITION

The Development Application purports to describe the development proposal as 'alterations and additions'. With respect, such a description of the proposed development is altogether misleading and quite inappropriate in light of the planning principle reformulated and promulgated in *Coorey v Municipality of Hunters Hill* [2013] NSWLEC 1187. In *Coorey* Senior Commissioner Moore and Acting Commissioner Sullivan replaced the planning principle in *Edgar Allen Planning Pty Limited v Woollahra Municipal Council* [2006] NSWLEC 790; (2006) 150 LGERA 1 with a new principle for determining if a development application should be described as being for additions and alterations rather than a new development.

The planning principle in *Edgar Allen Planning* is a prescriptive one and is in the following terms:

> 'A Development Application to alter and add to a building will be taken to be that relating to a new building where more than half of the existing external fabric of the building is demolished. The area of the existing external fabric is taken to be the surface area of all the existing external walls, the roof measuring plan and the area of the last habitable floor'.

The principle is often important when looking to the applicability of planning controls, particularly those in DCPs. An oft-quoted example is where some walls are left due to their existing position being in breach of the increased side, front or rear setback controls for a new dwelling but that would not apply if the proposal was for alterations and additions. In these circumstances the existing quantitative principle would classify the development as a new building.

In *Coorey* Moore SC and Sullivan AC described (at [45]-[47]) planning principles as follows:

> 45 The Land and Environment Court's website describes planning principles as being statements of 'a desirable outcome from a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making, a

> planning decision'. The first planning principle was published in 2003 and there have been over 40 principles published since that time.
>
> 46 Planning principles fall into two distinct classes. The first class, being the majority of the planning principles published to date, are those that are process related (in that they set out what matters are appropriate to be considered in undertaking an assessment of and reaching a decision about a particular planning concern). The minority of the planning principles are those that are prescriptive (in that they attempt to define what should be the outcome of a reasoning process concerning a particular planning concern).
>
> 47 In recent years, the Commissioners of the Court (who collegially develop planning principles) have ceased to adopt any further prescriptive planning principles.

However, as the Court pointed out in *Coorey*, the quantitative purely mathematical approach promulgated in *Edgar Allan Planning* 'ignores the fact that the nature of the analysis required depends on the reason why the enquiry is being made' (at [53]). Moore SC and Sullivan AC went on to say (at [54]-[55]):

> 54 Whether something should be regarded as alterations or additions to a heritage item engages different considerations when compared to an enquiry, for example, as to whether particular controls defining a building envelope may be engaged or not by a development proposal. The purely mathematically derived approach in *Edgar Allan Planning* fails to engage with the fundamental preliminary question as to the purpose for which the enquiry is being made.
>
> 55 As a consequence, it is no longer appropriate to set a prescriptive basis for determining whether approval is being sought for additions and/or alterations or if it is an application for an entirely new development. As with solar amenity, strict mathematical formulae are not an appropriate basis for such an assessment. As a further consequence, the planning principle published in *Edgar Allan Planning* should be set aside and the planning principle set out below should be adopted in its place.

The planning principle articulated by the Court in *Coorey* is in the following terms:

> 56 The first question to be considered is 'what is the purpose for determining whether this application should be characterised as being for additions and/or alterations to an existing structure rather than an application for a new structure?' The answer to this fundamental question will frame the approach to be undertaken to the analytic framework set out below.
>
> 57 In determining whether an application is appropriate to be regarded as for additions and/or alterations or not, it is appropriate to follow, by broad analogy, the process discussed by Bignold J in *Moto Projects (No 2) Pty*

Limited v North Sydney Council [1999] NSWLEC 280; (1999) 106 LGERA 298 -- namely undertaking both a qualitative and a quantitative analysis of what is proposed compared to what is currently in existence.

58 In this consideration, regard should be had to such of the matters in the following lists of matters as are relevant to the enquiry:

59 Qualitative issues

- How is the appearance of the existing building to be changed when viewed from public places?
- To what extent, if any, will existing landscaping be removed and how will that affect the setting of the building when viewed from public places?
- To what extent, if any, will the proposal impact on a heritage item, the curtilage of a heritage item or a heritage conservation area?
- What additional structures, if any, in the curtilage of the existing building will be demolished or altered if the proposal is approved?
- What is the extent, if any, of any proposed change to the use of the building?
- To what extent, if any, will the proposed development result in any change to the streetscape in which the building is located?
- To what extent, if any, are the existing access arrangements for the building proposed to be altered?
- To what extent, if any, will the outlook from within the existing building be altered as a consequence the proposed development?
- Is the proposed demolition so extensive to cause that which remains to lose the characteristics of the form of the existing structure?

60 Quantitative issues

- To what extent is the site coverage proposed to be changed?
- To what extent are any existing non-compliances with numerical controls either increased or diminished by the proposal?
- To what extent is the building envelope proposed to be changed?
- To what extent are boundary setbacks proposed to be changed?
- To what extent will the present numerical degree of landscaping on the site be changed?
- To what extent will the existing floor space ratio be altered?
- To what extent will there be changes in the roof form?
- To what extent will there be alterations to car parking/garaging on the site and/or within the building?
- To what extent is the existing landform proposed to be changed by cut and/or fill to give effect to the proposed development?
- What relationship does the proportion of the retained building bear to the proposed new development?

61 ***Obviously, the greater the overall extent of departure from the existing position, the greater the likelihood the proposal should be characterised as being for a new building***.

62 It is not intended that the above lists should be regarded as exhaustive. Other matters may well arise for consideration in the facts and circumstances of a particular application or the reason why the analysis is being undertaken.

> However, having considered all of the listed matters (together with any other additional matters that may be relevant in the particular circumstances of the application), an evaluation can then be made as to whether or not a proposal would correctly be characterised as additions and/or alterations to an existing structure or whether the proposal should be characterised as an application for an entirely new structure. *[Emphasis added]*

The change in planning principle from that articulated in *Edgar Allan Planning* to that in *Coorey* is a change 'from a mathematically structured prescriptive planning principle to one that is based on an inquisitive process' (*Coorey* at [63]). Now, *Coorey* involved alterations and additions to a heritage item which the learned Commissioners considered would have different considerations when compared to an enquiry as to whether particular controls as defining a building envelope may be engaged or not by a development proposal. The proposal did not meet the mathematical approach of *Edgar Allen Planning* to be described as alterations and additions to an existing dwelling, as the proposal was ultimately held to be.

In the case of the proposal the subject of the Development Application no heritage item is involved. However, the subject property as well as our client's property are located in a Foreshore Scenic Protection Area, and when regard is had to the resultant loss of privacy that would inevitably ensue for our clients in the event that the development proposal in its current form were to be approved, as well as the combined quantitative and qualitative changes to the built form of the existing dwelling on the subject property, we submit that it is both misleading and inappropriate, as a matter of planning principle, to construe and environmentally assess the proposed development as being merely 'alterations and additions'.

Applying the planning principle articulated by the Court in *Coorey*, in which the learned Commissioners concluded that 'obviously, the greater the overall extent of departure from the existing position, the greater the likelihood the proposal should be characterised as being for a new building' (*Coorey* at [61]), the true nature of the proposed development is, in fact, not 'alterations and additions' but 'a proposal for an entirely new structure' (*Coorey* at [70]) which needs to be appropriately assessed as such having regard to those controls in the MLEP and MDCP that are relevantly applicable to the erection of new buildings.

Even the statement of environmental effects ('SEE') prepared by Mr Lance Doyle on behalf of the applicant and submitted as part of the development application package tacitly, if not actually expressly, acknowledges that the purported and so-called 'alterations and additions' are really an application for a new building (refer pp 3, 8, 15, 19 and 61 of the SEE). However, the SEE also states, quite prominently:

The Proposal involves **a number of alterations and additions** to a pair of existing residential dwellings generally as follows -

- **Demolition of existing salient elements fronting Marine Parade.**
- Provision of terrace and plunge pool to No.82.
- **Enlargement of ground floor and level 1 by removal of internal walls and some minor enlargement**.
- Personnel lifts to both dwellings.
- **Construction of new bedrooms with ensuites and walk in robes within replacement roof level.**
- **Construction of new garage structure to No.82.**
- **New finishes to the existing western wall.**
- **Provision of all new glazing to the western elevation of levels two and three.**
- Landscaping and privacy screens to external areas. *[Emphasis added above]*

Thus, the development proposal involves, among other things, the demolition of the existing building elements fronting Marine Parade, the removal of internal walls, and the construction of additional habitable rooms—in other words, for all intents and purposes, demolition and rebuilding. In our estimate, approximately 70-75 per cent of the existing building is proposed to be rebuilt, 'based on an inquisitive process' (*Coorey* at [63]) and analysis of the architectural drawings lodged as part of the development application package.

In short, based on any objective but principled assessment of the proposed development, the true nature of the proposed development is, in fact, not 'alterations and additions' but 'a proposal for an entirely new structure' (*Coorey* at [70]) and therefore 'should be characterised as being for a new building' (*Coorey* at [61]).

7.0 PRIVACY

The proximity to our clients' property and overall height of certain aspects of the proposed development will create an unacceptable privacy impact (see **Annexure 1**).

In the event that Council were to consent to the proposed development in its current form there would be a severe impact on the amenity on our clients' property and the use and enjoyment of that property by our clients. At present, no screening from the deck to the pool located on our clients' property is proposed.

The proposed development is contrary to the well-established general planning principle relating to privacy set out in *Meriton v Sydney City Council* [2004] NSWLEC 313. In that decision Roseth SC stated (at [45]-[46]):

> 'When visual privacy is referred to in the context of residential design, it means the freedom of one dwelling and its private open space from being overlooked by another dwelling and its private open space. …
>
> '… Overlooking of neighbours that arises out of poor design is not acceptable. A poor design is demonstrated where an alternative design that provides the same amenity to the applicant at no additional cost, has a reduced impact on privacy.
>
> '… Landscaping should not be relied on as the sole protection against overlooking. While existing dense vegetation within a development is valuable, planting proposed in a landscaping plan should be given little weight. …'

It is clear from *Meriton v Sydney City Council* and subsequent cases in which the planning principle has been fairly consistently applied that separation rather than landscaping is the main safeguard in the protection of privacy.

In *Davis v Penrith City Cou*ncil [2013] NSWLEC 1141 Moore SC confirmed, at [121], the following as the criteria for assessing impact on neighbouring properties:

> How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?
>
> How reasonable is the proposal causing the impact?
>
> How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?
>
> Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?
>
> Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?

As Dickson C pointed out in *Rose & Sanchez v Woollahra Municipal Council* [2016] NSWLEC 1348 (19 August 2016) at [78]:

> In applying these criteria *Meriton v Sydney City Council* [2004] NSWLEC 313 at [45] clarifies the scope of visual privacy in the context of residential

> design as: the freedom of one dwelling and its private open space from being overlooked by another dwelling and its private open space.

That is the heart of the matter – the freedom of one dwelling and its private open space from being overlooked by another dwelling and its private open space.

In this case, there is no doubt that the impacts arise primarily from the absence of any proposed screening devices at the rear of the subject property, where views and the loss of amenity and visual privacy are of paramount importance. In *Vescio v Manly Council* [2012] NSWLEC 1098 (24 April 2012) the Court, in assessing the impacts on visual privacy, had regard to the fact that, in addition to the height difference, outlook, and angle of view from bedroom windows, any overlooking would be from a bedroom where people tended to spend less waking time, which was a factor to be considered in assessing impacts on visual privacy. Accordingly, the learned Commissioners (Pearson C and O'Neill C) did not consider that the impacts on privacy were such as to require the deletion of those windows, or any screening.

However, in the case of the present development proposal, the impacts upon visual privacy and overlooking occur, as mentioned, at the rear of the subject property, where views and the loss of amenity and visual privacy are of paramount importance. The swimming pool area together with its curtilage, given its prime location, is a major entertaining and recreational area for our clients. The use and enjoyment of that area is greatly diminished, and the loss of visual privacy acutely felt, when protective and ameliorative measures are not taken to minimise or prevent loss of privacy and overlooking. (As respects the assessment of the latter – namely, overlooking – Council's attention is drawn to the Court's decision in *Super Studio v Waverley Council* [2004] NSWLEC 91.)

In light of the fact that both the subject property and our clients' property are located within the Foreshore Scenic Protection Area, we submit that our clients have a reasonable expectation that their dwelling house and some of its open space area – relevantly, the swimming pool area and its curtilage – will and should remain private, and that landscaping should not be relied on to protect against overlooking. Accordingly, some sort of privacy screen or privacy louvres are legitimately required to afford privacy and avoid overlooking.

It is strongly submitted that, in the event that consent were to be granted to the Development Application in its present form, conditions should be imposed requiring the installation of appropriate screening devices, given the adverse impacts on privacy that would otherwise ensue. However, our clients' strong preference and submission is that the Development

Application and plans, in their current form, should be amended to make provision for the installation of appropriate screening devices so as to ensure that there will be no loss of amenity by reason of loss of privacy. Accordingly, we respectfully submit that the following amendments be made to the plans accompanying the Development Application:

> Privacy louvres are to be fixed to all glazing the full length of the existing glass balustrade alongside the boundary of the subject property and our clients' property.

8.0 CONCLUSION

In assessing the impact of a development proposal upon a neighbouring property, what was said by Roseth SC in *Pafburn v North Sydney Council* [2005] NSWLEC 444 (16 August 2005), at [19]-[24], is, in our respectful submission, extremely helpful:

> 19 Several judgments of this Court have dealt with the principles to be applied to the assessment of impacts on neighbouring properties. *Tenacity Consulting v Warringah* [2004] NSWLEC 140 dealt with the assessment of views loss; *Parsonage v Ku-ring-gai Council* [2004] NSWLEC 347 dealt with the assessment of overshadowing; while *Meriton v Sydney City Council* [2004] NSWLEC 313 and *Super Studio v Waverley Council* [2004] NSWLEC 91 dealt with the assessment of overlooking.
>
> 20 Five common themes run through the above principles. **The first theme** is that change in impact may be as important as the magnitude of impact. …
>
> 21 **The second theme** is that in assessing an impact, one should balance the magnitude of the impact with the necessity and reasonableness of the proposal that creates it. …
>
> 22 **The third theme** is that in assessing an impact one should take into consideration the vulnerability of the property receiving the impact. …
>
> 23 **The fourth theme** is that the skill with which a proposal has been designed is relevant to the assessments of its impacts. Even a small impact should be avoided if a more skilful design can reduce or eliminate it.
>
> 24 **The fifth theme** is that an impact that arises from a proposal that fails to comply with planning controls is much harder to justify than one that arises from a complying proposal. People affected by a proposal have a legitimate expectation that the development on adjoining properties will comply with the planning regime. *[Emphasis in the original]*

In the case of the present development proposal:

- the magnitude of impact upon the amenity, use and enjoyment by our clients of the rear of their property is considerable;

- the lack of privacy screening is unnecessary and unreasonable, showing almost contempt for, and a blatant disregard of, the legitimate expectations and entitlements of our clients;
- our client's property, especially the rear of the property which will receive the greatest impact, is extremely vulnerable;
- the lack of attention in the design of the development proposal to the impacts of the proposed development on our client's property in terms of visual privacy and overlooking is relevant to the assessments of those impacts, for even a small impact should be avoided if a more skilful design can reduce or eliminate it; and
- the fact that proposal fails to comply with a number of important planning controls is much harder to justify than would otherwise be the case with a complying proposal.

In short, our clients have, as Roseth SC pointed out in *Pafburn*, a legitimate expectation that the development to take place on the subject property 'will comply with the planning regime'.

There is, as we have already submitted, an even greater problem as respects the present development proposal. The Development Application purports to describe the development proposal as 'alterations and additions'. With respect, such a description of the proposed development is quite misleading and inappropriate in light of the planning principle promulgated in *Coorey v Municipality of Hunters Hill* [2013] NSWLEC 1187. When regard is had to the resultant loss of privacy that would inevitably ensure for our clients in the event that the development proposal in its current form were to be approved, as well as the combined quantitative and qualitative changes to the built form of the existing dwelling on the subject property, we submit that it is wrong to construe and environmentally assess the proposed development as being merely 'alterations and additions'.

In our respectful submission, the proposal 'should be characterised as being for a new building' (*Coorey* at [61]) on the basis that the true nature of the proposed development is, in fact, 'a proposal for an entirely new structure' (*Coorey* at [70]) which needs to be appropriately assessed as such having regard to those controls in the MLEP and MDCP that are relevantly applicable to the erection of new buildings. In that regard, please refer to the non-compliances with the relevantly applicable height of buildings and floor space ratio development controls discussed in this submission. When the extent of the non-compliances is looked at in its totality along with impacts on privacy, the natural environment and the character of the locality, the development proposal is unacceptable, especially in light of the location of the subject property.

In addition, the close proximity of the proposed development to our clients' property and the overall height of the proposed development will create an unacceptable privacy impact for our clients as respects their use and enjoyment of their land. At present, no screening from the deck to the pool located on our clients' property is proposed. In our opinion, the Development Application and accompanying plans, in their current form, need to be amended to make provision for the installation of appropriate screening devices so as to ensure that there will be no loss of amenity by reason of loss of privacy. In that regard, privacy louvres need to be fixed to all glazing the full length of the existing glass balustrade alongside the boundary of the subject property and our clients' property.

In our opinion, the proposal the subject of the Development Application requires considerable modification so as to render it acceptable and consistent with the current planning controls.

In the event that Council is not minded to refuse the Development Application, but on the contrary approve the application in its present form, being a course of action which, in our respectful submission, would be inappropriate both as a matter of planning principle and law, then we respectfully submit that it is essential that appropriately worded conditions are imposed on any consent that issues to reduce the adverse impacts that would otherwise arise for our clients from the carrying out of the development.

However, we must give a word of warning here that Council must exercise restraint. There is a considerable body of case law attesting to the proposition that circumstances can arise, and otherwise be such, under which conditions attached to a consent are 'so radical as to destroy the substance of the application': see eg *Parkes Developments Pty Ltd v Cambridge Credit Corporation Ltd* (1974) 33 LGRA 196; *Flower & Samios Pty Ltd v Mosman Municipal Council* (L & E Ct, Stein J, No 10097/93, 24 June 1993, unreported). The imposition of such conditions is tantamount to a refusal of the application, and the latter is, in any such circumstances, the only legally appropriate decision. *Refusal*—not a grant of conditional development consent. We respectfully submit that, having regard to the nature, character, bulk and scale of the development proposal, and the likely impacts of the development upon the natural and human-built environments (and, in particular, on our clients' property), the only legally appropriate course of action is to *refuse* consent to the Development Application in its current form.

Our clients reserve all of their rights and entitlements.

Yours faithfully,
TURNBULL PLANNING INTERNATIONAL PTY LIMITED

Pierre A Le Bas
Director & Legal Counsel
BA(Geog)(UNE) LLB(Hons1) GradCertLegP(UTS) MTCP(Syd)

Sophie Litherland
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BUrbRegPlan (UNE) GradDipSustainability (UNSW)

lav.bow86m2_submission.docx

ANNEXURE 1

Photograph 1: showing direct overlooking of 84 Bower Street from pool terrace at No. 86 Bower Street

Photograph 2: showing privacy impacts from upper level of No. 86 Bower Street Manly.

ANNEXURE B

23 August 2017

Claire Downie
Northern Beaches Council
1 Belgrave Street
Manly NSW 2095

Dear Claire,

Objection from No 86 Bower Street to DA No. 168/2017

This is a submission by way of objection to DA No. 168/2017. Our objection to the proposed development concerns four main aspects of the proposal:

1. No's 82 and 84 Bower Street are already maximised, that is, developed to their full capacity. This proposal is an overdevelopment of the site, which pushes past what is reasonable. The mass of the house/s is already excessive and threatens to become even more overbearing in its dominance. It exceeds both the FSR and height restrictions.

   The third proposed level replaces a pitched roof. It is a flat and squared off roof. These two elements of the design and the departure from the pitched roof means that the building is even more imposing than the current structure which already looms over us and is foreboding on the block. This increase in bulk and scale affects us most in our main living areas. The development proposal does not meet planning guidelines in the DCP.

2. The second and third levels both contain mainly glass on the western façade which affects our property significantly. On level two, this is a significant increase on what is already there. Therefore, our exposure is increased. Whilst screening is shown in the DA plans, there will actually be a greater capacity to look onto us in our main outdoor living area. The third level of the development is the same. The screening (if adequate) helps to protect our privacy back towards our house but gives us little protection in our main deck area. This is a major concern for us.

   The screening looks to be a cursory or purely design feature. The gaps between the blades are very open. The screening makes a gesture to protect privacy looking south, but allows full vision down and to the north. The screening on the third level appears to be further spaced apart, which offers even less protection. The removal of walls, and the addition of all this glass, is a real invasion of our privacy, which the proposed screening inadequately protects.

3. The decks of No 84 propose further and serious invasions to our privacy which have not been reasonably addressed despite consultation during which we made our concerns clear.

   The existing deck of No 84 is the most extreme example of a complete breach of privacy. From this deck (less than 8 metres away) the owners are afforded 270 degree views which permit full sight of our pool area, our main lounge area, our sunbed area, our main bedroom, our bathroom and our second living area. Anyone using this deck (which is a heavily used entertaining area) has full vision of all of these areas and we feel very compromised and vulnerable as a result. Our only protection against this is to permanently close our blinds, which completely shuts us in. This is a most unacceptable outcome.

   The fact that this deck is currently unscreened does not mean that it should stay that way. An injustice in planning terms has occurred. The current deck flies in the face of the guidelines and now is the time to make it right, given the scope of the works. This is simply the reasonable and proper thing to do. This DA rightly proposes screening to the deck of No 82 to meet planning guidelines. Surely the same measure of 'reasonableness' should be asked of No. 84 and be afforded to us.

4. The proposed third level deck opens up a new area from which our privacy will be affected. We will be completely exposed in our pool area, living areas, main bedroom and bathroom. This exacerbates the current issues. Should this third level and deck be approved it should have suitable screening on the western side of the actual deck (in addition to the side of the house) so that when in use, we are not affected. This also has been omitted.

Put most simply, this is a question of one party having their privacy completely compromised (No 86) or the other party (No 84) losing only a portion of the expansive view they are seeking. No 84 seeks a view out to the east, out to the north and out to the west. Without suitable screening, this allows them to look directly down on us, to the west and back on us, to the south – directly into our main living areas. A reasonable outcome is for respectable, view sharing. It is not reasonable, nor fair, for one occupant's desires to totally compromise the other's privacy.

In order to fully appreciate the points I have made above, we are hoping you will visit our house so that you can gauge the potential impact yourself. Please let me know if you are able to do this so that we can arrange a suitable time.

Kind regards,

TLavender

Tess Lavender

ANNEXURE C

Sent:	25/03/2020 7:30:50 AM
Subject:	Online Submission

25/03/2020

MRS Tess Lavender
86 Bower Street ST
MANLY NSW 2095
tess@lavender.ad

RE: DA2020/0211 - 82 - 84 Bower Street MANLY NSW 2095

Objection to DA2020/0211 82-84 Bower Street, Manly
Will and Tess Lavender, 86 Bower Street Manly NSW 2095
25 March 2020

This DA, for ‘alterations and additions’, cannot be assessed as a stand-alone DA. It has to be considered in conjunction with the Stop Work order that was issued for breaches to the development consent and also in conjunction with the original DA168/2017. Approval of this new DA, along with approval of the Building Information Certificate (simultaneously sought), would actually give the developers the green light to continue building a massive ‘new structure’ under the guise of ‘alterations and additions’.

If this transpires, it would bring into question the validity of the entire planning and development process. It would also make a nonsense of the serious legal device that a Stop Work Order is meant to be. In summary, it would mean that the developers had cleverly manipulated the system to get away with; an initial DA deception, a serious breach of that development consent, the lifting of a Stop Work Order without resolving any of the issues and then, by submitting a new DA, approval to complete building the brand new structure while completely ignoring the guidelines for a ‘new build’ - which are in place for good reason.

The original development application should never have been approved as alterations and additions in the first instance. What we said in our submissions to the original development application would occur, has occurred and we received no material consideration of our submission by Council in the process.

When the original DA was being assessed, we submitted that the extent of proposed works amounted to an entirely new building. It is our belief (as stated by our neighbour when we first met him) that the intention all along has been to "knock the house down but keep one wall". And what has actually taken place here, is that the developers have demolished all but part of one party wall, some floor areas and a deck ┐┐ - and now seek to make this go away by simply applying for a new DA to put back all those parts demolished outside of the consent.

The building is of significant bulk and scale. It is a massive structure, literally

squeezing itself into the limited space and has considerable effect on our amenity in general and specifically, on our privacy. Even with the help of reputable Town Planners we were ignored throughout the DA process. In this DA the FSR guidelines are exceeded massively, the height restrictions are exceeded, the setbacks are minimal or non-existent, there are new openings adjacent to our main living area and pool (which cause serious privacy issues) and there are decks which are not screened. Any visit to site immediately brings to light the unfairness of this situation - the serious overlooking issues and subsequent loss of privacy in nearly every living area of our house, our main deck and around our pool. Despite this, the development was approved without one single concession to us.

In fact, one can document the progression of this as the 'how to' in manipulating development consents to flaunt the system.

Specifically:
1. the application for 'alterations and additions' when so clearly the extent of work demonstrates that this is a new build.
2. the subsequent application and approval months into construction for the additional garage space, further inflating the FSR excesses.
3. the piecemeal demolition of the building-revealing a completely new double brick base structure, and gradual removal of components not approved
4. the significant steel structure put on top of the double brick base structure-which must have been measured and manufactured to fit on top/alongside 'new' walls which were supposedly not planned all along?
5. the application for a Building Information Certificate to make null and void a Stop Work Order for serious breaches of the original development consent when the issues have not been addressed, nor resolved.
6. a further application for a new DA to simply reinstate those elements demolished without permission, despite this being a considerable breach of the development consent and therefore the EP&A Act.

This new DA, for 'alterations and additions' needs to be seen for what it is - yet another piece in a manipulation to build a house that is too big for the block and is devoid of the necessary consideration to neighbours and the neighbourhood and the final move in a deft plan to beat the system.

Summary

If this is approved, the developers will have the green light to go ahead and complete the build of this 'new house' with absolutely no adherence to the planning guidelines for a new house. They will have made null and void the Stop Work Order and flouted the entire process. And we, as the direct neighbours, will have not been given the considerations normally attached to the building of an entirely new structure - nor indeed the basic rights to privacy any type of development dictates. The role of Council and the EP&A Act is to protect neighbours and neighbourhoods from this obvious manipulation.

We trust that Council will use every avenue you have to see that this flouting of the system is not allowed to continue. We hope that Council can see that approving this DA and the Building Information Certificate are just the latest moves in the long

game being played. As adjoining neighbours, we have the right to request a reasonable FSR, adherence to height restrictions, setbacks, noise consideration and importantly the right to use our private spaces as the LEP guidelines set out, without overlooking. Overall, we would like the right to maintain our amenity. Council now has an opportunity to remedy the situation to ensure a fair outcome for all.

ANNEXURE D

Partner	Patrick Holland
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Our reference	PSH:174443-1

Lawyers | McCullough Robertson

25 March 2020

Louise Kerr
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Dear Ms Kerr

Re: 82-84 Bower Street, Manly | Development Application No. 2020/0211 and Building Information Certification Application No. 2020/0048

1. We refer to the two abovementioned applications which were submitted to Council on 5 March 2020 in relation to the development of 82-84 Bower Street, Manly (**the Property**).

2. As you are aware, we act for Mr and Mrs Lavender (**our client**) who are the owners of 86 Bower Street, Manly, in relation to their concerns regarding significant breaches to the consent for Development Consent no.168/2017 (**the Consent**).

3. We note that separate to this submission, our client has also recently submitted separate objections to Council in relation to Development Application No. 2020/0211 **(DA Application)** and Building Information Certification Application No. 2020/0048 **(BIC Application).** Prior to these objections, our client also lodged an objection to the development application for the Consent when it was placed on public exhibition in 2017 [see **Annexure A**].

Background

4. We write to Council to express our client's strong objection to the approval of the DA Application and the BIC Application. In summary, these applications appear to be a continuation of the developer's attempt to strategically circumvent the proper development approval process in order to secure approval for complete demolition of the existing building and construction of a new dual occupancy under the guise of seeking approval for 'alterations and additions' to the previously existing dual occupancy.

5. Given that our client foreshadowed the events that are now playing out in their objection to Development Application No.168/2017 dated 21 August 2017 and the Consent was granted regardless, Council will no doubt appreciate that the lodgment of the DA Application and BIC Application, from our client's perspective, adds further insult to injury.

6. As you were advised in person during the meeting at our client's property on 10 January 2020 [see records of this meeting at **Annexure B** and **Annexure C**], it was clear to our client that the developer never had any intention of retaining those structures for which retrospective approval is now being sought to demolish. We refer to Part 6 of our client's letter of objection dated 21 August 2017 under the heading 'Alterations and Additions tantamount to demolition'. It was submitted on our client's behalf that it was "*both misleading and inappropriate, as a matter of planning principle to construe and environmentally assess the proposed development as being merely 'alterations and additions'*". Despite our client's objections, the Consent was granted. To our client's dismay, the development's impacts on our client's privacy were ignored. By way of reminder, the key aspects of the approved development which our client objects to are associated with:

    a. the height of the additional first floor storey, combined with the location and proximity of the rear deck (which lacks privacy screening) and which thereby permits a direct line of sight into our client's bathroom, bedroom, kitchen, living room and rear private open space areas; and

    b. the proximity of the wall along the western boundary of the Property at the ground floor and first floor levels, combined with the placement of windows and fixed louvre blades along the western boundary of the Property which are spaced too far apart, creating a further opportunity for significant overlooking into our client's property.

7. With the above concerns in mind, following the meeting held at our client's property on 10 January 2020, and in light of the Stop Works Orders issued by Council on 21 November 2019 and the amended Stop Works Order issued 19 December 2019, it was our client's expectation that a new development application for a dual occupancy development on the Property would be submitted by the developer. As the Consent was not complied with and was assessed and approved by Council under the (false) premise that the development would be for 'alterations and additions' to the existing dual occupancy, if Council was to proceed to approve the DA Application and issue a building information certificate with respect to the unauthorised works, this would set an extremely undesirable precedent for future developers to follow. This precedent encourages a piecemeal approach to securing approval for a larger development on a site over time, without the proposed development being subject to the same assessment process that it would otherwise have been if it were honestly and accurately described and presented to Council and the community.

8. While Development Application No. 2020/0211 seeks approval for the construction of only those new walls and structural components which were to be retained in accordance with the Consent, given that these structural components are an integral part of the development of the site as a whole, it is inappropriate for Development Application No. 2020/0211 to be considered and commented on in isolation.

9. Although the developer seeks to rely on the Consent to justify why approval for the DA Application ought to be granted, it is important to remember that the Consent was assessed and granted on the basis that what was proposed was "alterations and additions" to an existing building. What is now before Council is a development application that seeks to undermine that foundation and legitimise works that may not have otherwise been assessed and approved by Council if they had not already existed and were to be retained.

Application for Building Information Certificate No. 2020/0048

10. We refer to the BIC Application which relates to the unauthorised construction of walls and floors on the Property (**unauthorised works**).

11. For the following reasons our client submits that, in the circumstances, it would be completely inappropriate for Council to issue a building information certificate in respect of the unauthorised works.

12. Firstly, pursuant to section 6.25 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) it is critical to note that a building information certificate:

> "…is to be **issued by Council only if it appears that** [our emphasis]:
>
> *a) there is no matter discernible by the exercise of reasonable care and skill that would entitle the council, under the EP& Act or the Local Government Act 1993 -*
>
> *i. to order the building to be repaired, demolished, altered, added to or rebuilt, or*
>
> *ii. to take proceedings for an order or injunction requiring the building to be demolished, altered, added to or rebuilt, or*
>
> *iii. to take proceedings in relation to any encroachment by the building onto land vested in or under the control of the council, or*
>
> *b) there is such a matter but, in the circumstances, the council does not propose to make any such order or take any such proceedings."*

13. In accordance with section 6.25(3) of the EP&A Act, the issuing of the building information certificate would prevent Council:

> *(a) from making an order (or taking proceedings for the making of an order or injunction) under the EP& A or the Local Government Act 1993 requiring the building to be repaired, demolished, altered, added to or rebuilt in relation to matters existing or occurring before the date of issue of the certificate.*

14. Noting that Council has already issued a Stop Works Order pursuant to section 9.34 of the EP&A Act, we note that a 'Demolish Works Order' may also be issued by Council. Further, Council is also able to issue a penalty notice in respect of the unauthorised works pursuant to section 9.58 of the EP&A Act. With this in mind, it is clear that there certainly *are* matters discernible by the exercise of reasonable care and skill that would entitle the Council, under the EP&A Act to take action in accordance with section 6.25(1)(a) of the EP&A Act. As such, it would be inappropriate for a building information certificate to be issued by Council in these circumstances.

15. It is not in dispute that the works which are the subject of the BIC Application have either already been carried out unlawfully, or are proposed to be carried out without development consent but are yet to be undertaken. In this sense, the BIC application not only seeks retrospective approval for existing unauthorised works, but it also seeks to operate so as to enable the developer to proceed with works which have not yet been undertaken, without Council being able to take any action in respect of these works. Setting aside the fact that the DA Application has been lodged simultaneously with the BIC Application so that approval for those unauthorised works that are yet to be undertaken can be obtained, it is curious that works yet to be carried out have been included in the BIC Application. If the developer genuinely intended to no longer undertake works without development consent, why are works that have not yet been carried out included in the BIC Application?

Development Application No. 2020/0211

16. While it is accepted that multiple consents may in certain cases apply to a property, we refer to the Land and Environment Court's decision in *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 4)* [2019] NSWLEC 58, which details the key principles that apply where multiple development consents are permitted to operate on the same site. In this case, the Court made it clear that if multiple consents apply to a site, the conditions of each consent will still apply if development has been carried out pursuant to the consent. The Court notes at paragraph 76(g) of its judgment that:

"…if a holder of a planning approval acts upon the consent by carrying out the development the subject of the approval, the holder must comply with the approval and any conditions to which it is subject. Thus:

(g) "… once commenced there is no obligation to fully implement the consent provided that in undertaking part of the development authorised by the consent there has been no breach of any relevant condition of the consent."

17. With this in mind, where a condition of the Consent required certain walls and structural elements to be retained, any granting of consent for the DA Application will not make good again the developer's non-compliance with the Consent. Until the Consent is modified in accordance with section 4.55 of the EP&A Act so as to permit the demolition of these walls and structural elements, the developer remains in breach of the Consent. In summary, the developer cannot cure its non-compliance with a condition of the Consent on the basis that the works are permitted under another consent that applies to the same property.

18. Although the DA Application seeks to exclude all those elements approved under the Consent from the current application, this assumes that consent for the DA Application is inevitable and that compliance with the Consent has not been irreparably undermined by the unauthorised works undertaken. While in some cases a modification application might be legitimately submitted by an Applicant for unauthorised works in an effort to preserve a consent, in our view any modification application for the Consent submitted in respect of the unauthorised works would be unable to overcome the substantially the same test. This is because the nature of the Consent was for alterations and additions to an existing development, whereas the modification application would be effectively seeking approval for the demolition of existing development and construction of a brand new dual occupancy development.

19. In light of our opinion in relation to the above, it follows that the way forward for the developer is to submit a new development application for the entirety of the works proposed on the Property, not just those works which have been undertaken without development consent.

20. It is distressing to our client that Council and the community has been asked to consider and provide comment on only those structural works which have not been approved by the Consent, to the exclusion of all those works which are directly connected to these, but are tied to the Consent. By way of example, the close proximity and overbearing nature of the basement and ground floor wall along the western boundary which has almost been entirely reconstructed without approval is directly connected to the inappropriate siting of the fixed louvre blades along this wall and lack of privacy screening on the rear deck which will enable residents of the Property to see directly into our client's living rooms, bedroom and bathroom areas. Despite the relationship which exists between the unauthorised works which are the subject of the DA Application and the works approved under the Consent, the DA Application seeks that these be considered and assessed as though they are completely unrelated.

21. We note that the adequacy of the DA Application is also lacking. We refer to page 57 of the Statement of Environmental Effects (**SEE**) submitted with Development Application No. 2020/0211, where it is stated that the proposal meets the 'relevant objectives' of the Manly Development Control Plan 2013 (**MDCP**) with respect to its front, side and rear setbacks. The 'relevant' objectives referred to in the SEE are as follows:

    - *Objective 1) To maintain and enhance the existing streetscape.*
    - *Objective 2) To ensure and enhance local amenity by:*
        - *providing privacy*
        - *providing equitable access to light, sunshine and air movement*

- *facilitating view sharing and maintaining adequate space between buildings to limit impacts on views and vistas from private and public spaces*
- *Facilitating safe and adequate traffic conditions including levels of visibility around corner lots at the street intersection*

- *Objective 3) To allow adequate sunlight to penetrate both the private open spaces within the development site and private open spaces and windows to the living spaces of adjacent residential development*.

22. The SEE disregards the MDCP controls under Part 4.1.4.2 which relate specifically to side setbacks, including control (a) which provides that:

    a) *Setbacks between any part of a building and the side boundary must not be less than one third of the height of the adjacent external wall of the proposed building.*

23. There is no explanation which seeks to justify why having such a limited setback along the western boundary is acceptable beyond the SEE simply relying on the Consent and stating that "*approved setbacks to both side boundaries remain unaltered by the proposal*."

24. Noting that the unauthorised construction of the wall on the western boundary is subject to the DA Application and our client's objections to the proximity of this wall to the boundary and their property, our client trusts that Council will ensure that this wall is not authorised to remain in its present location.

25. While Council may have approved the previously existing wall in this location when it granted the Consent, there is now a fresh opportunity for Council to respond to our client's concerns as detailed in this letter, the letter of objection dated 21 August 2017, and the letters of objection dated 24 March 2020 submitted in respect of the DA Application and BIC Application.

Conclusion

26. Given the legal and public interest related impediments to any approval of the DA Application and BIC Application noted above, and in the interests of preserving the integrity of the planning system, Council is urged to determine not to issue a building information certificate in respect of the unauthorised works and to refuse DA Application.

27. In the event that Council is minded to issue a building information certificate and/or determine to approve the DA Application, given the significant impacts that will be experienced by our client as a consequence of this, we are instructed to request that our client be notified of this at least 2 weeks prior to this happening.

28. We reserve our client's rights with respect to the matters referred to in this letter. We also request the opportunity to meet with you and our client to discuss both applications.

29. If you have any queries in relation to this letter, please do not hesitate to contact me on (02) 8241 5610.

Yours sincerely

Patrick Holland
Partner

Annexures

A – Letter of objection to Development Application No. 168/2017, dated 21 August 2017

B – Letter from McCullough Robertson Lawyers to Council, dated 10 January 2020

C - Letter from Council letter to McCullough Robertson Lawyers, dated 23 January 2020

Partner Patrick Holland
Direct line 02 8241 5610
Email pholland@mccullough.com.au
Our reference PSH:174443-1

Lawyers McCullough Robertson

10 January 2020

Louise Kerr
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Dear Ms Kerr

Re: 82-84 Bower Street, Manly (Property) | Development Consent no. 168/2017

1. We refer to the above Property and development consent for which a meeting was held on Wednesday 8 January 2020 at 86 Bower Street, Manly (**meeting**).

2. As you are aware, we act for Mr and Mrs Lavender (**our client**) who are the owners of 86 Bower Street, Manly, in relation to their concerns regarding breaches of Development Consent no.168/2017 (**the Consent**) carried out at 82-84 Bower Street, Manly (**the Property**).

3. On behalf of our client we wish to again thank you, Ms Kelly and Ms Watson for attending the meeting on behalf of Northern Beaches Council (**Council**).

4. The purpose of this letter is to confirm in writing the key items that were discussed at the meeting, our client's position with respect to these items and our understanding of the steps Council has taken to date and will or is likely to take moving forward with respect to any future development application that the owner of the Property (**developer**) may submit to Council.

Status of Stop Works Order and enforcement action

5. We understand that a revised Stop Works Order (**Revised SWO**) dated 19 December 2019 was issued by Council which amends the Stop Works Order dated 21 November 2019 by permitting the developer to continue works authorised under Development Consent no. 2019/0125.

6. At the meeting Council agreed to inform our client should any appeal be commenced by the developer with respect to the Revised SWO, or in the event that the status of the SWO changes in any way.

7. It was noted and our client is pleased to hear that Ms Watson intends to undertake inspections of the Property while the Revised SWO is in place to ensure compliance with the Orders given by Council.

8. We confirm it is our opinion and our client's position as relayed in our previous letter to you of 4 December 2019, that until such time as a new development application is submitted to Council by the developer and alternative works on the Property are approved, the SWO should remain in place.

9. Given the extent and significant nature of the non-compliances with the Consent observed, Council may wish to consider whether a complaint to the Building Professionals Board should be made particularly in relation to issuing of a construction certificate for the development. In the circumstances it is difficult to fathom that a construction certificate could have been validly issued by the developer's private certifier given the extent of deviations from the approved plans evidenced to date.

New Development Application

10. At the meeting we confirm that you advised that the developer has made representations to Council's Development Assessment Manager, indicating that it is the developer's intention to submit a fresh development application to Council in relation to the Property.

11. We understand that there has been no indication that you are aware of that the developer intends to submit a modification application to Council seeking approval for alterations and additions to the Consent.

12. As detailed in our letter of 4 December 2019, we remain of the view that a new development application must be submitted by the developer and approved before any further works (excluding those authorised under development consent no.2019/0125) can lawfully proceed on the Property. It is therefore encouraging for our client to learn that the developer may be seeking to pursue this course of action.

13. Should any development application or application of any kind relating to the Property be submitted to Council, our client appreciates that Council will ensure our client is kept informed of this.

14. Our client is further comforted by your assurance that a new town planner, being someone other than Claire Downie, will be appointed by Council to assess any fresh development application that may be submitted by the developer with respect to the Property.

15. In the event that a new development application is submitted to Council which proposes to retain certain existing works already undertaken in accordance with the Consent, it was indicated by you that Council is able to reasonably request that the developer provide certification from a surveyor which demonstrates that the existing works are compliant with the approved plans. Given the developer's established disregard of the conditions of the Consent evidenced to date, there is uncertainty as to whether the existing works carried out are consistent with the Consent. For this reason we are instructed to urge Council to ensure certification is obtained and considered prior to approval of any new development application.

Key concerns

16. To reiterate that which was expressed to you at the meeting, we confirm that should any new development application be submitted to Council by the developer, a main concern that our client has relates to the impacts the development may have on our client's privacy.

17. The additional storey authorised by the Consent would have resulted in significant overlooking into our client's property if the development was to have been completed. The height of the additional storey, combined with the location and proximity of the rear deck and the placement of windows along the western façade allow future residents of the Property to have a direct line of sight into our client's bathroom, bedroom, kitchen, living room and rear private open space area.

18. In the event that the developer proceeds to submit a new development application, our client trusts that Council will have regard to these abovementioned concerns which our client feels were not adequately considered and addressed by Council with respect to its decision to issue the Consent.

Conclusion

19. As noted in this letter, should there be any applications submitted to Council in relation to the Property, the Consent or the Revised SWO, our client looks forward to hearing from Council directly about this as soon as possible.

20. If you have any queries in relation to this letter, please do not hesitate to contact me on (02) 8241 5610 or my colleague Elizabeth Ryan on (02) 8241 5638.

Yours sincerely

Patrick Holland
Partner

northern beaches council

23 January 2020

McCullough Robertson Lawyers
Attn: Mr Patrick Holland
Email: pholland@mccullough.com.au

Our Ref: 2020/018615

Dear Mr Holland

Re: Stop Works Order concerning Development Consent 168/2017
Property: 82-84 Bower Street, Manly (Your ref PSH:174443-1)

Thank you for your letter dated 10 January 2020.

Council understands the views expressed on behalf of your client in this matter.

In regards to the Stop Works Order, the owner's representative and the builder have advised Council of their intention to comply with the revised Stop Works Order dated 19 December 2019. This has been subsequently confirmed by Council inspection and we will continue to monitor the situation.

Should Council be advised of any appeal against the terms of the Order or be requested to revise the terms of the Order, your client will be notified accordingly.

In accordance with Council's Community Consultation Plan your client as an adjoining property owner would be notified and invited to make a submission should any future applications be submitted.

Should you require any further information or assistance in this matter, please contact Darren Greenow on 9970 1275 or by email council@northernbeaches.nsw.gov.au.

Yours faithfully

Peter Robinson
Acting Director Planning & Place Division

ANNEXURE E

From: Paul Vergotis
To: Peter Robinson
Cc: Anna Williams; Lillian Warnes
Subject: Re: DA2020/0211 82-84 Bower Street Manly
Date: Wednesday, 17 February 2021 3:02:38 PM

Hi Pete & team,

The intention of condition 8 was to provide a privacy device for the full length of the balcony to the western (seaward) extremity so the indoor and outdoor use was screened.

Happy to take a call if need be.

Kind regards
Paul VERGOTIS

On 17 Feb 2021, at 1:54 pm, Peter Robinson [redacted] > wrote:

Dear Paul,
DA2020/0211 for development at 82-84 Bower Street Manly was considered by the NBLPP initially on 29th July 2020. The application was deferred and the Panel visited the site and the primary objectors site on 18th August 2020. The Panel reconvened electronically on 15th September 2020 and determined the application for approval. The minutes of that determination are attached, and include conditions specifically addressing privacy between the site (82-84 Bower Street) and its western neighbour no. 86 Bower Street.
The applicant has provided Council with drawings (also attached) which clarify their intentions relating in particular to the privacy screen on the Ground level of the building, on the western elevation of the external balcony. The drawings show the screening extending only partially along the balcony. The neighbour at 86 Bower Street maintains that Condition 8 requires the screen to extend the full length of the western edge of the balcony.
Condition 8 of the consent issued reads as follows:
8. The external screens with vertical fins referred to in (7) above shall be replicated in size and
continued in a northerly direction from the external wall of the dwelling along the western edge
of the external balcony accessible from the living area of No. 84 Bower Street, Manly.
Reason: To preserve and maintain visual privacy and amenity to the immediate adjoining
property to the west at No. 86 Bower Street, Manly and to also maintain design consistency with
the similar edge type screening along the adjoining dwelling.

Could you please advise as to the Panel's intentions of Condition 8, and in particular

whether the Panel intended that the screening of the balcony on its western edge continue to its northern extremity.
Further, and for background information only , I have attached a further letter from the neighbour
Yours faithfully,
Peter Robinson

<DA4-A-101 GROUND & LEVEL 1.pdf>
<DA4-A-200 ELEVATIONS.pdf>
<Minutes - Northern Beaches Local Planning Panel - 20200915.PDF>
<Notice of Determination.PDF>
<Lavender 162 - letter to LPP re 82-84 Bower Street.docx>

ANNEXURE F

northern beaches council

19 October 2020

Mr Will & Mrs Tess Lavender
86 Bower Street
MANLY NSW 2095

Email: tess@cxlavender.com.au

Our Ref: 2020/618464

Dear Mr & Mrs Lavender

DA2020/0211 - 82-84 Bower Street, Manly

Thank you for your email dated 2 October 2020.

The Panel imposed the following conditions on the consent to ameliorate the privacy impacts to your dwelling and swimming pool area.

The wording of the conditions applied by the Local Planning Panel states the following:

7. *The 'Ground & Level 1 Revision B' plan and 'Elevations Revision B' plan are conditionally amended so that any subsequent construction certificate application is to indicate that the West Elevation Ground Floor windows accessible from the kitchen, dining and living areas of No. 84 Bower Street, Manly are fitted with external screens which shall have vertical angled fins that cover the windows. The individual vertical fins shall have a width of 200mm and be positioned top to bottom at an angle of 20 degrees orientated to the north with 50mm overlaps so as there can be no vision and overlooking onto the adjoining property to the west No. 86 Bower Street, Manly.*

   Reason: To preserve and maintain visual privacy and amenity to the immediate adjoining property to the west at No. 86 Bower Street, Manly.

8. *The external screens with vertical fins referred to in (7) above shall be replicated in size and continued in a northerly direction from the external wall of the dwelling along the western edge of the external balcony accessible from the living area of No. 84 Bower Street, Manly.*

   Reason: To preserve and maintain visual privacy and amenity to the immediate adjoining property to the west at No. 86 Bower Street, Manly and to also maintain design consistency with the similar edge type screening along the adjoining dwelling.

Details of the privacy screens is required to be submitted to the Principal Certifying Authority (PCA) when a Construction Certificate for works is made. The PCA is to

ensure that the development is carried out in accordance with the conditions. When a Construction Certificate is approved, a copy is required to be submitted to Council prior to any works commencing. Council does not make Construction Certificate documents, including plans available on Council's webpage. However, once the information is submitted, it can be accessed through an application under the Government Information (Public Access) Act. To apply, please follow the link below and fill out the online form:-

https://www.northernbeaches.nsw.gov.au/informal-information-request-form

Should you require any further information or assistance in this matter, please contact my office on 8495 6451.

Yours faithfully

Peter Robinson
Executive Manager, Development Assessment

ANNEXURE G

Photograph 1: Depicting view and potential for direct overlooking into the private open space (pool area) at 86 Bower Street, taken looking west from the balcony at 84 Bower Street, Manly.

Photograph 2: Depicting view and direct overlooking into the private open space (pool area) at 86 Bower Street, taken looking west from the balcony at 84 Bower Street, Manly. Note the western boundary wall of 86 Bower Street which ensures the preservation of the visual privacy and amenity of the neighbouring property located at 88 Bower Street.

Photographs 3 - 5: Depicting view and direct overlooking into the living room areas and private open space (pool area) at 86 Bower Street, taken from the balcony of 84 Bower Street, Manly. Note the direct line of sight into the second storey ensuite bathroom, lounge room and bedroom, as well as into the ground floor kitchen and main living room areas.

Photographs 6 - 7: Depicting 82-84 Bower Street (presently under construction) and 86 Bower Street, Manly as viewed looking east along Marine Parade. Note the significant bulk and scale of 82-84 Bower Street and the proximity of the balcony at 84 Bower Street in relation to 86 Bower Street.


ACIFIC PLUS
CONSTRUCTIONS

Photograph 8: Depicting view of western boundary wall of 86 Bower Street, which effectively prevents overlooking into the neighbouring property at 88 Bower Street, Manly.

Sent:	25/06/2021 11:28:00 AM
Subject:	FW: Objection to Mod2021/0317 - DA2020/0211
Attachments:	Tess Lavender Submission to Northern Beaches Council (1).docx;

From: Tess Lavender <tess@cxlavender.com.au>
Sent: Thursday, 24 June 2021 3:21 PM
To: Anna Williams <Anna.Williams@northernbeaches.nsw.gov.au>
Cc: Adam Croft <adam.croft@northernbeaches.nsw.gov.au>; Louise Kerr <Louise.Kerr@northernbeaches.nsw.gov.au>; Will Lavender <will@cxlavender.com.au>
Subject: Objection to Mod2021/0317 - DA2020/0211

Dear Anna,

Please find our objection to the above Modification application.

Regards

Tess

Tess Lavender

0411 628 262

24 June 2021

Ms Anna Williams
Manager, Development Assessments
Northern Beaches Council

Dear Anna,

Re: Mod2021/0317 – DA2020/0211

We have received the notice of modification application No. Mod2021/0317 (the Modification) and believe it is important that any decision maker in this matter is aware of the history of our involvement in the assessment and approval of the original development application, which we have consistently submitted should not have been approved. We are the direct neighbours of the development which is the subject of the Modification and the persons who will be most adversely affected by this development.

Previous Submissions

We have made a number of submissions in relation to the development works which have been carried out at 82-84 Bower Street, Manly. We provide a summary of the key matters raised in these submissions below.

Objection to DA 168/2017, (August 2017)

- Objected to the serious non compliances in the proposal such as FSR excess, height excess, insufficient setbacks, increased openings and excessive bulk and scale.
- Believed that by seeking to have this application characterised as alterations and additions to the existing development (despite significant evidence to the contrary), the applicant was trying to get away with multiple non-compliances with Council's local environmental planning development standards and development control plan controls, despite ultimately always intending to build a new structure.
- Argued that the age and condition of the existing building made it impossible for the development to be completed under the guise of 'alterations and additions' and that most floors and walls could not be retained as per the application and conditions of the consent.
- Listed serious privacy impacts and loss of amenity and requested that these be addressed.

DA 168/2017 was approved. None of our privacy objections were considered and zero concessions were made. We notified Council that if the applicant breached the conditions, as we suspected they would have to, we would bring this to Council's attention.

Objection to DA 2020/0211 – following the issuing of a Stop Work Order by Council in 2019 for significant breaches to the General Conditions of DA 168/07, (August 2020)

- Argued that the applicants had in fact carried through with what we predicted all along. The previous structure had all but been demolished.
- Agreed with Council's assessment report recommending refusal for this DA on the basis that the degree of demolition meant that it could only be considered a new development.

Presentation to the LPP, (August 2020) after 20 local objections

- Raised the very real impacts that the proximity, scale and additional openings meant for us in terms of the impingements the development had on our visual privacy and amenity.
- Explained the importance of screening the ground floor internal areas and balcony to stop the serious overlooking issues.
- After the LPP deferred their decision, we met with the LPP members at our home so that they could observe first-hand the privacy impacts that would result if approval of DA 2020/0211 was granted without the incorporation of adequate measures which would prevent this occurring.

In the Minutes from the LPP decision, the Panel made it clear that they agreed with our concerns regarding the impact that was posed to our privacy and stated that it was "**most important**" that the impacts to our property were addressed. The LPP ultimately approved the DA but importantly they did so subject to the imposition of two conditions, which were specifically imposed to prevent overlooking from the Applicant's internal living areas and balcony into our property, including into our internal living rooms and onto our outdoor pool area.

Objection to the current modification application, Mod 2021/0317

Views versus privacy

This is a matter of planning principle and the right of one neighbour to have privacy over the desire of another neighbour to have excessive views despite the loss of privacy and amenity this would result in for the other. The Applicant enjoys beautiful views, as do all the homes along this stretch of Bower Street. The proposed screening as required by Conditions 7 and 8 does not negate these views. See Photo 5.

With the screening as imposed by the LPP, the Applicant will still retain and be able to enjoy the expansive views that all these properties have to the north. And when they walk to the edge of their deck, occupants of 84 Bower Street will also enjoy views to the West, towards the more southern end of Manly Beach. This is how it is for all the residents on this side of the Street. If we want to view this part of the beach, we need to walk to the edge of our deck. We cannot see it from our living room and we cannot see it from most of our deck. In exactly the same position on our own deck, we have a solid brick wall to protect the privacy of our neighbours on that side. We simply do not understand why our neighbours believe they have the right to this view from their lounge room and all parts of their balcony in circumstances where it will come at the expense of our privacy.

Furthermore, one of the reasons that the LPP stated for imposing these two conditions was to "**maintain design consistency with the similar edge type screening along the adjoining dwelling".** The other side of this dual occupancy (82 Bower Street) has a balcony, which is screened for its entire length. This requirement is consistent with Council's development controls and therefore should be in place on both sides of the Applicant's development.

Without the screening as imposed by the LPP our property will be vulnerable to overlooking from both the Applicant's kitchen/dining and living area as well as their balcony, into all the areas of our home that are important to us and to our general amenity. These are our; pool deck and main outdoor living area, main indoor sitting area, dining room, kitchen, main bedroom, ensuite and upstairs loungeroom. See photos 1-4 attached.

Attempts by us to protect our privacy

The argument in the Statement of Environmental Effects (**SEE**) for the modification application that privacy doesn't matter to us is a nonsense. Firstly, the sailcloth referred to in the SEE was removed because it was a noise hazard given the coastal position and prevailing winds. But most importantly, it was nothing more than a sun screen. It covered less than 5% of the deck area and provided us with very little (if any) privacy – and certainly none in the areas where it is most needed as a result of the Applicant's development. We have however installed a retractable awning which we can use, when conditions allow, to provide privacy in one small section of the deck and we have included additional plantings in the garden bed to this end. But neither of these elements is capable of providing any adequate level of privacy screening against the extent of overlooking which results from this development.

Effectiveness of the proposed, modified screening

The detail of the new proposed screening on the Ground floor window areas and balcony does not fulfil the purpose of achieving visual privacy and amenity for us. Nor does it adequately address the reasons that the LPP stated for it being necessary.

The LPP made it clear in the conditions imposed that the purpose of the screening was to ensure that there "**can be no vision and overlooking"** (exact words) from the ground level "**kitchen, dining and living areas"** or from **"the external balcony"** into our property. The conditions imposed by the LPP required detailed screening be installed for both the windows and the balcony which would protect us from this potential overlooking and also clarified, when challenged, that it was to run the "**full length of the balcony"**.

The timber slats as proposed can be looked through. They will result in overlooking; forward onto our outdoor area and pool deck and back into the house in all areas as detailed above. They may look like they are a screen, but they have not been designed to stop the overlooking. On the balcony, the planter box is simply inadequate and would provide no visual privacy for us whatsoever.

Summary

We believe it is wrong that the Applicant seeks to expand upon what is the normal view of the residents up and down the Street – at the expense of our privacy. Approving this application allows one party excessive views (North, West and South directly into our home) at the expense of the other party's privacy and right not to be exposed to overlooking in their home. Ensuring that effective privacy screening is in place, as conditioned by the LPP, is a matter of both policy, principle and justice. If the Applicant is permitted to modify Mod 2021/0317 in the manner proposed, which will completely undermine the important reasons for which the relevant conditions were imposed, it will make a mockery of the entire planning and approval process. Most importantly, approval of the Modification will serve only to meet the excessive, unreasonable, unnecessary and extraordinary demands of one party to the serious detriment of the other.

Kindest regards

Tess and Will Lavender

Photo 1 (showing views from internal areas and balcony into kitchen, dining, main lounge, upstairs lounge, bedroom and bathroom)

Photo 2 (showing views from internal areas forward onto our main outdoor area and pool)

Photo 3 (showing views from internal areas and balcony onto main outdoor space)

Photo 4 (showing views from internal areas and balcony into bedroom, bathroom and upstairs lounge)

Photo 5 (showing part of the expansive view north that the applicant enjoys)