
From: Pierre Le Bas
Sent: 11/08/2022 4:54:33 PM
To: Stephanie Gelder
Cc: Council Northernbeaches Mailbox; craig key; Sonja Key; Tia Gao; Poppy Bevan; CJK
Subject: 38 The Drive New DA 2022/1128 - Our Ref: key.sed1f
Attachments: key.sed1f_submission_TGPLB_100822.pdf;

Hi Stephanie

Please see attached submission.

There are fundamental issues with the present proposal, and the issues are similar to the last iteration of the development application. The issues are in summary as follows (in no particular order):

1. Height, bulk and scale of the proposal;
2. Development tantamount to demolition (note acknowledgement of this fact in the SEE);
3. Overshadowing;
4. Overlooking and privacy;
5. Loss of views;
6. Failure to take advantage of an existing substantial view corridor in the design;
7. Unjustified and significant non-compliances with statutory development standards meaning a failure of clause 4.6 variation request and Council having no power to approve the application;
8. Failure to have proper regard to objectives enshrined in the WDCP.
9. Amenity issues generally;
10. Design flaws that fail to take account of neighbour interests.

Kind regards

Pierre

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Chief Executive Officer
Northern Beaches Council
725 Pittwater Road
DEE WHY NSW 2099

Dear Chief Executive Officer

DEMOLITION OF EXISTING DWELLING HOUSE AND CONSTRUCTION OF A NEW PRINCIPAL DWELLING AND A DETACHED SECONDARY DWELLING OVER A GARAGE, TOGETHER WITH A SWIMMING POOL & LANDSCAPING AT 38 THE DRIVE FRESHWATER (DA 2022/1128)

A diagram showing the spatial relationship between the applicants and our clients property is shown below (see also Annexure 2 for further detail):



This submission follows from a previous objection lodged by this firm on behalf of these same clients.

The earlier submission was dated 17 May 2021, with the development application (DA2021/0472) having been dealt with by Ms Rebecca Englund, town planner of Council. From information provided in the 'Council DA Tracker', the earlier development application appears to have been withdrawn on or about 27 September 2021.

The current development application (DA 2022/1128) is being dealt with by Ms Stephanie Gelder, town planner of Council.

Nature and Purpose of this Document

This document is a submission by way of objection to Development Application DA 2022/1128 (the 'development application') relating to No 38 The Drive, Freshwater (the 'subject property' or 'site').

Introduction and Background

The development application, supported by a clause 4.6 variation request relating to height, seeks consent for demolition of the existing dwelling house, with retention of some very minor built elements and construction of a new dwelling house and a detached secondary dwelling over a garage together with a swimming pool at the rear and adjacent the rear boundary (the 'proposed development' or 'development proposal').

Our clients' property (No 1 Seddon Hill Road) is directly adjacent to, and to the south of, the subject property.

As mentioned above, this submission constitutes an objection to the development application as lodged.

Executive Summary

There are fundamental issues with the present proposal, and the issues are similar to the last iteration of the development application. The issues are in summary as follows (in no particular order):

1. Height bulk and scale of the proposal;
2. Development tantamount to demolition (note acknowledgement of this fact in the SEE);
3. Overshadowing;
4. Overlooking and privacy;
5. Loss of views;
6. Failure to take advantage of an existing substantial view corridor in the design;
7. Unjustified and significant non-compliances with statutory development standards meaning a failure of clause 4.6 variation request and Council having no power to approve the application;
8. Failure to have proper regard to objectives enshrined in the WDCP.
9. Amenity issues generally;
10. Design flaws that fail to take account of neighbour interests.

Site Location and Description

The subject property is legally described as Lot 12 in Deposited Plan 829988 and is known as No 38 The Drive, Freshwater.

The property is some 985.7 sqm in area. It is an irregular parcel of land located on the western side of Dick Street at the intersection of Dick Street with the Drive. The Drive extends down to the Ocean facing waterfront which is a short distance away. See images 1 and 2 under:



The side boundary of the property adjoins our client's property, on the southern side of the subject. The site has a significant downward slope from the rear to the front of the land.

Currently situated on the subject property is a part single and part two-storey building, being a dwelling house, which is clad with coloured tiles and has a metal roof. A covered timber deck is located towards the front and a detached double car garage is located at street level. The garage has an accessible roof. The site is surrounded by residential development comprising of two and three storey dwelling houses.

The character of the immediate locality is predominately low density in nature. Freshwater is an iconic part of the Northern Beaches and properties on the bluff enjoy expansive coastal views. The subject site faces Curl Curl Beach and Freshwater Headland.

The site enjoys reasonable access to local shops and transport services.

Annexure 1 provides a locality sketch and **Annexure 2** a location plan showing the spatial relationship between the subject property and our clients' property.

Annexure 3 provides a photographic palette including a number of photos showing views from our clients' currently vacant site and the subject site, along with adjoining development.

The Development Proposal

The development application proposes the almost complete demolition of the existing dwelling house and the construction of a new four level dwelling and the construction of a new two level secondary dwelling over the detached garage, together with a swimming pool and landscaping.

In specific terms, the development application proposes the following:

Principal Dwelling

Level 1

- Retention of an existing storage area from the current dwelling house.

Level 2

- Demolition works;
- Provision of a sitting and living area to provide for an expanded guest bedroom and sitting area, and retention of existing office and bathroom;
- New internal access stairs to upper levels;
- New deck and external access stairs.

Level 3

- Demolition works;
- New bedroom and en-suite;
- New laundry and pantry ;
- New and expanded open plan kitchen, living and dining area
- Entrance foyer;
- New rear patio and front decking.

Level 4

- Master bedroom suite, with balcony, ensuite and WIR;
- Sitting room;
- Entertaining area.

External works

- Swimming pool;
- Tree removal and associated landscaping.

Garage and Secondary Dwelling

Garage Level

- Demolition works, including the removal of the walls and roof of the existing garage and bin storage area and existing access stairs;
- Construction of a new three (3) car garage and store;
- Construction of a new entry foyer and spiral access stairs;
- Extension of the existing inclinator and the construction of a new inclinator access station at the Garage Level;
- Construction of a new driveway crossover and pedestrian landing within the road reserve.

Level 2

- Construction of a new secondary dwelling, comprising one bedroom, kitchenette, bathroom, lounge, dining area, front deck and rear courtyard;
- New landscaped/green roof over the secondary dwelling;
- External access stairs to primary dwelling.

Nature of Submission

In preparing this submission we have considered the following legislation, regulations and other statutory instruments and documents:

- *Environmental Planning and Assessment Act 1979* ('EPAA');
- *Environmental Planning and Assessment Regulation 2000*;
- *State Environmental Planning Policy Resilience and Hazards (Chapter 2)*;
- *Warringah Local Environmental Plan 2011* ('WLEP'); and
- *Warringah Development Control Plan 2011* ('WDCP').

We have reviewed the development application and the various reports, plans and other documents accompanying or otherwise associated with the application. We have also undertaken a view of our clients' property and the area in which the subject property is located.

Having considered the subject property and its surrounds and the details of the development application currently before Council, we are of the opinion that the proposal, in its present form, does not warrant support. In addition, we are of the view that amendments would need to be made to the development proposal before Council was in a position to determine the development application in the applicants favour.

This submission details the various ways the proposed development lacks finesse and reasonable consideration for the amenity of surrounding properties and, in particular, our clients' property. The latter would, in our opinion, be greatly impacted—and adversely so—by the proposed development if it were to be carried out in its present form.

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

Statutory (WLEP) and WDCP Provisions

The relevantly applicable local statutory environmental planning instrument is WLEP 2011, with the subordinate control being WDCP 2011.

The subject property is zoned R2 Low Density Residential under WLEP. The objectives of the R2 zone are as follows (refer item 1, land use table, R2 zone):

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.

The proposed demolition of the existing dwelling house and construction of a new principal dwelling and secondary dwelling is development 'for a purpose' that is permissible with development consent in the R2 zone (refer item 3, land use table, R2 zone), subject to the discretion of Council and based on a merit-based assessment having regard to the matters for consideration set out in section 4.15 of the *Environmental Planning and Assessment Act 1979* (NSW) (the EPAA), the relevantly applicable development controls and their objectives and the zone objectives.

We submit that the proposal, is inconsistent with the first and third of the above objectives. The second objective is not relevant to the proposal. Specifically, built form is inconsistent with a 'low-density' residential environment and has the appearance of an apartment development rather than that of a dwelling. The proposed development is also inconsistent with the desired future character of the area. In our local survey of the precinct in the same zone, we were unable to find any precedent for a building height (for a newer dwelling) that breached the height control to the extent proposed.

We said in our former submission:

A vastly scaled down version of the dwelling may be more compatible with the area and this would reduce impacts on adjoining neighbours, such as in terms of view loss, overshadowing and privacy.

We are of the view that development has certainly not been scaled down sufficiently to warrant support from the Council.

The proposal does not represent low density development. The development is inconsistent with important view loss principles. Further the proposed development involves a significant contravention of the height of building development standard (and we say at 21.4%, more than an insignificant contravention that does not take account of objectives of zone or height control). The numerical non-compliances result in unacceptable overshadowing as well as privacy impacts. The proposed

development also contains various non-compliances with subordinate controls set out in WDCP.

Alterations and Additions Tantamount to Demolition

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

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

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

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

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

45 The Land and Environment Court's website describes planning principles as being statements of 'a desirable outcome from a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making, a planning decision'. The first planning principle was published in 2003 and there have been over 40 principles published since that time.

46 Planning principles fall into two distinct classes. The first class, being the majority of the planning principles published to date, are those that are process related (in that they set out what matters are appropriate to be considered in undertaking an assessment of and reaching a decision about a particular planning concern). The minority of the planning principles are those that are prescriptive (in that they attempt to define what should be the outcome of a reasoning process concerning a particular planning concern).

47 In recent years, the Commissioners of the Court (who collegially develop planning principles) have ceased to adopt any further prescriptive planning principles.

However, as the Court pointed out in *Coorey*, the quantitative purely mathematical approach promulgated in *Edgar Allan Planning* 'ignores the fact that the nature of

the analysis required depends on the reason why the enquiry is being made' (at [53]). Moore SC and Sullivan AC went on to say (at [54]-[55]):

54 Whether something should be regarded as alterations or additions to a heritage item engages different considerations when compared to an enquiry, for example, as to whether particular controls defining a building envelope may be engaged or not by a development proposal. The purely mathematically derived approach in *Edgar Allan Planning* fails to engage with the fundamental preliminary question as to the purpose for which the enquiry is being made.

55 As a consequence, it is no longer appropriate to set a prescriptive basis for determining whether approval is being sought for additions and/or alterations or if it is an application for an entirely new development. As with solar amenity, strict mathematical formulae are not an appropriate basis for such an assessment. As a further consequence, the planning principle published in *Edgar Allan Planning* should be set aside and the planning principle set out below should be adopted in its place.

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

56 The first question to be considered is 'what is the purpose for determining whether this application should be characterised as being for additions and/or alterations to an existing structure rather than an application for a new structure?' The answer to this fundamental question will frame the approach to be undertaken to the analytic framework set out below.

57 In determining whether an application is appropriate to be regarded as for additions and/or alterations or not, it is appropriate to follow, by broad analogy, the process discussed by Bignold J in *Moto Projects (No 2) Pty Limited v North Sydney Council* [1999] NSWLEC 280; (1999) 106 LGERA 298 -- namely undertaking both a qualitative and a quantitative analysis of what is proposed compared to what is currently in existence.

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

59 Qualitative issues

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

60 Quantitative issues

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

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

62 It is not intended that the above lists should be regarded as exhaustive. Other matters may well arise for consideration in the facts and circumstances of a particular application or the reason why the analysis is being undertaken. However, having considered all of the listed matters (together with any other additional matters that may be relevant in the particular circumstances of the application), an evaluation can then be made as to whether or not a proposal would correctly be characterised as additions and/or alterations to an existing structure or whether the proposal should be characterised as an application for an entirely new structure. *[Emphasis added]*

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

In the case of the proposal the subject of the development application no heritage item is involved. However, the subject property as well as our client's property are located in a Coastal Area (under former SEPP (Coastal Management) 2018 and now called the Resilience and Hazards SEPP), and when regard is had to the resultant loss of privacy that would inevitably ensue for our clients in the event that the development proposal in its current form were to be approved, as well as the combined quantitative and qualitative changes to the built form of the existing dwelling on the subject property, we submit that it is both misleading and inappropriate, as a matter of planning principle, to construe and environmentally assess the proposed development as being merely 'alterations and additions'.

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

Even the statement of environmental effects ('SEE') prepared by Vaughn Milligan Development Consulting Pty Ltd on behalf of the applicant and submitted as part of the development application package tacitly, if not actually expressly, acknowledges that the purported and so-called 'alterations and additions' are really an application for a new development.

Loss of Views

Control D7 ('Views') of WDCP requires that development shall provide for the reasonable sharing of views. The view objectives of WDCP are as follows:

- To allow for the reasonable sharing of views.
- To encourage innovative design solutions to improve the urban environment.
- To ensure existing canopy trees have priority over views.

In our opinion, the applicant's design fails to allow for the reasonable sharing of views, particularly as regards the uppermost level (south elevation) which will cause a significant impact on our clients aspect and existing view corridor.

Our client will lose views looking north-east. This can be fairly described as a severe impact notwithstanding the reduction in height proposed in the current development application, relating to the subject property. See Figure 2 under:

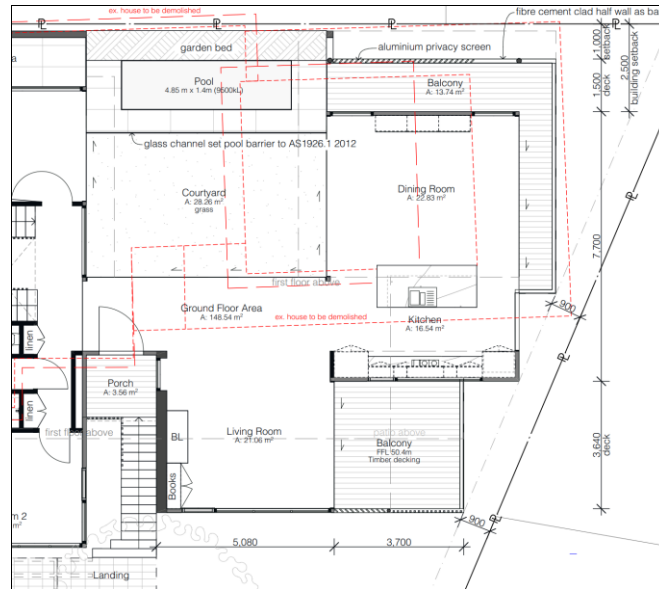


Figure 2 - Showing partial footprint details of our clients approved dwelling house at No1 Seddon Hill Road (stamped plans DA2021/0101 - Sheet 104)

The above site plan shows the broader layout of our clients approved development proposal (currently under construction). The view loss assessment by Urbaine Design Group is based on a dwelling house at 1 Seddon Hill Road that has been demolished and is in the process of being replaced. As such its veracity and factual basis must be seriously questioned.

The view loss assessment prepared by Urbaine Design Group, and submitted on behalf of the applicant, states (on p7):

However, there is no peer review system for determining the accuracy of the base material used for visual impact assessments. As a result, Urbaine provides a detailed description of its methodologies and the resultant accuracy verifiability – this is contained within Appendix C.

The methodology applied to the visual assessment of the current design proposal has been developed from consideration of the following key documents:

- Environmental Impact Assessment Practice Note, Guideline for Landscape Character and Visual Impact Assessment (EIA-N04) NSW RMS (2013);
- Visual Landscape Planning in Western Australia, A Manual for Evaluation, Assessment, Siting and Design, Western Australia Planning Commission (2007);
- Guidelines for Landscape and Visual Impact Assessment, (Wilson, 2002); (sic)

In order to assess the visual impact of the Design Proposal, it is necessary to identify a suitable scope of locations that may be impacted by it, evaluate the visual sensitivity of the Design Proposal to each location and determine the overall visual impact of the Design Proposal. Locations that feature a prominent, direct and mostly unobstructed line of sight to the subject site are used to assess the visual impact of the Design Proposal. The impact to each

location is then assessed by overlaying an accurate visualisation of the new design onto the base photography and interpreting the amount of view loss in each situation, together with potential opportunities for mitigation.

With respect, whilst the methodology referred to above is accepted in its entirety, the viewing points are based on viewing locations that are not established as being related to the development as approved. The photographs were taken from a series of photographs relating to a dwelling house now demolished. No weight can therefore be given to this document, without significant caveats relating to view locations.

We say significant impacts to views to the north east will be caused by the proposed development. The greatest effect is as respects the dining/kitchen area from which there will be caused a severe view loss. Clearly no cross views are retained. The drawing below (Figure 3) illustrates the bulk and scale of proposal and relationship with northern boundary of our clients property.

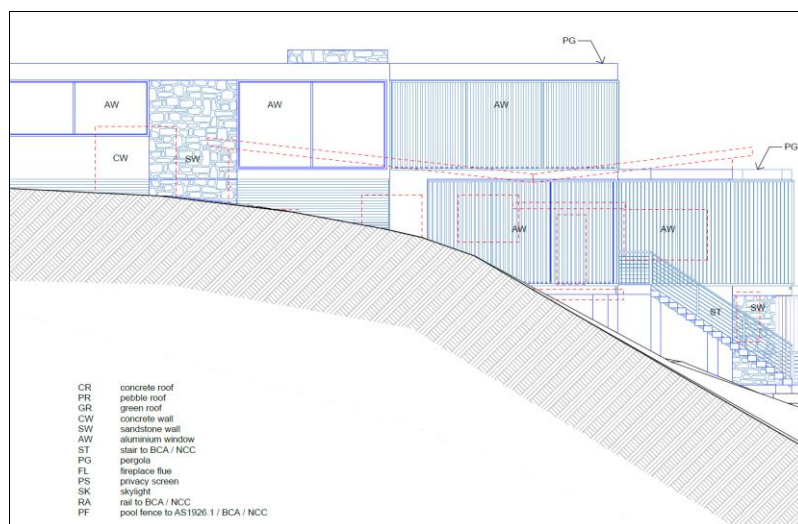


Figure 3 – Extract from drawings by Northern Beaches Designs showing southern elevation of proposed principal dwelling (NTS)

Three earlier decisions of the Land and Environment Court of NSW which focus on the issue of loss of view are considered relevant to an examination of this aspect of the matter in addition to the more recent 'planning principles' espoused in *Tenacity Consulting v Warringah* [2004] NSWLEC 140 ('Tenacity'). The earlier decisions are *Stevens v North Sydney Council* No 10454 of 1989, *Jove Industries v North Sydney Council* No 10249 of 1992 and *The Presbyterian Church (NSW) Property Trust v Woollahra Municipal Council* No 10026 of 1994.

The earlier decisions relate, in significant part, to the question of view loss in respect of properties located in the immediate vicinity of the Sydney Harbour foreshore. In each of these cases, it is noted that the Court considered that the issue of views was critical in terms of determination of the relevant development application, one way or the other. The issue of view loss appears to have gained even greater prominence as being relevant and important with the effluxion of time, in terms of planning assessment generally.

In *Tenacity* the Court established a series of tests to be applied in relevant planning assessments. We will proceed to analyse the view loss that would be likely in this particular case, in the context of that which is proposed in the development application, and sequentially apply the four relevant tests that were enunciated by the Court. The following is a view assessment undertaken in accordance with the process adopted by then Senior Commissioner Roseth.

Test 1: View Assessment

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

The views to be enjoyed by our clients are sweeping, valuable and dramatic, and contain significant locally iconic features. The views that are in issue for our clients' property are north - eastern side views towards Curl Curl Beach, Curl Curl headland and the ocean. They consist of transitioning land to whole views of the water. If the proposed development proceeds as lodged, the view loss to our clients' property would be severe from principle living areas and other living spaces, and moderate from the second floor master bedroom and balcony.

The proposed development is, in our view, entirely inappropriate due to the view loss caused by the development. There can be no doubt the built form of the scheme should be reduced and further revised to provide a better outcome in respect of view loss, for our client.

Test 2: Location of Views

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

The views currently enjoyed by our client are views that are enjoyed from both sitting and standing positions in the kitchen/dining area at ground floor level and other areas of the first floor of our client's dwelling house. The kitchen and main living areas are obviously where our clients spend most of their time and this should weigh heavily in the Council's own assessment.

We acknowledge that part of the views enjoyed from our client's property are across the applicant's own side boundary. Nonetheless, as a matter of fairness and equity some elements of the development proposal appear to have no purpose other than having the undesirable planning outcome of obscuring views currently enjoyed by our clients whilst maximising the view achievable for the occupants of the subject.

Test 3: Extent of Impact

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

In our opinion, the view loss that would be experienced by our clients would be assessed as severe. In that regard, the greatest effect is as respect to the kitchen/dining area.

The assessment is based on a number of factors including the position of the dwelling house relative to the existing view corridors, the degree of view loss in terms of the internal living space, the effect in terms of iconic elements, and the fact that from those living areas our client will lose a large part of this currently 'highly valued' view.

Test 4: Reasonableness

The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

The views currently enjoyed by our clients are from principal living areas of the dwelling house and are enjoyed as an integral part of the lifestyle of the occupants. The view loss is to a large extent attributable to non-compliance with relevant standards and controls that the applicant should be and is likely aware of.

The proposed principal dwelling fails to provide reasonable view sharing for its neighbours generally. This has come about due to a number of non-compliances with controls in WLEP and WDCP pertaining specifically to breaches of the following controls (some are not directly related to view loss but nonetheless illustrative of a general lack of consideration of the proposal in context):

1. Height of Building Control WLEP 2011
2. B1 – Wall Heights DCP
3. D8 – Privacy DCP
4. D9 – Building Bulk DCP

If the applicant were to embrace a further revised scheme which included increasing setbacks to side boundaries not just for the rear portion of the site, reducing height so that departures from the height control were no longer 'significant' and reviewing

the dwelling position on the land (pushing footprint forward and stepping down to the east), it would assist in reducing the view loss impact to our clients' property, and still provide substantial views along 'The Drive' view corridor for the applicants scheme and lastly would also provide a better planning outcome for the precinct generally.

It is evident that the applicant's proposal, incorporates a number of non-compliances with both the WLEP and WDCP and these are drivers for the unreasonable view loss. Given the circumstances, one can only conclude that the development proposal before Council must fail the fourth test in *Tenacity*.

At the risk of labouring the issue regarding views, we are bound to refer the reader to the view corridor created by 'The Drive' roadway which will never be 'built out', which runs east west to the Ocean, and lastly which provides a significant view corridor benefitting the subject site at all its various levels including at garage level.

We ask Council to consider the issues raised in the above section relating to excessive view loss caused by the unreasonable design.

Furthermore, we ask Council to request the applicant to erect NEW height poles to be able to fully assess the extent of the view loss. This is important in circumstances where the HOB control is exceeded so significantly.

Height of Building

The proposed development will create a four-storey house in a locality where properties are generally 2-3 storey. Where dwellings are higher they generally sit at the toe of the bluff.

The applicant's scheme sits above the 8.5m height of building control in WLEP, by some 21.4% (close to 2.0m) requiring that a clause 4.6 written request be submitted with the application. This degree of breach of the height control is simply beyond justification in the present circumstances and we have difficulty believing that Council would even consider supporting it.

Under WLEP, the maximum height of building for the subject site is 8.5 metres. The objectives of WLEP 'Height of Buildings' control are as follows:

- to ensure that buildings are compatible with the height and scale of surrounding and nearby development,
- to minimise visual impact, disruption of views, loss of privacy and loss of solar access,
- to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,
- to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

In our opinion, the development is at odds with all of the above objectives in one way or another. Furthermore as regards the clause 4.6 variation request, there are not sufficient environmental planning grounds to justify the contravention of the planning control in this case and to this extent. Whilst acknowledging the environmental constraints imposed by the slope of the land, the significant height

exceedance does not correlate with the land form. Rather it still represents a grab 'for the best view' without any regard to the locality, the neighbours, or precinct character.

As regards the proposed changes to the way clause 4.6 variation requests are assessed, our view is that the proposed development does not achieve compliance with the new test, requiring an 'improved planning outcome'. See below extract from the Explanation of Intended Effects from the DoPE 2021 (EIE).

A clause 4.6 request:

1. Will be consistent with
 - a) the objectives of the clause containing the development standard to be varied; and
 - b) the zone in which the development is proposed; and
2. Will result in an improved planning outcome, when compared with what would have been achieved if the development standard was not contravened, by consideration of the public interest and environmental, social and economic outcomes.

The development in its current form, is inconsistent with the objectives of the clause, with the zone objectives and certainly does not result in a development that provides an improved planning outcome.

The photograph under (from Vaughan Milligan Development Consulting Pty Ltd at p12) of the clause 4.6 variation request illustrates the availability of a significant view corridor that benefits the subject site, no matter the height of the development erected thereon.



Image 3 – Showing subject site in far distance and view corridor created by roadway
(Courtesy Vaughan Milligan Development Consulting Pty Ltd at p12)

The scheme is such that the development as now proposed, would dominate the surroundings. The sheer bulk of the development proposal will cause interference with view corridors, detrimentally impact surrounding occupants' internal amenity and will create unnecessary overshadowing. It will dominate the bluff two full storeys above its crest. Although the site is on a slope, additional

design/construction measures could easily be implemented so as to provide a compatible scheme that still enjoyed significant iconic views.

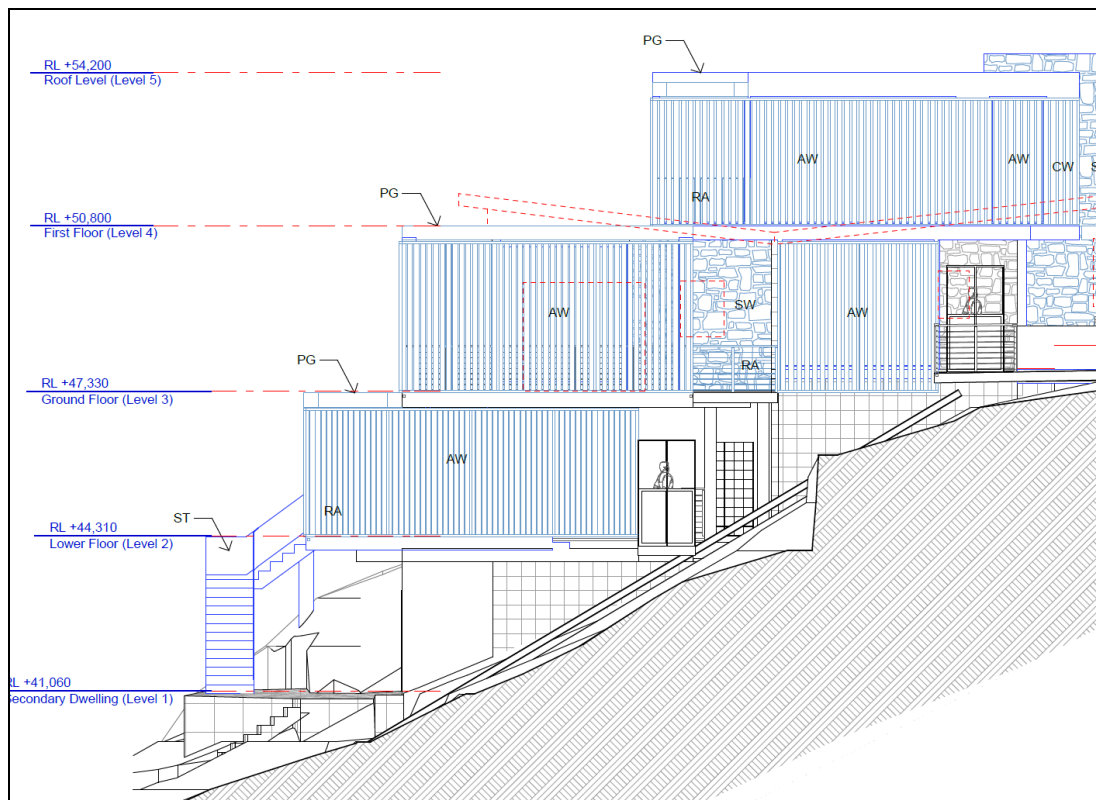


Figure 4 – Showing north elevation (Northern Beaches Designs Sheet DA 13)

The above extract from the plan set demonstrates the non-compliance with the HOB control. Note that if the drawing is correct, it appears to show the building extending from approximately RL44.5 to RL54.2 at its highest point which is a height of some 9.7m. The more eastward height where the development steps down a storey is similar based on the proposed RL's. Note height of existing dwelling house shown red dotted with the roof of same a full storey below the proposed height of the new structure. The existing structure still dominates on the top of the bluff, so one should imagine a built form with twice that height.

We respectfully submit to Council that, in the event that consent was to be granted to the proposed development more-or-less in its present form, conditions of consent ought to be imposed so as to prevent built elements closer than 4.5 metres from the southern side boundary, given the overall height of this proposal.

We call for Council to reject the application in its current form and require the applicant to provide an amended scheme, which addresses the significant issues associated with the current design.

Height Poles

We request that the applicant be asked to replace existing height poles. The height poles should also be checked and certified by a registered surveyor.

Side Boundary Envelope and Site Coverage

As respects the WDCP B3 Side Boundary Envelope control, the objectives of the control are as follows:

- To ensure that development does not become visually dominant by virtue of its height and bulk.
- To ensure adequate light, solar access and privacy by providing spatial separation between buildings.
- To ensure that development responds to the topography of the site.

The proposed principal dwelling does not appear to comply with the side boundary envelope control (even given its generous terms). Further sections running north-south should be provided showing compliance with the envelope control.

Now, as respects the WDCP B4 Side Coverage control, the objectives of the control are as follows:

- To provide opportunities for the provision of landscaping and the enhancement of existing native vegetation.
- To minimise the bulk and scale of development.
- To reduce the stormwater runoff, preventing soil erosion and siltation of the natural drainage network.
- To limit impervious areas and encourage natural drainage into the sub-surface.

The applicant has provided a landscape plan however this does not show site coverage calculations.

Rear Boundary Setback

Clause B9 of the WDCP 2011 provides the following objectives:

- To ensure opportunities for deep soil landscape areas are maintained.
- To create a sense of openness in rear yards.
- To preserve the amenity of adjacent land, particularly relating to privacy between buildings.
- To maintain the existing visual continuity and pattern of buildings, rear gardens and landscape elements.
- To provide opportunities to maintain privacy between dwellings.

In this case the minimum required rear boundary setback is 6.0m, which is to be landscaped and 'free of above or below ground structures' (WDCP, Part B, Built form controls). In this case a poor existing planning outcome has been exacerbated by the extension of an elevated swimming pool hard against the rear boundary of the subject property, such that there is little opportunity for landscaping. This increases the potential for both aural and visual privacy impacts. These impacts are likely to be greatest for the dwelling house directly west of the subject (not our clients property). Further in terms of the objectives referred to above, significant inconsistencies arise, as there is very limited opportunity for deep soil planting in the setback area.

We submit that this situation is entirely unacceptable and flies in the face of what comprises what we consider a reasonable planning control. Please see the extract from the WDCP at B9, graphically depicting that which is sought to be achieved by the rear building setback controls.

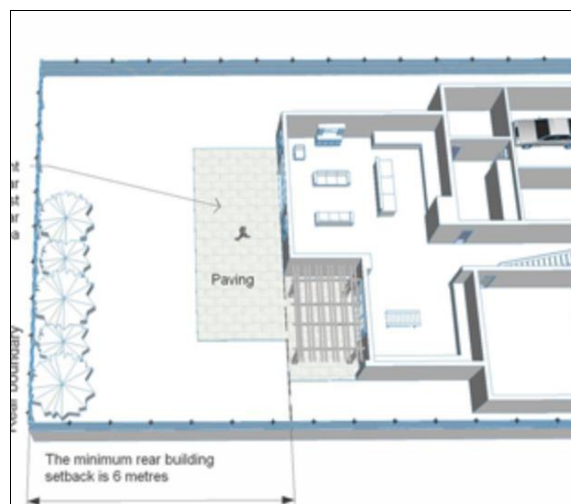


Figure 5 - From WDCP and illustrating desirable layout for rear setback area

Privacy

The highest level of the principal dwelling is set back insufficiently from the southern common boundary, and this is a living area in the immediate vicinity of our clients living areas. This is well illustrated in the 3D modelling (architectural perspectives) by the draftsman in the Masterplan Set:

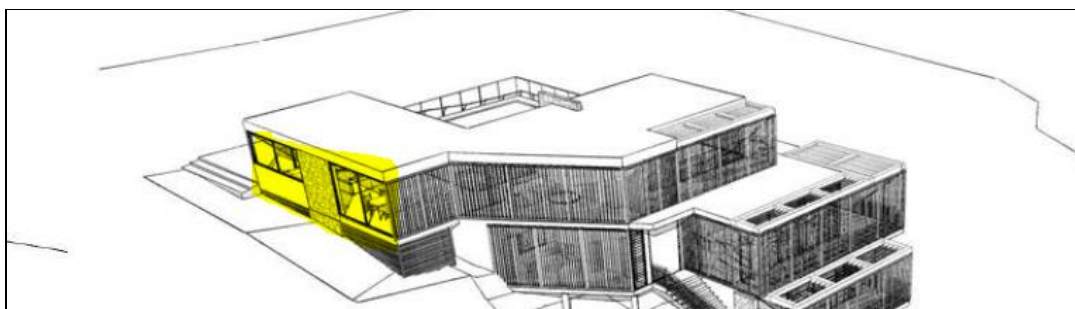


Figure 6 - From Masterplan set and showing picture windows running along the southern boundary of the subject (highlighted yellow)

The proximity of the proposed development to our clients' property, the elevated position of the windows and the proximity to our clients rear boundary and POS, have the potential to create an unacceptable privacy impact on our clients' property.

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

When visual privacy is referred to in the context of residential design, it means the freedom of one dwelling and its private open space from being overlooked by another dwelling and its private open space. ...

... Overlooking of neighbours that arises out of poor design is not acceptable. A poor design is demonstrated where an alternative design that provides the same amenity to the applicant at no additional cost, has a reduced impact on privacy.

... Landscaping should not be relied on as the sole protection against overlooking. While existing dense vegetation within a development is valuable, planting proposed in a landscaping plan should be given little weight. ...

It is clear from *Meriton v Sydney City Council* and subsequent cases in which the planning principle has been fairly consistently applied, that separation rather than landscaping is the main safeguard in the protection of privacy. In *Davis v Penrith City Council* [2013] NSWLEC 1141 Moore SC confirmed, at [121], the following as the criteria for assessing impact on neighbouring properties:

How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?

How reasonable is the proposal causing the impact?

How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?

Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?

Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?

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

In applying these criteria *Meriton v Sydney City Council* [2004] NSWLEC 313 at [45] clarifies the scope of visual privacy in the context of residential design as: the freedom of one dwelling and its private open space from being overlooked by another dwelling and its private open space.

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

Control D8 ('Visual privacy') of WDCP makes provision for visual privacy, as follows:

- Building layout should be designed to optimise privacy for occupants of the development and occupants of adjoining properties.
- Orientate living areas, habitable rooms and windows to private open space areas or to the street to limit overlooking.
- The effective location of doors, windows and balconies to avoid overlooking is preferred to the use of screening devices, high sills or obscured glass.
- The windows of one dwelling are to be located so they do not provide direct or close views (i.e. from less than 9 metres away) into the windows of other dwellings.

The southern elevation on level 4 — if it is to remain as part of the scheme— would need to have increased setbacks; this would somewhat reduce overlooking and privacy impacts.

Regrettably, the applicant has chosen not to provide these increased setbacks. It is noted that the southern side setback is 3.05 metres from the common boundary.

This setback has been selected because of an easement that runs along the common boundary on the south side of the subject. In our view the setback should be further increased to allow for planting along the southern boundary outside of the area of influence of the easement. Windows should also be either obscure fixed panels or face only to the east and west in articulations in the facade.

This proposed setback does not comply with the above objectives in D8 'Visual Privacy' of WDCP, which suggests that windows of one dwelling are to be located 9.0 metres away from windows of other dwellings.

As mentioned previously, our clients respectfully request that Council require amended plans which address this issue, in order to protect the privacy of the occupants of No 1 Seddon Hill Road.

Overshadowing

The proposal results in significant overshadowing of our clients property. The extent of the overshadowing results in non-compliance with solar access requirements.

Control D6 'Access to Sunlight' of WDCP has the following objectives:

- To ensure that reasonable access to sunlight is maintained.
- To encourage innovative design solutions to improve the urban environment and public open space.
- To promote passive solar design and the use of solar energy.

In our opinion, the applicant has not taken into consideration provision of a reasonable level of solar access to our client's living areas or the north facing POS close to the rear boundary of our clients property. The applicant's plans show a significant shadow from 9:00am until 12:00pm. The diagrams further suggest

internal living spaces will be significantly impacted until 3pm 21st of June (the winter solstice).

The control requires;

1. Development should avoid unreasonable overshadowing any public open space.
2. At least 50% of the required area of private open space of each dwelling and at least 50% of the required area of private open space of adjoining dwellings are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21.

We respectfully submit that this overshadowing is the result of poor design. It certainly fails to comply with the development control.

Restricted sunlight access and excessive overshadowing are a cause of significant concern for our clients, and is relevant to identify the applicable planning principles in relation to these issues. Perhaps the most relevantly applicable legal authority is *The Benevolent Society v Waverley Council* [2010] NSWLEC 1082 at 133-144. The Court at para [144] consolidated and revised the planning principle on solar access in the following terms:

Where guidelines dealing with the hours of sunlight on a window or open space leave open the question what proportion of the window or open space should be in sunlight, and whether the sunlight should be measured at floor, table or a standing person's eye level, assessment of the adequacy of solar access should be undertaken with the following principles in mind, where relevant:

- The ease with which sunlight access can be protected is inversely proportional to the density of development. At low densities, there is a reasonable expectation that a dwelling and some of its open space will retain its existing sunlight. (However, even at low densities there are sites and buildings that are highly vulnerable to being overshadowed.) At higher densities sunlight is harder to protect and the claim to retain it is not as strong.
- The amount of sunlight lost should be taken into account, as well as the amount of sunlight retained.
- Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines. The poor quality of a proposal's design may be demonstrated by a more sensitive design that achieves the same amenity without substantial additional cost, while reducing the impact on neighbours.
- For a window, door or glass wall to be assessed as being in sunlight, regard should be had not only to the proportion of the glazed area in sunlight but also to the size of the glazed area itself. Strict mathematical formulae are not always an appropriate measure of solar amenity. For larger glazed areas, adequate solar amenity in the built space behind may be achieved by the sun falling on comparatively modest portions of the glazed area.
- For private open space to be assessed as receiving adequate sunlight, regard should be had of the size of the open space and the amount of it receiving sunlight. Self-evidently, the smaller the open space, the greater the proportion of it requiring sunlight for it to have adequate solar amenity. A useable strip

adjoining the living area in sunlight usually provides better solar amenity, depending on the size of the space. The amount of sunlight on private open space should ordinarily be measured at ground level but regard should be had to the size of the space as, in a smaller private open space, sunlight falling on seated residents may be adequate.

- Overshadowing by fences, roof overhangs and changes in level should be taken into consideration. Overshadowing by vegetation should be ignored, except that vegetation may be taken into account in a qualitative way, in particular dense hedges that appear like a solid fence.
- In areas undergoing change, the impact on what is likely to be built on adjoining sites should be considered as well as the existing development. [Our emphasis.]

In our opinion, the proposal fails to take into consideration and make appropriate provision for the shadowing caused by the proposal arising from excess bulk and scale and insufficient setback. The development presents an unsympathetic response to the relevantly applicable controls.

Our client's property is on the southern side of the subject site, which further exacerbates the overshadowing issue. The overshadowing issue also gives rise to knock on impacts such as appropriate ventilation and passive thermal regulation of our clients property.

Given the extent of the non-compliance with overshadowing we ask the application be refused and a more sensitive design be required that addresses the issue.

Other Amenity and Environmental Planning Issues

In our opinion, the proposed built form of the development is inappropriate. Without putting too fine point on it, site coverage controls ordinarily limit bulk and scale and we consider the applicant's proposal to be an unacceptable overdevelopment of the site.

The usual acceptable maximum for BUA in a low density residential zone is 50%. When this level of site coverage is combined with four storeys of development, the result is clearly an anathema to good planning.

It is important to take in consideration the building footprint in this case, which will be incremental to existing. Clause D9 'Bulk and Scale' of WDCP has the following requirement (3):

on sloping land, the height and bulk of development (particularly on the downhill side) is to be minimised, and the need for cut and fill reduced by designs which minimise the building footprint and allow the building mass to step down the slope.

The positioning of the bulk in the north-east and south west creates adverse impacts, and a revision of dwelling orientation should be considered. Such a review may reduce privacy impacts and as well shadowing and view loss issues.

In summary a complete review of dwelling orientation is warranted. Surely some of the building massing can be relocated away from common boundaries.

Geotechnical Issues Generally

The site is within Area B and C of Landslide Risk Land - Flanking Slopes 5 to 25 and Slope >25 on the WLEP Landslip Risk Map.

The applicant has engaged White Geotechnical Group (in a Report dated 8 June 2022) to prepare a geotechnical report as respects potential landslip hazards. After reviewing the report, we would urge Council to adopt (by way of appropriately worded conditions) all the recommendations made as regards the construction of the development, in the event that consent is granted.

Additionally, given the amount of excavation proposed we request that dilapidation reports be undertaken, to assess if any damage occurs as a result of the excavation and associated vibration.

Conclusion

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

19 Several judgments of this Court have dealt with the principles to be applied to the assessment of impacts on neighbouring properties. *Tenacity Consulting v Warringah* [2004] NSWLEC 140 dealt with the assessment of views loss; *Parsonage v Ku-ring-gai Council* [2004] NSWLEC 347 dealt with the assessment of overshadowing; while *Meriton v Sydney City Council* [2004] NSWLEC 313 and *Super Studio v Waverley Council* [2004] NSWLEC 91 dealt with the assessment of overlooking.

20 Five common themes run through the above principles. The first theme is that change in impact may be as important as the magnitude of impact. ...

21 The second theme is that in assessing an impact, one should balance the magnitude of the impact with the necessity and reasonableness of the proposal that creates it. ...

22 The third theme is that in assessing an impact one should take into consideration the vulnerability of the property receiving the impact. ...

23 The fourth theme is that the skill with which a proposal has been designed is relevant to the assessments of its impacts. Even a small impact should be avoided if a more skilful design can reduce or eliminate it.

24 The fifth theme is that an impact that arises from a proposal that fails to comply with planning controls is much harder to justify than one that arises from a complying proposal. People affected by a proposal have a legitimate expectation that the development on adjoining properties will comply with the planning regime. *[Original emphasis]*

In the case of the present development proposal we observe:

- the magnitude of impact upon the amenity, use and enjoyment by our clients of their current property and proposed new dwelling is certainly not insignificant, in that:
 - the views that are in issue for our clients are northern-eastern side views, along the southern side boundary of the subject site, towards iconic elements including Curl Curl Beach and headland;
 - the views are whole views of the water, transitioning land to water view, with the headland view unobstructed;
 - the applicant could provide an amended scheme, which involves better design to ensure that view sharing is maintained for adjacent dwellings;
 - the moderate to severe view impacts also arise by reason of several non-compliances with WLEP and WDCP controls, which are in place to protect adjacent properties views; and
 - an amended scheme which would be more compliant with these controls would result in a scheme that provided reasonable view sharing;
- our clients' existing house and proposed development are vulnerable, being directly adjacent and to the south of the subject site;
- the lack of attention in the design of the development proposal as regards the impacts of the proposed development on our clients' new dwelling in terms of height, bulk, visual privacy, overshadowing, site coverage and inadequate setbacks is relevant to the assessments of those impacts, such that even a small impact should be avoided if a more skilful design can reduce or eliminate it;
- the fact that the proposal fails to comply with a number of important planning controls is harder to justify than would otherwise be the case if the development were a complying proposal;
- the development is not for alterations and additions according to the relevant legal tests (see above); and
- the proposal involves 4 storeys strongly indicating that the application is an overdevelopment.

We request the following:

- that the applicant erect NEW height poles so our clients can fully understand the scope of the impact of the proposal.
- that Council require an amended scheme that is far more compliant as regards overshadowing and overlooking. This may involve significant reduction to the southern wing of the principal dwelling.

- that Council require the applicant to reorient the proposed dwelling house and move built elements away from the south boundary to produce a scheme that is less impacting, with action per the above being likely required.
- that Council impose a condition requiring pre and post dilapidation reports if the Council is minded to grant approval (support to this scheme seems unlikely in our experience).

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

In addition, the close proximity of the proposed development to our clients' property and their proposed new dwelling house, will create an unacceptable privacy impact for our clients as respects the use and enjoyment of their land. The overall height of the proposed development and non-complying setbacks is considered 'not to be acceptable'.

Given the extent of the planning issues generated by the current proposal, our view is the application should be refused.

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

Our clients have chosen to make their own submission to Council as well and otherwise reserve all of their rights and entitlements.

Yours faithfully,

TURNBULL PLANNING INTERNATIONAL PTY LIMITED

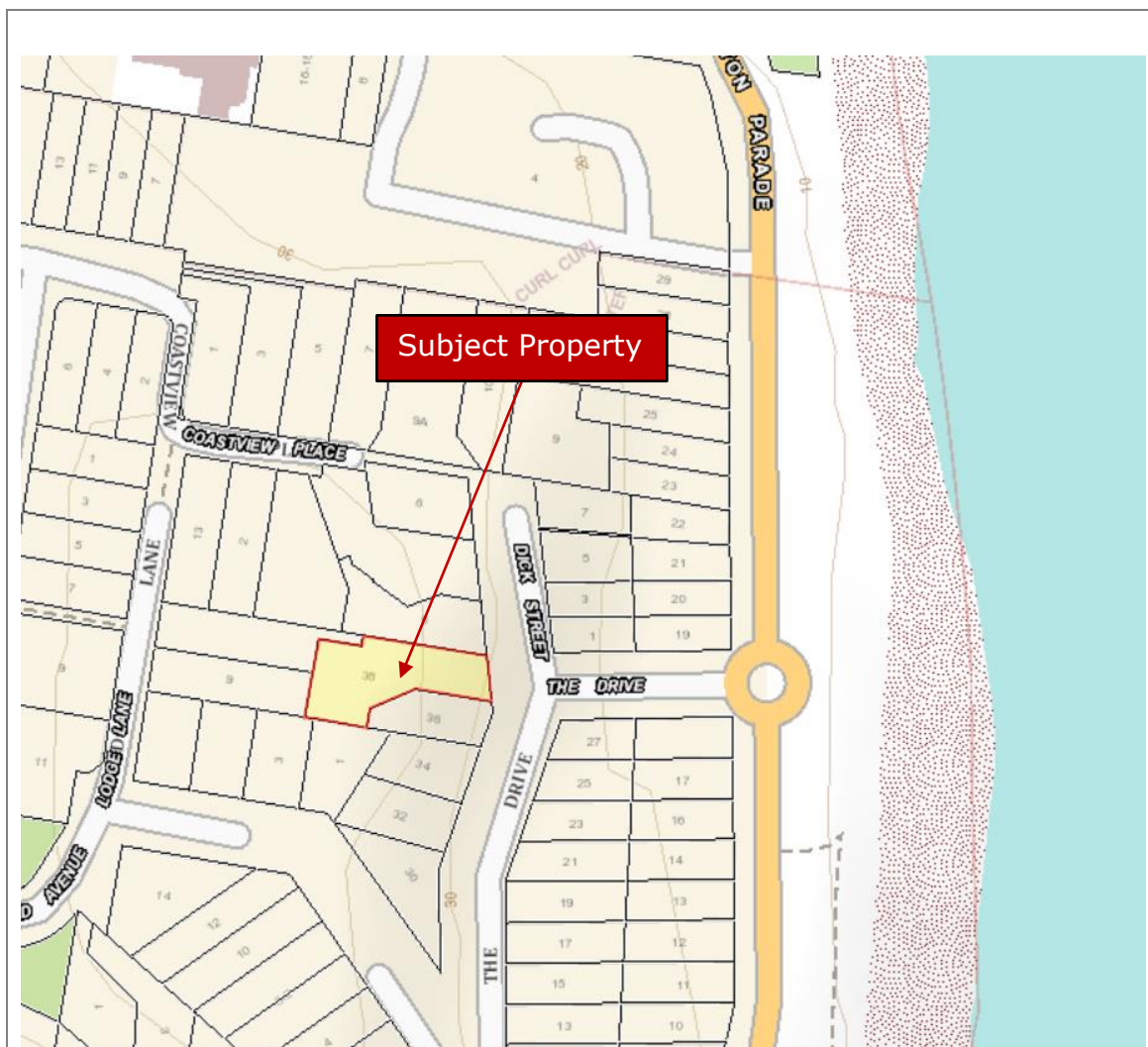


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ANNEXURE 1



LOCALITY PLAN
EXTRACT FROM SIX MAPS



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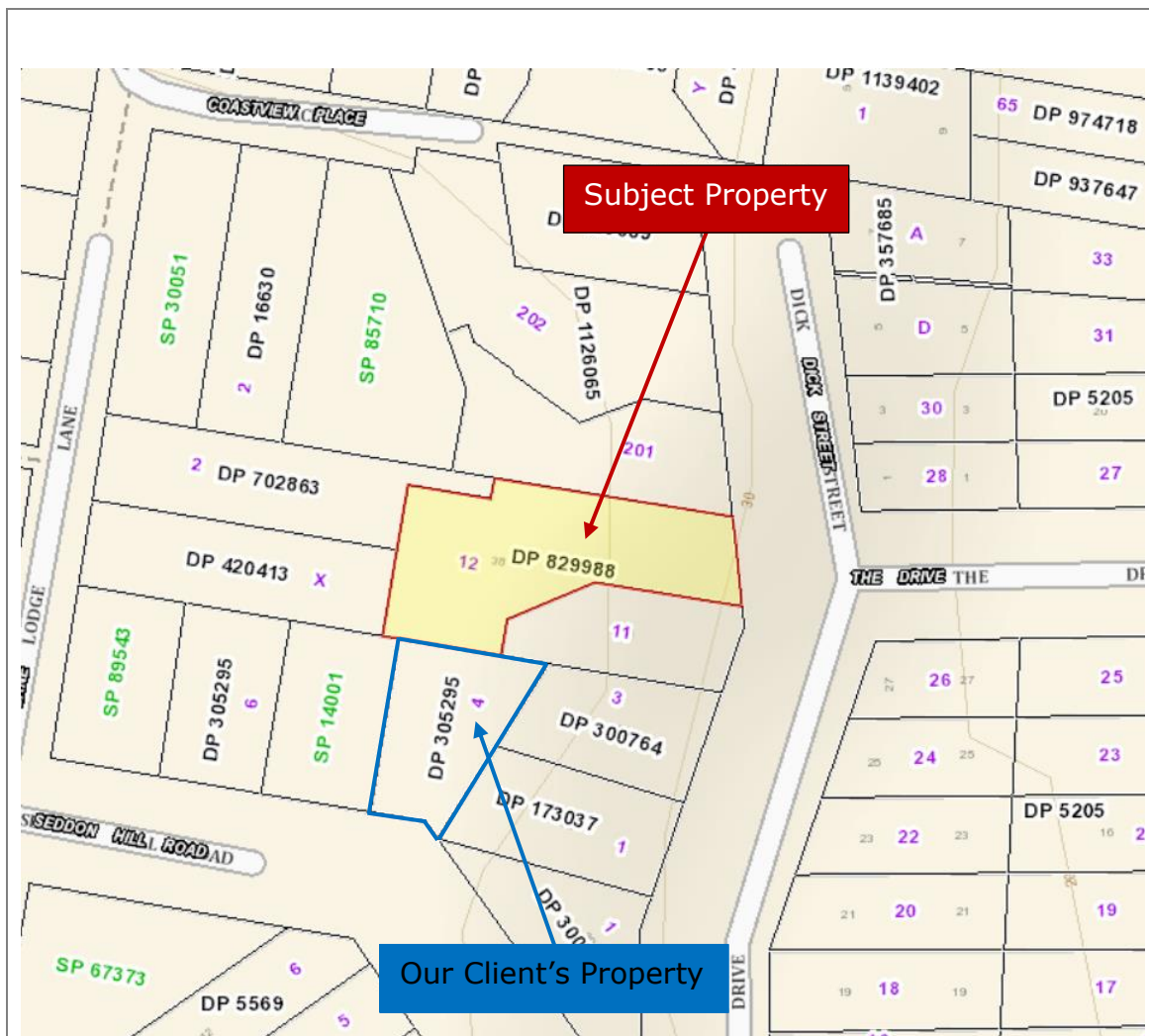
August 2022
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DRAWN: TG

Annexure 1

**38 The Drive
Freshwater**

ANNEXURE 2



**PLAN SHOWING RELATIONSHIP BETWEEN SUBJECT
AND OUR CLIENTS PROPERTY**
EXTRACT FROM SIX MAPS



TOWN PLANNERS
Suite 2301, Quattro Building 2
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August 2022
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DRAWN: TG

Annexure 2

38 The Drive
Freshwater

ANNEXURE 3



Photograph 1 – Our clients site looking north east towards subject



Photograph 2 – Lower part of our client site

ANNEXURE 3 (CONT)



Photograph 3 – Street frontage of our clients site



Photograph 4 – Boundary of our clients site with No 3 Seddon Hill Road

ANNEXURE 3 (CONT)



Photograph 5 – Subject site viewed from the Drive



Photograph 6 – Subject site viewed from The Drive

ANNEXURE 3 (CONT)



Photograph 7 – Site adjoining subject to the south and fronting The Drive



Photograph 8 – Site adjoining subject to the north and fronting The Drive