

DEVELOPMENT APPLICATION ASSESSMENT REPORT

Application Number:	DA2020/1762
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Responsible Officer:	Jordan Davies
Land to be developed (Address):	Lot 1 DP 827733, 316 Hudson Parade CLAREVILLE NSW 2107 Lot 2 DP 827733, 316 Hudson Parade CLAREVILLE NSW 2107 Lot LIC 559856, 316 Hudson Parade CLAREVILLE NSW 2107
Proposed Development:	Demolition works and construction of boatshed, ramp, slipway, jetty & steps
Zoning:	C2 Environmental Conservation C4 Environmental Living
Development Permissible:	No - Zone C2 Environmental Conservation No - Zone W1 Natural Waterways
Existing Use Rights:	Yes
Consent Authority:	Northern Beaches Council
Delegation Level:	NBLPP
Land and Environment Court Action:	No
Owner:	Northern Beaches Council Tony Brian Walls
Applicant:	Rhonda Carr

Application Lodged:	15/02/2021
Integrated Development:	Yes
Designated Development:	No
State Reporting Category:	Residential - Alterations and additions
Notified:	04/03/2021 to 18/03/2021
Advertised:	Not Advertised
Submissions Received:	2
Clause 4.6 Variation:	4.3 Height of buildings: 34%
Recommendation:	Approval

Estimated Cost of Works:	\$ 567,500.00
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Executive Summary

The application seeks to construct a boat shed and associated maritime structures including a jetty, seawall, slip way, boat ramp, berthing area and waterway access stairs.

The application seeks the replacement of the previous boat shed and associated structures which once stood on the land and in doing so, the application is reliant upon existing use rights given that boat sheds and the associated structures are not permissible within the W1 Natural Waterway Zone and E2 Environmental Conservation Zone under the Pittwater LEP 2014. The application is accompanied by documentation that support the claim of existing use rights and the information provided with the application has demonstrated to the satisfaction of Council that the land does benefit from existing use rights. Therefore, a boat shed and associated structures may be rebuilt upon the land (subject to the granting of consent).

The application is referred to the Northern Beaches Local Planning Panel (NBLPP) as the development is partially located over land which is owned by the Council. The remainder of the land on which the development is situated is owned by Crown Lands (seaward of the Mean High Water Mark).

The application is also referred to the NBLPP for determination as the proposed development departs from the building height development standard under Pittwater Local Environmental Plan 2014 by 34% within the W1 Natural Waterway Zone, which has a prescribed maximum building height of 4m.

The design of the boat shed is of a scale that is considered to be generally consistent with the previous structure which stood on the land, and the height increase of the boat shed relative to the water level is a result of the raised flood level to cater for the estuarine planning level for the site. The external dimensions of the proposed boat shed are slightly larger than the previous boat shed which once occupied the site, and Council's recommendation is that the footprint be slightly reduced to match the previous building footprint. This is recommended as a consent condition.

The application is classified as Integrated Development pursuant to the *Fisheries Management Act 1994* and DPI Fisheries has granted its General Terms of Approval for the application. The environmental, coastal, marine habitat and coastal issues have been considered by Council's internal referral departments who are each satisfied the proposal will not result in adverse environmental impacts that would have otherwise been experienced by the retention of the boat shed and associated structures which previously occupied the land.

The application was notified for a period of 14 days in accordance with Council's Community Participation Plan and a total of two (2) submissions were received. The submissions raised concern with the design and scale of the boatshed, environmental and coastal impacts, additional footprint and reclamation of land and the design of the seawall. The issues raised in the submissions have been addressed later in this assessment report.

Council considers that all merit and environmental issues of the application have been resolved, that the appropriate owners consent have been received from Council's Property Team and the Department of Planning - Crown Lands, and therefore the application is recommended for approval to the Local Planning Panel.

PROPOSED DEVELOPMENT IN DETAIL

The proposed development is for "Demolition works and construction of boatshed, ramp, slipway, jetty & steps".

Specifically, the proposal involves the:

- Demolition of the remaining structures associated with the boatshed which once stood on the land and foreshore area;
- Construction of a boatshed and associated concrete platform/curtilage;
- Construction of a sandstone seawall around the perimeter of the boatshed; and

- Construction of a concrete boat ramp, slip rails, timber jetty, steps and piles to a berthing pen.

ASSESSMENT INTRODUCTION

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

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

SUMMARY OF ASSESSMENT ISSUES

Assessment - Integrated Development – DPI Fisheries - Fisheries Management Act (s201 Circumstances in which a person (other than a public or local government authority) may carry out dredging or reclamation)

Pittwater Local Environmental Plan 2014 - 4.6 Exceptions to development standards

Pittwater Local Environmental Plan 2014 - 7.2 Earthworks

Pittwater Local Environmental Plan 2014 - 7.6 Biodiversity protection

Pittwater Local Environmental Plan 2014 - 7.7 Geotechnical hazards

Pittwater Local Environmental Plan 2014 - 7.8 Limited development on foreshore area

Pittwater 21 Development Control Plan - D3.2 Scenic protection - General

Pittwater 21 Development Control Plan - D15.15 Waterfront development

Pittwater 21 Development Control Plan - D15.18 Seawalls

SITE DESCRIPTION

Property Description:	Lot 1 DP 827733, 316 Hudson Parade CLAREVILLE NSW 2107 Lot 2 DP 827733, 316 Hudson Parade CLAREVILLE NSW 2107 Lot LIC 559856, 316 Hudson Parade CLAREVILLE NSW 2107
Detailed Site Description:	The subject site consists of land located on the western side of side of Hudson Parade. The land directly adjoins the Pittwater waterway and consists of an irregular parcel of land adjoining the waterway, the boundary of which reflected

the previous boat shed and access stairs which stood on the land. The remainder of the development site located west of the Mean High Water Mark (MHW) is upon Crown Land.

The land on which the development is proposed is legally known as Lot 2 in DP 827733 and is commonly known as No. 316 Hudson Parade. Lot 2 is owned by Northern Beaches Council and the use of the land is subject to a license that is currently being considered by Northern Beaches Council. Lot 1 in DP 827733 contains the residential dwelling and is under private ownership and is also commonly known as No. 316 Hudson Parade.

Lot 2 is an irregular shape which contains access stairs between the foreshore area and the residential dwelling upon No. 316 Hudson Parade. The remainder of Lot 2 is configured to contain an area of land on which a former boatshed sat and accommodated the surrounding curtilage which was associated with the former boat shed.

Lot 2 has area of 52m², with the remaining area within crown land with an approximate license area of 209.5sqm (based on the crown land licence plan).

The area in which the boat shed and structures are proposed is located within the E2 Environmental Conservation Zone and W1 Natural Waterway Zone under Pittwater Local Environmental Plan 2014. Lot 1 containing the dwelling house is zoned E4 Environmental Living.

The site currently has timber stairs leading down to the area of the former boatshed from the residential dwelling to the east. The land contains the footprint of former boatshed that has been demolished since 2018 and some dintel retaining walls which are currently uncompleted. There are timber poles associated with the former jetty and berthing area in the waterway.

Detailed Description of Adjoining/Surrounding Development

Adjoining and surrounding development is characterised by residential development to the east, Refuge Cove Reserve surrounding the boat shed to the east and the Pittwater Waterway to the west. There are rock platforms and the foreshore area to the south and an area of sandy beach to the north. There is another boatshed in the visual catchment of the site 80m to the south.

Map:



SITE HISTORY

The land has been used for a boat shed and associated maritime structures for an extended period of time. The following history is relevant in regards to the proposed development:

- In 1993, a previous owner of No. 316 Hudson Parade dedicated to Council foreshore land at Refuge Cove Reserve, now Lot 2. The transfer was conditional upon a lease being provided over the access way to the foreshore and the section of the original boat shed above the MHWL. A lease was subsequently granted by Pittwater Council to the owner in accordance with this condition.
- The previous lease agreement expired on 4 March 2013. In 2015 the owner of No. 316 Hudson Parade, after purchasing the property, approached Pittwater Council seeking to renew the agreement for a further twenty (20) year term.
- Pittwater Council, at its meeting on 7 March 2016, resolved (the 2016 Resolution) as follows:

C10.1 316 Hudson Parade Clareville - Renewal of Expired Lease

1. *That the report by the Independent Chairperson regarding the re-categorisation of Lot 2, DP827733 be noted.*
 2. *That the land, Lot 2, DP827733 in Refuge Cove be re-categorised from Natural Area to General Community Use.*
 3. *That the General Manager be delegated to negotiate the terms and conditions of a new lease based on the expired lease following the re-categorisation of the land.*
- On 15 November 2016, a Complying Development Certificate (CDC) was issued by an accredited certifier for development on foreshore land, including Lot 2 described as "Repairs and restoration of existing structures". The CDC related to the boat shed that existed on Lot 2 and the adjoining Crown Land.
 - On 14 September 2018, Council served a Stop Work Order following the complete demolition of the existing boat shed. It was Council's view that this work was not carried out in accordance with the CDC, the CDC was not lawfully issued and the works were undertaken without owner's

consent. The Stop Work Order was appealed to the Land and Environment Court (Proceedings No. 2018/00308701). The appeal was subsequently discontinued by the applicant with Council's consent. In connection with the discontinuance of the proceedings, the applicant agreed to surrender the CDC and Council agreed to act on any outstanding Council resolutions made on 7 March 2016 (specifically the 2016 Resolution).

- Item 2 of the 2016 resolution relating to the re-categorisation of the land has been completed by Council.
- On 15 February 2021, the subject development application DA2020/1762 was lodged with Council.
- The owner of No. 316 Hudson Parade has requested that Northern Beaches Council grant a 20 year license over Lot 2 in DP827733 for the use of the community land to facilitate the use of the boatshed, associated structures and access stairs within Lot 2.
- At the ordinary Council Meeting of 26 October 2021 (following deferral of the item at the meeting of 27 April 2021), Council considered the application for a license over Lot 2. At that meeting, the elected Council provided in support to the granting of a twenty (20) year license subject to the recommendations outlined in the minutes for Item 13.1.

History of Development Application

Upon initial assessment of the development application, Council wrote to the applicant requesting:

- additional information in relation to existing use rights;
- requesting owners consent be provided by Northern Beaches Council and Crown Lands for the lodgement of the application;
- request to address the concerns raised by DPI Fisheries with regards to design;
- request for the height of the boat shed to be reduced;
- the submission of a Clause 4.6 variation request;
- request for reduced footprint of the boatshed; and
- addressing matters raised in the initial referral responses from Council's Riparian Team and Coastal Team.

Council subsequently was provided with responses from the applicant which included amended plans and additional information to address each of the above matters. This included a reduction of height and footprint of the boatshed, amended sea wall design, amended estuarine risk management report, amended marine habitat report, clause 4.6 variation request and the required owner's consent from Northern Beaches Council and Crown Lands.

The application was referred to DPI Fisheries and Councils Riparian and Coastal Team to review the information. DPI Fisheries provided a response stating they were satisfied with the proposal and granted General Terms of Approval. Council's Riparian and Coastal team were also satisfied of the additional information.

The amended application was not required to be re-notified as the amended design reduced the size of the proposed structures and addressed the environmental and coastal issues raised by Council's referral bodies.

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

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

Section 4.15 Matters for Consideration'	Comments
Section 4.15 (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on “Environmental Planning Instruments” in this report.
Section 4.15 (1) (a)(ii) – Provisions of any draft environmental planning instrument	Draft State Environmental Planning Policy (Remediation of Land) seeks to replace the existing SEPP No. 55 (Remediation of Land). Public consultation on the draft policy was completed on 13 April 2018. The subject site has been used for residential purposes for an extended period of time. The proposed development retains the residential use of the site, and is not considered a contamination risk.
Section 4.15 (1) (a)(iii) – Provisions of any development control plan	Pittwater 21 Development Control Plan applies to this proposal.
Section 4.15 (1) (a)(iiia) – Provisions of any planning agreement	None applicable.
Section 4.15 (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation 2000)	<u>Division 8A</u> of the EP&A Regulation 2000 requires the consent authority to consider "Prescribed conditions" of development consent. These matters can be addressed via a condition of consent. <u>Clause 50(1A)</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer at lodgement of the development application. This clause is not relevant to this application. <u>Clauses 54 and 109</u> of the EP&A Regulation 2000 allow Council to request additional information. Additional information was requested in relation to updated coastal engineering and risk assessments, amended plans, information regarding existing use rights and an amended Clause 4.6 variation request. This information was submitted to Council and assessed by Council's planners and relevant referral bodies. <u>Clause 92</u> of the EP&A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This matter can be addressed via a condition of consent. <u>Clauses 93 and/or 94</u> of the EP&A Regulation 2000 requires the consent authority to consider the upgrading of a building (including fire safety upgrade of development). This clause is not relevant to this application. <u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This matter can be addressed via a condition of consent. <u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider the provisions of the Building Code of

Section 4.15 Matters for Consideration'	Comments
	Australia (BCA). This matter can be addressed via a condition of consent. Clause 143A of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer prior to the issue of a Construction Certificate. This clause is not relevant to this application.
Section 4.15 (1) (b) – the likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality	(i) Environmental Impact The environmental impacts of the proposed development on the natural and built environment are addressed under the Pittwater 21 Development Control Plan section in this report. (ii) Social Impact The proposed development will not have a detrimental social impact in the locality considering the character of the proposal. (iii) Economic Impact The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.
Section 4.15 (1) (c) – the suitability of the site for the development	The site is considered suitable for the proposed development.
Section 4.15 (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs	See discussion on “Notification & Submissions Received” in this report.
Section 4.15 (1) (e) – the public interest	No matters have arisen in this assessment that would justify the refusal of the application in the public interest.

EXISTING USE RIGHTS

- Does the existing use satisfy the definition of "existing use" under the *Environmental Planning and Assessment Act 1979* (the 'Act')?

Section 4.65 of the Act defines an existing use as:

"(a) the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part, have the effect of prohibiting that use, and

(b) the use of a building, work or land:

- (i) for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and*
- (ii) that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse."*

This necessarily requires the following questions to be answered:

1. *Was the use of the building, work or land a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part 4 of the Act, have the effect of prohibiting that use?*

Comment

The land is zoned W1 Natural Waterway and E2 Environmental Conservation at present under the Pittwater Local Environmental Plan 2014 (PLEP 2014). The development for the purpose of a boat shed and associated structures is prohibited under the current PLEP 2014.

The Applicant has provided evidence in the form of Legal Advice which explores the history of the use of the land for the purpose of a Boat Shed and the previous relevant town planning schemes applying to the land.

There is evidence by way of historical photographs that the boat shed was erected on the land by 1947. Importantly, the legal advice notes *'In 1945, the Local Government (Town and Country Planning) Amendment Act inserted Part XIIA into the Local Government Act 1919. From 1945, and as at 1947, the carrying out of development on the land was regulated by Ordinance No. 105 Town and Country Planning – General Interim Development ("Ordinance 105"), pursuant to the Local Government Act 1919. That amendment to the Local Government Act anticipated the formation of the Cumberland County Council and ultimately the making of the County of Cumberland Planning Scheme Ordinance and the making of similar schemes by other authorities. Relevantly, for present purposes, the effect of the 1945 amendment was to make lawful the use of the land upon which the Structures were erected for use for the purpose of a boat shed, ramp, concrete base and jetty.'*

Therefore, it is concluded that the boat shed and associate structures existed upon the land at a time when the use of the land was permissible under the relevant planning instrument applicable the time (County of Cumberland Planning Scheme Ordinance).

2. *Was the use of the land granted development consent before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use?*

Comment

The applicant (and the Council) has not been able to locate a development consent specifically relating to the boat shed structures. This is partially due to the age of the structures (constructed at least by 1947) and this is not surprising given the time that has passed since the structures were erected.

Therefore, in the absence of paper work relating to development consent, the applicant's legal advice states that it is appropriate to take the position of the *presumption of regularity* based on the steps taken by Council since 1947 in dealing with the land on which the boatshed and structure sits. In particular, the applicant has cited the following events to have occurred since 1947 while the structures stood on the land:

- *In 1957 a permissive occupancy was granted covering the land upon which the Structures were erected within the waterway.*
- *Following subdivision of the original lot, the registered plans from at least 1967 have clearly marked the outline of the Structures.*
- *In 1981, a plan of subdivision was registered which excluded that part of what is now Crown Land on which the Structures were erected from being dedicated public reserve.*
- *In 1993, the previous owners and the Council of the Municipality of Pittwater (as it then was) entered into a lease agreement for use and access of the area for a boatshed and purposes incidental thereto that was located on Crown Land, renewal of which is currently being*

negotiated with Council.

- *In 2016 the permissive occupancy was converted into a licence. It is relevant to note that the licence was conditional. The terms and conditions are set out in Schedule 2. Clause 3 of Schedule 2 related to unauthorised structures and specifically identified that there were four unauthorised pylons. It is, in my opinion, instructive that the land owner was able to specifically identify the unauthorised component of the structures, being four pylons only.*
- *On 15 July 2016, a delegate of the Minister Administering the Crown Lands Act provided owner's consent to the lodgement of the CDC for repairs and replacement of the Structures.*

The applicant's legal advice puts forward that the presumption of regularity is dealt with in the court case *Minister for Natural Resources v NSW Aboriginal Land Council (1987) 9 NSWLR 154* where it deals with how the presumption of regularity can be expressed, which is:

"Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled."

In regards to the above, Council and the Crown have entered into a lease agreement and license agreement for the use of the structures on the land since the structures existed on the land. As recent as 8 February 2016, a 20 year License was granted by Crown Lands for the structures.

Therefore, Council is satisfied that a *presumption of regularity* can be made for structures on the land given the steps that both Crown Land and Council have taken in dealing with boat shed structures on the land to date.

Furthermore, the demolition of the structures in 2018 (as part of the Complying Development Certificate to carry out repairs to the existing structures) is not considered to result in the abandonment of existing use rights.

The applicant's legal advice deals with the question of abandonment in the context of the demolished structures and the relevant circumstances and events which have followed since demolition of the structures, which include stop work orders, Land and Environment Court Proceedings and the Lodgement of a new application seeking consent (following the CDC being deemed invalid). All of these events demonstrate that there was a clear intent of the user of the land to continue the use of the land for the purpose of a boat shed and associated structures. Furthermore, Council's recent in-principle support at the Council meeting of 26 October 2021 to grant a license over the land for the use of the structures reiterates the intentions of the user of the land.

3. *Has the use of the building been carried out within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse?*

Comment

As discussed above, the structures existed in 1947 during a time when applicable planning regime permitted such structures on the land. The structures have existed and been used until the present day.

- **What is "the land on which the existing use was carried out" for the purposes of cl 42(2) (b) of the Environmental Planning and Assessment Regulation 2000 ("the Regulation")?**

Meagher JA in *Steedman v Baulkham Hills Shire Council* [No. 1] (1991) 87 LGERA 26 stated (at 27) the rule to be applied as follows: *"if the land is rightly regarded as a unit and it is found that part of its area was physically used for the purpose in question it follows that the land was used for that purpose"*.

Comment

Having regard to the above case law, it is noted that portions of the area of the land were physically used for the purpose in question and therefore, it is considered that the land was used for that purpose and that existing use rights apply to that part of the subject site considered to form the 'Unit of Land'.

The applicant's legal advice deals with the 'Unit of Land' to which existing use rights apply. This includes physical markers that include the extent of the jetty structures projecting to the west, which include the extent of the slip rails, jetty, jetty stairs, the revetment walls at the base of the boatshed and concrete ramp. Each of these structures defines the 'unit of land'. This is further complimented by the Crown Lands license which defines a berthing area which forms part of the 'unit of land'.

The applicant's legal advice includes a plan which defines the unit of land based on the physical structures and license boundaries. The proposed development including the boat shed, associated platform, jetty, stairs and berthing area are considered to be within the designated unit of land to which existing use rights apply.

- **What are the planning principles that should be adopted in dealing with an application to alter enlarge or rebuild and existing use?**

The judgement in *Fodor Investments v Hornsby Shire Council* (2005) NSWLEC 71, sets out the planning principles that should be applied in dealing with development applications seeking to carry out development on the basis of existing use rights.

The following four principles adopted by the NSW Land and Environment Court in this case will have general application in dealing with development applications that rely on existing use rights:

1. How do the bulk and scale (as expressed by height, floor space ratio and setbacks) of the proposal relate to what is permissible on surrounding sites?

While planning controls, such as height, floor space ratio and setbacks do not apply to sites with existing use rights; they have relevance to the assessment of applications on such sites. This is because the controls apply to surrounding sites and indicate the kind of development that can be expected if and when surrounding sites are redeveloped. The relationship of new development to its existing and likely future context is a matter to be considered in all planning assessments.

Comment

Height

The planning controls set a maximum height for a boatshed under the Pittwater 21 Development Control Plan (PDCP) and the maximum building height under the PLEP 2014.

The design of the boatshed building itself is of a height consistent with the previous structure, with the increase in height relative to the water level as a result of the need to comply with the estuarine planning levels (increase 500mm). The increase in height relative to the water level is necessary to response to current estuarine planning levels and results in a small increase in height, that is not considered unreasonable or visually excessive.

Boatshed footprint

The PDCP sets a maximum footprint for boatsheds at 4m x 6m. Based on survey data provided for the previous boat shed, the previous boatshed footprint was 6.2m (wide) x 9.2m (long). The proposed boatshed is 6.75m (wide) x 9.745m (long). The proposal is in excess of the current PDCP guidelines for boat sheds (4m x 6m), with the aim of the PDCP control to ensure '*Structures blend with the natural environment*' and '*Structures are not detrimental to the visual quality, water quality or estuarine habitat of the Pittwater Waterway*'. The proposed boat shed is of a size slightly larger than the previous footprint itself. The applicant has put forward that the new boat shed has a comparable internal floor area of the previous structure, due to the structural walls of the new boatshed being thicker and therefore, resulting in a bigger footprint.

However, Council's controls guide the size of boat sheds based on the external dimensions of the building, not the internal floor area. The intent of the control is to guide bulk and scale of the boat shed and the internal floor area is not relevant to this cause. Therefore, Council cannot see any basis for supporting a footprint larger than the previous structure on the land which measured 6.2m (wide) x 9.2m (long). In this regard, should consent be issued, a condition would be recommended that the external footprint is limited to this size.

2. What is the relevance of the building in which the existing use takes place?

Where the change of use is proposed within an existing building, the bulk and scale of that building are likely to be deemed acceptable, even if the building is out of scale with its surroundings, because it already exists. However, where the existing building is proposed for demolition, while its bulk is clearly an important consideration, there is no automatic entitlement to another building of the same floor space ratio, height or parking provision.

Comment

Change of use is not proposed. See discussion above regarding building bulk and scale.

3. What are the impacts on adjoining land?

The impact on adjoining land should be assessed as it is assessed for all development. It is true that where, for example, a development control plan requires three hours of sunlight to be maintained in adjoining rear yards, the numerical control does not apply. However, the overshadowing impact on adjoining rear yards should be reasonable.

Comment

The development is not considered to result in any unreasonable amenity impacts for adjoining land owners.

Public foreshore access is maintained around the boatshed and along the foreshore.

The size of the structure will be generally consistent with the previous boatshed which sat on the land, subject to conditions regarding the footprint.

Council's referral bodies are satisfied with the matters relating to the coastal environment and biodiversity values of the site.

4. What is the internal amenity?

Internal amenity must be assessed as it is assessed for all development. Again, numerical requirements for sunlight access or private open space do not apply, but these and other aspects must be judged acceptable as a matter of good planning and design. None of the legal principles discussed above suggests that development on sites with existing use rights may have lower

amenity than development generally.

Comment

The boat shed will retain reasonable amenity and functionality for the user.

Relevance of the Planning Controls to the assessment

The Lands and Environment Court Judgement *Saffioti v Kiama Municipal Council [2019] NSWLEC 57* sets out that the provisions of the relevant Local Environmental Plan and Development Control Plan (in this case PLEP 2014 and PDCP) are to be taken into consideration in the assessment of a development to which existing use rights apply. The planning controls, where they do not derogate from the establishment of existing use rights, are to be considered by the consent authority in assessment of the application.

To this extent, the development standards and provisions within the Pittwater LEP 2014 and Pittwater DCP have been taken into consideration in the assessment of the development for which existing use rights apply.

Conclusion

The applicant has demonstrated to the satisfaction of Council that there can be a presumption of regularity through the events and actions taken to date by the relevant public authorities and that the use has not been abandoned and, therefore, is a lawful use.

BUSHFIRE PRONE LAND

The site is not classified as bush fire prone land.

NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited from 04/03/2021 to 18/03/2021 in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the Community Participation Plan.

As a result of the public exhibition process council is in receipt of 2 submission/s from:

Name:	Address:
Mr Samuel Nicholas Wallrock Ms Lucy Caroline Proffitt	318 Hudson Parade CLAREVILLE NSW 2107
Haley Byrne Mr Phillip Anthony Byrne	319 Hudson Parade CLAREVILLE NSW 2107

The following issues were raised in the submissions and each have been addressed below:

- Objection to the increase in the size of the base of the boat shed (in particular the southern side of the footprint) including any reclamation of additional land and filling of land. Any enlargement subsequently impacting on the foreshore environment and processes including degradation of the beach area to the south. The design of the concrete seawall will negatively impact the coastal process, the previous structure was dry stacked sandstone blocks with large openings to allow wave energy to dissipate.
- The structure should be constructed upon piers as to not impact upon natural foreshore processes.

- The boat shed is out of character with traditional, timber boat sheds due to materials, bulk and scale of the boatshed.
- Existing use rights abandoned, as the structures now demolished. Council should carefully review the issues of existing use rights.
- Public foreshore access to be maintained.
- Council should require removal of the as built dintel walls.

The matters raised within the submissions are addressed as follows:

- ***Objection to the increase in the size of the base of the boat shed (in particular the southern side of the footprint) including any reclamation of additional land and filling of land. Any enlargement subsequently impacting on the foreshore environment and processes including degradation of the beach area to the south. The design of the concrete seawall will negatively impact the coastal process, the previous structure was dry stacked sandstone blocks with large openings to allow wave energy to dissipate.***

Comment

The plans have since been amended to reduce the extent of the boat shed platform, particularly at the southern side of the boat shed. This was also at the request of DPI Fisheries who advised 'no additional reclamation of land' would be supported. The applicant has submitted amended plans reducing the size of the platform, to remain generally consistent with what previously stood on the site. In this regard, DPI Fisheries reviewed the amended plans and supported the application. The area of land designated to the boat shed is also consistent with what is considered to be the unit of land to which existing use rights relate.

Council's Coastal and Catchments team have reviewed the development with regards to impact upon the coastal processes and are satisfied based on the amended design which minimising adverse impacts on coastal processes. The application is supported by Coastal and Marine Damages Report which makes an assessment of longshore drift and concludes that impacts upon the beach to the south of the boat shed have been minimised. Council's Coastal and Catchments Team have reviewed the report and are satisfied.

The design of the seawall was amended to include a stepped sandstone wall that allows for wave energy dissipation, an improved and satisfactory outcome in comparison to the previously proposed non-stepped wall and the dintel walls which exist on the land which are to be demolished.

- ***The structure should be constructed upon piers as to not impact upon natural foreshore processes.***

Comment

The previous boat shed which sat on the land was not constructed on piers. The new design uses the same area of land to support the boat shed to allow the existing state of the foreshore to be maintained, with the area accommodating a boat shed since at least 1947.

The design is supported by DPI Fisheries with regards to marine habitat and the design of the seawall. Council's Coastal and Catchments team are also satisfied the proposal will not give rise to unreasonable impacts upon the foreshore processes.

In this regard, the proposal is suitable for the site given the existing circumstance and historical use of the land for the previous boatshed.

- ***The boat shed is out of character with traditional, timber boat sheds due to materials, bulk and scale of the boat shed. Structure should be no larger than previous footprint and Council should require compliance with 4m LEP height.***

Comment

The boat shed uses timber columns and stone finishes, with glazed doors which allows the landscape to be viewed through the structure. This modern interpretation of a boat shed is common for the Pittwater area and the materials uses are consistent with modern boat sheds in the area (largely stone and timber).

The height is assessed against the requirements of the PLEP 2014 under the Clause 4.6 request and found to be acceptable. The footprint of the boat shed itself would be required via condition to be reduced slightly to ensure it is the same size of the previous structure which stood on the site (6.2m x 9.2m).

- ***Existing use rights abandoned, as the structures now demolished. Council should carefully review the issues of existing use rights.***

Comment

Existing use rights are discussed in detail elsewhere within this assessment report. Council is satisfied existing use rights continue to apply to the land.

- ***Public foreshore access to be maintained.***

Comment

The issue of public foreshore access is discussed throughout the report. Council is satisfied that foreshore access is maintained around the boatshed structure and consistent how the foreshore area has been historically used and accessed when the previous boat shed occupied the land.

- ***Council should require removal of the as built dintel walls.***

Comment

The dintel walls are nominated for removal on the plans and the seawall is to be constructed with sandstone blocks, in accordance with requirements of DPI Fisheries and Council's Coastal and Catchments team.

REFERRALS

Internal Referral Body	Comments
Landscape Officer	Supported subject to conditions This application is for the partial demolition of existing boat shed structures, and the construction of new boat shed, timber jetty, stairs, ramp and slipway. Councils Landscape Referral section has considered the application

Internal Referral Body	Comments
	against the Pittwater Local Environment Plan, and the following Pittwater 21 DCP controls: - B4.22 Preservation of Trees and Bushland Vegetation. - C1.1 Landscaping. - D3.11 Landscaped Area - Environmentally Sensitive Land. The Statement of Environmental Effects provided with the application notes that no trees shall be removed as a result of the proposed works. This is confirmed on the Architectural Plans as no existing vegetation has been indicated for removal. It is noted that there are some large, significant canopy trees located at the rear of the property close to the proposed works. The works are unlikely to have an impact on these existing trees, however care shall be taken during excavation and construction works, as well as the delivery and removal of material from the site to ensure that these trees are protected accordingly. The protection of these trees are necessary to satisfy control B4.22 and D3.11, as key objectives of these controls seek to <i>"protect and enhance the scenic value and character that trees and bushland vegetation provide"</i>, and to ensure <i>"the bulk and scale of built form is minimised"</i>. The landscape component of the proposal is therefore acceptable subject to the protection of existing trees.
NECC (Bushland and Biodiversity)	Supported subject to conditions This application is for the partial demolition of existing boat shed structures, and the construction of new boat shed, timber jetty, stairs, ramp and slipway. Council's Natural Environment Unit - Biodiversity referral team have reviewed the application for consistency against the relevant environmental legislation and controls, including: Biodiversity Conservation Act 2016 (BC Act) State Environmental Planning Policy (Coastal Management) - Coastal Environment Area Pittwater Local Environmental Plan (PLEP) - 7.6 Biodiversity Protection Pittwater Development Control Plan (PDCP) - B4.7 Pittwater Spotted Gum Forest - Endangered Ecological Community

Internal Referral Body	Comments
	The application does not require the removal of native vegetation and is unlikely to indirectly impact upon nearby biodiversity values. The Landscape Referral response addresses the concerns of the Natural Environment Unit - Biodiversity. Subject to conditions the Bushland and Biodiversity referral team find the application to be consistent against relevant environmental controls.
NECC (Coast and Catchments)	Supported with conditions <u>Further comments 3/09/21</u> Revised information and plans have been supplied. These have been considered and adequately address outstanding matters subject to conditions being applied. Supported subject to conditions. <u>Further comments 22/07/21</u> It is noted a revised plan has been submitted in response to concerns from Council and Fisheries in regard to the footprint and design of the seawall component of the structure. A number of dot points have not yet been addressed adequately: - A footprint that is similar to the original structures - No reclamation of waterfront land for private development - Provision of public access along the foreshore The application has been assessed in consideration of - Coastal Management Act 2016 - State Environmental Planning Policy (Coastal Management) 2018 - Pittwater LEP 2014 - Pittwater 21 DCP Further, the application has been assessed in consideration of the following: - No navigational concerns from the Transport for NSW-Maritime Division dated 10 May 2021 enclosing dated and signed maps - Refusal from the DPI-Fisheries under the Department of Primary Industries dated 29 March 2021 - Absence of current Consent to lodge DA from the Department of Crown Lands under the NSW Planning, Industries & Environment - Absence of current Consent to lodge DA from Northern

Internal Referral Body	Comments
	Beaches Council The proposal as submitted is not supported due the likely impacts on access along the public foreshore and likely impacts on the marine environment as noted in the Marine Habitat Survey report submitted with the application and the DPI Fisheries response to this proposal. These impacts are inconsistent with the above listed planning controls and legislation. Any application for a boatshed, ramp, slipway, concrete jetty, timber jetty & steps and berthing area at this site requires concurrence from DPI fisheries and must satisfy the following matters: - A footprint that is similar to the original structures - No reclamation of waterfront land for private development - A proposal that is in accordance with the Environmentally Friendly Seawalls Guideline (OEH 2009) - Provision of public access along the foreshore - Address potential impacts to marine habitat
NECC (Riparian Lands and Creeks)	Supported subject to conditions <u>Additional comments 22/07/21</u> See coastal referral comments which cover all of the below. <u>Additional comments 17 June 2021</u> An assessment has been undertaken considering the additional information provided. The application has been assessed in consideration of - Coastal Management Act 2016 - State Environmental Planning Policy (Coastal Management) 2018 - Pittwater LEP 2014 - Pittwater 21 DCP Further, the application has been assessed in consideration of the following: No navigational concerns from the Transport for NSW- Maritime

Internal Referral Body	Comments
	Division dated 10 May 2021 enclosing dated and signed maps Refusal from the DPI-Fisheries under the Department of Primary Industries dated 29 March 2021 Absence of current Consent to lodge DA from the Department of Crown Lands under the NSW Planning, Industries & Environment Absence of current Consent to lodge DA from Northern Beaches Council The proposal as submitted is not supported due the likely impacts on access along the public foreshore and likely impacts on the marine environment as noted in the Marine Habitat Survey report submitted with the application and the DPI Fisheries response to this proposal. These impacts are inconsistent with the above listed planning controls and legislation. Any application for a boatshed, ramp, slipway, concrete jetty, timber jetty & steps and berthing area at this site requires concurrence from DPI fisheries and must satisfy the following matters: - A footprint that is similar to the original structures. - No reclamation of waterfront land for private development. - A proposal that is in accordance with the Environmentally Friendly Seawalls Guideline (OEH 2009). - Provision of public access along the foreshore. - Address potential impacts to marine habitat. This application cannot be assessed due to lack of supporting information and documentation. To adequately assess any risks the proposed works may have to aquatic biodiversity in the area, Council requires, in compliance with section B4.19 Estuarine Habitat of the Pittwater DCP, a Marine Habitat Survey / Aquatic Ecology Report for all works below the mean high water mark. The report must consider controls in both section B4.19 Estuarine Habitat and section B4.16 Seagrass Conservation, and include recommendations to minimise any impacts to seagrass and biodiversity from sediment and erosion, physical disturbances and potential pollution during the demolition and construction phases. A Caluerpa Management Plan may also be required if this noxious macroalgae is found to be located in the vicinity of the subject site. Section B4.16 further states that jetties, ramps, wharves, pontoons and other in-stream structures shall be designed and constructed in accordance with NSW Department of Primary Industries - Fisheries specifications to maximise light filtration to seafloor. Proponents are advised to consult with NSW DPI - Fisheries to discuss the requirements of their proposal. A copy of the Aquatic Ecology Report should be provided to NSW DPI - Fisheries and as integrated development, all relevant approvals and permits from NSW DPI - Fisheries will also be required.
Parks, reserves, beaches,	

Internal Referral Body	Comments
foreshore	Supported subject to conditions The proposed development can be supported with conditions.
Property Management and Commercial	Supported subject to conditions The proposal is for demolition works and construction of a boatshed, ramp, slipway, jetty & steps on Council land. Property has no objection to the proposal subject to the conditions contained in the Parks, Reserves and Foreshores Referral Response dated 17/02/2021, in particular the condition relating to the executing of a licence for the use of Council land prior to the issue of a Construction Certificate.

External Referral Body	Comments
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ENVIRONMENTAL PLANNING INSTRUMENTS (EPIs)*

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

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

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

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

SEPP 55 - Remediation of Land

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

Council records indicate that the subject site has been used for a boat shed associated with the residential use of the land for a significant period of time with no prior land uses.

In this regard it is considered that the site poses no risk of contamination and therefore, no further consideration is required under Clause 7(1)(b) and (c) of SEPP 55 and the land is considered to be suitable for the proposed land use.

SEPP (Infrastructure) 2007

Ausgrid

Clause 45 of the SEPP requires the Consent Authority to consider any development application (or an application for modification of consent) for any development carried out:

- within or immediately adjacent to an easement for electricity purposes (whether or not the electricity infrastructure exists).

- immediately adjacent to an electricity substation.
- within 5.0m of an overhead power line.
- includes installation of a swimming pool any part of which is: within 30m of a structure supporting an overhead electricity transmission line and/or within 5.0m of an overhead electricity power line.

Comment

The proposal was referred to Ausgrid. No response has been received within the 21 day statutory period and therefore, it is assumed that no objections are raised and no conditions are recommended.

SEPP (Coastal Management) 2018

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

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

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

Comment:

The proposal is not located on land containing coastal wetlands or littoral rainforest.

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

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

Comment:

The proposal is not located on land in proximity to coastal wetlands or proximity to littoral rainforest.

12 Development on land within the coastal vulnerability area

Development consent must not be granted to development on land that is within the area identified as “coastal vulnerability area” on the Coastal Vulnerability Area Map unless the consent authority is satisfied that:

- (a) if the proposed development comprises the erection of a building or works—the building or works are engineered to withstand current and projected coastal hazards for the design life of the building or works, and*
- (b) the proposed development:*
 - (i) is not likely to alter coastal processes to the detriment of the natural environment or other land, and*
 - (ii) is not likely to reduce the public amenity, access to and use of any beach, foreshore, rock platform or headland adjacent to the proposed development, and*
 - (iii) incorporates appropriate measures to manage risk to life and public safety from coastal hazards, and*
- (c) measures are in place to ensure that there are appropriate responses to, and management of, anticipated coastal processes and current and future coastal hazards.*

Comment

The proposal is not located on coastal vulnerability land.

13 Development on land within the coastal environment area

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

Comment:

The application is accompanied by a Marine Habitat Survey which concludes that the proposal will not have a detrimental impact on marine habitat, including any seagrasses.

The application is supported by DPI Fisheries who also conclude that the proposal will not have an unacceptable impact on marine habitat and the design of the new seawall is acceptable with regards to marine habitat.

The area on which the proposed boat shed sits is not an 'undeveloped' rock platform, as there has historically been a boat shed and associated structures in this location as evident by the material supplied by the applicant, a visual site inspection and existing use rights applying to the land. The design of the boat shed uses materials sympathetic to the foreshore location using sandstone finishes, timber supporting posts and glazing to allow the landscape to be viewed through the structure itself. The structure is not adjacent to any known Aboriginal heritage sites and is in the same general footprint

of where the previous structure stood.

The proposal allows continuous foreshore access around the perimeter of the boatshed and provides stairs at the southern edge of the structure where there is a level change between the platform and the beach.

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

Comment

Council is satisfied the proposal has been designed to minimise and avoid the impact to the matters listed in (1) above.

14 Development on land within the coastal use area

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

Comment

Subject to condition, the design of the boat shed will be of a similar scale to the boat shed which previously stood on the land, as to not further detract from the scenic qualities of the foreshore area. The materials and finishes selected for the new boat shed are sympathetic to the surrounds and improve upon the previous dilapidated structure that previously stood in the location. The proposal is not within any areas of known Aboriginal heritage and the structure is in the location of previously disturbed areas of rock platform.

Continuous foreshore access is provided around the boat shed structure and does not further inhibit foreshore access when compared to the boatshed which previously stood in this location. Foreshore access is provided around boatshed and access stairs provided to the southern beach to account for level changes between the beach and platform.

Council has considered the matters listed in (a) and is satisfied the development has been design to avoid and minimise impact. Council has taken into consideration the surrounding built environment and the existing size of the boat shed structure which once stood on the land in assessing the bulk and scale of the development.

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

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

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

Comment

The proposal is not considered to cause in increase in risk of coastal hazards. The application is accompanied by a Estuarine Risk Management Report which concludes the boat shed and associated structure will result in an acceptable level of risk to life, property and the foreshore area.

Pittwater Local Environmental Plan 2014

Is the development permissible?	Zone C2 : No Zone W1 : No
After consideration of the merits of the proposal, is the development consistent with: aims of the LEP?	Yes
zone objectives of the LEP?	Zone C2 : Yes Zone W1 : Yes

Principal Development Standards

Standard	Requirement	Proposed	% Variation	Complies
4.3 - Height of Buildings	4m* - W1 Zone 8.5m - E2 Zone	5.35m* 5.7m from NGL	34%	No Yes

*Height of buildings measured from 1.17 AHD which is the Highest Astronomical Tide where the building is located behind the MHWL.

Compliance Assessment

Clause	Compliance with Requirements
1.9A Suspension of covenants, agreements and instruments	Yes
4.3 Height of buildings	No
4.6 Exceptions to development standards	Yes
5.7 Development below mean high water mark	Yes
7.2 Earthworks	Yes
7.6 Biodiversity protection	Yes
7.7 Geotechnical hazards	Yes
7.8 Limited development on foreshore area	Yes
7.10 Essential services	Yes

Detailed Assessment

4.6 Exceptions to development standards

Description of non-compliance:

Development standard:	Height of buildings
Requirement:	4m
Proposed:	5.35m
Percentage variation to requirement:	34%

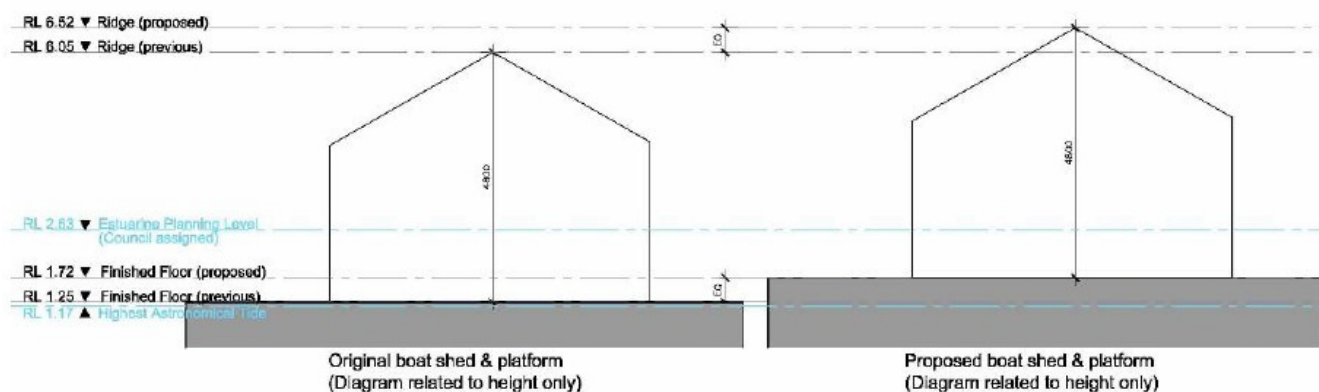


Figure 1 - Applicant's diagram of height of boatshed relative to highest astronomical tide. Left showing previous (now demolished) boatshed, right showing proposed.

Assessment of request to vary a development standard

With regards to existing use rights applying to the development, it has been established in the Land and Environment Court in *Made Property Group Pty Limited v North Sydney Council* [2020] NSWLEC 1332 that a Clause 4.6 variation request is required if the development exceeds the height of buildings development standard.

The following assessment of the variation to Clause 4.3 - Height of Buildings development standard, has taken into consideration the recent judgement contained within *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

Clause 4.6 Exceptions to development standards

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

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

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

Comment

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

this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

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

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

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

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

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

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

Comment

The Applicant's written request (attached to this report as an Appendix) has demonstrated that the objectives of the development standard are achieved, notwithstanding the non-compliance with the development standard.

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

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

Comment

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

'As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 *at* [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.'

s 1.3 of the EPA Act reads as follows:

1.3 Objects of Act(cf previous s 5)

The objects of this Act are as follows:

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

Applicant's Written Justification

The applicant's written request argues, in part:

Variation

- *Part 4, Clause 4.3 – Heights of Buildings, of the PLEP restricts the height of a building in the W1 Zone to a maximum of 4m.*
- *This control is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.*
- *NBC interprets the height of waterfront structures to be measured from the highest astronomic tide level which equates to RL 1.17 AHD.*
- *Under this interpretation the highest permissible height of a waterfront structure shall be $1.17 + 4.0 = 5.17$ AHD.*
- *The height of the previous boatshed above its platform was 4.8m at a Relative Level of 6.05.*
- *The height of the new structure above its platform is proposed to be 4.8m at RL 6.52*
- *The level of the previous platform was RL 1.25*
- *The level of the proposed platform is RL 1.72*
- *The height of the original structure and that of the new structure is 4.8m*
- *The platform has had to be raised to accommodate the NBC Estuarine Planning Level.*
- *The proposal seeks a variance to the PLEP standard of 1.35m that being 5.35m above the highest astronomical tide level.*

Pittwater DCP

D15.15 Cl(c)(ii) states that:

"Boatsheds shall be one storey and no greater than 4.5 metres in building height above the platform on which it is built"

D15.15 Cl(c)(vi) states that:

"The minimum floor level for proposed boatsheds shall be in accordance with the B3 Estuarine Hazard controls for foreshore development around the Pittwater Waterway"

B3.9 Estuarine Hazard – states that: Floor Levels - Boat shed Facilities

"New boat shed: All floor levels shall be at or above the Estuarine Planning Level"

The proposal seeks a variance to:

- PDCP D15.15 Cl(c)(ii) of 0.3m in height above the platform as per its original height.
- PDCP D15.15 Cl(c)(vi) of – 0.91m in the height of the platform below the Estuarine planning level for the site.

Variations to B3.9.

“Consideration may be given on a merit basis to a floor level of a boat shed at a level lower than the Estuarine Planning Level where it can be demonstrated through an Estuarine Risk Management Report that the boat shed is structurally designed to withstand periodic wave action and tidal inundation up to the Estuarine Planning Level.” An Estuarine Risk Management Report has been prepared by Royal Haskoning DHV and is attached to the subject development application.

The report endorses NBCs estuarine planning level of RL 2.63 and conditionally supports the proposed variance in this circumstance to the level of RL 1.72. By right of compliance with the requirements of

B3.9 of the DCP the level of the proposed boatshed platform has been set at RL 1.72 which is 0.55m above the highest astronomical tide height of RL1.17.

The zoning of the land

E2 Environmental Conservation – landward of the mean high-water mark.

W1 Natural Waterways – Seaward of the mean high-water mark (4m height limit)

This application relates to the W1 portion of the site as the proposed boatshed sits well below the building height control in the E2 zone.

a. OBJECTIVES OF THE ZONE

Zone W1 - Natural Waterways

1 Objectives of zone

- To protect the ecological and scenic values of natural waterways.

Comment: The proposed increase in height of the boat shed and lowering of the platform floor

- To prevent development that would have an adverse effect on the natural values of waterways in this zone.

Comment: The proposed increase in height of the boatshed and lowering of the platform floor

- To provide for sustainable fishing industries and recreational fishing.

Comment: The proposed increase of the boatshed and the lowering of the platform floor level

- To ensure development does not adversely impact on the natural environment or obstruct the navigation of the waterway.

Comment: The proposed increase in height of the boatshed and lowering of the platform floor

- To provide opportunities for private access to the waterway where these do not cause unnecessary impact on public access to the foreshore.

Comment: The proposed increase in boatshed height and lowering of the platform level will no

Development Standard objectives

PLEP 4.3 Height of buildings

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

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

Comment: The gabled boatshed has been integral to the character of Pittwater since settlement of the area. A boatshed of similar scale has existed on the site since at least 1947. The proposed boatshed is consistent with the form of many other boatsheds in the locality.

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

Comment: The proposed boatshed is consistent with the height of the previous boatshed and many other boatsheds in the locality.

(c) to minimise any overshadowing of neighbouring properties,

Comment: The proposed boatshed will not cause any overshadowing of neighbouring properties.

(d) to allow for the reasonable sharing of views,

Comment: The proposed boatshed will not cause any view loss to surrounding properties.

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

Comment: The proposed boatshed has been designed to sit sensitively in its topographic setting. As opposed to the previous boatshed the proposed boatshed will have a lower roof angle and broader eaves that in combination will emphasise the horizontal rather than vertical form.

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

Comment: The proposed boatshed will provide better fit with the natural environment than that of its predecessor and will have no impact on any heritage conservation area or heritage item.

The proposed increase in height is consistent with the objectives of the zone and the development standard.

HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE.

The Land and Environment Court has provided guidance as to the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary:

The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

OBJECTIVES OF THE DEVELOPMENT STANDARD – THE FIRST WAY

The proposed structure is consistent with the objectives of the height of building controls in the PLEP and the DCP21.

While there are tensions between these instruments in as much as the PLEP sets a height of 4 metres, measured by NBC above the highest astronomical tide level and the DCP21 that sets the height at 4.5m above the platform, which is to be set at the site-specific estuarine planning level, the objectives of each instrument are similar and are met by the proposal.

The proposed boatshed is consistent with the desired character of the locality and that of nearby boat sheds.

It will not overshadow or block any views and the amendments to the original design will see it sit sensitively into the landscape thus improving its visual impact on the area.

As the proposed development achieves the objectives of the control it is not necessary or reasonable to require the rebuilt structure to comply with the current standards.

EXISTING USE – THE SECOND WAY

In his Memorandum of Advice Ian Hemmings SC found that lawful existing use has been established and that it has not been abandoned with respect to the proposed development.

Under part 5 Clause 41 of the EP&A Regulation:

41 Certain development allowed (cf clause 39 of EP&A Regulation 1994)

(1) An existing use may, subject to this Division:

- (a) be enlarged, expanded or intensified, or*
- (b) be altered or extended, or*
- (c) be rebuilt, or*

Clause 41(1)(c) enables a development that has established existing use to be rebuilt. As the boat shed use was erected well before the relevant date on which the current planning instruments came into force it is not necessary or reasonable to strictly apply the consequent development standards to the proposal.

SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS.

Sufficient environmental planning grounds as defined by the relevant clauses of Section 1.3 of the EP&A Act have been achieved to justify the contravention of the standard.

The objectives of the standards are met despite the non-compliance patent in the design.

PUBLIC INTEREST

A boatshed and its associated structures:

- Have existed harmoniously on this site since at least 1947.*
- Supported and helped form the beach and local estuarine systems in the decades since they were built.*
- Have established the local boatshed aesthetic of the area and Pittwater in general.*

The resetting of the platform level to meet Council requirements and the maintenance of the height of the prior structure will see the area returned to its former aesthetic.

The structures will help maintain the beach and its estuarine systems.

With the above in mind Council can be satisfied that the proposal is in the public interest as it restores the prior pattern of development, is beneficial to the maintenance of the beach and meets the objectives of the relevant instruments

Council's Comment

The arguments made by the applicant are generally agreed with, insofar as the height of the boat shed relative to the platform on which it sits is consistent with the previous boatshed which sat on the land. The increase in height relative to the water level is a result of the increased platform height that is needed to increase the height of the platform, relative to the estuarine planning level to ensure the reasonable protection of property and the structure itself. The boatshed is considered to be of good design, uses materials sympathetic to the locality and is generally consistent with the boatshed which previously occupied the land, for which existing use rights have been established.

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

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

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

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

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

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

Comment

In considering whether or not the proposed development will be in the public interest, consideration must be given to the underlying objectives of the Height of Buildings development standard and the objectives of the W1 Natural Waterway zone. An assessment against these objectives is provided below.

Objectives of development standard

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

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

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

Comment

The boat shed replaces a previous structure of similar height and scale, that stood on the land for a significant period of time. The DCP sets out the desired height of boat sheds relative to the platform level of 4.5m, with the proposal being 4.8m relative to the platform level which is not inconsistent with the general envisaged height of boat sheds under the DCP.

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

Comment

The boat shed is consistent with the height of the previous structure on the land as explained above. There is one boat shed 80m south of the site, however boat sheds are not prevalent in the immediate visual catchment of the site. Therefore, the most relevant comparison is the previous design which once stood on the site.

c) to minimise any overshadowing of neighbouring properties,

Comment

Will not overshadow private property, acceptable overshadowing of foreshore area.

d) to allow for the reasonable sharing of views,

Comment

Will not impact views from privacy properties.

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

Comment

The building sits upon an improved platform that previously consisted of a concrete and rock rubble platform. The new design is built to be consistent with the guidelines for seawalls and has a footprint generally consistent with what previously existed on the site.

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

Comment

The proposal makes use of quality materials that blend into the landscape, including timber posts and sandstone finishes. The building is considered sympathetic to the environment and locality, not inconsistent with the modern boatsheds throughout the Pittwater.

Zone objectives

The underlying objectives of the W1 Natural Waterways zone are:

- ***To protect the ecological and scenic values of natural waterways.***

Comment

The boat shed has been designed to meet the requirements of DPI Fisheries, Council's Coastal Team and use a material palette that is sympathetic for the environment. The boat shed replaces a former boatshed in the same location and therefore is not considered to further detract from the scenic value of what has historically been in the location.

- ***To prevent development that would have an adverse effect on the natural values of waterways in this zone.***

Comment

The development is found to not result in unacceptable impacts on the natural environment including foreshore processes, marine habitat and seagrasses, as assessed by DPI Fisheries and Council's relevant riparian, coastal and biodiversity experts. The rebuilding of the boat shed in the same location will not give rise to additional impacts and will resolve the previously dilapidated state of structures.

- ***To provide for sustainable fishing industries and recreational fishing.***

Comment

Not applicable to the proposal.

- ***To ensure development does not adversely impact on the natural environment or obstruct the navigation of the waterway.***

Comment

The application is accompanied by a Marine Habitat Survey that concludes the proposal will not have detrimental effects to marine habitat or seagrasses. The application does not involve the removal of any trees. The proposal maintains an appropriate outcome with regards to these environmental requirements. Crown Lands has issued Land Owners Consent for the structures

seaward of the mean high water mark and a letter has been provided from Transport for NSW advising no navigational issues with the proposal.

- **To provide opportunities for private access to the waterway where these do not cause unnecessary impact on public access to the foreshore.**

Council is satisfied that reasonable public access is maintained around the boatshed and does not further inhibit public access around the foreshore when compared to the structures which previously sat on the land. The proposal allows the continued use of the waterway for private access where it has historically been used for the purpose of a boat shed and maritime structures.

Conclusion

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the W1 Natural Waterway zone.

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

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

Planning Circular PS20-002 dated 5 May 2020, as issued by the NSW Department of Planning, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument. In this regard, given the consistency of the variation to the objectives of the zone, the concurrence of the Secretary for the variation to the Height of buildings Development Standard is assumed by the Local Planning Panel.

7.2 Earthworks

The objective of Clause 6.2 - 'Earthworks' requires development to ensure that earthworks for which development consent is required will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land.

In this regard, before granting development consent for earthworks, Council must consider the following matters:

(a) the likely disruption of, or any detrimental effect on, existing drainage patterns and soil stability in the locality of the development

Comment

The proposal is unlikely to unreasonably disrupt existing drainage patterns and soil stability in the locality.

(b) the effect of the proposed development on the likely future use or redevelopment of the land

Comment

The proposal will not unreasonably limit the likely future use or redevelopment of the land.

(c) the quality of the fill or the soil to be excavated, or both

Comment

The excavated material can be dealt with through a Waste Management Plan, which could form a condition should consent be granted.

(d) the effect of the proposed development on the existing and likely amenity of adjoining

properties

Comment

The proposed earthworks will not result in unreasonable amenity impacts on adjoining properties.

(e) the source of any fill material and the destination of any excavated material

Comment

The excavated material can be dealt with through a Waste Management Plan, which could form a condition should consent be granted.

(f) the likelihood of disturbing relics

Comment

The site is not mapped as being a potential location of Aboriginal or other relics. A condition could be included for unexpected finds, should consent be granted.

(g) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area

Comment

The proposed development has been considered by DPI Fisheries, Council's Riparian, Coast & Catchments and Biodiversity teams, who are each satisfied the proposed development will not result in adverse impacts to the environment or environmentally sensitive areas.

(h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development

Comment

The proposed design is considered to have minimised impacts of the development, whilst retaining the existing use rights of the proponent. Conditions are included in the recommendation of this report that will minimise the impacts of the development.

(i) the proximity to and potential for adverse impacts on any heritage item, archaeological site or heritage conservation area

Comment

The site is not a heritage item, in the vicinity of a heritage item or in a conservation area or archaeological site.

Having regard to the above assessment, it is concluded that the proposed development is consistent with the aims and objectives of PLEP 2014, Pittwater 21 DCP and the objectives specified in s.5(a)(i) and (ii) of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is supported, in this particular circumstance.

7.6 Biodiversity protection

Before determining a development application for development on land to which this clause applies, this clause requires the consent authority to consider:

(a) whether the development is likely to have:

(i) any adverse impact on the condition, ecological value and significance of the fauna and flora on the land, and

- (ii) any adverse impact on the importance of the vegetation on the land to the habitat and survival of native fauna, and***
- (iii) any potential to fragment, disturb or diminish the biodiversity structure, function and composition of the land, and***
- (iv) any adverse impact on the habitat elements providing connectivity on the land***

Comment

The development has been assessed by Council's Biodiversity Team, who raised no objections to approval. Therefore, Council can be satisfied that the development will not have any adverse impact on the condition, ecological value and significance of the fauna and flora on the land.

- (b) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development***

Comment

The development has been assessed by Council's Biodiversity Team, who raised no objections to approval. Therefore, Council can be satisfied that the proposal includes appropriate measures to avoid and minimise the impacts of the development.

Before granting development consent, this clause also requires the consent authority to be satisfied that:

- (a) the development is designed, sited and will be managed to avoid any significant adverse environmental impact, or***
- (b) if that impact cannot be reasonably avoided by adopting feasible alternatives—the development is designed, sited and will be managed to minimise that impact, or***
- (c) if that impact cannot be minimised - the development will be managed to mitigate that impact.***

Comment

The development has been assessed by Council's Biodiversity Team, who raised no objections to approval. Therefore, Council can be satisfied that the development is designed, sited and will be managed to any significant adverse environmental impact.

7.7 Geotechnical hazards

Under Clause 7.7 Geotechnical Hazards, before determining a development application for development on land to which this clause applies, the consent authority must consider the following matters to decide whether or not the development takes into account all geotechnical risks:

- (a) site layout, including access,***
- (b) the development's design and construction methods,***
- (c) the amount of cut and fill that will be required for the development,***
- (d) waste water management, stormwater and drainage across the land,***
- (e) the geotechnical constraints of the site,***
- (f) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.***

Comment:

The proposed development is supported by an estuarine risk management report (which makes an assessment based on the proposal specific to the foreshore location), geotechnical risks forms (in accordance with Council's Geotechnical Risk Policy, prepared by a geotechnical engineer) and architectural plans that demonstrate all geotechnical risks have been taken into account, relative to the foreshore area of the boatshed.

The application has been reviewed by Council's Coast and Catchment Team who are satisfied of the proposal, subject to conditions.

Development consent must not be granted to development on land to which this clause applies unless:

(a) the consent authority is satisfied that the development will appropriately manage waste water, stormwater and drainage across the land so as not to affect the rate, volume and quality of water leaving the land

Comment

The proposed foreshore location means that storm water will be directed off the structure into the Pittwater Waterway, with no on-site detention or the like required given the location and size of the structure.

(b) the consent authority is satisfied that:

- (i) the development is designed, sited, and will be managed to avoid any geotechnical risk and significant adverse impact on the development and the land surrounding the development, or**
- (ii) if that risk or impact cannot be reasonably avoided - the development is designed, sited and will be managed to minimise that risk or impact, or**
- (iii) if that risk or impact cannot be minimised - the development will be managed to mitigate that risk or impact.**

Comment

The application has been reviewed by Council's Coast and Catchments Team, who is supportive of the proposal, subject to conditions of consent. The application is accompanied by a Estuarine Risk Management Report which prepared by a suitably qualified engineer, which is specific to the foreshore location and makes recommendations to ensure the structure adequacy of the boatshed is achieve to mitigate risk to life and property.

As such, Council can be satisfied that the proposed development has been designed, sited, and will be managed to avoid any geotechnical risk and significant adverse impact on the development and the land surrounding the development.

7.8 Limited development on foreshore area

Under Clause 7.8 Limited Development on Foreshore Area, development consent must not be granted for development on land in the foreshore area except for the following purposes:

- ***the extension, alteration or rebuilding of an existing building wholly or partly in the foreshore area, but only if the development will not result in the footprint of the building extending further into the foreshore area,***
- ***boat sheds, sea retaining walls, wharves, slipways, jetties, waterway access stairs, swimming pools, fences, cycleways, walking trails, picnic facilities or other recreation facilities (outdoors).***

Comment

The proposed development is for a boat shed, sea retaining wall, slipway, jetty and waterway access stairs.

Development consent must not be granted under this clause unless the consent authority is

satisfied that:

(a) the development will contribute to achieving the objectives for the zone in which the land is located

Comment

The application is reliant upon existing use rights, which is discussed in further detail elsewhere in this report. However, the proposal is considered consistent with the objectives of the W1 Natural Waterways Zone, in particular *"To provide opportunities for private access to the waterway where these do not cause unnecessary impact on public access to the foreshore"*, *"To protect the ecological and scenic values of natural waterways"* and *"To prevent development that would have an adverse effect on the natural values of waterways in this zone"*. The structure makes use of timber, sandstone and glazing to provide material palette sympathetic to the area and allows the structure to blend into the surrounds. For the reasons outlined within the assessment report, including the consideration by Council's Biodiversity Team, Coast and Catchment Team and Riparian Team, the application is consistent with the zone objective of the E2 Environmental Conservation zone, in particular *"To protect, manage, restore and enhance the ecology, hydrology and scenic values of riparian corridors and waterways, groundwater resources, biodiversity corridors, areas of remnant native vegetation and dependent ecosystems."*

(b) the appearance of any proposed structure, from both the waterway and adjacent foreshore areas, will be compatible with the surrounding area, and

Comment

The structure uses a footprint that is generally consistent with the previous boatshed which once stood in the location and uses stone, timber and glazing to create a relatively lightweight structure in appearance that is sympathetic in the foreshore area and consistent with the styles of boatsheds common along the Pittwater Foreshore.

- ***the development will not cause environmental harm such as:***
 - i ***pollution or siltation of the waterway, or***
 - i ***an adverse effect on surrounding uses, marine habitat, wetland areas, fauna and flora habitats, or***
 - i ***an adverse effect on drainage patterns, or***
 - i ***the removal or disturbance of remnant riparian vegetation, and***

Comment

The application has been considered by Council's Coast and Catchments Team, Riparian Team, Biodiversity Team and DPI Fisheries. The application is accompanied by a Marine Habitat Survey which concludes the proposal will not have an adverse impact to the aquatic environment or biodiversity value of the site. Council's relevant referral experts and DPI Fisheries are satisfied the proposed development will not cause any unacceptable environmental harm.

- ***the development will not cause congestion or generate conflict between people using open space areas or the waterway, and***

Comment

The proposal demonstrates continuous foreshore access will be available around the boatshed structure. The area around the boatshed is sufficient for safe and practical public access. The

application is supported by the TfNSW who have advised they have no navigational issues with the proposal.

- ***opportunities to provide continuous public access along the foreshore and to the waterway will not be compromised, and***

Comment

The proposal will allow for continual public foreshore access, as demonstrated on the plans. Members of the public can traverse around the rear or the front of the boatshed structure and any changes in level have been accommodated by access stairs. Access stairs are provided on the southern edge due to the level change between the beach and boatshed platform, whilst on the northern site the levels match the existing rock shelf.

- ***any historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance of the land on which the development is to be carried out and of surrounding land will be maintained, and***

Comment

There are no heritage items or known Aboriginal sites in the immediate vicinity of the site. The application has demonstrated there will be no unacceptable impacts on the natural environment.

- ***in the case of development for the alteration or rebuilding of an existing building wholly or partly in the foreshore area, the alteration or rebuilding will not have an adverse impact on the amenity or aesthetic appearance of the foreshore, and***

Comment

The proposal is to rebuild an existing boat shed which once stood in the location of the previous boatshed. The materials selection is considered to give an improved visual appearance to the boat shed, with the previous structure dilapidated and affected by tidal inundation.

- ***sea level rise, coastal erosion and recession, or change of flooding patterns as a result of climate change have been considered.***

Comment

The boat shed platform has been set at an appropriate Estuarine Planning Level to account for climate conditions and sea level rise.

In deciding whether to grant consent for development in the foreshore area, the consent authority must consider whether and to what extent the development would encourage the following:

- ***continuous public access to and along the foreshore through or adjacent to the proposed development,***
- ***public access to link with existing or proposed open space,***
- ***public access to be secured by appropriate covenants, agreements or other instruments registered on the title to land,***
- ***public access to be located above mean high water mark,***
- ***the reinforcing of the foreshore character and respect for existing environmental conditions.***

Comment

The proposed development will retain continuous public access to and along the foreshore. It is noted that the area is relatively difficult to access and mostly services the adjoining properties along Hudson Parade. The plans nominate the intended path of public access around the rear of the boat shed, however, access across the front of the boat shed is also possible. Stairs have been provided at the southern edge to account for the level change between the beach and the boat shed platform, whilst on the northern side the boat shed platform generally meets the existing rock shelf (40mm level change). The stepped sandstone blocks around the boatshed also provide informal steps/access between the beach and boat shed platform.

The area in which the boat shed is proposed has historically been used as the boat shed, as evident by the boat shed and associated structures which previously stood in the location. The proposed development is acceptable in relation to the foreshore character and the existing environmental conditions.

Pittwater 21 Development Control Plan

Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
A1.7 Considerations before consent is granted	Yes	Yes
A4.3 Bilgola Locality	Yes	Yes
B1.3 Heritage Conservation - General	Yes	Yes
B1.4 Aboriginal Heritage Significance	Yes	Yes
B3.1 Landslip Hazard	Yes	Yes
B3.6 Contaminated Land and Potentially Contaminated Land	Yes	Yes
B4.7 Pittwater Spotted Gum Forest - Endangered Ecological Community	Yes	Yes
B4.16 Seagrass Conservation	Yes	Yes
B4.19 Estuarine Habitat	Yes	Yes
B8.1 Construction and Demolition - Excavation and Landfill	Yes	Yes
B8.3 Construction and Demolition - Waste Minimisation	Yes	Yes
B8.4 Construction and Demolition - Site Fencing and Security	Yes	Yes
B8.5 Construction and Demolition - Works in the Public Domain	Yes	Yes
C1.2 Safety and Security	Yes	Yes
C1.3 View Sharing	Yes	Yes

Clause	Compliance with Requirements	Consistency Aims/Objectives
C1.4 Solar Access	Yes	Yes
C1.5 Visual Privacy	Yes	Yes
C1.6 Acoustic Privacy	Yes	Yes
C1.12 Waste and Recycling Facilities	Yes	Yes
C1.13 Pollution Control	Yes	Yes
D3.1 Character as viewed from a public place	Yes	Yes
D3.2 Scenic protection - General	Yes	Yes
D3.3 Building colours and materials	Yes	Yes
D15.11 Waterfront lighting	Yes	Yes
D15.12 Development seaward of mean high water mark	Yes	Yes
D15.13 Lateral limits to development seaward of mean high water mark	Yes	Yes
D15.14 Minimum frontage for waterfront development	Yes	Yes
D15.15 Waterfront development	No	Yes
D15.18 Seawalls	Yes	Yes

Detailed Assessment

D3.2 Scenic protection - General

The proposed design of the boatshed is considered against the outcomes of the control as follows:

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

Comment

The relevant part of the Bilgola Locality Statement for the Pittwater Foreshore Area includes:

"Future development will maintain a building height limit below the tree canopy, and minimise bulk and scale. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment".

The proposed boat shed uses solid timber columns, sandstone finished walls and glazing which is considered to be sympathetic to the area and in harmony with modern examples of boatsheds on the Pittwater Foreshore in the surrounding area, which compliment the architectural style of the locality. The glazing allows the trees and the landscape to be viewed through sections of the boatshed and gives the structure a lightweight feel. The building will be below the height of the canopy trees which sit behind the structure.

- ***Scenic bushland and geographical landforms are the predominant features of Bilgola with the built form being the secondary component of the visual catchment.***

Comment

The materials selected allow the boat shed to blend into the background and the glazing allows the landscape to be viewed through sections of the boatshed. The proposal will sit well below the ridgeline behind and is of a design and footprint generally consistent with the previous boat shed which once stood in its location.

- ***Preserve scenic quality as part of the recreational amenity.***

Comment

The boat shed is intended to enhance the recreational use of the land for the owners, whilst still allow public foreshore access around the boatshed for members of the public who are exploring the foreshore area. Given the proposed boatshed replaces the long standing previous boatshed, the use of the land is consistent with how it has historically been used for recreational purposes.

Overall, the proposed boat shed is of good design, of a scale and size generally consistent with the boatshed which previously stood and will consist of materials that will blend into the landscape. The proposed development is consistent with the aims and objectives of this control.

D15.15 Waterfront development

The rebuilding of the boat shed, slipway, boat ramp, jetty and berthing area permitted under the provisions of existing use rights, as discussed in detail earlier within this report. The application seeks replacement of these structures with levels adapted to meet the requires estuarine planning level of the new boatshed structure.

The design of the structures have been reviewed by DPI Fisheries (General Terms of Approval issued), Transport for NSW (who raised no concern with navigational issues) and Council's Coast and Catchment teams. The design of the jetty, berthing area, boat ramp and slipway are generally consistent with the design of the previous structures which once stood on the land and are therefore supported. The height of the jetty (1.72AHD, matching the boatshed platform) is 1m above the MHW, consistent with the DCP. The width of the jetty is 2m in accordance with the DCP.

In regards to the design of the boat shed structure itself, the following comments are made:

Height

The planning controls set a maximum height for a boat shed under the PDCA at 4.5m, as measured from the platform on which it sits. The proposed boat shed has a height of 4.8m from the platform, however, this is consistent with the previous design of the boat shed which occupied the land. The maximum building height under the PLEP is addressed earlier in this report. Given the height relative to the platform level is consistent with the previous boat shed on the land, this minor departure from the control can be supported in the context of existing use rights applying to the land.

Boatshed footprint

The PDCA sets a maximum footprint for boat sheds at 4m x 6m. Based on survey data provided for the previous boat shed, the previous boat shed footprint was 6.2m (wide) x 9.2m (long). The proposed boat shed is 6.75m (wide) x 9.745m (long). The proposal is larger than the current DCP guidelines for boat sheds (4m x 6m), with the aim of the PDCA control being to ensure '*Structures blend with the natural environment*' and '*Structures are not detrimental to the visual quality, water quality or estuarine habitat of the Pittwater Waterway*'. Furthermore, the proposed boat shed is of a size slightly larger than the previous footprint itself. The applicant has put forward that the new boat shed has a comparable internal floor area of the previous structure, due to the structural walls of the new boatshed being thicker and therefore, resulting in a bigger footprint.

However, Council's controls guide the size of boat sheds based on the external dimensions of the building, not the internal floor area. The intent of the control to guide the bulk and scale of the boat shed and the internal floor area is not relevant to this cause. Therefore, Council cannot see any planning basis for supporting a footprint larger than the previous structure on the land which measured 6.2m (wide) x 9.2m (long). In this regard, Council recommends a condition of consent that the external footprint is limited to this size (6.2m (wide) & 9.2m (long)).

D15.18 Seawalls

Council's Coast and Catchment Team, DPI Fisheries and Crown Lands have considered the proposed development with regards to the construction of a new sandstone seawall around the boat shed. The proposed seawall replaces the previous rubble seawall which once stood around the boat shed which supported the area of earth/land on which the boat shed stood. The new seawall has been proposed in accordance with the *Office of Environment and Heritage Environmentally Friendly Seawalls Guide* which includes unbonded, stepped sandstone blocks which allows for habitat for aquatic species. The application is accompanied by Marine Habitat Survey which concludes the proposal will not result in adverse environmental impacts to marine habitat in the proximity of site as a result of the development and the seawall is of a design that is conducive to supporting marine habitat.

The application is also accompanied by a Coast and Marine Damages Report prepared by Coastal Engineers Royal Haskoning which was prepared in respect to a new seawall in this location and any additional impacts over the previous rubble seawall which once stood in the location. The report assess the impact of damages to the foreshore area, coastal processes and the impact to longshore sediment transportation as a result of new seawall. With regards to the construction of the seawall in the location, the report concludes *"While they may have a slightly higher elevation than the former boatshed floor level of 1.2-1.3m AHD, their influence as a groyne on littoral draft (or longshore sediment transport) would exhibit no material difference to that compared to the former boatshed and ramp structures."*

As a rubble seawall has historically been used as the supporting structure around the boatshed in this location, the proposed replacement with a new sandstone block seawall generally consistent with the previous footprint is a reasonable solution given the history of structures associated with land and the expert reports conclude that there will be no unacceptable adverse impacts with regards to coastal processes or marine habitat.

THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES

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

CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN

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

POLICY CONTROLS

Northern Beaches Section 7.12 Contributions Plan 2021

The proposal is subject to the application of Northern Beaches Section 7.12 Contributions Plan 2021.

A monetary contribution of \$5,675 is required for the provision of new and augmented public infrastructure. The contribution is calculated as 1% of the total development cost of \$567,500.

CONCLUSION

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

- Environmental Planning and Assessment Act 1979;
- Environmental Planning and Assessment Regulation 2000;
- All relevant and draft Environmental Planning Instruments;
- Pittwater Local Environment Plan;
- Pittwater Development Control Plan; and
- Codes and Policies of Council.

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

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

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

Council is satisfied that:

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

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

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

Summarised Conclusion

The application has been considered with regards to existing use rights and the proposal is accompanied by a sufficient level of detail and supporting evidence to allow Council to be satisfied that existing use rights apply to the land.

The merit issues with regards to the boatshed design have been resolved (subject to a recommendation to require a slight reduction in the external footprint of the boatshed) and the coastal, environmental and estuarine issues resolved to the satisfaction of Council's referral bodies and the DPI Fisheries.

The appropriate owners consent have been received from Council's Property Team and the

Department of Planning - Crown Lands and therefore the application is recommended for approval to the Local Planning Panel.

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

RECOMMENDATION

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

Accordingly the Northern Beaches Local Planning Panel, on behalf of Northern Beaches Council as the consent authority grant Development Consent to DA2020/1762 for Demolition works and construction of boatshed, ramp, slipway, jetty & steps on land at Lot 1 DP 827733, 316 Hudson Parade, CLAREVILLE, Lot 2 DP 827733, 316 Hudson Parade, CLAREVILLE, Lot LIC 559856, 316 Hudson Parade, CLAREVILLE, subject to the conditions printed below:

DEVELOPMENT CONSENT OPERATIONAL CONDITIONS

1. **Approved Plans and Supporting Documentation**

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

a) Approved Plans

Architectural Plans - Endorsed with Council's stamp		
Drawing No.	Dated	Prepared By
DA-000, Issue J	6/07/2021	Michael Fountain Architects
DA-001, Issue W	1/09/2021	Michael Fountain Architects
DA-010, Issue I	6/07/2021	Michael Fountain Architects
DA-011, Issue J	6/07/2021	Michael Fountain Architects
DA-012, Issue I	2/07/2021	Michael Fountain Architects
DA-013, Issue I	2/07/2021	Michael Fountain Architects
DA-020, Issue K	6/07/2021	Michael Fountain Architects
DA-021, Issue I	6/07/2021	Michael Fountain Architects
DA-040, Issue A	16/08/2021	Michael Fountain Architects

DA-030, Issue D	09/06/2021	Michael Fountain Architects
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Reports / Documentation – All recommendations and requirements contained within:		
Report No. / Page No. / Section No.	Dated	Prepared By
Marine Habitat Survey	April 2021	Bio-Analysis
Estuarine Risk Management Report, Ref PA2731	16 April 2021	Royal Haskoning Australia

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

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

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

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

Other Department, Authority or Service	EDMS Reference	Dated
DPI Fisheries - General Terms of Approval - Ref IDA21/93	2021/515426	16 July 2021

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

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

3. **Prescribed Conditions**

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

Any such sign is to be maintained while the building work, subdivision work or demolition work is being carried out, but must be removed when the work has been completed.
- (d) Residential building work within the meaning of the Home Building Act 1989 must not be carried out unless the Principal Certifying Authority for the development to which the work relates (not being the Council) has given the Council written notice of the following information:

- (i) in the case of work for which a principal contractor is required to be appointed:
 - A. the name and licence number of the principal contractor, and
 - B. the name of the insurer by which the work is insured under Part 6 of that Act,
- (ii) in the case of work to be done by an owner-builder:
 - A. the name of the owner-builder, and
 - B. if the owner-builder is required to hold an owner-builder permit under that Act, the number of the owner-builder permit.

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

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

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

Reason: Legislative requirement.

4. **General Requirements**

- (a) Unless authorised by Council:
Building construction and delivery of material hours are restricted to:
 - 7.00 am to 5.00 pm inclusive Monday to Friday,
 - 8.00 am to 1.00 pm inclusive on Saturday,
 - No work on Sundays and Public Holidays.

Demolition and excavation works are restricted to:

- 8.00 am to 5.00 pm Monday to Friday only.

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

- (b) Should any asbestos be uncovered on site, its demolition and removal must be carried out in accordance with WorkCover requirements and the relevant Australian Standards.

- (c) At all times after the submission the Notice of Commencement to Council, a copy of the Development Consent and Construction Certificate is to remain onsite at all times until the issue of a final Occupation Certificate. The consent shall be available for perusal of any Authorised Officer.
- (d) Where demolition works have been completed and new construction works have not commenced within 4 weeks of the completion of the demolition works that area affected by the demolition works shall be fully stabilised and the site must be maintained in a safe and clean state until such time as new construction works commence.
- (e) Onsite toilet facilities (being either connected to the sewer or an accredited sewer management facility) for workers are to be provided for construction sites at a rate of 1 per 20 persons.
- (f) Prior to the release of the Construction Certificate, payment of the Long Service Levy is required. This payment can be made at Council or to the Long Services Payments Corporation. Payment is not required where the value of the works is less than \$25,000. The Long Service Levy is calculated on 0.35% of the building and construction work. The levy rate and level in which it applies is subject to legislative change. The applicable fee at the time of payment of the Long Service Levy will apply.
- (g) The applicant shall bear the cost of all works associated with the development that occurs on Council's property.
- (h) No skip bins, building materials, demolition or excavation waste of any nature, and no hoist, plant or machinery (crane, concrete pump or lift) shall be placed on Council's footpaths, roadways, parks or grass verges without Council Approval.
- (i) Demolition materials and builders' wastes are to be removed to approved waste/recycling centres.
- (j) No trees or native shrubs or understorey vegetation on public property (footpaths, roads, reserves, etc.) or on the land to be developed shall be removed or damaged during construction unless specifically approved in this consent including for the erection of any fences, hoardings or other temporary works.
- (k) Prior to the commencement of any development onsite for:
 - i) Building/s that are to be erected
 - ii) Building/s that are situated in the immediate vicinity of a public place and is dangerous to persons or property on or in the public place
 - iii) Building/s that are to be demolished
 - iv) For any work/s that is to be carried out
 - v) For any work/s that is to be demolished

The person responsible for the development site is to erect or install on or around the development area such temporary structures or appliances (wholly within the development site) as are necessary to protect persons or property and to prevent unauthorised access to the site in order for the land or premises to be maintained in a safe or healthy condition. Upon completion of the development, such temporary structures or appliances are to be removed within 7 days.
- (l) A "Road Opening Permit" must be obtained from Council, and all appropriate charges paid, prior to commencement of any work on Council property. The owner/applicant shall be responsible for all public utilities and services in the area of the work, shall notify all relevant Authorities, and bear all costs associated with any repairs and/or adjustments as those Authorities may deem necessary.
- (m) The works must comply with the relevant Ausgrid Network Standards and SafeWork NSW Codes of Practice.

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

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

FEES / CHARGES / CONTRIBUTIONS

5. Policy Controls

Northern Beaches 7.12 Contributions Plan 2021

A monetary contribution of \$5,675.00 is payable to Northern Beaches Council for the provision of local infrastructure and services pursuant to section 7.12 of the Environmental Planning & Assessment Act 1979 and the Northern Beaches Section 7.12 Contributions Plan 2021. The monetary contribution is based on a development cost of \$567,500.00.

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

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

The Northern Beaches Section 7.12 Contributions Plan 2021 may be inspected at 725 Pittwater Rd, Dee Why and at Council's Customer Service Centres or alternatively, on Council's website at www.northernbeaches.nsw.gov.au

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

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

6. Security Bond

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

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

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

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

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

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

7. No Clearing of Vegetation

Unless otherwise exempt, no vegetation is to be cleared prior to issue of a Construction Certificate.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to issue of Construction Certificate.

Reason: To protect native vegetation.

8. License with Council required to be executed

Prior to issue of a Construction Certificate the proposed license with Council must be executed by both parties.

Reason: To ensure the applicant has complied with the Local Government Act 1993 in regards to having authorised tenure over Council land.

9. Amendments to the approved plans

The following amendments are to be made to the approved plans:

- i The boat shed building shall be amended to consist of a maximum external length of 9.2m and external width of 6.2m. In this regard, the approved boat shed footprint is to match the external dimensions of the boat shed which previously stood on the site.
- i The roof shall consist of a colour no-lighter than mid-grey.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of the construction certificate.

Reason: To ensure development minimises unreasonable impacts upon surrounding land.

10. **Boundary Identification Survey**

A boundary identification survey, prepared by a Registered Surveyor, is to be prepared in respect of the subject site.

The plans submitted for the Construction Certificate are to accurately reflect the property boundaries as shown on the boundary identification survey, with setbacks between the property boundaries and the approved works consistent with those nominated on the Approved Plans of this consent.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of any Construction Certificate.

Reason: To ensure all approved works are constructed within the subject site and in a manner anticipated by the development consent.

11. **Working and Access on Reserves Permit**

Works (undertaken by principal contractors working without Council supervision) on Land owned or managed by Council require a "Working on Reserves" permit prior to commencement. Applications can be obtained from Council's website or the Parks and Recreation business unit.

Reason: public safety and the protection of Council infrastructure.

12. **Estuarine Hazard Design Requirements**

All development or activities must be designed and constructed such that they will not increase the level of risk from estuarine processes for any people, assets or infrastructure in surrounding properties; they will not adversely affect estuarine processes; they will not be adversely affected by estuarine processes.

To ensure Council's recommended flood evacuation strategy of 'shelter-in-place', it will need to be demonstrated that there is safe pedestrian access to a 'safe haven' above the Estuarine Planning Level.

Reason: To minimise potential hazards associated with development in an estuarine habitat.

13. **Estuarine Planning Level Requirements**

An Estuarine Planning Level (EPL) of 2.63m AHD has been adopted by Council for the subject site and shall be applied to all development proposed below this level as follows:

- i All structural elements below 2.63m AHD shall be of flood compatible materials;
- i All electrical equipment, wiring, fuel lines or any other service pipes and connections must be located either above 2.63m AHD or waterproofed to this level; and
- i The storage of toxic or potentially polluting goods, chemicals or materials, which may be hazardous or pollute the waterway, is not permitted below 2.63m AHD.
- i All interior power supplies (including electrical fittings, outlets and switches) must be located at or above 2.63m AHD. All exterior power supplies (including electrical fittings, outlets and switches) shall be located at or above 2.63m AHD to avoid the likelihood of contact with splashing waves and spray.

Reason: To ensure aspect of the development are built at the appropriate level

14. **Compliance with Estuarine Risk Management Report**

The development is to comply with all recommendations of the approved Estuarine Risk Management Report prepared by Royal HaskoningDHV dated 16 April 2021 and these recommendations are to be incorporated into construction plans.

Reason: To minimise potential hazards associated with development in an estuarine habitat.

15. **Structural Engineering for Estuarine Risk**

Structural engineering design for the development shall be prepared, with input as necessary from a chartered professional engineer with coastal engineering as a core competency, to ensure that for its design life (taken to be 60years as justified and accepted by Council) the development is able to withstand the wave impact forces and loadings identified in the approved Estuarine Risk Management Report prepared by Royal HaskoningDHV dated 16 April 2021.

Note: The potential for component fatigue (wear and tear) should be recognised for the less severe, but more frequent, wave impact loadings.

Reason: To ensure structural engineering is prepared by an appropriately qualified professional

16. **Engineers Certification of Plans**

The structural design shall be prepared by and each plan/sheet signed by, a registered professional civil or structural engineer with chartered professional status (CP Eng) who has an appropriate level of professional indemnity insurance and shall be submitted to the Principal Certifying Authority prior to the release of the Construction Certificate.

Reason: To ensure structural engineering is prepared by an appropriately qualified professional

17. **Decking materials**

Decking and pontoon materials are to provide 50% light transmittance.

Reason: To protect aquatic species and estuarine habitat

18. **Boatshed footings**

Boatshed footings are to be constructed in accordance with updated plans and OEH's 'Environmentally Friendly Seawalls: A Guide to Improving the Environmental Value of Seawalls and Seawall-Lined Foreshores in Estuaries'

Reason: Provide habitat in the intertidal zone.

19. **Low Level Coastal Inundation Risk Design**

All development must be designed and constructed to achieve a low risk of damage and instability due to coastal inundation, wave impact and foreshore erosion hazards.

20. **Compliance with Standards**

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

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

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

CONDITIONS THAT MUST BE ADDRESSED PRIOR TO ANY COMMENCEMENT

21. **Dilapidation Report of Land owned or managed by Council**

A dilapidation report established at the commencement of the works shall contain a survey of pre-existing land features including photographic record of the Land under Council's care control and management adjoining the development, detailing the physical condition of items such as, but not exclusively limited to, physical assets such as crossovers, driveways, footpaths, utilities, furniture, play equipment, trees, gardens, lawn areas, bushland, and any rock outcrops.

This dilapidation report shall be submitted to Council and the Certifying Authority prior to commencement of works, and shall be the basis for rectification of any damage to Council's assets as listed in the Post Construction Dilapidation report submitted prior to the issue of the Occupation Certificate.

Any damage to these assets during the works must be replaced like for like to the satisfaction of the Certifying Authority, and shall be subject to acceptance by Council.

The applicant may be held liable to any damage to public infrastructures in the vicinity of the site, where such damage is not accurately recorded under the requirements of this condition. In this regard, where required, the damage deposit lodged by the applicant may be used by Council to repair such damage on Council's property.

Reason: protection of Council's assets.

22. **Construction Management Plan**

Prior to commencement of works on site, appropriate environmental site management measures must be in place and incorporate the following throughout demolition and construction:

- i) access to and from the site during construction and demolition,
- ii) safety and security of the site, road and footpath area including details of proposed fencing, hoarding and lighting,
- iii) methods of loading and unloading machinery and building materials,
- iv) location of storage materials, excavation and waste materials,
- v) methods to prevent material being tracked off the site onto surrounding roadways,

vi) erosion, sediment and dust control measures, and

vii) protection of existing trees and vegetation including the tree protection zone, in accordance with AS 4970-2009 Protection of Trees on Development Sites.

During works, the site management measures set out in the above must remain in place and be maintained until the completion of works.

Construction materials must not be stored on Land owned or managed by Council. Safe pedestrian access free of trip hazards must be maintained at all times on or adjacent to any public access routes connected to Land owned or managed by Council.

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

23. Installation and Maintenance of Sediment and Erosion Control

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

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

24. DPI Fisheries Part 7 permit for dredging, reclamation and to harm marine vegetation

The proponent must apply for and obtain a Part 7 permit for dredging, reclamation and to harm marine vegetation under the FM Act from DPI Fisheries prior to any works on site.

Reason: To protect aquatic vegetation and estuarine habitat

25. Approval of Works in Public Beach Reserve

No works are to be carried out from or within the public beach reserve without the written approval of Council or necessary leases or licenses.

Reason: To ensure no damage is done to the public beach reserve

CONDITIONS TO BE COMPLIED WITH DURING DEMOLITION AND BUILDING WORK

26. Tree and Vegetation Protection

a) Existing trees and vegetation shall be retained and protected, including:

- i) all trees and vegetation within the site not approved for removal, excluding exempt trees and vegetation under the relevant planning instruments of legislation,
- ii) all trees and vegetation located on adjoining properties,
- iii) all road reserve trees and vegetation.

b) Tree protection shall be undertaken as follows:

- i) tree protection shall be in accordance with Australian Standard 4970-2009 Protection of Trees on Development Sites, including the provision of temporary fencing to protect existing trees within 5 metres of development,
- ii) existing ground levels shall be maintained within the tree protection zone of trees to be retained, unless authorised by an Arborist with minimum AQF Level 5 in arboriculture,
- iii) removal of existing tree roots at or >25mm (Ø) diameter is not permitted without consultation with an Arborist with minimum AQF Level 5 in arboriculture,
- iv) no excavated material, building material storage, site facilities, nor landscape materials are to be placed within the canopy dripline of trees and other vegetation required to be retained,
- v) structures are to bridge tree roots at or >25mm (Ø) diameter unless directed by an Arborist with minimum AQF Level 5 in arboriculture on site,
- vi) excavation for stormwater lines and all other utility services is not permitted within the tree protection zone, without consultation with an Arborist with minimum AQF Level 5 in arboriculture including advice on root protection measures,
- vii) should either or all of v), vi) and vii) occur during site establishment and construction works, an Arborist with minimum AQF Level 5 in arboriculture shall provide recommendations for tree protection measures. Details including photographic evidence of works undertaken shall be submitted by the Arborist to the Certifying Authority,
- viii) any temporary access to, or location of scaffolding within the tree protection zone of a protected tree or any other tree to be retained during the construction works is to be undertaken using the protection measures specified in sections 4.5.3 and 4.5.6 of Australian Standard 4970-2009 Protection of Trees on Development Sites,
- ix) the activities listed in section 4.2 of Australian Standard 4970-2009 Protection of Trees on Development Sites shall not occur within the tree protection zone of any tree on the lot or any tree on an adjoining site,
- x) tree pruning from within the site to enable approved works shall not exceed 10% of any tree canopy, and shall be in accordance with Australian Standard 4373-2007 Pruning of Amenity Trees,
- xi) the tree protection measures specified in this clause must: i) be in place before work commences on the site, and ii) be maintained in good condition during the construction period, and iii) remain in place for the duration of the construction works.

The Certifying Authority must ensure that:

- c) The activities listed in section 4.2 of Australian Standard 4970-2009 Protection of Trees on Development Sites, do not occur within the tree protection zone of any tree, and any temporary access to, or location of scaffolding within the tree protection zone of a protected tree, or any other tree to be retained on the site during the construction, is undertaken using the protection measures specified in sections 4.5.3 and 4.5.6 of that standard.

Note: All street trees within the road verge and trees within private property are protected under Northern Beaches Council development control plans, except where Council's written consent for removal has been obtained. The felling, lopping, topping, ringbarking, or removal of any tree (s) is prohibited.

Reason: Tree and vegetation protection.

27. **Condition of Trees**

During the construction period the applicant is responsible for ensuring all existing trees required to be retained are maintained in a healthy and vigorous condition. This is to be done by ensuring that all identified tree protection measures are adhered to, or by seeking arboricultural advice from an Arborist with minimum AQF Level 5 in arboriculture during the works. In this regard all protected trees shall not exhibit:

- i) a general decline in health and vigour,

- ii) damaged, crushed or dying roots due to poor pruning techniques,
- iii) more than 10% loss or dieback of roots, branches and foliage,
- iv) mechanical damage or bruising of bark and timber of roots, trunk and branches,
- v) yellowing of foliage or a thinning of the canopy untypical of its species,
- vi) an increase in the amount of deadwood not associated with normal growth,
- vii) an increase in kino or gum exudation,
- viii) inappropriate increases in epicormic growth that may indicate that the plants are in a stressed condition,
- ix) branch drop, torn branches and stripped bark not associated with natural climatic conditions.

Any mitigating measures and recommendations required by the Arborist are to be implemented.

The owner of the adjoining allotment of land is not liable for the cost of work carried out for the purpose of this clause.

Reason: Protection of trees.

28. Survey Certificate

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

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

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

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

Details demonstrating compliance are to be submitted to the Principal Certifying Authority.

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

29. Protection of Council's Public Assets

Any damage to Council's public assets shall be made good by the applicant and/or the contractor, to the satisfaction of Council.

Council's public assets include, but is not limited to the following: road, kerb and gutters, crossovers, crossings, paths, grass verge, open space and associated elements such as furniture, recreational facilities and the like, within the meaning of the Local Government Act 1993.

The dumping or storage of building materials, spoil, vegetation, green waste, or any other material in Land owned or managed by Council is prohibited.

Asset Protection Zones as defined within Planning for Bush Fire Protection 2019, shall be contained wholly within development sites, and shall be managed by the development site owner in perpetuity.

Existing trees shall be protected in accordance with AS4970-2009 Protection of Trees on Development Sites, with particular reference to Section 4, with no ground intrusion into the tree protection zone and no trunk, branch nor canopy disturbance. Should any problems arise with regard to the existing trees on public land during the construction period, the applicant is to immediately Contact Council's Tree Services section and resolve the matter to Council's satisfaction.

Reason: to protect and/or restore any damaged public asset.

30. **Pollution Control**

All stockpiles, materials, waste and slurry associated with works (including excavated material) is to be contained at source within the construction area and enclosed in waterproof covering and/or sediment and erosion control while not in use. All waste/debris is to be removed off site and disposed of as frequently as required in accordance to local regulations.

Reason: To protect the surrounding environment, and ensure that pollutants and building associated waste do not leave the construction site.

31. **Pollution Control**

Any excess materials such as cleaning paintbrushes, lacquers, and any water from cleaning tools must not enter the stormwater network and/or receiving waterways.

Reason: To ensure that building associated chemicals and pollutants don't enter the surrounding environment.

32. **Environmental safeguards and pollution control**

Environmental safeguards (silt curtains, booms etc.) are to be used during construction to ensure that there is no escape of turbid plumes into the aquatic environment. Turbid plumes have the potential to smother aquatic vegetation and have a deleterious effect on benthic organisms.

Reason: To protect aquatic vegetation and estuarine habitat

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

33. **No Weeds Imported On To The Site**

No Priority or environmental weeds are to be imported on to the site prior to or during construction works.

Details demonstrating compliance are to be submitted to the Principal Certifying Authority prior to issue of any Occupation Certificate.

Reason: To reduce the risk of site works contributing to spread of Priority and environmental weeds.

34. **Post Construction Dilapidation Report of Land owned or managed by Council**
Rectification works to Council's assets shall be contained in a Post Construction Dilapidation report submitted to Council prior to the issue of the Occupation Certificate.

The applicant may be held liable to any damage to public infrastructures in the vicinity of the site, where such damage is not accurately recorded under the requirements of this condition. In this regard, where required, the damage deposit lodged by the applicant may be used by Council to repair such damage on Council's property.

Reason: protection of Council's assets.

35. **Removal of All Temporary Structures/Materials and Construction Rubbish**

Once construction has been completed all silt and sediment fences, silt, rubbish, building debris, straw bales and temporary fences/bunds are to be removed from the site.

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

Reason: to protect reserve amenity and public safety.

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

36. **Environmental and Priority Weed Control**
All weeds are to be removed and controlled in accordance with the NSW Biosecurity Act 2015.

Reason: Preservation of environmental amenity.

37. **Protection of Habitat Features**
All natural landscape features, including any rock outcrops, native vegetation, soil and/or watercourses, are to remain undisturbed except where affected by necessary works detailed on approved plans.

Reason: To protect wildlife habitat.

38. **Control of Domestic Dogs/Cats**
Domestic dogs and cats are to be kept from entering wildlife habitat areas at all times.

Dogs and cats are to be kept in an enclosed area and/or inside the dwelling, or on a leash such that they cannot enter areas of wildlife habitat, bushland or foreshore unrestrained, on the site or on surrounding properties or reserves.

Reason: To protect native wildlife in accordance.

39. **General Foreshore Matters**

Unless in accordance with the approved works the Consent holder must ensure that:

- a) No materials or cleared vegetation that may obstruct flow or cause damage to the foreshore are left within the coastal foreshore area.
- b) All drainage works must not obstruct flow of water within the coastal waters. Drain discharge points are stabilised to prevent erosion. Any excavation must not result in diversion of any foreshore bank instability or damage to native vegetation.
- c) The foreshore is to function as an ecological system and as such, all works, access, roads, recreational areas, service easements and any other non-ecologically functioning work or activity are to be located beyond the foreshore other than provided by the consent.

Reason: Environmental protection, monitoring and enhancement of the foreshore.

40. **Maintenance of Public Access**

Public access is to be maintained in accordance with the requirements of the Crown Land License issued for the site.

Reason: To ensure ongoing public access to the adjoining foreshore areas

41. **Maintenance of Public Access**

Public access along the foreshore is to be provided and maintained as shown in the updated Plan Drawings DA-001 received Aug 2021.

Gates, locks and signage that restrict public access along the foreshore and behind the boatshed are not permitted.

Reason: To allow for public access along the foreshore.

42. **Compliance with Estuarine Risk Management Report**

The development is to comply with all recommendations of the approved Estuarine Risk Management Report prepared by Royal HaskoningDHV dated 16 April 2021 and these recommendations are to be maintained over the life of the development.

Reason: To ensure preservation of the development and the estuarine environment and to ensure compliance with section 27 of Coastal Management Act 2016