

4 November 2021

The General Manager
Northern Beaches Council
PO Box 82
Manly NSW 1655

Dear Sir,

Statement of Environmental Effects
Section 4.55(2) Modification of Development Consent DA2020/0211
Reconstruction of walls and structures which were demolished during
the course of renovations to an existing dual occupancy due to
structural integrity of the walls and structures being compromised
82 and 84 Bower Street, Manly

1.0 Introduction

On 15th September 2020, the Northern Beaches Local Planning Panel (NBLPP) granted conditional development consent to the above application. The conditions of consent required the provision of fixed privacy attenuation measures to maintain visual privacy and amenity to the immediately adjoining property to the west at No. 84 Bower Street Manly with Conditions 7 and 8 requiring the following:

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

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

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

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

The reasoning behind the imposition of these conditions is further expanded upon in the minutes of the NBLPP meeting of 15th September 2021 as follows:

Statement of Reasons: This development application was the subject of considerable debate and objection from the adjoining neighbours who, in the main, made many valid arguments before the Panel about the merits of the proposed development. Notably the assessment report presented to the Panel summarised these contentious issues and concluded by recommending that the application should be refused.

The Panel after considering the competing arguments posited by both the applicant and the adjoining objectors decided to defer the determination of the application pending a better understanding of the visual impacts caused by the development. On this basis a further site inspection by 3 of the Panel members was held on 18 August 2020 where access to the subject site was gained. This was most beneficial as the Panel members gained a better understanding of the nature of the reconstruction works proposed. In addition to this the Panel also visited the dwelling of the immediate adjoining owners to the west No. 86 Bower Street, Manly. Once again this visit to the adjoining property was very beneficial and gave the Panel members a clear understanding of the visual privacy impacts likely to be caused from overlooking from west facing windows in the internal living area and from the northern end external balcony at No 84 Bower Street, Manly.

It is to be noted that the Panel's community representative, Mr Lawther was not in favour with the granting of a development consent to the proposed works as the impacts, from his perspective, were not able to be resolved. The majority of the Panel in reaching its ultimate decision to grant consent to the development application, were mindful of the fact that back in 2016 the former Manly Council granted consent to alterations and additions to the previous semi-detached building erected on the site. Then in 2017 another development consent was granted by Northern Beaches Council for alterations and additions to the pre-existing dual occupancy/semi. These facts must be given considerable weight. The works being proposed with this current application do not alter the height, bulk and scale of the building as approved back in 2017. This was a matter that the majority of the Panel had verified by the council's officers. This application seeks to put back walls that should have been retained but ended up being demolished during the course of the construction authorised by the 2017 consent and a subsequent 2018 modification application that had also been approved.

The other very important matter that needed to be considered was the site location and its context. All of the ocean foreshore lots along Bower Street (and Marine Parade) are sloping sites where most of the dwellings and outdoor terrace/deck areas all overlook one another. This is an inevitable consequence of the sloping nature of these types of sites. The subject site and the adjoining site are typical examples of foreshore lots.

Given the above site characteristics the major contention with this current application relates to the privacy impacts likely to eventuate rather than whether the reinstatement work constitutes a new dwelling. This later issue whilst important must be considered in light of the development consent history of the site which not only enjoys the benefit of a previous development consent (and modification) it also enjoys the benefit of 'existing use rights' which would have an overriding legal effect on compliance with the current planning and built form controls.

As such, the majority of the Panel took the view (after its deferral, detailed site inspection, site location context, and reconsideration) that the proper course of action to adopt was to grant development consent to the application but in doing so impose appropriate conditions to achieve the best practical outcome to first, facilitate the completion of the partially constructed building, and secondly (and most importantly) ensure the likely privacy impacts to the immediate adjoining property to the west are addressed. The additional conditions imposed by the majority of the Panel are appropriate responses to these likely impacts.

We note that the NBLPP acknowledged that in the imposition of these conditions a "very important matter" that needed to be considered was the site's location and its context where most of the dwellings and outdoor terrace/deck areas associated with the foreshore properties along Bower Street (Marine Parade) overlooked one another.

Having inspected the subject property to obtain an understanding in relation to the juxtaposition of adjoining development we have formed the opinion that Condition 7 is reasonably imposed having regard to the privacy outcomes anticipated by clause 3.4.2 Manly Development Control Plan (MDCP) which seek to strike a balance between the minimisation of privacy impacts between adjacent and nearby development and view sharing.

That said, we have formed the opinion that the imposition of Condition 8, in its current form, is unreasonable in that the privacy screening to the western edge of the balcony will have a severe impact on views available in a north-westerly direction from the principal living area and adjacent private open space terrace of the subject property towards the heritage listed Marine Parade coastal walk and iconic Manly Beach and its immediate environs. This condition seeks to "preserve" privacy rather than minimise loss of privacy as required by clause 3.4.2 of MDCP.

Accordingly, this application seeks to modify condition 8 of the development consent to better achieve the objectives associated with the clause 3.4.2 MDCP privacy provisions being a balance between the minimisation of privacy impacts and view sharing. Such outcome is outcome is particularly relevant in circumstances where adjoining and surrounding development is orientated to take advantage of heritage listed and iconic views and where a degree of mutual overlooking currently exists as identified by the NBLPP as being a very important matter for consideration.

This application is made pursuant to section 4.55(2) of the Environmental Planning and Assessment Act 1979 (the Act).

2.0 Proposed modifications

This application seeks to modify the wording of Condition 8 as depicted in red below:

8. *The external screens with vertical fins referred to in (7) above shall be replicated in size and continued in a northerly direction for a length of 1.62 metres from the external wall of the dwelling along the western edge of the external balcony accessible from the living area of No. 84 Bower Street, Manly as depicted on plans S4.55-A-101 and S4.55-A-203 prepared by Smith and Tzannes.*

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

A copy of the referenced Architectural plans is at Attachment 1.

3.0 Section 4.55 of the Environmental Planning and Assessment Act 1979

Section 4.55(2) of the Act provides that:

- (a) *it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and*
- (b) *it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and*
- (c) *it has notified the application in accordance with—*
 - (i) *the regulations, if the regulations so require, or*
 - (ii) *a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*
- (d) *it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.*

- (3) *In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.*

In answering the threshold question as to whether the proposal represents “substantially the same” development the proposal must be compared to the development for which consent was originally granted, and the applicable planning controls. In order for Council to be satisfied that the proposal is “substantially the same” there must be a finding that the modified development is “essentially” or “materially” the same as the (currently) approved development - *Moto Projects (no. 2) Pty Ltd v North Sydney Council* [1999] 106 LGERA 298 per Bignold J.

The above reference by Bignold J to “essentially” and “materially” the same is taken from Stein J in *Vacik Pty Ltd v Penrith City Council* (unreported), Land and Environment Court NSW, 24 February 1992, where his honour said in reference to Section 102 of the Environmental Planning and Assessment Act (the predecessor to Section 96):

“Substantially when used in the Section means essentially or materially or having the same essence.”

What the abovementioned authorities confirms is that in undertaking the comparative analysis the enquiry must focus on qualitative elements (numerical aspects such as heights, setbacks etc) and the general context in which the development was approved (including relationships to neighbouring properties and aspects of development that were of importance to the consent authority when granting the original approval).

When one undertakes the above analysis in respect of the subject application, we are satisfied that the proposed modification to the privacy screen detailing as contained within Condition 8 better achieves the objectives associated with the clause 3.4.2 MDCP privacy provisions being a balance between the minimisation of privacy impacts and view sharing. Such outcome is particularly relevant in circumstances where adjoining and surrounding development is orientated to take advantage of heritage listed and iconic views and where a degree of mutual overlooking currently exists as identified by the NBLPP as being a very important matter for consideration.

We have formed the opinion that the imposition of Condition 8, in its current form, is unreasonable in that the privacy screening to the western edge of the balcony will have a severe impact on views available in a north-westerly direction from the principal living area and adjacent private open space terrace of the subject property towards the heritage listed Marine Parade coastal walk and iconic Manly Beach and its immediate environs. This condition seeks to “preserve” privacy rather than minimise loss of privacy as required by clause 3.4.2 of MDCP.

In this regard, we are satisfied that the approved development remains, in its modified state, a development which will continue to relate to its surrounds and adjoining development in the same fashion to that originally approved with privacy impacts between adjoining development minimised and a view sharing outcome achieved.

The Court in the authority of *Stavrides v Canada Bay City Council* [2007] NSWLEC 248 established general principles which should be considered in determining whether a modified proposal was “substantially the same” as that originally. A number of those general principles are relevant to the subject application, namely:

- The application remains a proposal involving the reconstruction of walls and structures which were demolished during the course of renovations to an existing dual occupancy due to structural integrity of the walls and structures being compromised
- The previously approved building heights, wall heights, setbacks and building footprint are unaltered, and
- The modifications satisfy the privacy provisions at clause 3.4.2 of MDCP.

On the basis of the above analysis, we regard the proposed application being “essentially or materially” the same as the approved development such that the application is appropriately categorised as being “substantially the same” and appropriately dealt with by way of Section 4.55(2) of the Act.

4.0 Statutory Planning Considerations

We have been engaged to assess the reasonableness of condition 8 as imposed having regard to the applicable statutory planning considerations as they relate to privacy. In this regard, the objectives associated with the applicable provisions contained within MDCP are as follows:

Clause 3.4.2 Privacy and Security

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

Relevant DCP objectives to satisfy in relation to this part include the following:

Objective 1) To minimise loss of privacy to adjacent and nearby development by:

- *appropriate design for privacy (both acoustical and visual) including screening between closely spaced buildings;*
- *mitigating direct viewing between windows and/or outdoor living areas of adjacent buildings*

Objective 2) To increase privacy without compromising access to light and air. To balance outlook and views from habitable rooms and private open space

Objective 3) To encourage awareness of neighbourhood security

Of particular relevance to the subject application is the notation which identifies the need to balance considerations associated with privacy with other considerations such as views and solar access with the degree of privacy impact influenced by factors including the expectations of occupants for privacy. Objective 2 seeks to achieve a balance between increasing privacy and the maintenance of outlook and views from habitable rooms and private open space.

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

In such circumstances, the MDCP privacy provisions seek to strike a balance between minimising loss of privacy/ increasing privacy to adjacent and nearby development and minimising impact on outlook and views from habitable rooms and private open space.

Condition 8 as drafted requires the provision of a vertically louvred privacy screen along the entire eastern edge of the external balcony accessible from the living area of No. 84 Bower Street, Manly with such privacy screen superimposed on the photographs at Figures 1, 2 and 3 over page taken from the adjacent habitable rooms and private open space areas.

These images demonstrate that Condition 8 as drafted maintains absolute blinkered privacy between the subject property and the adjoining property to the west and in doing so results in severe view impacts from the principal living areas and adjacent private open space terrace area of the subject property. A view sharing outcome is clearly not maintained between adjoining and surrounding development with the condition seeking privacy preservation rather than the minimisation of privacy impacts having regard to the site's location and its context where most of the dwellings and outdoor terrace/deck areas overlooked one another.

This was an observation of the NBLPP identified in the minutes of 15th September 2020 as being a “very important matter” for consideration.

Accordingly, we are of the opinion that Condition 8 does not strike a reasonable balance between the maintenance of views and privacy with there being no reasonable expectation by the occupants of the adjoining property to the west, No. 86 Bower Street, for the preservation of privacy between adjoining development. In this regard, the condition as imposed hinders the attainment of the objectives associated with the clause 3.4.2 MDCP privacy provisions.

Having inspected the subject property we are of the opinion that a reasonable balance between the minimisation of privacy loss and the maintenance of views is appropriately achieved through the provision of a vertical louvred privacy screen extending for a length of 1.62 metres in a northerly direction from the external wall of the dwelling along the western edge of the external balcony accessible from the living area of No. 84 Bower Street, Manly as depicted on the plans at Attachment 1. This privacy outcome is depicted in yellow at Figures 1, 2 and 3 below and over page.



Figure 1 – Extent of louvred privacy screen as required by Condition 8 in red with proposed modified extent of privacy screen in yellow as viewed from the western end of the principal living area within the subject property



Figure 2 – Extent of louvered privacy screen as required by condition 8 in red with proposed modified extent of privacy screen in yellow as viewed from the western end of the principal living area and western end of the adjacent private open space terrace within the subject property



Figure 3 – Extent of louvered privacy screen as required by condition 8 in red with proposed modified extent of privacy screen in yellow as viewed from the northernmost principal living room door/ balcony threshold of the subject property

We are satisfied that the proposed modification to the privacy screen detailing as contained within Condition 8 better achieves the objectives associated with the clause 3.4.2 MDCP privacy provisions being a balance between the minimisation of privacy impacts and view sharing. Such outcome is particularly relevant in circumstances where adjoining and surrounding development is orientated to take advantage of heritage listed and iconic views and where a degree of mutual overlooking currently exists as identified by the NBLPP as being a very important matter for consideration.

5.0 Conclusion

This statement has been prepared in support of an application seeking to modify Condition 8 of the development consent to achieve the privacy outcome anticipated through compliance with the privacy provisions at clause 3.4.2 MDCP. This application is made pursuant to section 4.55(2) of the Act.

This document demonstrates that the proposed modification to the privacy screen detailing as contained within Condition 8 better achieves the objectives associated with the clause 3.4.2 MDCP privacy provisions being a balance between the minimisation of privacy impacts and view sharing. Such outcome is particularly relevant in circumstances where adjoining and surrounding development is orientated to take advantage of heritage listed and iconic views and where a degree of mutual overlooking currently exists as identified by the NBLPP as being a very important matter for consideration.

We are satisfied that the approved development remains, in its modified state, a development which will continue to relate to its surrounds and adjoining development in the same fashion to that originally approved with privacy impacts between adjoining development minimised and a view sharing outcome achieved.

Accordingly, the application is appropriately dealt with by way of s4.55(2) of the Act. Having given due consideration to the relevant considerations pursuant to s4.15 of the Act it is considered that the modifications, the subject of this document, succeeds on merit and is appropriate for the granting of consent.

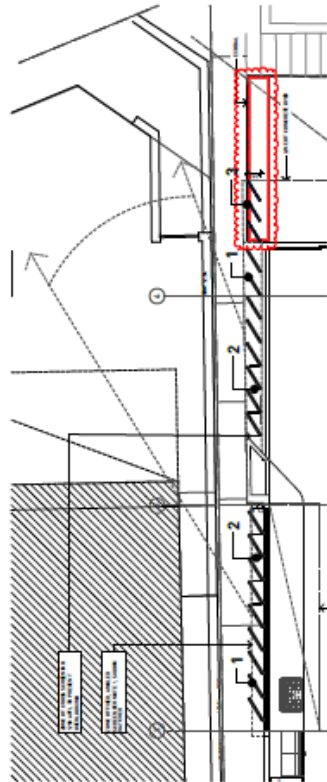
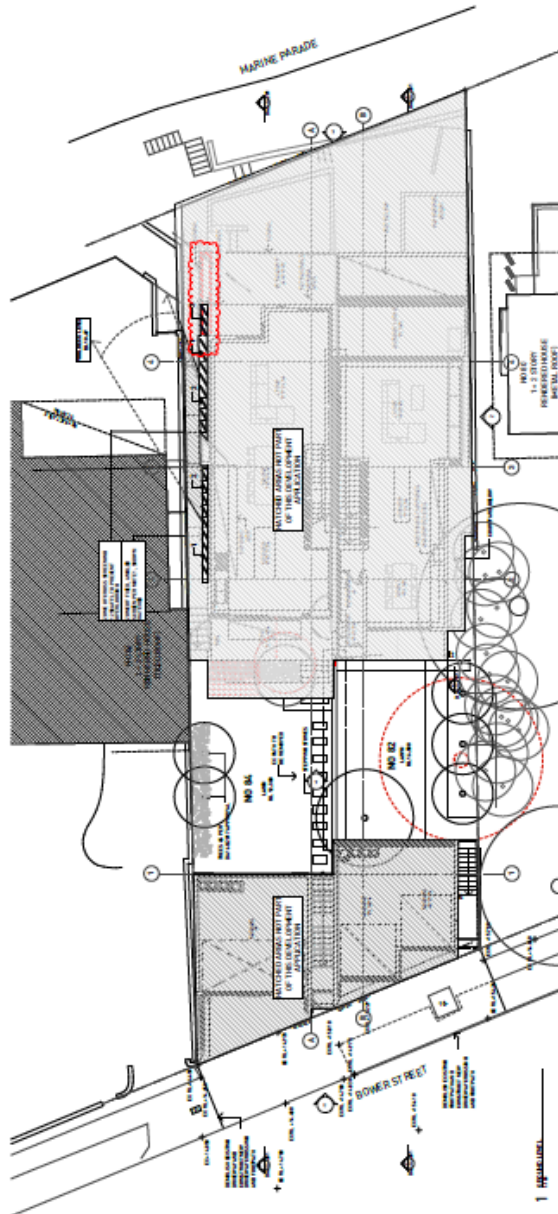
Yours faithfully

Boston Blyth Fleming Pty Limited

A handwritten signature in black ink, appearing to read 'Greg Boston', is written over a horizontal line.

Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

Attachment 1 Modified Architectural plans



54.55 MODIFICATION TO EXISTING CONSENT NOTES

1. ANGLED TIMBER PRIVACY SCREENS TO FULL HEIGHT OF WINDOW,
20 DEGREES FROM TRUE NORTH

2. SOLID TIMBER CROSS SCREENING TO 125.0mm ABOVE FINISHED FLOOR LEVEL.

3. ANGLED FULL HEIGHT TIMBER PRIVACY SCREENS

PROJECT: 82-148 River Street Mainly PROPOSED: 82-148 River Street Mainly APPLICANT: [Redacted] DATE: [Redacted] STATUS: [Redacted] COMMISSION: [Redacted]	PROJECT: 82-148 River Street Mainly PROPOSED: 82-148 River Street Mainly APPLICANT: [Redacted] DATE: [Redacted] STATUS: [Redacted] COMMISSION: [Redacted]
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