
Sent: 28/11/2018 5:59:05 PM
Subject: DA 2018/1761 No 24 Aitken Avenue, Queenscliff - Letter of objection
Attachments: LETTER OF OBJECTION 24 Aitken Ave Queensliff 20181128.pdf;

To Whom It May Concern

Please find attached letter of objection to the above DA.

Regards

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28 November 2018

The General Manager
Northern Beaches Council
725 Pittwater Road
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Dear Sir/Madam

**LETTER OF OBJECTION TO DA 2018/1761 FOR
DEMOLITION WORKS AND CONSTRUCTION OF A RESIDENTIAL FLAT BUILDING AT 24 AITKEN
AVE, QUEENSCLIFF**

I refer to the above Development Application (DA) for No 24 Aitken Avenue, Queenscliff (the subject site). I act on behalf of the owners of No 22 Aitken Avenue, the adjoining property to the west.

I have inspected the subject site from the street and No 22 Aitken Avenue. I have also examined the relevant documents, plans and reports including the Statement of Environmental Effects (SEE) prepared in support of the DA.

In summary, we object to the proposed development for the following reasons:

- Existing use rights have not been clearly established
- The proposal does not satisfy the Planning Principle for merit assessment of existing use rights redevelopment
- Not in keeping with the character and context of the locality
- Excessive Building Bulk and Scale
- Excessive excavation
- Unacceptable amenity impacts to No 22 Aitken Ave as follows:
 - visually dominating
 - overshadowing
 - view loss
 - privacy loss.
- Overdevelopment of the site

Overall, the proposal represents an unreasonable enlargement, expansion and intensification of the existing use. These issues will be discussed in further detail below.

Existing Use Rights

The proposed development is defined as a residential flat building and is prohibited in the R2 Low Density Zone pursuant to Warringah Local Environmental Plan 2011 (WLEP). The development may be permitted **if** existing use rights are established under section 4.65 of the Environmental Planning and Assessment Act 1979 (EP&A Act). The onus of establishing existing use rights lies with the applicant. *Prima facie*, there are 3 elements to establishing an existing use, namely:

1. The use is prohibited under an environmental planning instrument;
2. Consent for the use was granted before the commencement of environmental planning instrument referred to in (1) and;
3. The non-conforming use has occurred continuously since the environmental planning instrument came into force and a 12 month gap has not occurred at any point.

Criteria 1 is satisfied. The commencement of WLEP 2011 has the effect of prohibiting the use of land zoned R2 Low Density Residential for the purpose of a residential flat building.

However, in order to properly establish existing use rights, it must be established when the use first became prohibited (i.e. under WLEP 2011 or an earlier instrument?) and whether the use was being undertaken lawfully immediately prior to that prohibition.

Simply because a use commenced on the site does not immediately determine whether or not there is an existing use within the meaning of the EP&A Act. In order for the use to be an existing use, it must have been lawfully commenced and lawfully carried out immediately before the use became prohibited.

It is noted from an email from Council provided by the applicant that “*the property 24 Aitken Avenue was built in 1949*”. However, there is no documentary evidence provided. Nor is it stated what the approved use of the building was (flats or dwelling?) or under what instrument approval was given (if any). The applicant has not provided enough evidence to establish lawful commencement nor is it known when the use first became prohibited. Consequently, Criterion 2 is not satisfied.

There has been no information or evidence provided to demonstrate that the use has continued. Criterion 3 has not been addressed.

Council needs to be satisfied that the use of the existing building for a residential flat building is an existing use in accordance with Section 4.65 of the EP&A Act. While it appears likely, insufficient information has been provided to date.

Planning Principle: Existing use rights and merit assessment

While it is acknowledged that zoning provisions, development standards under the LEP and planning controls under the DCP are not strictly applicable to the proposed development, a merit assessment is required. In this regard there is a Planning Principle for the assessment of proposals on land with existing use rights, which provides a structure for assessment.

The principles to be considered when undertaking a merits assessment of a proposed redevelopment of a site with existing use rights were dealt with by Roseth SC in *Fodor Investments v Hornsby Shire*

Council [2005] NSWLEC 71. The planning principle outlines four questions to be considered in the assessment of existing use rights developments. These are:

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?*
2. *What is the relevance of the building in which the existing takes place?*
3. *What are the impacts on adjoining land?*
4. *What is the internal amenity?*

Three of the above four principles apply to the issues in the present case; namely the proposal's appearance in the context of the surrounding area (in particular, Aitken Avenue); the height and siting of the existing building and the impact on the adjoining properties. No concerns are raised with regard to the internal amenity of the proposed apartments.

Issues of concern are discussed below:

Planning Principle 1: Excessive Building Bulk and Scale

The Planning Principle states:

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 assessment.

In this regard, the proposed development is completely out of character with the development permissible under the current planning controls. The table below demonstrates the major non-compliances with the numerical planning controls in Warringah Local Environmental Plan 2011 (WLEP) and the Warringah Development Control Plan 2011 (WDCP):

Relevant Planning Controls:

Control	Requirement	Proposed	Compliance
Height of Buildings (WLEP)	8.5m	10.7m	No
WDCP:			
B1 Wall height	7.2m	Max 10m	No
B3 Side boundary envelope	5m at 45 degrees	Breach both sides	No
B5 Side boundary setbacks	0.9m	0.8m - basement 3m - upper levels	No
B7 Front boundary setbacks	6.5m or street average	Nil - garage	No Yes
B9 Rear boundary setbacks	6m	5.3m	No
D1 Landscape open space	40% or 210m ²	12% or 65m ²	No

Table 1. Current applicable planning controls

As demonstrated by the above non-compliances with the applicable planning controls, the proposed development is out of character with the kind of development that can be expected when surrounding

developments are redeveloped. This is demonstrated by the recent redevelopment of No 22 Aitken Avenue which has a height, bulk and scale which complies with the relevant planning controls and less than half of the bulk and scale of that proposed, as illustrated in Figure 1 below:

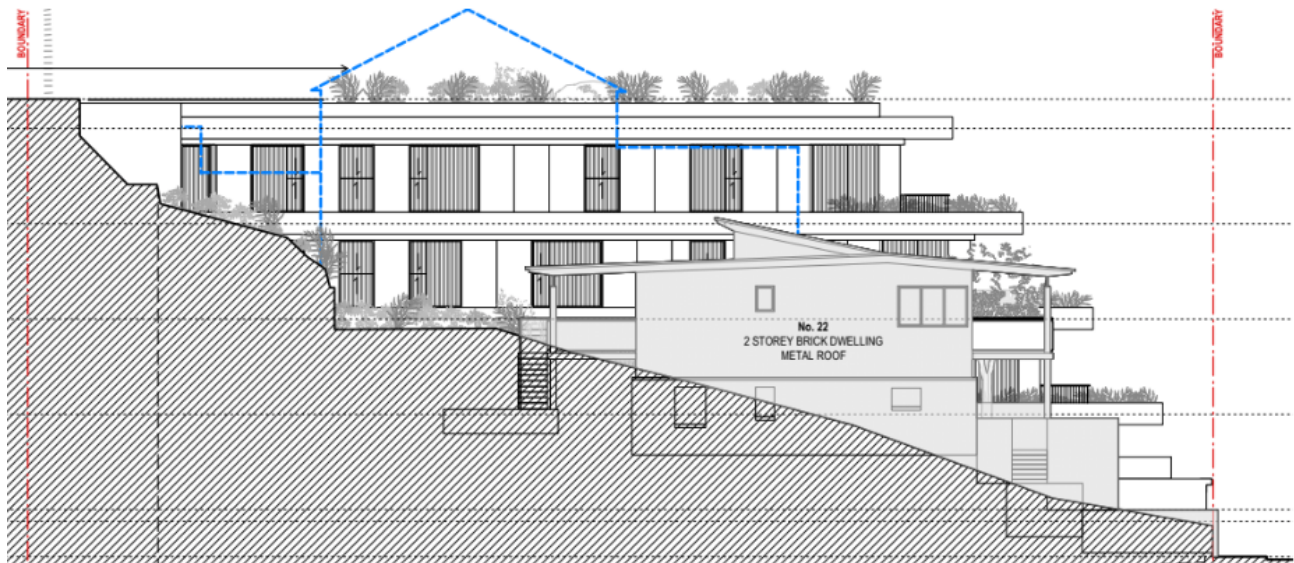


Figure 1. Massing comparison showing the substantial bulk of the proposed development compared to No 22 Aitken Ave (Source: Breakspear Architects)

The proposed development will visually dominate its two adjoining neighbouring dwellings and is out of character with existing and future development in the area.

Planning Principle 2: Relevance of the existing building

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.

The applicant argues that the as the height of the existing building is RL 28.230 compared to the height of the proposed development at RL 25.160, that the proposed development does not represent significant or unreasonable enlargement, expansion or intensification of the existing approved development.

However, this comparison of maximum RLs is misleading as it does not indicate overall bulk, scale and building volume. For a more extensive comparison, table 2 below compares gross floor area (GFA), building footprint, number of apartments and number of bedrooms.

	Existing building	Proposed building	Variation
Gross Floor Area (approximate)	240m ²	554m ²	+130%
Building footprint (approximate)	164m ²	294m ² (Ground level) 402m ² (Basement)	+80% +145%
Number of apartments	3	4	+33%
Number of bedrooms	6	12	+100%

Table 2. Comparison of existing building with proposed development

As demonstrated in Table 2, the proposed development represents a significant and unreasonable enlargement, expansion and intensification of the existing development and should not be approved in its current form.

Planning Principle 3: Impacts on adjoining land

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.

The proposed development will result in the following impacts on No 22 Aitken Avenue:

- **Visually dominant**

The proposal will visually dominate No 22 Aitken Avenue. It is more than double its length and is storeys higher. When viewed from 22 Aitken, the proposal will be overwhelming. Likewise, it will appear as a five storey building in the streetscape and will appear out of character.

- **Solar impacts**

The proposed development will result in additional overshadowing of 22 Aitken Avenue. The extension of the building footprint toward the street will substantially increase shadowing to No 22 Aitken Avenue during the morning hours. Particular concern is raised regarding additional shadowing to the front deck which leads off the living room. The shadow diagrams submitted with the DA do not appear to show the full extent of shadows cast. Elevational shadow diagrams of the eastern elevation of 22 Aitken Ave are requested in order to accurately determine shadow impacts on this property.

- **View impacts**

No 22 Aitken Avenue currently enjoys views of Manly Lagoon and, in the distance, North Head from its front deck in a south-easterly direction. The forward extension of the building footprint of No 24 Aitken Avenue will block some of those existing views.

It is noted that there is an existing power pole located in the road reserve where the new driveway is proposed to be relocated. Information is requested as to the relocation of this pole with concerns raised that it will interrupt the existing views from No 22 Aitken Avenue.

- **Privacy impacts**

The multitude of windows, court yards and balconies along the western side of the proposed development will result in unacceptable privacy impacts on No 22 Aitken Avenue. In particular:

- The ground floor, paved courtyards are on a nil setback and will result in potential acoustic impacts.
- The proposed living room windows along the western elevation will overlook No 22 Aitken Ave
- The proposed front balconies will result in visual and acoustic privacy impacts to No 22 Aitken Ave
- The proposal does not comply with the Apartment Design Guidelines (ADG) which requires 6m separation between habitable rooms/balconies with adjoining properties.

Excessive excavation

Concern is raised over the substantial excavation proposed within close proximity to the adjoining properties which could result in potential damage. The Geotechnical Report submitted with the DA notes that:

... excavation of up to 16m depth will be required at the rear (north eastern end) of the site and 3.5m excavation will be required at the front (south-western end) of the site. According to development plans, the basement excavation will extend up to the front and side boundaries and approximately 4.5m from the north-eastern boundary....

The Geotechnical report also notes that the excavation will potentially encroach on the zone of influence of foundations for the adjoining buildings and that further Geotechnical design work will be required. The amount of excavation and proximity to the common boundary with No 22 Aitken Ave is excessive and unreasonable.

Concern is also raised regarding the health and safety impacts from airborne pollution arising from the rock cutting. This has not been addressed in the DA documentation.

Inadequate Landscaped Area

As most of the subject site is covered by the building footprint, the proposal has only 12% of the site area or 65m² of landscaped area (as defined in DCP) this is inadequate and inconsistent with the landscaped character of the area.

Construction Traffic

Concern is raised over impacts to existing residents resulting from construction traffic, particularly given the amount of excavation proposed and the trucks required to export material from the site. Aitken Avenue is a narrow, dead-end street. Details of how access will be maintained for existing residents and emergency vehicles has not been provided.

Conclusion

For reasons outlined in this submission, the proposed development is unreasonable and represents an overdevelopment of the site. Existing use rights have not been established. The proposed development also fails to meet both Council's planning controls and the merit assessment guidelines outlined in the planning principle for existing use rights redevelopment. The proposed development represents an unreasonable enlargement, expansion and intensification compared to the existing development.

The proposal is out of character with the Aitken Avenue streetscape and results in detrimental amenity impacts on surrounding properties. The proposed development should not be approved in its current form.

Yours faithfully,



Danielle Deegan BEc, Grad Dip Planning
Director