

# AGENDA

## **NORTHERN BEACHES LOCAL PLANNING PANEL MEETING**

Notice is hereby given that a Meeting of the Northern Beaches Local Planning Panel will be held in the Council Chambers, Civic Centre, Dee Why on

**WEDNESDAY 18 SEPTEMBER 2019**

Beginning at 1.00pm for the purpose of considering and determining matters included in this agenda.



**Peter Robinson**  
**Executive Manager Development Assessment**

**Panel Members**

Peter Biscoe	Chair
Robert Hussey	Town Planner
Graham Brown	Town Planner
John Simmonds	Community Representative

**Quorum**

A quorum is three Panel members

**Conflict of Interest**

Any Panel Member who has a conflict of Interest must not be present at the site inspection and leave the Chamber during any discussion of the relevant Item and must not take part in any discussion or voting of this Item.

**Agenda for a Meeting of the Northern Beaches Local Planning Panel  
to be held on Wednesday 18 September 2019  
in the Council Chambers, Civic Centre, Dee Why  
Commencing at 1.00pm**

<b>1.0</b>	<b>APOLOGIES &amp; DECLARATIONS OF INTEREST</b>	
<b>2.0</b>	<b>MINUTES OF PREVIOUS MEETING</b>	
2.1	Minutes of Northern Beaches Local Planning Panel held 4 September 2019	
<b>3.0</b>	<b>DEVELOPMENT APPLICATIONS .....</b>	<b>5</b>
3.1	Mod2019/0312 - 0 Sandy Bay Road, Clontarf - Modification of Development Consent DA91/2015 granted for alterations and additions to an existing cafe .....	5
3.2	Mod2019/0373 - 53 Alexander Street, Manly - Modification of Development Consent DA2019/0275 granted for demolition works, subdivision of 1 lot into 2 lots and construction of two semi-detached dwellings .....	39
<b>4.0</b>	<b>REVIEW OF DETERMINATIONS.....</b>	<b>61</b>
4.1	REV2018/0034 - 70 McCarrs Creek Road, Church Point - Review of Determination of Application N0538/17 for construction of a new dwelling.....	61

## **2.0 MINUTES OF PREVIOUS MEETING**

### **2.1 MINUTES OF NORTHERN BEACHES LOCAL PLANNING PANEL HELD 4 SEPTEMBER 2019**

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#### **RECOMMENDATION**

That the Panel note that the Minutes of the Northern Beaches Local Planning Panel held 4 September 2019 were adopted by the Chairperson and have been posted on Council's website.

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### 3.0 DEVELOPMENT APPLICATIONS

**ITEM 3.1** MOD2019/0312 - 0 SANDY BAY ROAD, CLONTARF -  
MODIFICATION OF DEVELOPMENT CONSENT DA91/2015  
GRANTED FOR ALTERATIONS AND ADDITIONS TO AN  
EXISTING CAFE

**AUTHORISING MANAGER** MATTHEW EDMONDS

**TRIM FILE REF** 2019/518488

**ATTACHMENTS** 1 [↓](#) Assessment Report  
2 [↓](#) Site Plan and Elevations

#### PURPOSE

This application has been referred to the Northern Beaches Local Planning Panel as it is a modification of a determination or decision made by a local planning panel.

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#### RECOMMENDATION OF MANAGER DEVELOPMENT ASSESSMENT

That the Northern Beaches Local Planning Panel, on behalf of Northern Beaches Council as the consent authority, **approves** Application No. Mod2019/0312 for Modification of Development Consent DA91/2015 granted for alterations and additions to an existing café at Lot 7118 DP 1059397, 0 Sandy Bay Road, Clontarf subject to the conditions and for the reasons set out in the Assessment Report.

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## APPLICATION FOR MODIFICATION ASSESSMENT REPORT

<b>Application Number:</b>	Mod2019/0312
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<b>Responsible Officer:</b>	Kent Bull
<b>Land to be developed (Address):</b>	Lot 7118 DP 1059397, 0 Sandy Bay Road CLONTARF NSW 2093
<b>Proposed Development:</b>	Modification of Development Consent DA91/2015 granted for alterations and additions to an existing cafe
<b>Zoning:</b>	Manly LEP2013 - Land zoned RE1 Public Recreation
<b>Development Permissible:</b>	Yes
<b>Existing Use Rights:</b>	No
<b>Consent Authority:</b>	Northern Beaches Council
<b>Delegation Level:</b>	NBLPP
<b>Land and Environment Court Action:</b>	No
<b>Owner:</b>	Department of Land & Water Conservation
<b>Applicant:</b>	Clonnys At Clontarf Pty Ltd

<b>Application lodged:</b>	28/06/2019
<b>Integrated Development:</b>	No
<b>Designated Development:</b>	No
<b>State Reporting Category:</b>	Commercial/Retail/Office
<b>Notified:</b>	02/08/2019 to 16/08/2019
<b>Advertised:</b>	Not Advertised
<b>Submissions Received:</b>	0
<b>Clause 4.6 Variation:</b>	Nil
<b>Recommendation:</b>	Approval

### EXECUTIVE SUMMARY

The modification application seeks consent to modify DA91/2015, granted for the alterations and additions of an existing restaurant, café, takeaway food and drink premises, which was approved by the Manly Independent Assessment Panel on 18 June 2015. As such, this application is referred to the Northern Beaches Local Planning Panel for determination.

In addition to other amendments, the modification seeks an overall reduction to the approved building footprint. The application seeks to modify conditions for the revised architectural plans, landscape plans and hours of operation. A total of ten (10) conditions have been requested to be deleted, these include conditions requiring a gross pollutant trap, a rainwater tank, restrictions on a new mechanical exhaust system and the bin storage area.

The notification of the application resulted in no submissions being received.

The assessment concludes that the proposed design is an appropriate modification to the original approval and will ensure the amenity of the subject site is maintained, without any unreasonable impacts on surrounding reserve and neighbouring properties. It is therefore recommended that the application be supported subject to conditions.

## **ASSESSMENT INTRODUCTION**

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

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

## **SUMMARY OF ASSESSMENT ISSUES**

Manly Local Environmental Plan 2013 - 5.10 Heritage conservation  
 Manly Local Environmental Plan 2013 - 6.4 Stormwater management  
 Manly Development Control Plan - 3.3.1 Landscaping Design  
 Manly Development Control Plan - 3.4 Amenity (Views, Overshadowing, Overlooking /Privacy, Noise)  
 Manly Development Control Plan - 3.8 Waste Management  
 Manly Development Control Plan - 3.9 Mechanical Plant Equipment

## **SITE DESCRIPTION**

<b>Property Description:</b>	Lot 7118 DP 1059397 , 0 Sandy Bay Road CLONTARF NSW 2093
<b>Detailed Site Description:</b>	<p>The subject site is known as Clontarf Reserve, Sandy Bay Road, Clontarf and is legally referred to as Lot 7118 in DP 1059397. The site consists of one (1) allotment located on the western side of Sandy Bay Road.</p> <p>The site is irregular in shape and measures approximately 120m north to south and approximately 180m east to west. The site has a surveyed area of 1.5ha. The site is generally level and slopes gently towards the foreshore area to the west.</p>

The site is located within the RE1 Public Recreation zone and accommodates an existing single storey restaurant, cafe and food and drink premises known as 'Clonnys at Clontarf'. A public car park area is located to the south east of this premises. Clontarf Reserve also features an enclosed swimming enclosure to the western foreshore as well as public facilities including barbecues, an enclosed playground, public toilets and showers. The site also contains a number of established canopy trees including Norfolk Island Pines and Moreton Bay Fig Trees.

Land Owners consent was provided by Crown Lands on 7 August 2019. The proposed works are located within the area of the lease and licence agreement signed by the Applicant with Council.

Clonnys at Clontarf is located within Clontarf Park, a local heritage item listed and described in Schedule 5 of the Manly Local Environment Plan 2013, but it should be noted that the restaurant premises is not individually listed as a heritage item. Clonnys at Clontarf is also located in the vicinity of the three (3) heritage items. See Clause 5.10 (Heritage Conservation) for further discussion.

#### **Detailed Description of Adjoining/Surrounding Development**

Adjoining and surrounding development is characterised by low density dwellings within a landscaped setting.

Map:



#### **SITE HISTORY**



The land has been used for commercial purposes for an extended period of time. A search of Council's records has revealed the following relevant history:

18 June 2015

Development Application No. 91/2015 for the alterations and additions to an existing restaurant, cafe, takeaway food premises including partial demolition, internal fit-out, removal of trees, landscaping and signage - Clonnys at Clontarf was granted consent by the Manly Independent Assessment Panel on the 18 June 2015.

30 November 2015

Section 96 (2) application to Development Application No. 91/2015 to modify approved alterations and additions to an existing restaurant, cafe, takeaway food and drink premises including partial demolition, internal fit-out, removal of trees, landscaping and signage - involving reduction in kitchen/kiosk area, change to roof form, enclosure of restaurant area and addition of outdoor seating beneath eaves - Clonnys at Clontarf - Part 2 was granted consent by Manly Council's Development Assessment Unit on the 30 November 2015.

8 July 2019

Construction Certificate No. CC2019/0739 for Development Application No. 91/2015 and Section 96 (2) application to Development Application No. 91/2015 issued on 8 July 2019.

**APPLICATION HISTORY**

28 June 2019

Subject development application received by Council.

10 July 2019

Request for further information letter sent to the Applicant indicating that Council required Owners Consent from Crown Lands.

24 July 2019 - 21 August 2019

Various email correspondence between the Applicant and the Development Assessment Officer clarifying matters concerning land owners consent, site inspections, conditions and notification sign evidence.

1 August 2019

Photo evidence provided by the Applicant and received by Council that the notification sign had been in place at the beginning of the notification period.

7 August 2019

Land Owners Consent provided by the Applicant and received by Council.

9 August 2019

Site inspection undertaken by the Development Assessment Officer. Applicant present during

inspection. Notification sign was in place at the time of the site inspection.

#### 21 August 2019

Photo evidence provided by the Applicant and received by Council that the notification sign had been in place for the duration of the notification period.

#### 21 August 2019

Applicant provides email confirmation that the Statement of Environmental Effects incorrectly requests for the revision of condition "ANS05", rather it should refer to condition "ANS06".

### **PROPOSED DEVELOPMENT IN DETAIL**

The application seeks the Modification of Development Consent DA91/2015 granted for alterations and additions to an existing cafe. In particular, the modifications include:

- Extend awning along the north eastern elevation to provide shading to the kiosk and restaurant areas (82m<sup>2</sup> of roof area);
- Hardstand area along the north eastern side of the building to the entry and kiosk areas for all-weather access and integrated with existing paved pathway from the car park area;
- New verandah concrete slab (650mm width extension);
- Verandah seating area increased by re-positioning the external walls of the restaurant;
- Modified entrance lobby on the northern side of the building;
- New "annex" on the southern side of the building (46m<sup>2</sup>) to be used as a childrens play area and kitchen scullery;
- Provision of new 1.8m high screened bin and storage area to the rear (south eastern elevation) of the building and deletion of the approved covered bin and storage areas; and
- Revised provision of landscaping to reflect amended building layout.

The application also proposes the following changes to the conditions of consent within DA0091/2015:

- Modify conditions:  
DA1 - to reflect the revised architectural plans;  
ANS06 - to reflect the revised landscape plan; and  
43 (6BS01) - to reflect the extension of the hours of operation to commence trading from 6am.
- Delete conditions:  
ANS08 - requirement for gross pollutant trap;  
ANS09 - requirement for a positive covenant and restriction on the use of land relating to the gross pollutant trap;  
ANS10 - prior to the issue of an Occupational Certificate requirements relevant to gross pollutant trap;  
ANS11 - requirement to amend landscape drawings;  
8 (2DS07) - the proposal seeks to retain the existing rainwater tank and does not propose a new rainwater tank;  
11 (2NL03) - the proposal seeks to retain the existing mechanical exhaust system and does not propose a new mechanical exhaust system;  
12 (2NL05) - the proposal seeks to retain the existing mechanical exhaust system. The supporting Mechanical Plant Noise Assessment Report concludes that when the existing mechanical plant and equipment are operating together that it was not audible at the nearest residential premises;  
14 (2WM03) - the proposal seeks a screened bin enclosure and storage area that is to be ventilated

to external air via natural ventilation;  
28 (4DS03) - as the proposal relates to a commercial development the condition requiring the installation of residential rainwater tanks is not applicable; and  
40 (5MS01) - requirement for a certificate from a practicing mechanical engineer shall be submitted to Council following the completed installation of the mechanical exhaust ventilation system;

## ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

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

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

- An assessment report and recommendation has been prepared and is attached taking into all relevant provisions of the Environmental Planning and Assessment Act 1979 and associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon all lands whether nearby, adjoining or at a distance;
- Consideration was given to all documentation provided (up to the time of determination) by the applicant, persons who have made submissions regarding the application and any advice given by relevant Council / Government / Authority Officers on the proposal;

In this regard, the consideration of the application adopts the previous assessment detailed in the Assessment Report for DA0091/2015, in full, with amendments detailed and assessed as follows:

The relevant matters for consideration under Section 4.55 (2) of the Environmental Planning and Assessment Act, 1979, are:

Section 4.55 (2) - Other Modifications	Comments
A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:	
(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	The development, as proposed, has been found to be such that Council is satisfied that the proposed works are substantially the same as those already approved under DA0091/2015.
(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) 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	Development Application DA0091/2015 did not require concurrence from the relevant Minister, public authority or approval body.
(c) it has notified the application in accordance with:	The application has been publicly exhibited

Section 4.55 (2) - Other Modifications	Comments
(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 under section 72 that requires the notification or advertising of applications for modification of a development consent, and	in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000, Manly Environmental Plan 2013 and Manly Development Control Plan.
(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.	No submissions were received in relation to this application.

#### Section 4.15 Assessment

In accordance with Section 4.55 (3) of the Environmental Planning and Assessment Act 1979, in determining an modification application made under Section 96 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 relevant matters for consideration under Section 4.15 of the Environmental Planning and Assessment Act, 1979, are:

Section 4.15 'Matters for Consideration'	Comments
Section 4.15 (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on "Environmental Planning Instruments" in this report.
Section 4.15 (1) (a)(ii) – Provisions of any draft environmental planning instrument	None applicable.
Section 4.15 (1) (a)(iii) – Provisions of any development control plan	Manly/ Development Control Plan applies to this proposal.
Section 4.15 (1) (a)(iia) – Provisions of any planning agreement	None applicable.
Section 4.15 (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation 2000)	<p><u>Division 8A</u> of the EP&amp;A Regulation 2000 requires the consent authority to consider Prescribed conditions of development consent. These matters have been addressed via a condition in the original consent.</p> <p><u>Clause 50(1A)</u> of the EP&amp;A Regulation 2000 requires the submission of a design verification certificate from the building designer at lodgement of the development application. This clause is not relevant to this application.</p> <p><u>Clauses 54 and 109</u> of the EP&amp;A Regulation 2000, Council requested additional information and has therefore considered the number of days taken in this assessment in light of this clause within the Regulations.</p>



Section 4.15 'Matters for Consideration'	Comments
	<p>No Additional information was requested.</p> <p><u>Clause 92</u> of the EP&amp;A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This matter has been addressed via a condition in the original consent.</p> <p><u>Clauses 93 and/or 94</u> of the EP&amp;A Regulation 2000 requires the consent authority to consider the upgrading of a building (including fire safety upgrade of development). This matter has been addressed via a condition in the original consent.</p> <p><u>Clause 98</u> of the EP&amp;A Regulation 2000 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This Clause is not relevant to this application.</p> <p><u>Clause 98</u> of the EP&amp;A Regulation 2000 requires the consent authority to consider the provisions of the Building Code of Australia (BCA). This matter has been addressed via a condition in the original consent.</p> <p><u>Clause 143A</u> of the EP&amp;A Regulation 2000 requires the submission of a design verification certificate from the building designer prior to the issue of a Construction Certificate. This clause is not relevant to this application.</p>
Section 4.15 (1) (b) – the likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality	<p>(i) <b>Environmental Impact</b> The environmental impacts of the proposed development on the natural and built environment are addressed under the Manly Development Control Plan section in this report.</p> <p>(ii) <b>Social Impact</b> The proposed development will not have a detrimental social impact in the locality considering the character of the proposal.</p> <p>(iii) <b>Economic Impact</b> The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.</p>
Section 4.15 (1) (c) – the suitability of the site for the development	The site is considered suitable for the proposed development.
Section 4.15 (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs	See discussion on “Notification & Submissions Received” in this report.
Section 4.15 (1) (e) – the public interest	No matters have arisen in this assessment that would justify the refusal of the application in the public interest.

## EXISTING USE RIGHTS

Existing Use Rights are not applicable to this application.

### **BUSHFIRE PRONE LAND**

The site is not classified as bush fire prone land.

### **NOTIFICATION & SUBMISSIONS RECEIVED**

The subject development application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the relevant Development Control Plan.

As a result of the public exhibition of the application Council received no submissions.

### **REFERRALS**

<b>Internal Referral Body</b>	<b>Comments</b>
Building Assessment - Fire and Disability upgrades	<p>The application has been investigated with respect to aspects relevant to the Building Certification and Fire Safety Department. There are no objections to approval of the development.</p> <p>Note: The proposed development may not comply with some requirements of the BCA. Issues such as these however may be determined at Construction Certificate stage.</p>
Environmental Health (Food Premises, Skin Pen.)	<p>General Comments</p> <p>There are no significant food related changes in this MOD however the scullery and storeroom would need to comply with the appropriate food premises standards.</p> <p>Recommendation</p> <p>APPROVAL - subject to conditions</p> <p>Planner Comments 29/08/19:</p> <p>Additional comments were sought from Council's Team Leader of Environmental Health regarding the request to delete condition 14 (2WM03) which relates to the bin storage area. The advice received was that the deletion of the condition would not be beneficial for future health inspection under the Food Act 2003. Council's Team Leader of Environmental Health agreed to modifying the condition to achieve consistency with Australian Standard AS4674.</p>
Landscape Officer	<p>The landscape component of the modification proposal is acceptable, providing no alteration to the landscape outcome of the approved development application.</p> <p>Council's Landscape section have assessed the application against the landscape controls of Manly DCP 2013, section 3: General Principles of Development, and section 4: Development Controls and</p>

Internal Referral Body	Comments
	Development Types.
NECC (Bushland and Biodiversity)	The proposed modification will not result in additional impact to native vegetation and is therefore supported.
NECC (Coast and Catchments)	<p>The application has been assessed in consideration of the Coastal Management Act 2016, State Environmental Planning Policy (Coastal Management) 2018, Sydney Harbour Catchment Regional Environment Plan, 2005 and Sydney Harbour Foreshores and Waterways Area Development Control Plan, 2005. It has also been assessed against requirements of the Manly LEP and DCP.</p> <p>The subject land is located within the Sydney Harbour Foreshores &amp; Waterways area boundary. Based on internal assessment, it is determined that the proposed modifications meet the requirements of the Sydney Harbour REP and DCP, and relevant clauses of the Manly LEP and DCP.</p> <p>The subject land is also located with the Coastal Zone.</p> <p>12 Development on land within the coastal vulnerability area</p> <p><i>Development consent must not be granted to development on land that is within the area identified as "coastal vulnerability area" on the Coastal Vulnerability Area Map unless the consent authority is satisfied that:</i></p> <ul style="list-style-type: none"> <li>(a) <i>if the proposed development comprises the erection of a building or works—the building or works are engineered to withstand current and projected coastal hazards for the design life of the building or works, and</i></li> <li>(b) <i>the proposed development:</i> <ul style="list-style-type: none"> <li>(i) <i>is not likely to alter coastal processes to the detriment of the natural environment or other land, and</i></li> <li>(ii) <i>is not likely to reduce the public amenity, access to and use of any beach, foreshore, rock platform or headland adjacent to the proposed development, and</i></li> <li>(iii) <i>incorporates appropriate measures to manage risk to life and public safety from coastal hazards, and</i></li> </ul> </li> <li>(c) <i>measures are in place to ensure that there are appropriate responses to, and management of, anticipated coastal processes and current and future coastal hazards.</i></li> </ul> <p><u>Comment:</u> The proposed modifications meet Clauses 12 and 15 of the Coastal Management SEPP (Clauses 13 and 14 do not apply as the land is located within the SREP area). As such, it is considered that the application does comply with the requirements of the State Environmental Planning Policy (Coastal Management) 2018.</p>
NECC (Development)	Development Engineering has no objection to delete the condition

Internal Referral Body	Comments
Engineering)	<p>ANS08, ANS09, ANS10, 8 and 28.</p> <p>No additional engineering condition is required.</p>
Parks, reserves, beaches, foreshore	<p>Parks &amp; Recreation are currently developing a master plan for Clontarf Reserve. It is important that the Clonny's redevelopment appropriately integrates with the masterplan for the overall reserve.</p> <p>Parks staff have reviewed the proposed finishes in the modification and are satisfied that for the most part, the proposed changes and the standard of these changes will fit in with the overall finishes planned for the surrounding reserve.</p> <p>The only suggestion that would be made is that the outdoor patio and hardstand areas that wrap around the northern and western sides of the building have a consistent finish. Currently only a section on the northern side will be paved, with the rest being constructed in concrete. Given the high profile status of the reserve, and the extensive work that will be undertaken on it as a result of the master-planning process, consideration should be given to a consistent hardstand finish for Clonny's which will ensure a high standard of presentation.</p> <p>Planner Comments 29/08/19:</p> <p>Clarification was sought from Council's Senior Landscape Architect of Park Assets - Planning, Design &amp; Delivery, following concerns raised by the Applicant regarding a recommended hardstand finishes condition for the proposal. Council's Senior Landscape Architect confirmed that the existing concrete hardstand between the West Court and North Patio could remain subject to the condition being amended to require the North Court Hardstand Area to have a flooring material equivalent to travertine pavers.</p>
Property Management and Commercial	<p>The proposal is for a modification to development consent for alterations and additions to the existing restaurant building.</p> <p>The proposed works are located within the area of the lease and licence agreement signed by the applicant with Council, and as such Property has no further comment to make regarding the proposal. It is noted that two proposed sets of gates located within the lease area on the south eastern side of the property open out onto the park area. As such, it is recommended that the leasee extend their public liability insurance to cover these gates when they are open into the park.</p>
Strategic and Place Planning (Heritage Officer)	<p>Further to a review of the available documents and site visit, The site of proposed development is not a listed heritage item in its own right, however, it is located in the vicinity of heritage item, the protected foreshore area.</p> <p>Given the nature of the proposal and the item, the impact on heritage values is assessed as acceptable.</p> <p>Based on the above, I have no objections to this proposal from heritage perspective.</p> <p>Proposal is acceptable without conditions.</p>

Internal Referral Body	Comments
	Kind Regards Zoran Popovic  Heritage Advisor

External Referral Body	Comments
Ausgrid: (SEPP Infra.)	The proposal was referred to Ausgrid. No response has been received within the 21 day statutory period and therefore, it is assumed that no objections are raised and no conditions are recommended.

### **ENVIRONMENTAL PLANNING INSTRUMENTS (EPIs)\***

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

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

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

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

#### **SEPP 55 - Remediation of Land**

The Assessment Report for Development Application No. DA0091/2015 indicated that on the basis of the history of the use of the site (recreational area), that it was considered unlikely the land is contaminated.

Clause 7 (1) (a) of SEPP 55 requires the Consent Authority to consider whether land is contaminated. Council records indicate that the subject site has been used as a recreational area for a significant period of time with no prior land uses. In this regard it is considered that the site poses no risk of contamination and therefore, no further consideration is required under Clause 7 (1) (b) and (c) of SEPP 55 and the land is considered to be suitable for the commercial land use.

#### **SEPP 64 - Advertising and Signage**

Clauses 8 and 13 of SEPP 64 require Council to determine consistency with the objectives stipulated under Clause 3(1)(a) of the aforementioned SEPP and to assess the proposal against the assessment criteria of Schedule 1.

The objectives of the policy aim to ensure that the proposed signage is compatible with the desired amenity and visual character of the locality, provides effective communication and is of high quality having regards to both design and finishes.

In accordance with the provisions stipulated under Schedule 1 of SEPP 64, the following assessment is provided:



Matters for Consideration	Comment	Complies
<b>1. Character of the area</b> Is the proposal compatible with the existing or desired future character of the area or locality in which it is proposed to be located?	The proposed kiosk signage and cafe wall signage northern elevation is compatible with the existing character of Clontarf Park for the purpose of a restaurant, cafe, takeaway food and drink premises.	YES
Is the proposal consistent with a particular theme for outdoor advertising in the area or locality?	As 'Clonnys at Clontarf' is the only restaurant/kiosk facility within the Clontarf Park there are limited examples of commercial signage within the immediate area. The nearest commercial food and drink premises is Clontarf Marina located approximately 200m north along Sandy Bay Road. Noting the above, the proposed signage is not considered to be inconsistent with the locality of Clontarf.	YES
<b>2. Special areas</b> Does the proposal detract from the amenity or visual quality of any environmentally sensitive areas, heritage areas, natural or other conservation areas, open space areas, waterways, rural landscapes or residential areas?	The proposed signage that measures a total of 2.2m <sup>2</sup> are to be affixed to the existing restaurant and take away premises which has been in operation since the 1980s. While 'Clonnys at Clontarf' is not individually listed as a heritage item, the restaurant and take away premises is located within Clontarf Park which is listed as an item of environmental heritage under Schedule 5 of the Manly Local Environment Plan 2013. The application has been reviewed by relevant officers within Council to ensure that the proposal does not detract from the amenity or visual quality of any environmentally sensitive areas, heritage areas, natural or other conservation areas, open space areas, waterways, rural landscapes or residential areas.	YES
<b>3. Views and vistas</b> Does the proposal obscure or compromise important views?	The signage is affixed to the northern facade and is not indicated to protrude beyond the built form when viewed from east street side elevation or the western water side elevation. As such, the proposal does not obscure or compromise important views.	YES
Does the proposal dominate the skyline and reduce the quality of vistas?	As above, the signage is affixed to the northern facade and is not indicated to protrude beyond the built form when viewed from east street side elevation or the western water side elevation. As such, the proposal does not dominate the skyline or reduce the quality of vistas.	YES
Does the proposal respect the viewing rights of other advertisers?	As above, the signage is affixed to the northern facade and is not indicated to protrude beyond the built form when viewed from east street side elevation or the western water side elevation. As such, the proposal is considered to respect the viewing rights of other advertisers.	YES
<b>4. Streetscape, setting or landscape</b>	The scale, proportion and form of the signage	YES

Is the scale, proportion and form of the proposal appropriate for the streetscape, setting or landscape?	being two signs with a total area measured at 2.2m <sup>2</sup> , is considered to be appropriate for its setting within Clontarf Park.	
Does the proposal contribute to the visual interest of the streetscape, setting or landscape?	The signage is considered to contribute to the visual interest of Clontarf Park.	YES
Does the proposal reduce clutter by rationalising and simplifying existing advertising?	The proposal limits signage to the northern elevation and seeks to reduce the overall extent of existing and approved signage for the restaurant and take away premises.	YES
Does the proposal screen unsightliness?	The proposed signage being located on an area of blank facade and below an existing gabled roof provides an element of visual interest.	YES
Does the proposal protrude above buildings, structures or tree canopies in the area or locality?	As above, the signage is affixed to the northern facade and is not indicated to protrude beyond the built form when viewed from east street side elevation or the western water side elevation. Further, the signage will be below the tree canopies of surrounding canopy trees including Norfolk Island Pines and Fig Trees.	YES
<b>5. Site and building</b> Is the proposal compatible with the scale, proportion and other characteristics of the site or building, or both, on which the proposed signage is to be located?	The proposal is considered to be compatible with the scale, proportion and other characteristics of the Clontarf Park and the restaurant and take away premises on which the proposed signage is to be located.	YES
Does the proposal respect important features of the site or building, or both?	The proposal is considered to respect important features of the site such as the surrounding parkland and trees, while also not dominating the northern elevation of the building.	YES
Does the proposal show innovation and imagination in its relationship to the site or building, or both?	The signage shows innovation and imagination in its relationship to the site and building by being limited to the northern facade of building and thereby reducing the extent and visual impact of proposal.	YES
<b>6. Associated devices and logos with advertisements and advertising structures</b> Have any safety devices, platforms, lighting devices or logos been designed as an integral part of the signage or structure on which it is to be displayed?	There are no safety devices, platforms, lighting devices or logos contained as an integral part of the signage or structure.	YES
<b>7. Illumination</b> Would illumination result in unacceptable glare, affect safety for pedestrians, vehicles or aircraft, detract from the amenity of any residence or other form of accommodation?	The signage is not indicated to be illuminated, therefore, it does not result in unacceptable glare, affect safety for pedestrians, vehicles or aircraft, or detract from the amenity of any residence or other form of accommodation.	YES
Can the intensity of the illumination be	The signage is not illuminated.	N/A

adjusted, if necessary?		
Is the illumination subject to a curfew?	The signage is not illuminated.	N/A
<b>8. Safety</b> Would the proposal reduce the safety for any public road, pedestrians or bicyclists?	The signage is affixed to the northern facade and is not indicated to protrude beyond the built form when viewed from east street side elevation or the western water side elevation. As such, the proposal does not reduce the safety for any public road, pedestrians or bicyclists.	YES
Would the proposal reduce the safety for pedestrians, particularly children, by obscuring sightlines from public areas?	As above, the signage is affixed to the northern facade and is not indicated to protrude beyond the built form when viewed from east street side elevation or the western water side elevation. As such, the proposal does not obscure sightlines from public areas within Clontarf Park and therefore does not reduce the safety for pedestrians, particularly children.	YES

Accordingly, the proposed signage is considered to be of a scale and design suitable for the locality. The proposal is therefore deemed to be consistent with the provisions of the SEPP and its underlying objectives.

#### **SEPP (Infrastructure) 2007**

##### Ausgrid

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

- within or immediately adjacent to an easement for electricity purposes (whether or not the electricity infrastructure exists).
- immediately adjacent to an electricity substation.
- within 5.0m of an overhead power line.
- includes installation of a swimming pool any part of which is: within 30m of a structure supporting an overhead electricity transmission line and/or within 5.0m of an overhead electricity power line.

##### Comment:

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

#### **Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005**

The subject property is located within the Foreshores and Waterways Area therefore the provisions of this plan apply to this development.

An assessment of the proposal against Clause 2(2) (aims of the SREP), Clause 14 (nominated planning principles), Clause 22 (relating to public access to and use of foreshores and waterways), Clause 23 (relating to maintenance of a working harbour), Clause 24 (relating to interrelationship of



waterway and foreshore uses), Clause 25 (relating to foreshore and waterways scenic quality), Clause 26 (relating to maintenance, protection and enhancement of views) and Clause 27 (relating to boat storage facilities) has been undertaken. The proposal is considered to be consistent with the above provisions of the SREP. Given the scale of the proposed modification and the works proposed referral to the Foreshores and Waterways Planning and Development Advisory Committee was not considered necessary. Further, Schedule 2 (Development to be referred to Foreshores and Waterways Planning and Development Advisory Committee) does not require the proposed development (restaurant, cafe, takeaway food and drink premises) to be referred to the Foreshores and Waterways Planning and Development Advisory Committee.

### SEPP (Coastal Management) 2018

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

#### 12 Development on land within the coastal vulnerability area

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

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

*hazards.*

Comment:

Council's Coast and Catchments Division has provided comments indicating that the proposed modifications meet Clauses 12 and 15 of the SEPP Coastal Management (2018). In this regard, the proposed works are considered acceptable to withstand current and projected coastal hazards. Further, the proposal is not considered likely to alter coastal processes to the detriment of the natural environment or other land, or reduce the public amenity, access to and use of any beach, foreshore, rock platform or headland adjacent to the proposed development or within Clontarf Reserve. The proposal is considered acceptable in that no further measures have been recommended to manage risk to life and public safety from coastal hazards or to ensure that there are appropriate responses to, and management of, anticipated coastal processes and current and future coastal hazards.

**13 Development on land within the coastal environment area**

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

Comment:

This clause does not apply to land within the Foreshores and Waterways Area within the meaning of Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005.

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

Comment:

This clause does not apply to land within the Foreshores and Waterways Area within the meaning of

Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005.

#### 14 Development on land within the coastal use area

(1)

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

#### Comment:

This clause does not apply to land within the Foreshores and Waterways Area within the meaning of Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005.

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

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

#### Comment:

Council's Coast and Catchments Division has provided comments indicating that the proposed modifications meet Clauses 12 and 15 of the SEPP Coastal Management (2018). In this regard, the proposed development is not considered likely to cause increased risk of coastal hazards on the subject site or other land.

As such, it is considered that the application does/does not comply with the requirements of the State Environmental Planning Policy (Coastal Management) 2018.

#### Manly Local Environmental Plan 2013

Is the development permissible?	Yes
After consideration of the merits of the proposal, is the development consistent with:	

aims of the LEP?	Yes
zone objectives of the LEP?	Yes

#### Principal Development Standards

Standard	Requirement	Approved	Proposed	% Variation	Complies
Height of Buildings:	N/A	5.03m	5.03m	N/A	Yes
Floor Space Ratio	N/A	FSR: 0.023:1 (339m <sup>2</sup> )	FSR: 0.0152:1 (228m <sup>2</sup> )	N/A	Yes

#### Compliance Assessment

Clause	Compliance with Requirements
5.10 Heritage conservation	Yes
6.1 Acid sulfate soils	Yes
6.2 Earthworks	Yes
6.4 Stormwater management	Yes
6.5 Terrestrial biodiversity	Yes
6.8 Landslide risk	Yes
6.9 Foreshore scenic protection area	Yes
6.12 Essential services	Yes
6.21 Noise impacts—licensed premises	Yes
Schedule 5 Environmental heritage	Yes

#### Detailed Assessment

##### 5.10 Heritage conservation

Council's Heritage Advisor has reviewed the proposal and provided comments indicating that the impact on heritage values is acceptable and that no objections are raised from a heritage perspective.

As described in Schedule 5 of the MLEP 2013, Clonnys at Clontarf is located within Clontarf Park, but it not individually listed as a heritage item.

<u>Ref Item</u>	<u>Address</u>	<u>Level of Significance</u>
I42	Clontarf Park Holmes Avenue and Sandy Bay Road	Local

Clonnys at Clontarf is located in the vicinity of the following heritage items:

<u>Ref Item</u>	<u>Address</u>	<u>Level of Significance</u>
I43 Norfolk Island Pine commemorative tree ( <i>Araucaria heterophylla</i> )	Holmes Avenue, Clontarf Park	Local
I44 Middle Harbour Submarine Syphon (NSOOS)	Holmes Avenue, Clontarf	Local

I45 Middle Harbour Syphon (NSOOS)

Reserve  
Monash Crescent (The Spit) State  
East Side

#### 6.4 Stormwater management

Council's Development Engineer has reviewed the proposal and provided comments indicating that no objection is raised to the deletion of conditions ANS08, ANS09, ANS10, 8(2D207) and 28(4DS03).

The conditions to be deleted have been listed below:

Condition ANS08 reads:

*A Gross Pollutant Trap is to be provided within the site above the Mean High Water mark in an accessible location to treat stormwater from the site prior to being discharged into either the Council stormwater pipe or the Harbour. The GPT should have the following features:*

- *A removable trash screen or basket;*
- *A weir located adjacent to the outlet pipe;*
- *A sediment zone, a minimum of 200 mm high, located below the invert levels of the inlet and outlet pipes;*
- *Easy accessibility for removal of trash and sediment; and*
- *Weepholes in the base of the GPT together with a granular sub-base underneath.*

*The location and details of the GPT, which accord with Manly Council and Roads & Maritime Services requirements shall be submitted to Council for approval by a Council Engineer, prior to issue of the Construction Certificate.*

*Reason: To ensure stormwater services comply with legislative and Council requirements.*

Condition ANS09 reads:

*A Positive Covenant and Restriction on the use of land in favour of Manly Council is to be registered on the Title prior to the issue of any Occupation Certificate. Working of the covenant and restriction on the use of land shall be guided by Appendix 8 of the Manly Specification for On-site Stormwater Management 2003, substituting 'on-site stormwater detention system', with 'required Gross Pollutant Trap'. The purposes of the Covenant is to ensure that the registered proprietor takes responsibility for the control, care and maintenance of the Gross Pollutant Trap. The Restriction ensures that the system is not altered in any manner, shape or form.*

*(a) Obligation to Maintain: The Registered Proprietor shall maintain on a regular basis the Gross Pollutant Trap including clearing of silt, debris and rubbish, in perpetuity. This is to ensure the effective operation of the trap, in preventing pollution of the harbour and foreshore area by site stormwater.*

*Reason: To ensure site stormwater pollutant loads are captured by the Gross Pollutant Trap as required by Roads & Maritime Services; and the private trap is maintained in perpetuity.*

Condition 8(2D207) reads:

*Detailed plans and specification of the design of the rainwater tanks must be provided prior to the issue of the Construction Certificate complying with the requirements: -*

- *Australian/New Zealand Standard AS/NZS 3500:2003,*



- NSW Code of Practice Plumbing and Drainage, 2006 produced by Committee on Uniformity of Plumbing and Drainage Regulations in NSW (CUPDR).
- Council's rainwater tank policy.

*Reason: To protect public health and amenity.*

Condition 28(4DS03) reads:

*Rainwater tanks must be installed on residential properties by a suitably qualified and licensed plumber and in accordance with the following:*

- Australian/New Zealand Standard AS/NZS 3500:2003,
- NSW Code of Practice Plumbing and Drainage, 2006 produced by Committee on Uniformity of Plumbing and Drainage Regulations in NSW (CUPDR).
- Council's rainwater tank policy.

*Reason: To protect public health and amenity.*

### Manly Development Control Plan

#### Built Form Controls

As the site is located within the RE1 Public Recreation zone of the Manly LEP 2013, the proposal is not subject to the development controls listed under Clause 4.1, Clause 4.2 and Clause 4.3. The proposed modifications result in the reduction of the overall scale and building footprint in comparison with Development Application No. 91/2015 and the subsequent Section 96 (2) application. Further, Council's Principal Planner for Property Commercial & Tourist Assets has also provided comments indicating that the proposed works are located within the area of the lease and licence agreement signed by the Applicant with Council.

#### Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
3.1 Streetscapes and Townscapes	Yes	Yes
3.2 Heritage Considerations	Yes	Yes
3.3.1 Landscaping Design	Yes	Yes
3.3.2 Preservation of Trees or Bushland Vegetation	Yes	Yes
3.4 Amenity (Views, Overshadowing, Overlooking /Privacy, Noise)	Yes	Yes
3.4.1 Sunlight Access and Overshadowing	Yes	Yes
3.4.2 Privacy and Security	Yes	Yes
3.4.3 Maintenance of Views	Yes	Yes
3.4.4 Other Nuisance (Odour, Fumes etc.)	Yes	Yes
3.5 Sustainability - (Greenhouse Energy Efficiency, Thermal Performance, and Water Sensitive Urban Design)	Yes	Yes
3.5.1 Solar Access	Yes	Yes
3.5.3 Ventilation	Yes	Yes
3.5.4 Energy Efficient Appliances and Demand Reduction and Efficient Lighting (non-residential buildings)	Yes	Yes
3.5.5 Landscaping	Yes	Yes

Clause	Compliance with Requirements	Consistency Aims/Objectives
3.5.6 Energy efficiency/conservation requirements for non-residential developments	Yes	Yes
3.5.7 Building Construction and Design	Yes	Yes
3.5.8 Water Sensitive Urban Design	Yes	Yes
3.6 Accessibility	Yes	Yes
3.8 Waste Management	No	Yes
3.9 Mechanical Plant Equipment	Yes	Yes
3.10 Safety and Security	Yes	Yes
5 Special Character Areas and Sites	Yes	Yes
5.4.1 Foreshore Scenic Protection Area	Yes	Yes
Schedule 1 – Maps accompanying the DCP	Yes	Yes

#### Detailed Assessment

##### **3.3.1 Landscaping Design**

Council's Senior Landscape Architect of Park Assets - Planning, Design & Delivery has reviewed the proposal and provided comments indicating that the landscape component of the modification is acceptable. Council's Natural Environment Officer for Bushland and Biodiversity has also supported the proposal indicating that the modification would not result in additional impact to native vegetation. It is therefore recommended the request to modify condition ANS06 to reflect the revised landscape plan be supported. Further, it is recommended that deletion of condition ANS11 requiring the amendment to landscape drawings also be supported.

Condition ANS11 reads:

*The Landscape drawings are to be amended to include native plant species to provide new and/or improved low dense clumping habitat to provide for potential foraging and nesting habitat for native species. The planting schedule must comprise species such as Lomandra sp., Dianella sp. Banksia spinulosa, Caustis sp., Xanthorrhoea sp., Isolepis sp., Juncus sp., Adiantum sp., Calochlaena sp., Callistemon sp., Grevillea juniperina, Gleichenia sp., Grevillea 'Robyn Gordon' and tussocky natives grasses (e.g. Kangaroo Grass). Plans are to be suitably amended prior to issue of the Construction Certificate.*

*Reason: To improve the ecological value of the site and to enhance habitat for native species.*

##### **3.4 Amenity (Views, Overshadowing, Overlooking /Privacy, Noise)**

Condition 43 (6BS01) that states the approved hours of operation being the following:

*The hours of operation of the premises (i.e. hours open for business) must not exceed 8am to 8pm, 7 days per week for the take away food and drink premises/kiosk; and 8am to 11pm, 7 days per week for the restaurant and café, without the prior approval of Council.*

*Reason: To ensure amenity of the surrounding locality is maintained and hours of operation are consistent with those in surrounding locality.*

The modification seeks to revise this condition to reflect an extension of the hours of operation to commence trading from 6am. The amended hours of operation are not anticipated to have an unreasonable impact on any residential areas within the vicinity of the subject site. It is therefore recommended that the revised hours of operation be supported and the condition be amended to read as follows:

*The hours of operation of the premises (i.e. hours open for business) must not exceed 6am to 8pm, 7 days per week for the take away food and drink premises/kiosk; and 6am to 11pm, 7 days per week for the restaurant and café, without the prior approval of Council.*

*Reason: To ensure amenity of the surrounding locality is maintained and hours of operation are consistent with those in surrounding locality.*

Subject to compliance with this condition, the proposed hours of operation are considered as acceptable.

### 3.8 Waste Management

The modification seeks to delete condition 14 (2WM03) that reads:

*Garbage rooms or grease arrester rooms must be constructed of solid material: cement rendered and steel trowelled to a smooth even surface. The door to the garbage room is to be designed and constructed to ensure the room is vermin proof and can be opened from the inside at all times. The garbage room is to be ventilated to the external air by natural ventilation or an approved air handling exhaust system.*

*Reason: To keep garbage rooms in a clean and sanitary condition to protect public health.*

Comments were sought from Council's Team Leader of Environmental Health regarding this request. The advice received was that the deletion of the condition would not be beneficial for future health inspection under the Food Act 2003. Council's Team Leader of Environmental Health agreed to modifying the condition to achieve consistency with Australian Standard AS4674.

Condition 14 (2WM03) is therefore recommended to be modified to read:

#### *Garbage and Recycling Facilities*

*All waste and recyclable material generated by this premises must be stored in the approved screened bin enclosure. All walls of the screened bin enclosure shall be rendered to a smooth surface, covered to prevent stormwater intrusion, well ventilated, kept free of vermin, coved at the floor/wall intersection, graded and appropriately drained to the sewer with a tap in close proximity to facilitate cleaning.*

*Reason: To keep garbage rooms in a clean and sanitary condition to protect public health. To also prevent pollution of the environment and to protect the amenity of the area.*

Subject to compliance with this condition, the proposal is considered to satisfy the objectives of this clause and is supported on merit.

### 3.9 Mechanical Plant Equipment

Council's Environmental Health Officer has reviewed the proposal and provided comments indicating that the modification is acceptable. It is therefore recommended that the deletion of conditions 11



(2NL03), 12 (2NL05) and 40 (5MS01) which relate to a new mechanical exhaust system be supported. It should also be noted that the submitted Mechanical Plant Noise Assessment report Ref nss 23051-Final, prepared by Noise and Sound Services, dated 20 June 2019 concludes that when the existing mechanical plant and associated equipment are operating together that it was not audible at the nearest residential premises.

Condition 11 (2NL03) reads:

*Details of the proposed mechanical exhaust systems, detailing compliance with the relevant requirements of Clause F4.12 of the Building Code of Australia and Australian Standard 1668 Parts 1 and 2 are to be submitted to Council or the Principal Certifying Authority for approval prior to the issue of a Construction Certificate.*

*Reason: To ensure compliance with legislation and to protect public health and safety.*

Condition 12 (2NL05) reads:

*Mechanical plant situated on the roof area of the premises must be acoustically treated to ensure noise emissions are not audible at the nearest residential premises. Details are to be submitted to the Council/Accredited Certifier prior to the issue of the Construction Certificate.*

*Council may require the owner or occupier of the premises to engage the services of a suitably qualified professional to undertake an acoustic assessment of the premises in the event concerns regarding the emission of 'offensive noise' are raised and/or justified by Council.*

*Reason: To protect the acoustic amenity of neighbouring properties.*

Condition 40 (5MS01) reads:

*At the completion of the installation of the mechanical exhaust ventilation system, a certificate from a practising mechanical engineer shall be submitted to Council or the Principal Certifying Authority prior to the issue of the Occupation Certificate indicating compliance with Australian Standard AS 1668.*

*Reason: To ensure the mechanical exhaust ventilation system complies with Australian Standard AS1668.*

## **THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES**

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

## **CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN**

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

## **POLICY CONTROLS**

### **Northern Beaches Section 7.12 Contributions Plan 2019**

Section 7.12 contributions were levied on the Development Application.

## **CONCLUSION**

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

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

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

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

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

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

## RECOMMENDATION

THAT Northern Beaches Local Planning Panel as the consent authority grant approval to Modification Application No. Mod2019/0312 for Modification of Development Consent DA91/2015 granted for alterations and additions to an existing cafe on land at Lot 7118 DP 1059397,0 Sandy Bay Road, CLONTARF, subject to the conditions printed below:

### A. Modify Condition No. DA1 to read as follows:

The development, except where modified by the conditions of this consent, is to be carried out in accordance with the following plans and reference documentation:

*Drawings affixed with Council's 'Development Consent' stamp relating to Development Consent No. 91/2015:*

Plan No. / Title	Issue/Revision & Date	Date Received by Council
DA02 / Site and Roof Plan	Issue E / 22.04.2015	28.04.2015
DA03 / Proposed Floor Plan	Issue E / 22.04.2015	28.04.2015
DA04 / Proposed Section	Issue E / 22.04.2015	28.04.2015
DA05 / Proposed Elevations (North West and North East)	Issue E / 22.04.2015	28.04.2015
DA06 / Proposed Elevations (South East and South West)	Issue E / 22.04.2015	28.04.2015
DA08 / Landscape Plan	Issue E / 22.04.2015	28.04.2015

Document Title	Prepared By	Issue/Revision & Date	Date Received by Council
Statement of Environmental Effects	Patrick Lebon	April 2015	28.04.2015
Heritage Impact Statement	John Oultram Heritage & Design	April 2015	28.04.2015
BCA Assessment Report	BCA Logic	17.04.2015	28.04.2015
Arboricultural Impact Report	Landscape Matrix Pty Ltd	16.04.2015	28.04.2015

Except where previously amended on 30 November 2015:

*Drawings affixed with Council's 'Development Consent' stamp relating to Development Consent No. 91/2015:*

<b>Plan No. / Title</b>	<b>Issue/Revision &amp; Date</b>	<b>Date Received by Council</b>
DA01 / Site and Proposed Roof Plan	Issue A / 11.09.2015	21.09.2015
DA02 / Ground Floor Plan / Existing Arrangement	Issue A / 11.09.2015	21.09.2015
DA03 / Proposed Floor Plan / General Arrangement	Issue B / 14.10.2015	04.11.2015
DA04 / Proposed Northwest & Northeast Elevations	Issue B / 14.10.2015	04.11.2015
DA05 / Proposed Southeast & Southwest Elevations	Issue B / 14.10.2015	04.11.2015
DA06 / Proposed Section	Issue B / 14.10.2015	04.11.2015

<b>Document Title</b>	<b>Prepared By</b>	<b>Issue/Revision &amp; Date</b>	<b>Date Received by Council</b>
Statement of Environmental Effects	Patrick Lebon as amended by Squillace Architects	September 2015	21.09.2015

Except where now amended by:

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

a) Modification Approved Plans

<b>Architectural Plans - Endorsed with Council's stamp</b>		
<b>Drawing No.</b>	<b>Dated</b>	<b>Prepared By</b>
Project No. 1004, Revision A, Sheet 2 (Site Plan)	May 2019	Paul Carrick & Associates
Project No. 1004, Revision A, Sheet 3 (Existing & Proposed Structures Plan)	May 2019	Paul Carrick & Associates
Project No. 1004, Revision A, Sheet 4 (Proposed Floor Plan)	March 2019	Paul Carrick & Associates
Project No. 1004, Revision A, Sheet 5 (Proposed Roof Plan)	March 2019	Paul Carrick & Associates
Project No. 1004, Revision A, Sheet 6 (Elevations & Sections)	March 2019	Paul Carrick & Associates

Project No. 1004, Revision A, Sheet 7 (Elevations)	March 2019	Paul Carrick & Associates
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<b>Reports / Documentation – All recommendations and requirements contained within:</b>		
<b>Report No. / Page No. / Section No.</b>	<b>Dated</b>	<b>Prepared By</b>
Mechanical Plant Noise Assessment, Report No. nss 23051-Final	June 2019	Noise and Sound Services

c) Any plans and / or documentation submitted to satisfy the Deferred Commencement Conditions of this consent as approved in writing by Council.

d) Any plans and / or documentation submitted to satisfy the Conditions of this consent.

f) The development is to be undertaken generally in accordance with the following:

<b>Landscape Plans</b>		
<b>Drawing No.</b>	<b>Dated</b>	<b>Prepared By</b>
Project No. 1004, Revision A, Sheet 8 (Landscape)	March 2019	Paul Carrick & Associates

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

#### **B. Amendment to the approved plans**

The following amendments to the approved plans:

- Plans are to be amended to demonstrate the refuse area (bin enclosure) covered by a skillion roof that is no higher than RL 4.9 to prevent stormwater intrusion. All walls of the bin enclosure shall be rendered to a smooth surface, coved at the floor/wall intersection, graded and appropriately drained to the sewer.

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

Reason: To keep garbage rooms in a clean and sanitary condition, to protect public health and the amenity of the area, and to prevent pollution of the environment.

#### **C. Modify Condition ANS06 to read as follows:**

Landscaping shall be undertaken in accordance with the approved Landscape Plan prepared by Paul Carrick & Associates being Project No. 1004, Revision A, Sheet 8 (Landscape) dated March 2019, prior to the issue of any Occupation Certificate. The proposed plantings shall not impinge upon the available public vistas from the building.

Reason: To ensure suitable landscaping is installed within Clontarf Reserve and views out from the building are maintained.

#### **D. Modify Condition 43 (6BS01) to read as follows:**

The hours of operation of the premises (i.e. hours open for business) must not exceed 6am to 8pm, 7 days per week for the take away food and drink premises/kiosk; and 6am to 11pm, 7 days per week for the restaurant and café, without the prior approval of Council.

Reason: To ensure amenity of the surrounding locality is maintained and hours of operation are consistent with those in surrounding locality.

**E. Modify Condition 14 (2WM03) to read as follows:**

Garbage and Recycling Facilities

All waste and recyclable material generated by this premises must be stored in the approved screened bin enclosure. All walls of the screened bin enclosure shall be rendered to a smooth surface, covered to prevent stormwater intrusion, well ventilated, kept free of vermin, coved at the floor/wall intersection, graded and appropriately drained to the sewer with a tap in close proximity to facilitate cleaning.

Reason: To prevent pollution of the environment and to protect the amenity of the area.

**F. Add Condition ANS15 to read as follows:**

Kitchen Design (Scullery and Storeroom), construction and fit out of food premises:

The construction fit-out and finishes of the food premises must comply with Standard 3.2.3 of the Australian and New Zealand Food Standards Code, the Food Act 2003 and Australian Standard AS 4674 'Design, construction and fit out of food premises' this includes the scullery and storeroom . Prior to any Occupation Certificate (OC) being issued certification is to be provided by a suitably qualified person that the fit-out complies with the above requirement.

Reason: To ensure that the kitchen complies with the design requirements.

**G. Add Condition ANS16 to read as follows:**

Working on Reserves Permit

Works (undertaken by principal contractors working without Council supervision) on land under Council's care control and management require a "Working on Reserves" permit prior to commencement. Applications can be obtained from Council's website or the Parks, Reserves and Foreshores business unit.

Reason: Public Safety and the protection of Council infrastructure.

**H. Add Condition ANS17 to read as follows:**

External Hardstand Finishes

The North Court Hardstand Area to have a flooring material equivalent to travertine pavers (600x400mm).

Reason: To ensure a consistent outdoor finish to best complement the surrounding reserve.

**I. Add Condition ANS18 to read as follows:**

Extent of Building Work



No building works are to extend beyond the approved lease and licence area.

Reason: To ensure building works do not encroach beyond the agreed lease area into the public park.

**J. Delete Condition ANS08.**

**K. Delete Condition ANS09.**

**L. Delete Condition ANS10.**

**M. Delete Condition ANS11.**

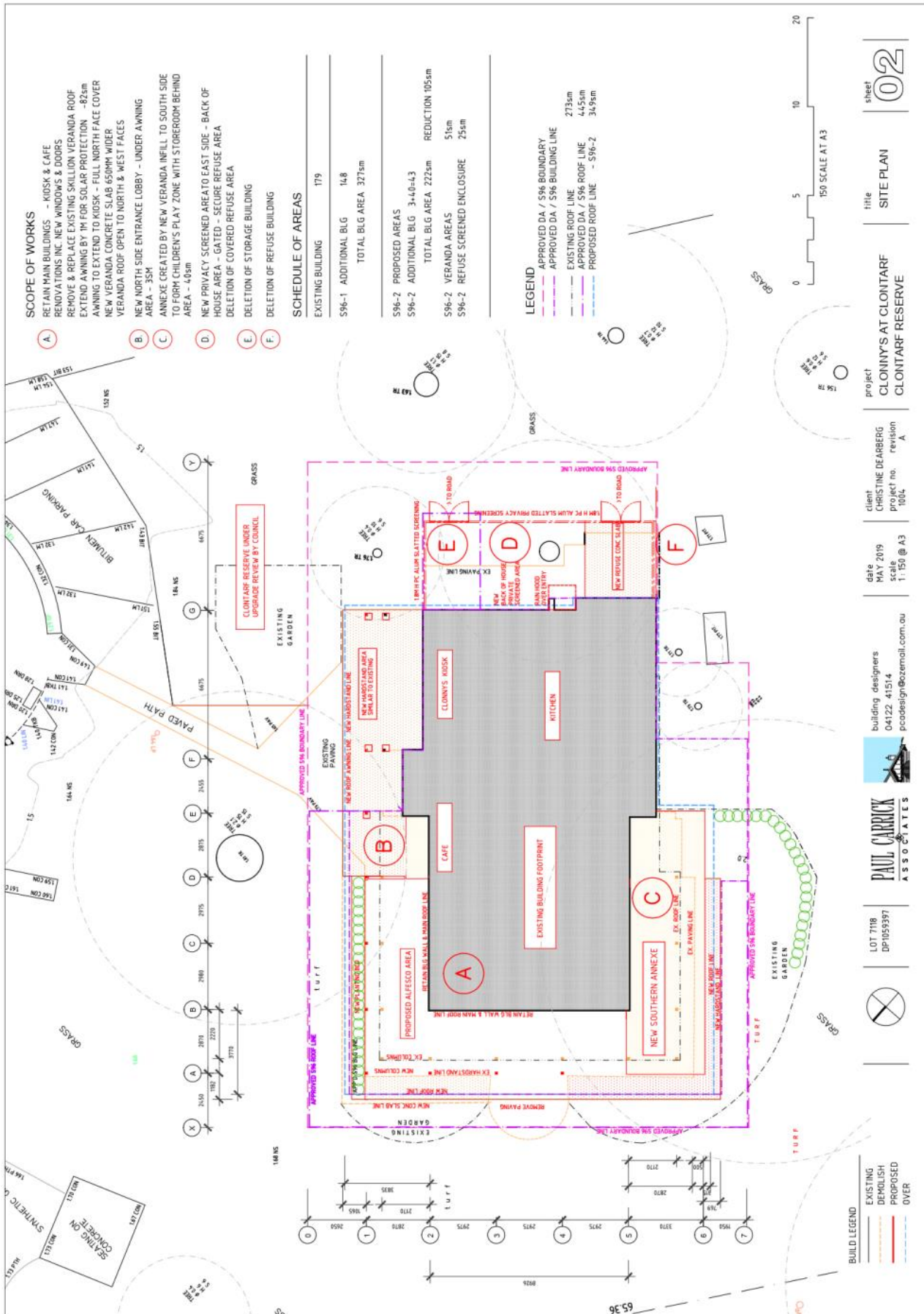
**N. Delete Condition 8 (2DS07).**

**O. Delete Condition 11 (2NL03).**

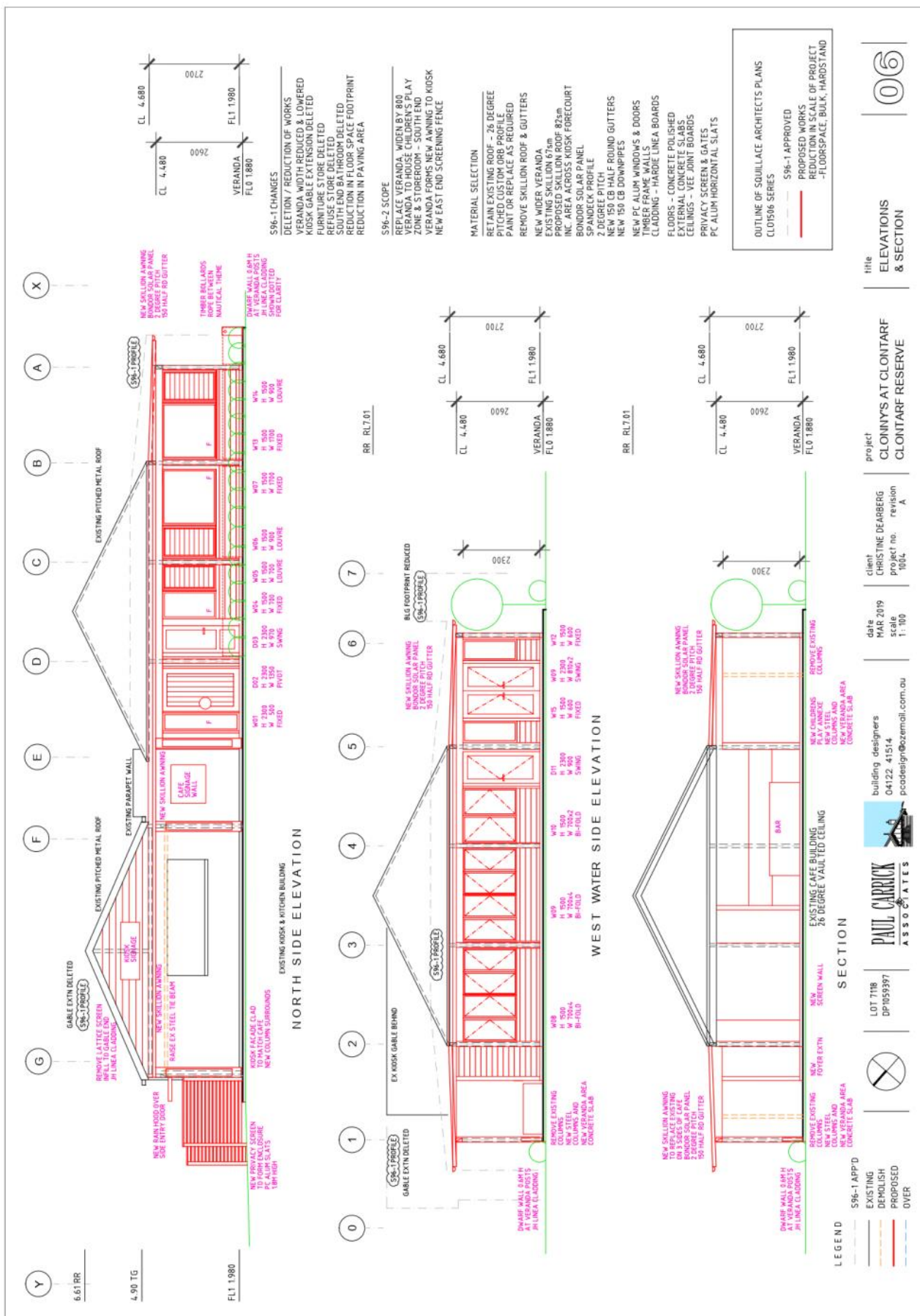
**P. Delete Condition 12 (2NL05).**

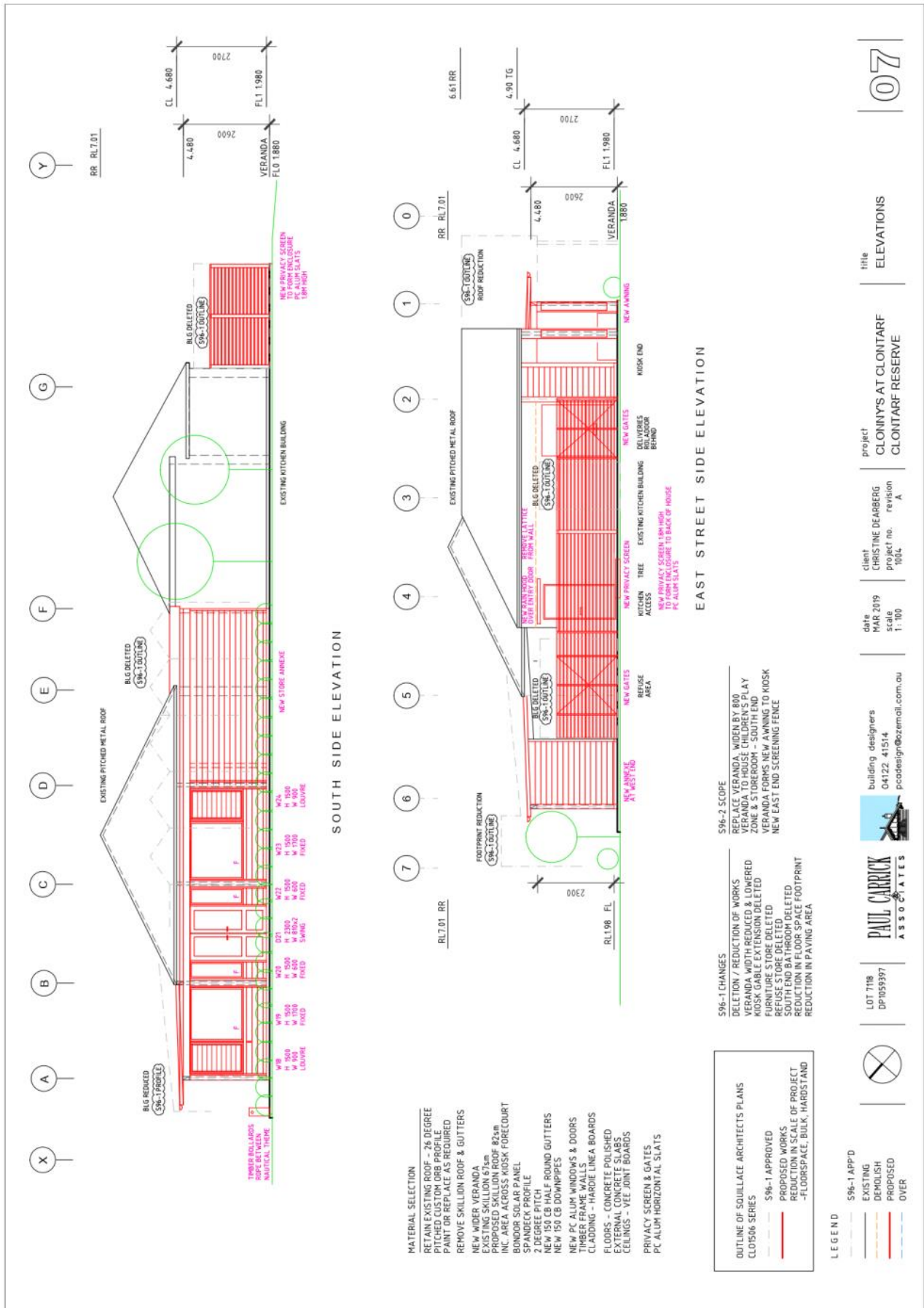
**Q. Delete Condition 28 (4DS03).**

**R. Delete Condition 40 (5MS01).**









<b>ITEM 3.2</b>	<b>MOD2019/0373 - 53 ALEXANDER STREET, MANLY - MODIFICATION OF DEVELOPMENT CONSENT DA2019/0275 GRANTED FOR DEMOLITION WORKS, SUBDIVISION OF 1 LOT INTO 2 LOTS AND CONSTRUCTION OF TWO SEMI- DETACHED DWELLINGS</b>
<b>AUTHORISING MANAGER</b>	<b>STEVE FINDLAY</b>
<b>TRIM FILE REF</b>	<b>2019/520237</b>
<b>ATTACHMENTS</b>	<b>1 <a href="#">↓</a> Assessment Report</b> <b>2 <a href="#">↓</a> Site Plan and Elevations</b>

### PURPOSE

This application has been referred to the Northern Beaches Local Planning Panel as it is a modification of a determination or decision made by a local planning panel.

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### RECOMMENDATION OF MANAGER DEVELOPMENT ASSESSMENT

That the Northern Beaches Local Planning Panel, on behalf of Northern Beaches Council as the consent authority, **approves** Application No. Mod2019/0373 for Modification of Development Consent DA2019/0275 granted for demolition Works, subdivision of 1 lot into 2 lots and construction of two semi-detached dwellings at Lot 17 Sec 1 DP 4603, 53 Alexander Street, Manly subject to the conditions and for the reasons set out in the Assessment Report.

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## APPLICATION FOR MODIFICATION ASSESSMENT REPORT

<b>Application Number:</b>	Mod2019/0373
<b>Responsible Officer:</b>	Thomas Prosser
<b>Land to be developed (Address):</b>	Lot 17 DP 4603, 53 Alexander Street MANLY NSW 2095
<b>Proposed Development:</b>	Modification of Development Consent DA2019/0275 granted for demolition Works, subdivision of 1 lot into 2 lots and construction of two semi-detached dwellings
<b>Zoning:</b>	Manly LEP2013 - Land zoned R1 General Residential
<b>Development Permissible:</b>	Yes
<b>Existing Use Rights:</b>	No
<b>Consent Authority:</b>	Northern Beaches Council
<b>Delegation Level:</b>	NBLPP
<b>Land and Environment Court Action:</b>	No
<b>Owner:</b>	Adam Charles Achterstraat Rachel Ellen Achterstraat
<b>Applicant:</b>	Adam Charles Achterstraat Rachel Ellen Achterstraat
<b>Application lodged:</b>	05/08/2019
<b>Integrated Development:</b>	No
<b>Designated Development:</b>	No
<b>State Reporting Category:</b>	Residential - Alterations and additions
<b>Notified:</b>	16/08/2019 to 30/08/2019
<b>Advertised:</b>	Not Advertised
<b>Submissions Received:</b>	6
<b>Clause 4.6 Variation:</b>	Nil
<b>Recommendation:</b>	Approval

### EXECUTIVE SUMMARY

This report considers proposed modifications to an approved semi-detached dwellings development which was approved by the Northern Beaches Local Planning Panel on 26 June 2019.

The modifications involve removing a bedroom from the rear of each semi-detached dwelling and placing it in the location of the approved garages. In doing so, building bulk is lessened, however the displaced parking spaces are to be located within the front setback area.

As the Development Application approved by the Panel involved carparking spaces that complied with the 6.0m front setback, and this application seeks to vary that approval in a significant manner, the



application is being referred back to the Panel for their consideration.

The application has been assessed against the planning controls of the MDCP 2013, and whilst there is a variation to the front setback control, the design has been found to be compatible with the streetscape and consistent with the relevant objectives and requirements. In this regard, the parking spaces will integrate into the streetscape and will relate positively to adjoining and surrounding dwellings.

The notification of the proposal resulted in six (6) submissions of support for the application, citing improved design compatibility, improved amenity and streetscape outcomes.

The assessment concludes that the modifications will be compatible with the prevailing streetscape and there will be improvements to the amenity of neighbouring properties.

Therefore, it is recommended that the application be approved.

## **ASSESSMENT INTRODUCTION**

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

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

## **SUMMARY OF ASSESSMENT ISSUES**

Manly Development Control Plan - 3.1 Streetscapes and Townscapes

Manly Development Control Plan - 4.1.4 Setbacks (front, side and rear) and Building Separation

## **SITE DESCRIPTION**

<b>Property Description:</b>	Lot 17 DP 4603 , 53 Alexander Street MANLY NSW 2095
<b>Detailed Site Description:</b>	<p>The subject site consists of an allotment located on the southern side of Alexander Street.</p> <p>The site is regular in shape with a frontage of 12.19m along Alexander Street and a depth of 36.575m. The site has a surveyed area of 445.6m<sup>2</sup>.</p>



The site is located within the R1 - General Residential zone and accommodates a dwelling house on site.

The site is relatively flat and has vegetation to the front and rear of the site.

**Detailed Description of Adjoining/Surrounding Development**

Adjoining and surrounding development is characterised by a mix of older style and modern 1 and 2 storey dwellings on each side of Alexander Street.

Map:



**SITE HISTORY**

**Pre-Lodgement Meeting (PLM75/2017)**

A Pre-lodgement meeting was held in relation to the following proposal:

"Demolition works, subdivision of 1 lot into 2 lots and the construction of 2 x semi-detached dwellings"

The Notes provided from this meeting stated that the proposal was not supported and required a redesign, including further details to show compliance with controls and setting back the proposed car parking from the street.

**Assessing Officers Comment:**

Although, carparking spaces were originally discouraged from being within located the front setback area, further consideration of the streetscape and character of development in the area has found that hardstand parking spaces would be a suitable and appropriate outcome in this instance. Detailed reasoning is outlined in the relevant sections of this report.

## PROPOSED DEVELOPMENT IN DETAIL

The proposal is for modification of the approved development involving the construction of two semi-detached dwellings.

In detail, the proposal involves the following:

- Deletion of the approved Bedroom No. 3, deletion of the approved garage and a new Bedroom No. 3 is to be provided in the location of approved garage of each dwelling
- A new hardstand carparking space in the approved driveway area in the front setback of the dwellings
- Alteration to the front entry porch and associated steps in each dwelling
- Minor internal layout alterations to each dwelling
- A window to be provided to Bedroom No. 3 and laundry/WC in each dwelling

## ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

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

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

- An assessment report and recommendation has been prepared and is attached taking into all relevant provisions of the Environmental Planning and Assessment Act 1979 and associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon all lands whether nearby, adjoining or at a distance;
- Consideration was given to all documentation provided (up to the time of determination) by the applicant, persons who have made submissions regarding the application and any advice given by relevant Council / Government / Authority Officers on the proposal;

In this regard, the consideration of the application adopts the previous assessment detailed in the Assessment Report for DA2019/0275, in full, with amendments detailed and assessed as follows:

The relevant matters for consideration under Section 4.55(1A) of the Environmental Planning and Assessment Act, 1979, are:

Section 4.55(1A) - Other Modifications	Comments
A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:	
(a) it is satisfied that the proposed modification is of minimal environmental impact, and	<b>Yes</b> The modification, as proposed in this application, is considered to be of minimal environmental impact.
(b) 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	The development, as proposed, has been found to be such that Council is satisfied that the proposed works are substantially the same as those already approved under DADA2019/0275.

Section 4.55(1A) - Other Modifications	Comments
modified (if at all), 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 under section 72 that requires the notification or advertising of applications for modification of a development consent, and	The application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000, Manly Local Environment Plan 2011 and Manly Development Control Plan.
(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.	No submissions were received in relation to this application.

#### Section 4.15 Assessment

In accordance with Section 4.55 (3) of the Environmental Planning and Assessment Act 1979, in determining an modification application made under Section 4.55 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 relevant matters for consideration under Section 4.15 of the Environmental Planning and Assessment Act, 1979, are:

Section 4.15 'Matters for Consideration'	Comments
Section 4.15 (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on “Environmental Planning Instruments” in this report.
Section 4.15 (1) (a)(ii) – Provisions of any draft environmental planning instrument	None applicable.
Section 4.15 (1) (a)(iii) – Provisions of any development control plan	Manly Development Control Plan applies to this proposal.
Section 4.15 (1) (a)(iiia) – Provisions of any planning agreement	None applicable.
Section 4.15 (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation 2000)	<u>Division 8A</u> of the EP&A Regulation 2000 requires the consent authority to consider Prescribed conditions of development consent. These matters have been addressed via a condition in the original consent.  Clauses 54 and 109 of the EP&A Regulation 2000, Council requested additional information and has therefore considered the number of days taken in this assessment in light of this clause within the Regulations. No Additional information was requested.



Section 4.15 'Matters for Consideration'	Comments
	<p>Clause 92 of the EP&amp;A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This matter has been addressed via a condition in the original consent.</p> <p>Clauses 93 and/or 94 of the EP&amp;A Regulation 2000 requires the consent authority to consider the upgrading of a building (including fire safety upgrade of development). This clause is not relevant to this application.</p> <p>Clause 98 of the EP&amp;A Regulation 2000 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This clause is not relevant to this application.</p> <p>Clause 98 of the EP&amp;A Regulation 2000 requires the consent authority to consider the provisions of the Building Code of Australia (BCA). This matter has been addressed via a condition in the original consent.</p>
Section 4.15 (1) (b) – the likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality	<p>(i) <b>Environmental Impact</b> The environmental impacts of the proposed development on the natural and built environment are addressed under the Manly Development Control Plan section in this report.</p> <p>(ii) <b>Social Impact</b> The proposed development will not have a detrimental social impact in the locality considering the character of the proposal.</p> <p>(iii) <b>Economic Impact</b> The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.</p>
Section 4.15 (1) (c) – the suitability of the site for the development	The site is considered suitable for the proposed development.
Section 4.15 (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs	See discussion on “Notification & Submissions Received” in this report.
Section 4.15 (1) (e) – the public interest	No matters have arisen in this assessment that would justify the refusal of the application in the public interest.

#### EXISTING USE RIGHTS

Existing Use Rights are not applicable to this application.

#### BUSHFIRE PRONE LAND

The site is not classified as bush fire prone land.

## NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the relevant Development Control Plan.

As a result of the public exhibition process council is in receipt of 6 submission/s from:

Name:	Address:
Mrs Kate Bush	55 Alexander Street MANLY NSW 2095
Rezvan Hosseini	41 Alexander Street MANLY NSW 2095
Mr Richard Joseph Nassar	145 Headland Road NORTH CURL CURL NSW 2099
Mr Raymond Henry Moran	70 Alexander Street MANLY NSW 2095
Mrs Claire Elizabeth Ravesteijn	C/- Nolan Planning Consultants 75 Oliver Street FRESHWATER NSW 2096
Mr Robert Alexander Atkinson	61 Alexander Street MANLY NSW 2095

The notification of the proposal received five (5) submissions of support which cited the following:

- Improvement to amenity
- Improvement to streetscape outcomes
- Compatibility with other examples in the street/more in keeping with the style of Alexander Street
- Reduction in visual impact
- Compliant with flooding requirements

The matters raised above are further considered in this report against the relevant matters under MLEP and MDCP.

## REFERRALS

Internal Referral Body	Comments
NECC (Stormwater and Floodplain Engineering – Flood risk)	The development is located in the Manly Lagoon 1% AEP (1 in 100 year ) flood extent. Subject to conditions, the modifications complies with Council's Flood Prone Land controls.
External Referral Body	Comments
Ausgrid: (SEPP Infra.)	

## ENVIRONMENTAL PLANNING INSTRUMENTS (EPIS)\*

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

In this regard, whilst all provisions of each Environmental Planning Instruments (SEPPs, REPs and LEPS), Development Controls Plans and Council Policies have been considered in the assessment,



many provisions contained within the document are not relevant or are enacting, definitions and operational provisions which the proposal is considered to be acceptable against.

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

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

#### **SEPP 55 - Remediation of Land**

Clause 7 (1) (a) of SEPP 55 requires the Consent Authority to consider whether land is contaminated. Council records indicate that the subject site has been used for residential purposes for a significant period of time with no prior land uses. In this regard it is considered that the site poses no risk of contamination and therefore, no further consideration is required under Clause 7 (1) (b) and (c) of SEPP 55 and the land is considered to be suitable for the residential land use.

#### **SEPP (Building Sustainability Index: BASIX) 2004**

A BASIX certificate has been submitted with the application (see Certificate No. 992449S\_02 and 993147S\_02).

The BASIX Certificates indicates that the developments will achieve the following:

Commitment	Required Target	Proposed
Water	40	42
Thermal Comfort	Pass	Pass
Energy	50	53

A condition has been included in the recommendation of this report requiring compliance with the commitments indicated in the BASIX Certificate.

#### **SEPP (Infrastructure) 2007**

##### Ausgrid

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

- within or immediately adjacent to an easement for electricity purposes (whether or not the electricity infrastructure exists).
- immediately adjacent to an electricity substation.
- within 5.0m of an overhead power line.
- includes installation of a swimming pool any part of which is: within 30m of a structure supporting an overhead electricity transmission line and/or within 5.0m of an overhead electricity power line.

Comment:

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

### Manly Local Environmental Plan 2013

Is the development permissible?	Yes
After consideration of the merits of the proposal, is the development consistent with:	
aims of the LEP?	Yes
zone objectives of the LEP?	Yes

### Principal Development Standards

Standard	Requirement	Approved	Proposed	% Variation	Complies
Height of Buildings:	8.5m	8.5m	8.5m	N/A	Yes
Floor Space Ratio	FSR: 0.6:1	FSR : 0.6:1 133sqm (each lot)	FSR : 0.6:1 133sqm (each lot)	N/A	Yes

### Compliance Assessment

Clause	Compliance with Requirements
4.3 Height of buildings	Yes
4.4 Floor space ratio	Yes
6.1 Acid sulfate soils	Yes
6.2 Earthworks	Yes
6.3 Flood planning	Yes
6.4 Stormwater management	Yes
6.8 Landslide risk	Yes
6.12 Essential services	Yes

### Manly Development Control Plan

#### Built Form Controls

Built Form Controls - Site Area: Site Area: 445.6m <sup>2</sup> or 222.8m <sup>2</sup> (per new lot)	Requirement	Approved	Proposed	Complies
4.1.1.1 Residential Density and Dwelling Size	Density: 1 dwelling/250sqm	1 dwelling/222.8sqm	1 dwelling/222.8sqm	No (as approved)
4.1.2.1 Wall Height	East: 6.5m	6.5m	6.5m	Yes
	West: 6.5m	6.5m	6.5m	Yes
4.1.2.2 Number of	2	2	2	Yes

Storeys				
4.1.2.3 Roof Height	Height: 2.5m	2m	2m	Yes
4.1.4.1 Street Front Setbacks	Prevailing building line / 6m	3.8m-4.0m (balconies) 5.8m-6.0m (front of dwelling)	0m (hardstand parking) 3.8m-4.0m (balconies) 5.8m-6.0m (front of dwelling)	<b>No (see comments)</b>
4.1.4.2 Side Setbacks and Secondary Street Frontages	2.17m (based on wall height)	0.9m-2.527m	0.9m-2.527m	No (as approved)
	Windows: 3m	0.9m-2.527m	0.9m-2.527m	No (as approved)
4.1.4.4 Rear Setbacks	8m	8.0m (terrace)	8m (terrace)	Yes
4.1.5.1 Minimum Residential Total Open Space Requirements Residential Open Space Area: OS3	Open space 55% of site area (122.54sqm)	47.6% (106sqm)	47.6% (106sqm)	No (as approved)
4.1.5.2 Landscaped Area	Landscaped area 35% of open space	46.2% (49sqm)	46.2% (49sqm)	Yes
4.1.5.3 Private Open Space	18m	21sqm	21sqm	Yes
4.1.6.1 Parking Design and the Location of Garages, Carports or Hardstand Areas	Maximum 50% of frontage up to maximum 6.2m	50%	41.7%	Yes
Schedule 3 Parking and Access	Dwelling 2 spaces	1 spaces (2 spaces likely to adversely impact on the streetscape)	1 spaces (2 spaces likely to adversely impact on the streetscape)	Yes

Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
3.1 Streetscapes and Townscapes	Yes	Yes
3.1.1 Streetscape (Residential areas)	Yes	Yes
3.3.1 Landscaping Design	Yes	Yes
3.4 Amenity (Views, Overshadowing, Overlooking /Privacy, Noise)	Yes	Yes
3.4.1 Sunlight Access and Overshadowing	Yes	Yes
3.4.2 Privacy and Security	Yes	Yes
3.4.3 Maintenance of Views	Yes	Yes

Clause	Compliance with Requirements	Consistency Aims/Objectives
3.5 Sustainability - (Greenhouse Energy Efficiency, Thermal Performance, and Water Sensitive Urban Design)	Yes	Yes
3.6 Accessibility	Yes	Yes
3.7 Stormwater Management	Yes	Yes
3.8 Waste Management	Yes	Yes
3.9 Mechanical Plant Equipment	Yes	Yes
3.10 Safety and Security	Yes	Yes
4.1 Residential Development Controls	Yes	Yes
4.1.1 Dwelling Density, Dwelling Size and Subdivision	Yes	Yes
4.1.1.1 Residential Density and Dwelling Size	Yes	Yes
4.1.2 Height of Buildings (Incorporating Wall Height, Number of Storeys & Roof Height)	Yes	Yes
4.1.4 Setbacks (front, side and rear) and Building Separation	No	Yes
4.1.5 Open Space and Landscaping	Yes	Yes
4.1.6 Parking, Vehicular Access and Loading (Including Bicycle Facilities)	Yes	Yes
4.1.7 First Floor and Roof Additions	Yes	Yes
5.4.3 Flood Prone Land	Yes	Yes

#### Detailed Assessment

### **3.1 Streetscapes and Townscapes**

#### **Description of issue**

The proposed modification involves deletion of the approved garages (which are integrated within the approved semi-detached dwellings and are compliant with the front setback control) and replacement of that parking with open hardstand carparking spaces for each dwelling within the front setback to the street (Nil front setback).

#### **Merit consideration:**

With regard to the consideration for a variation, the development is considered against the underlying Objectives of the Control as follows:

*Objective 1) To minimise any negative visual impact of walls, fences and carparking on the street frontage.*

#### **Comment:**

The proposal involves converting the approved driveway areas (to each semi-detached dwelling) into hardstand carparking spaces with no associated car parking structure (carport or garage).

Despite the anomaly in the street of the neighbouring garage structures, the streetscape is predominantly characterised by frontages which do not involve carparking structures. This is generally as a result of car parking being setback from the street or due to a lack of on-site car parking.

Although, the proposal involves a parking space that is within the front setback, the absence of a structure means that the outcome would be compatible with the streetscape, as the space would present similarly to regular driveways and would complement the eclectic mix of front yard treatments in the street.

*Objective 2) To ensure development generally viewed from the street complements the identified streetscape.*

Comment:

The street is characterised by a consistent front building line for the dwellings proper and relatively narrow lot widths. This results in front yard areas which are similar in terms of size and dimensions. However, the presentation of each of these areas is varied due to the mix of elements within these areas. This includes varying fence styles, vegetation, landscaping and driveway areas. As such, the proposed open car parking spaces with landscaping to either side would complement this varied and irregular presentation within a similar size of front yard area.

*Objective 3) To encourage soft landscape alternatives when front fences and walls may not be appropriate.*

Comment:

Conditions remain on this consent which control fence height and provide requirements for flooding. This ensures that the front fence is appropriate.

Having regard to the above assessment, it is concluded that the proposed development is consistent with the relevant objectives of MLEP 2013 / MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is supported, in this particular circumstance.

#### **4.1.4 Setbacks (front, side and rear) and Building Separation**

##### **Description of non-compliance**

The proposed hardstand spaces do not comply with the control for front setbacks (to be generally consistent with the prevailing building line or 6.0m).

##### **Merit consideration:**

With regard to the consideration for a variation, the development is considered against the underlying Objectives of the Control as follows:

*Objective 1) To maintain and enhance the existing streetscape including the desired spatial proportions of the street, the street edge and the landscape character of the street.*

Comment:

The proposal for a hardstand parking spaces in the front setback of each property will not result in any additional building bulk being added to the front of the site. The openness afforded by the approved development will continue to contribute to a circumstance in which the spatial proportions in the street are sufficiently maintained. Furthermore, the landscaped strips that are provided at each side of the



hard stand spaces ensure that the parking spaces will be appropriately integrated with landscaping so as to provide a natural element to the presentation of the properties in the street. As such, the proposed design for the hardstand spaces will result in a satisfactory outcome in the terms of streetscape.

*Objective 2) To ensure and enhance local amenity by:*

- *providing privacy;*
- *providing equitable access to light, sunshine and air movement; and*
- *facilitating view sharing and maintaining adequate space between buildings to limit impacts on views and vistas from private and public spaces.*
- *defining and adding character to the streetscape including the provision of adequate space between buildings to create a rhythm or pattern of spaces; and*
- *facilitating safe and adequate traffic conditions including levels of visibility around corner lots at the street intersection.*

Comment:

The proposal involves changes to the approved semi-detached dwellings so that bedrooms from the rear are deleted and relocated to the position of the approved garages. This relocation will enhance amenity for neighbouring dwellings which adjoining the rear of the site as a result of the reduction in bulk, as compared to the approved situation.

The proposal will also provide a satisfactory outcome for privacy in terms of the design of the new windows. These windows are highlight windows and will therefore reduce the opportunity for overlooking.

Furthermore, the open nature of the parking space at the front of the site will not have any unreasonable impact on amenity, and will maintain visibility and presentation to the street, that is both visually desirable and safe.

*Objective 3) To promote flexibility in the siting of buildings.*

Comment:

The proposal involves the location of a car parking space to the front of each dwelling in a manner that does not comply with the numerical control for front setbacks. However, in this situation the presentation of the spaces will be compatible in the streetscape and the absence of built structures will ensure that there is no unreasonable impact on amenity. As such, flexibility in applying the numerical control is warranted.

*Objective 4) To enhance and maintain natural features by:*

- *accommodating planting, including deep soil zones, vegetation consolidated across sites, native vegetation and native trees;*
- *ensuring the nature of development does not unduly detract from the context of the site and particularly in relation to the nature of any adjoining Open Space lands and National Parks; and*
- *ensuring the provisions of State Environmental Planning Policy No 19 - Urban Bushland are satisfied.*

Comment:

The proposal involves a situation in which the landscaped garden strips that were approved beside the driveway will be maintained next to the proposed hardstand spaces. Given the narrow nature of the lots and the consistent style in visual presentation with other lots in the street, this provides an acceptable provision of natural features. Furthermore, the proposal maintains compliance with the control for landscaped area under the Manly DCP 2013.

*Objective 5) To assist in appropriate bush fire asset protection zones.*

Comment:

Not applicable.

Having regard to the above assessment, it is concluded that the proposed development is consistent with the relevant objectives of MLEP 2013 / MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is supported, in this particular circumstance.

#### **THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES**

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

#### **CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN**

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

#### **POLICY CONTROLS**

##### **Northern Beaches Section 7.12 Contributions Plan 2019**

Section 7.12 contributions were levied on the Development Application.

#### **CONCLUSION**

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

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

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

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

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

The assessment of the proposed modifications to the approved semi-detached dwellings against the provisions of MLEP 2013 reveals the proposal remains compliant with the 'Height of Building' and 'Floor Space Ratio' Development Standards.

The assessment of the proposal against the provisions of the Manly DCP 2013 reveals the proposal does not comply with the required front setback control. Given the character of the street and the amenity outcome, some flexibility in applying this control is warranted.

The non-compliance will not have any unreasonable amenity impacts on adjoining properties and will not have any unacceptable impacts on the streetscape.

The notification of the application resulted in support for the proposal.

Overall, the proposed reduction in the bulk to the rear of the semi-detached dwellings, and the complementary and compatible nature of the hardstand spaces with the prevailing streetscape, will ensure an outcome in which the parking design is reasonable and suitable for the site.

Therefore, it is recommended that the modification application be approved.

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

## RECOMMENDATION

THAT Northern Beaches Local Planning Panel as the consent authority grant approval to Modification Application No. Mod2019/0373 for Modification of Development Consent DA2019/0275 granted for demolition Works, subdivision of 1 lot into 2 lots and construction of two semi-detached dwellings on land at Lot 17 DP 4603,53 Alexander Street, MANLY, subject to the conditions printed below:

### A. Add Condition No.1A - Modification of Consent - Approved Plans and supporting Documentation to read as follows:

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

#### a) Modification Approved Plans

Architectural Plans - Endorsed with Council's stamp		
Drawing No.	Dated	Prepared By
MD.01- Site + Title Page	14/07/2019	Du Plessis Architects
MD.02- Ground Floor	14/07/2019	Du Plessis Architects
MD.03- First Floor	14/07/2019	Du Plessis Architects
MD.04- Roof Plan	14/07/2019	Du Plessis Architects
MD.05- Elevations	14/07/2019	Du Plessis Architects
MD.06- Elevations	14/07/2019	Du Plessis Architects
MD.07- Sections	14/07/2019	Du Plessis Architects
MD.10- Demolition Plan	14/07/2019	Du Plessis Architects
MD.11- Concept Foundation Plan	14/07/2019	Du Plessis Architects

#### b) Any plans and / or documentation submitted to satisfy the Conditions of this consent.

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

### A. Modify Condition 12 - to read as follows:

In order to protect property and occupants from flood risk the following is required:

#### Building Components and Structural Soundness – C1

All new development below the Flood Planning Level of 3.65m AHD shall be designed and constructed as flood compatible buildings in accordance with Reducing Vulnerability of Buildings to Flood Damage: Guidance on Building in Flood Prone Areas, Hawkesbury-Nepean Floodplain Management Steering Committee (2006).

#### Building Components and Structural Soundness – C2

All new development must be designed and constructed to ensure structural integrity up to the Probable Maximum Flood of 5.65m AHD, taking into account the forces of floodwater, wave action, flowing water with debris, buoyancy and immersion. Structural certification shall be provided confirming the above.

**Building Components and Structural Soundness – C3**

All new electrical equipment, power points, wiring, fuel lines, sewerage systems or any other service pipes and connections must be waterproofed and/or located above the Flood Planning Level of 3.65m AHD. All existing electrical equipment and power points located below the Flood Planning Level must have residual current devices installed cut electricity supply during flood events.

**Flood Emergency Response – E2**

Appropriate access to the shelter in place refuge should be available from all areas of the new development.

**Floor Levels – F1**

New floor levels within the development shall be set at or above the Flood Planning Level of 3.65m AHD

**Floor Levels – F7**

New floor levels within the development shall be set at or above the Probable Maximum Flood Level of 5.65m AHD

**Floor Levels – F2**

The underfloor area of the dwelling below the 1% AEP flood level of 3.15m AHD is to be designed and constructed to allow clear passage of floodwaters. The underfloor perimeter of the dwelling is to have a minimum of 50% open area below the 1% level

**Fencing – H1**

Fencing (including pool fencing, boundary fencing, balcony balustrades and accessway balustrades) shall be open for passage of flood waters - All new fencing on the property must be design with a minimum of 50% open area between the 1% flood level of 3.15m AHD and natural ground level, to allow flood waters to pass through.

**Recommendations**

The development must comply with all recommendations outlined in: The Flood Risk Management Report prepared by Civil and Structural Design Pty Ltd dated 17 July 2019.

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

Reason: To reduce the impact of flooding and flood liability on owners and occupiers of flood-prone property and reduce public and private losses in accordance with Council and NSW Government policy.

**B. Delete Condition 12A which reads as follows:**

The garage door below the 1% AEP flood level of 3.15m is to be designed and constructed to allow clear passage of floodwaters. The garage door must have a minimum of 50% open area below the 1% AEP flood level, consisting of openings with a minimum diameter of 75mm.

Reason: To reduce the impact of flooding and flood liability on owners and occupiers of flood-prone property and reduce public and private losses in accordance with Council and NSW Government policy.

**C. Delete Condition 27A which reads as follows:**

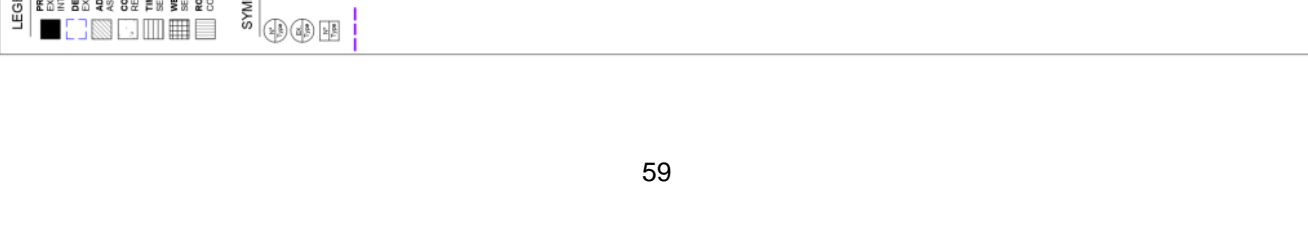
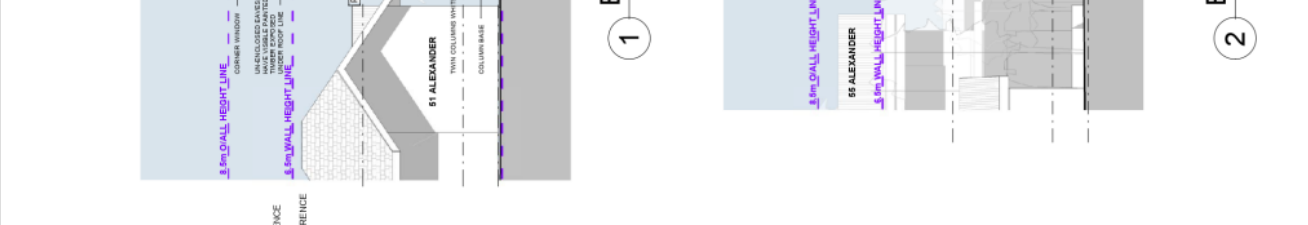
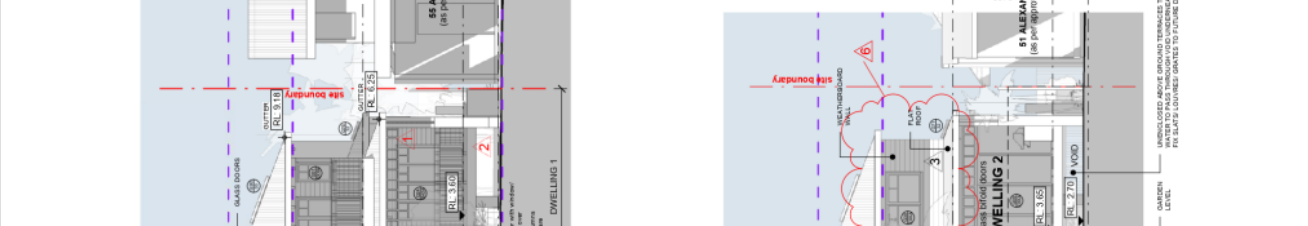
The underfloor area of the dwelling and perimeter of the dwelling below the 1% AEP flood level of 3.15m AHD are to be designed and constructed to allow clear passage of floodwaters. The open walls



of the garage below the 1% AEP flood level are to remain open to allow clear passage of floodwater.  
The garage door must have a minimum of 50% open area below the 1% AEP flood level of 3.15m AHD.

Reason: To reduce the impact of flooding and flood liability on owners and occupiers of flood-prone property and reduce public and private losses in accordance with Council and NSW Government policy.

[illegible]

[illegible]



[illegible]

**LEGEND**

**PROPOSED NEW BLD WALLS**  
 EXTERNAL WALLS BRICK AND/OR METAL CLASBOARD WALLS  
 EXISTING WALLS CONCRETE OR CMU WITH PORTLAND CEMENT RENDER  
 EXISTING SEMI WALLS & FIXTURES TO BE DEMOLISHED

**DEMOLITION**  
 EXISTING SEMI WALLS & FIXTURES TO BE DEMOLISHED  
 EXISTING CONCRETE  
 EXISTING TIMBER FLOOR  
 EXISTING METAL CLASBOARD FLOOR  
 EXISTING METAL CLASBOARD ROOFING TO FALLS

**ADJOINING REHABILITATING PROPERTIES**  
 EXISTING CONCRETE  
 EXISTING TIMBER FLOOR  
 EXISTING METAL CLASBOARD FLOOR  
 EXISTING METAL CLASBOARD ROOFING TO FALLS

**ROOFING**  
 COLOURBOND METAL ROOFING TO FALLS

**SYMBOLS**

WINDOW LABEL  
 EXISTING WINDOW  
 DOOR LABEL  
 DOUBLE WALL  
 HEIGHT LINE

PLAY SECTION REFERENCE  
 PLAY ELEVATION REFERENCE  
 RL (LEVELS)  
 FLOOR LEVELS

**Elevation - East**  
 1:100

**Elevation - West**  
 1:100

## 4.0 REVIEW OF DETERMINATIONS

ITEM 4.1	REV2018/0034 - 70 MCCARRS CREEK ROAD, CHURCH POINT - REVIEW OF DETERMINATION OF APPLICATION N0538/17 FOR CONSTRUCTION OF A NEW DWELLING
AUTHORISING MANAGER	ANNA WILLIAMS
TRIM FILE REF	2019/520276
ATTACHMENTS	1 <a href="#">↓ Assessment Report</a> 2 <a href="#">↓ Site Plan and Elevations</a> 3 <a href="#">↓ Clause 4.6</a>

### PURPOSE

This application has been referred to the Northern Beaches Local Planning Panel as it is a review of a determination or decision made by a local planning panel and the development contravenes a development standard imposed by an environmental planning instrument by more than 10% or non-numerical development standards.

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### RECOMMENDATION OF MANAGER DEVELOPMENT ASSESSMENT

That the Northern Beaches Local Planning Panel, on behalf of Northern Beaches Council as the consent authority, **approves** Application No. REV2018/0034 for Review of Determination of Application N0538/17 for construction of a new dwelling at Lot 1 DP 1121456, 70 McCarrs Creek Road, Church Point subject to the conditions and for the reasons set out in the Assessment Report.

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## REVIEW OF DETERMINATION ASSESSMENT REPORT

<b>Application Number:</b>	REV2018/0034
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<b>Responsible Officer:</b>	Renee Ezzy
<b>Land to be developed (Address):</b>	Lot 1 DP 1121456, 70 McCarrs Creek Road CHURCH POINT NSW 2105
<b>Proposed Development:</b>	Review of Determination of Application N0538/17 for construction of a new dwelling
<b>Zoning:</b>	E4 Environmental Living
<b>Development Permissible:</b>	Yes
<b>Existing Use Rights:</b>	No
<b>Consent Authority:</b>	Northern Beaches Council
<b>Delegation Level:</b>	NBLPP
<b>Land and Environment Court Action:</b>	Yes
<b>Owner:</b>	Steven Ronald Skidmore Kim Tattersall
<b>Applicant:</b>	James de Soyres & Associates Pty Ltd

<b>Application lodged:</b>	06/12/2018
<b>Integrated Development:</b>	Yes
<b>Designated Development:</b>	No
<b>State Reporting Category:</b>	Refer to Development Application
<b>Notified:</b>	24/08/2019 to 07/09/2019
<b>Advertised:</b>	24/08/2019
<b>Submissions Received:</b>	6
<b>Clause 4.6 Variation:</b>	4.3 Height of buildings: 23%
<b>Recommendation:</b>	Approval

<b>Estimated Cost of Works:</b>	\$ 1,639,910.00
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### Executive Summary

This report provides an assessment of a Review of Determination for a residential development on the site known as 70 McCarrs Creek Road, Church Point ("the site"). The site is located on the south-western side of McCarrs Creek Road.

On 15 August 2018, the Northern Beaches Local Planning Panel (NBLPP) refused the Development Application (N0538/17) for the construction of a dwelling house, elevated parking platform, boat shed, sea wall and tree removal.

On 6 December 2018, a Section 8.2 Review of Determination application was lodged with amended plans. As insufficient time was provided for the referral and assessment of the Review, the Applicant

lodged a Class 1 Appeal with the NSW Land and Environment Court on 20 February 2019. The matter is set down for a S34 Conciliation on 11 November 2019.

Council and the Applicant have engaged in 'without prejudice' discussions relating to the reasons for refusal. The Applicant on 14 August 2019, provided amended plans in response to these discussions. The main changes to the proposed development are summarised as follows:

- The building footprint has been reduced and setback further from the southern foreshore building line and Aboriginal middens by approximately a further 4.0m
- Bedroom 1 deck has been set back into the building to align with the ensuite retaining Tree 66
- The north-eastern side deck has been setback off the boundary to comply with the 1.0m setback and retain significant trees 65 and 62
- Increase clearance of the driveway structure to protect trees 17 and 20
- The landscaped area has been increased to 70%
- The boat shed has been reduced in internal floor area from 11.4m<sup>2</sup> to 8.2m<sup>2</sup>
- The boat shed has been moved further south-east away from the middens to enable new planting between the boat shed and the middens.

In association with the construction of the proposed new dwelling house, the applicant also seeks consent to disturb an Aboriginal shell midden, which constitutes integrated development under the provisions of s4.46 of the EP&A Act and s90 of the National Parks and Wildlife Act.

The application also seeks consent to construct a new seawall, which constitutes integrated development under the provisions of s4.46 of the EP&A Act and s91 of the Water Management Act 2000.

The application is also reliant upon extensive works in the public road reserve, including the construction of an elevated access driveway and turning bay. These works within the road reserve require concurrence from Roads and Maritime Services (RMS). Whilst separate approval is required for these works pursuant to s138 of the Roads Act, the cumulative impact of these works has been considered as part of this assessment, as these works provide access to the proposed new dwelling.



**Figure 1 - Site Plan** (Source. James de Soyres Architect)

The subject site is zoned E4 Environmental Living under the Pittwater Local Environmental Plan 2014 (PLEP 2014). Development for the purposes of a dwelling house, and ancillary parking structure, boat shed and sea wall is permitted with consent

Pursuant to Section 8.2 of the Act, the applicant seeks a review of all aspects of the refusal of N0538/17. Clauses 8.3 and 8.10 of the Act requires that the request for the review must be made and determined within 6 months after the date of determination. The application was determined on 15 August 2018 and the Notice of Determination was issued on 21 August 2018. The request for review was lodged on 9 December 2019. The Applicant lodged a Class 1 Appeal in the NSW Land and Environment Court on 20 February 2019. Accordingly, the period for Appeal has not expired and a decision by the Court has not yet been made.

Accordingly, it is recommended that the NBLPP, as the determining authority, having considered the application for review of determination, resolve to approve REV2018/0034 for the reasons detailed within the "Recommendation" section of this report.

## **ASSESSMENT INTRODUCTION**

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

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

## **SUMMARY OF ASSESSMENT ISSUES**

Environmental Planning and Assessment Act 1979 - Section 8.3 - Environmental Planning and Assessment Act 1979 - Section 8.3

Assessment - NSW Office of Environment and Heritage (Biodiversity Conservation Act )

Pittwater Local Environmental Plan 2014 - 4.6 Exceptions to development standards

Pittwater 21 Development Control Plan - D4.5 Front building line

Pittwater 21 Development Control Plan - D4.8 Building envelope

## **SITE DESCRIPTION**

<b>Property Description:</b>	Lot 1 DP 1121456 , 70 McCarrs Creek Road CHURCH POINT NSW 2105
<b>Detailed Site Description:</b>	The site is legally described as Lot 1 in Deposited Plan

1121456, and is commonly referred to as 70 McCarrs Creek Road, Church Point ('the site'). The site is slightly irregular in shape, with a 15.895m wide frontage to McCarrs Creek Road to the north-east, a maximum depth of 38.635m and a total area of 565m<sup>2</sup>. The site adjoins the Pittwater Waterway, in an area known as Browns Bay, with the MHWL defining the south-western (rear) boundary of the site.

The site slopes down away from the street towards the waterway, with a fall of approximately 20m and an average slope of approximately 52%. With the exception of timber access stairs and minor structures including a skid along the waters edge, the site is vacant and undeveloped.

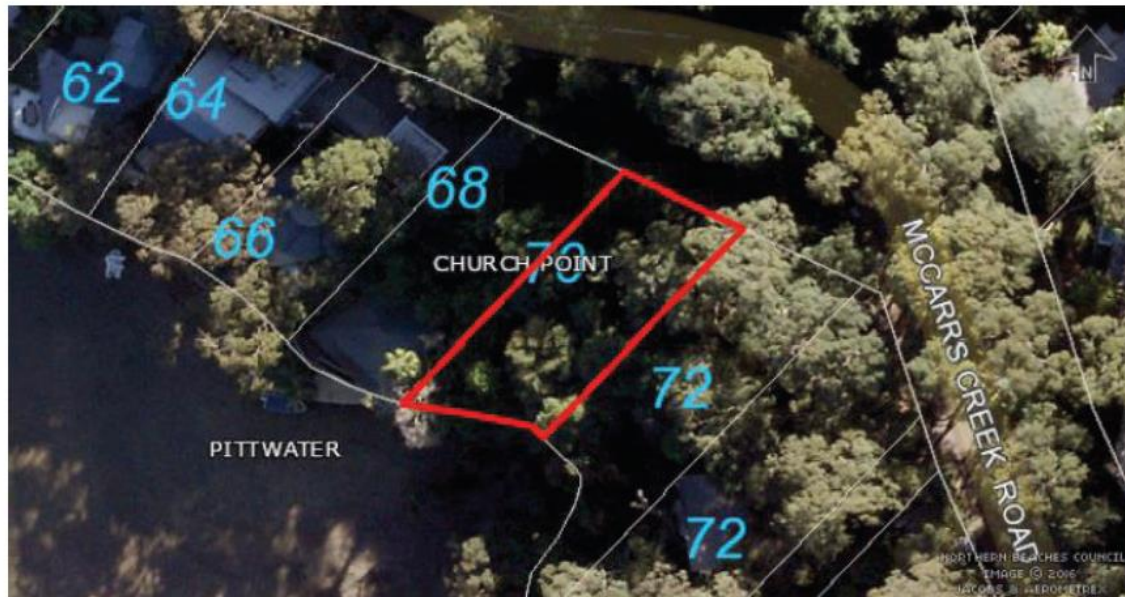
The site features a natural watercourse that runs along the south-eastern side boundary containing significant rock outcrops, an Aboriginal midden in the lower portion of the site, a number of rock outcrops within the body of the site, and is heavily vegetated (Littoral Rainforest - Endangered Ecological Community). The site is mapped as being prone to bushfire, landslip, estuary wave and tidal action, and flooding. The foreshore building line also dissects the site, at a distance of approximately 23m from, and approximately parallel to, the front property boundary.

McCarrs Creek Road is a two-lane secondary classified road, under the care and control of Northern Beaches Council. The roadway lacks any formalised kerb and guttering, and on-street parking within the vicinity of the site is extremely limited. The site is setback from the road pavement, at a maximum distance of approximately 16m. Like the site, the setback area or road verge is steep (approximately 74%), heavily vegetated and features a number of rock outcrops and a sandstone retaining wall supporting the road section located in the centre of the verge. A timber staircase currently provides pedestrian access into the site, however there is no vehicular access to the site.

Direct vehicular access is also restricted in relation to adjoining sites; with vehicular and pedestrian access to 66 and 68 McCarrs Creek Road gained via a right of carriageway over 64 and 66 McCarrs Creek Road and no access vehicular access available to 72 and 72A McCarrs Creek Road.

Map:





#### SITE HISTORY

On 22 June 2016, Development Application N0312/16 was lodged for the construction of a sea wall.

On 23 June 2016, Development Application N0259/16 for construction of a new dwelling was lodged with Council. Council requested the application be withdrawn due to the following concerns:

- Environmental impacts,
- Extent of development in the foreshore area
- Character and visual impact
- Built form non-compliances,
- Insufficient and inconsistent information relating to:
  - o Flooding,
  - o Arboricultural impact assessment,
  - o Geotechnical hazards,
  - o Landscaping,
  - o Driveway design,
  - o Aboriginal heritage,
  - o Height non-compliance, and
  - o Construction methodology.

On 21 September 2016, development application N0259/16 was withdrawn by the applicant.

On 14 November 2016, development application N0312/16 was withdrawn by the applicant.



On 14 September 2017, the applicant had a pre-lodgement meeting to discuss the construction of a new dwelling on the subject site.

On 23 November 2017, Development Application N0538/17 for construction of a new dwelling, elevated parking structure, boat house, seawall and tree removal was lodged with Council.

On 6 March 2018, Council wrote to the applicant requesting the application be withdrawn for the following reasons:

- Unqualified impact upon an item of Aboriginal heritage significance, with a lack of information identified by OEH,
- Unreasonable impact upon the Littoral Rainforest Endangered Ecological Community ('EEC'),
- Inadequate arboricultural assessment,
- Lack of owners consent for tree removal,
- Insufficient engineering detail regarding works within the road reserve,
- Insufficient engineering detail relating to works in the vicinity of the creek,
- Unacceptable geotechnical risks associated with proposed works,
- Insufficient consideration of the estuarine hazard affecting the site,
- Unacceptable impacts associated with the boatshed in the foreshore area,
- Excessive building height,
- Inadequate clause 4.6 submission,
- Unreasonable visual impact,
- Inconsistencies with recommendations from NSW RFS and proposed landscaping,
- Inconsistencies with the E4 Environmental Living zone.

On 14 May 2018, the applicant provided a full suite of amended information, with the exception of the information required to address the concerns of OEH.

On 15 August 2018, the application was determined by the Northern Beaches Local Planning Panel (NBLPP) with a recommendation for refusal. The Notice of Determination was issued on 21 August 2018.

On 8 December 2018, the Applicant lodged a Review of Determination application (REV2018/0034) for a review of the reasons for refusal issued for N0538/17.

On 20 February 2019, the Applicant lodged a Class 1 Appeal with the NSW Land and Environment Court.

## **PROPOSED DEVELOPMENT IN DETAIL**

The proposed development as revised, is for construction of a dwelling house comprising the following:

### **Parking Structure - RL23.925**

- Parking for two (2) vehicles and a turning bay and driveway extending across the road verge
- Bin storage
- Stair access to second floor level

**Second Floor Level - RL21.015**

- Entry deck
- Lift access to dwelling

**First Floor Level - RL17.440**

- Kitchen
- Living and Dining
- Terrace off living and dining (36m2)
- Entry with deck
- Powder room

**Ground Floor Level - RL14.465**

- Bedroom 1 with ensuite and walk-in-robe, south-west facing deck off bedroom (2.9m2)
- Bedroom 2 and Games room
- Bathroom

**Lower Level - RL11.605**

- Deck with rainwater tank, sewer pump and tank and hot water system
- Landscaping

**Boat Shed - RL1.9**

- New sea wall (RL1.75 to top of wall)



Figure 1 - South-east view of originally proposed development (Source: James deSoyres Architects)





Clause 8.3 Application for and conduct of review of the EP&A Act 1979 states:

- 1) *An applicant for development consent may request a consent authority to review a determination or decision made by the consent authority. The consent authority is to review the determination or decision if duly requested to do so under this Division.*
- 2) *A determination or decision cannot be reviewed under this Division:*
  - a) *after the period within which any appeal may be made to the Court has expired if no appeal was made, or*
  - b) *after the Court has disposed of an appeal against the determination or decision.*
- 3) *In requesting a review, the applicant may amend the proposed development the subject of the original application for development consent or for modification of development consent. The consent authority may review the matter having regard to the amended development, but only if it is satisfied that it is substantially the same development.*
- 4) *The review of a determination or decision made by a delegate of a council is to be conducted:*
  - a) *by the council (unless the determination or decision may be made only by a local planning panel or delegate of the council), or*
  - b) *by another delegate of the council who is not subordinate to the delegate who made the determination or decision.*
- 5) *The review of a determination or decision made by a local planning panel is also to be conducted by the panel.*
- 6) *The review of a determination or decision made by a council is to be conducted by the council and not by a delegate of the council.*
- 7) *The review of a determination or decision made by a Sydney district or regional planning panel is also to be conducted by the panel.*

In accordance with Section 8.3 (2) of the Act, the request for the review must be made and determined within 6 months after the date of determination of the development application. The application was determined on 15 August 2018 and the notice of determination was issued on 21 August 2018. The review was lodged on 6 December 2018 and needed to be considered by the NBLPP before 21 February 2019, which is within 6 months of the date the notice of determination was issued. The application was lodged on the 6 December and was required to be notified for 30 days. With the extended notification period required over the Christmas break, the notification period finished on 9 February 2019.

This was deemed insufficient time to enable a full assessment of the application and receive integrated referral responses before the expiration of the statutory time frame. Accordingly, the Applicant lodged a Class 1 Appeal in the NSW Land and Environment Court on 20 February 2019. Accordingly, the period for Appeal had not expired and a decision by the Court has not yet been made.

Section 8.3 (3) provides that the Council may review a determination if in the event that the applicant has made amendments to the development described in the original application, the consent authority is satisfied that the development, as amended, is substantially the same as the development described in the original application.

The amendments to the proposal are outlined in the 'Detailed Description of Works' section of this report. In relation to the issue of substantially the same, in *Michael Standley and Associates Pty Ltd v North Sydney Council* [1997] NSW LEC 190 (5 December 1997) Justice Stein noted;

*'There are, of course, differences between the building as sought to be modified and the approved development. The question is, however, whether these differences result in a building, which could no longer be described as "substantially the same development". The mere fact that there are differences does not mean that the proposal is necessarily one which is not substantially the same as the approved development.'*

The overall built form of the development has been reduced from the original scheme in the following



respects:

- The building footprint has been reduced and setback further from the southern foreshore building line and Aboriginal middens by approximately a further 4.0m
- Bedroom 1 deck has been set back into the building to align with the ensuite retaining Tree 66
- The north-eastern side deck has been setback off the boundary to comply with the 1.0m setback and retain significant trees 65 and 62
- Increase clearance of the driveway structure to protect trees 17 and 20
- The landscaped area has been increased to 70%
- The boat shed has been reduced in internal floor area from 11.4m<sup>2</sup> to 8.2m<sup>2</sup>
- The boat shed has been moved further south-east away from the middens to enable new planting between the boat shed and the middens.

The built form is found to be substantially the same, therefore a consideration of whether the development is substantially the same should focus on whether there are sufficient similarities to reasonably conclude the development is substantially the same.

A review of the original and amended plans has found the following similarities between the two schemes:

- The proposal remains for the same proposed uses, i.e. construction of a dwelling house, elevated parking structure, boat shed and sea wall.
- The proposed design changes result in a reduction in the bulk and scale of the building, a reduction in the number of trees to be removed to reduce the impact on the Littoral Rainforest EEC and visual impact of the development generally, and protection of the Aboriginal Middens on the site.
- The amendments do not result in any additional impacts or issues that were not relevant to the DA as originally submitted.

Therefore, the proposed development (as amended) is found to be substantially the same and can be assessed under the provisions of Section 8.2 "Review of Determination".

### **Assessment of the Reason for Refusal by Northern Beaches Local Planning Panel**

#### ***How has the 8.2 Application Responded to the Reasons for Refusal?***

The applicant has amended the proposal and has provided additional information. Consequently, the Reasons for Refusal of N0538/17 that are stipulated in the Notice of Determination are examined below to determine if they remain applicable or should be overturned:

#### **1. Unacceptable impacts upon existing vegetation.**

##### Particulars:

*The proposed development results in a significant net loss of Littoral Rainforest Endangered Ecological Community on the site, inconsistent with the provisions of clause B4.17 (Littoral Rainforest – Endangered Ecological Community) of P21 DCP. The extent of clearing and tree removal has not been appropriately minimised, attributing to inconsistency with the objectives of the E4 Environmental Management Zone, and the desired future character of the Church Point and Bayview Locality prescribed by clause A4.4 (Church Point and Bayview Locality) of P21 DCP.*

##### Comment:

Following a consultative without prejudice conciliation between Council and the Applicants experts, it

was agreed that by relocating the dwelling closer to the front boundary, there would be a reduction in the amount of clearing required, three (3) additional significant canopy trees (Trees 42, 68 and 69) would be retained, and a greater separation between the location of the Aboriginal middens to facilitate new vegetation.

In addition, further detailed Aborist advice incorporating an 8 stage Construction Methodology and Tree Protection Plan has been submitted which provides measures to mitigate any accidental tree damage or incidental site impacts. It is considered that the amendments to the proposal in relation to the vegetation on the site will suitably accommodate the development rights of the owners while maintaining the unique Littoral Rainforest features and overriding desired future character of the Bayview Locality.

## 2. Excessive Built Form

### Particulars:

*The proposed development exceeds the 8.5m maximum building height prescribed by clause 4.3 (Height of Buildings) of PLEP 2014 and the request to vary this development standard does not adequately address the matters required by subclause (3) of clause 4.6 (Exceptions to development standards) of PLEP 2014.*

*Furthermore, the proposal is inconsistent with the minimum front building line prescribed by clause D4.3 (Front building line) of P21 DCP, the building envelope prescribed by clause D4.8 (Building envelope) of P21 DCP, the landscaped area requirement of clause D4.10 (Landscaped area – Environmentally sensitive land) of P21 DCP and the undercroft height limits of clause D4.13 (Construction, retaining walls, terracing and undercroft areas) of P21 DCP, such that the proposal presents as an overdevelopment of the environmentally sensitive and highly constrained site.*

### Comments:

#### **Building Height**

The amended design presents an increase in the height non-compliance with Clause 4.3 (Height of Buildings) of PLEP 2014 providing a total height of 12.3m for the dwelling which is 2.3m above the 10m height limit applying to the site. The merits of the application are discussed in further detail within Clause 4.6 of this report. On balance, the development with the height breach is supported in this instance due to a combination of significant constraints on the site. The resulting built form while technically greater than the numerical control envisions, is a more considerably placed structure which respects the value of the Aboriginal middens, significant trees forming the Littoral Rainforest EEC and watercourse running through the site.

#### **Front Setback**

As with the building height, the front setback on this site presents unique design challenges. The Applicant has amended the design of the dwelling reducing the overall size and deleting the quantum of the previous Second Floor Level and remodelling the Ground Floor bedroom level. While the development now encroaches up to 2.75m from the front boundary, this encroachment will not be discernible from McCarrs Creek Road or the surrounding properties due to the large 16m wide vegetated verge between the site and the made road section of McCarrs Creek Road and the fact that the dwelling is below the finished surface level of the road.

In pushing the development closer to the front northern boundary, a greater number of existing canopy trees have been retained and a greater clearance between the dwelling and the location of the Aboriginal middens is now available to provide new vegetation to establish greater long term screening of the structures on the site.

**Landscaped Area - Clause D4.10**

The relocation of the building platform further to the north-west has increased the area available in front of the dwelling increasing the available landscaped open space from 55.9% to 70%.

**Building Envelope - Clause D4.8**

The amended design will increase the technical non-compliance with the building envelope control. The area where this non-compliance occurs is at the first floor level up to approximately 2.9m - 4m on the north-west and approximately up to approximately 2.2m on the south-east. The extent of envelope breach is increased where the bulk of the building has been pushed further toward the front of the site.

While the numerical breach seems significant, on this site where the slope is approximately 52%, this breach does not create an unacceptable building bulk. The building form sits below the surface level of McCarrs Creek Road and has minimised the overall scale and impact of the development. Further, the height of the undercroft areas have been reduced to a more reasonable clearance of less than 4m at its highest point.

**3. Inadequate consideration of risks**Particulars:

*The application does not adequately consider the risks associated with the construction of the proposed driveway and dwelling house in light of the geotechnical hazard that affects the site, inconsistent with the provisions of clauses 7.2 (Earthworks) and 7.7 (Geotechnical hazards) of PLEP 2014 and B3.1 (Landslip hazard) of P21 DCP. Furthermore, the application has not demonstrated consistency with the provisions of Planning for Bushfire Protection 2006 and has not been endorsed by the NSW RFS, resulting in inconsistency with the s4.14 of the EP&A Act.*

Comments:

In terms of the geotechnical and landslip hazard, additional Preliminary Structural drawings for the proposed pier layout and structural system for the driveway and parking structure have been provided supported by a letter of 'design intent' by the Structural Engineer and Geotechnical Engineer. This information is considered satisfactory in demonstrating consistency with the requirements of PLEP 2104 and P21 DCP. Deferred Commencement conditions have been recommended for imposition in relation to the required construction of the driveway.

In relation to the proposal's consistency with the provisions of Planning for Bushfire Protection 2006, the NSW RFS on 5 February 2019 provided advice indicating that the amended Landscape design was satisfactory in addressing previous concerns and have issued conditions of consent relevant to the development. It is therefore recommended that this reason for refusal has been adequately satisfied and should be deleted.

**EXISTING USE RIGHTS**

Existing Use Rights are not applicable to this application.

**BUSHFIRE PRONE LAND**

The site is classified as bush fire prone land. Section 4.14 of the Environmental Planning and Assessment Act 1979 requires Council to be satisfied that the development conforms to the specifications and requirements of the version (as prescribed by the regulations) of the document entitled Planning for Bush Fire Protection.

A Bush Fire Report was submitted with the application (prepared by Bushfire Planning Services Pty Ltd,

dated 22 November 2017 and subsequent addendums to this report dated 1 May 2018, 18 September 2018 and 31 May 2019). The report(s) stated that the bushfire attack level of the site is "Flame Zone" and BAL 40. The report recommended an alternative solution to comply with Planning for Bush Fire Protection.

The application was referred to the NSW Rural Fire Service for further assessment. The NSW RFS raised no objections to approval, subject to conditions. The recommendations of the Bush Fire Report, along with the conditions from the NSW RFS have been included as part of the recommended conditions of consent.

## NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the relevant Development Control Plan.

As a result of the public exhibition process council is in receipt of 6 submission/s from:

Name:	Address:
Ms Anne Tenney	88 McCarrs Creek Road CHURCH POINT NSW 2105
Mr Roger Gordon Maynard Mrs Jacqueline Maynard	120 McCarrs Creek Road CHURCH POINT NSW 2105
Ms Janet Marjorie Tinkler	89 McCarrs Creek Road CHURCH POINT NSW 2105
Dr Guy Gordon	110 McCarrs Creek Road CHURCH POINT NSW 2105
Ms Bernadette Anne Rue	108 A McCarrs Creek Road CHURCH POINT NSW 2105
Ms Catherine Anne Kubany	183 McCarrs Creek Road CHURCH POINT NSW 2105

The subject application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and Pittwater 21 Development Control Plan.

As a result of the public exhibition of the application, Council received four (4) submissions to the original notification of the application for review. The application was re-notified following receipt of the current amended design and one (1) further submission was received. It is noted that these submissions are the same as submitted for the original application.

The matters raised within the submissions are addressed as follows:

- Location of the boat shed on the waters edge**

*Boat sheds are not allowed as the building line is much higher. Boat shed in line with the house next door on waters edge not allowed now.*

Comment:

Boat sheds are permissible pursuant to Clause 7.8 (2) of PLEP 2014.

In accordance with Clause D15.15 (c) Waterfront Development of P21 DCP, boat sheds are permissible provided they are located above the mean high water mark and meet the requirements of the clause. This issue does not hold determining weight.

- Unique waterfall/creek forming a rare rainforest to be culled.**



Comment:

The proposed works on the site do not impact on the existing water course that is located along the north-eastern boundary of the site. The works have been designed clear of this area and are acceptable in terms of flooding impacts.

Significant review has been undertaken in relation to the status of the trees on the site that form part of the Littoral Rainforest EEC. Council's Biodiversity section have reviewed the Arborist and Biodiversity reports submitted with the application and have nominated the trees which are considered the most valuable for retention. The applicant has amended their design to accommodate the retention of specific trees to Council's satisfaction. In addition, the Applicant has nominated to enter into the Biodiversity Offset Scheme in accordance with the requirements of the NSW Biodiversity Conservation Act 2016. Details of this are provided within the NECC (Bushland and Biodiversity) referral comments within this report. This issue does not hold determining weight.

- **Removal of trees and Replanting.**

*Arborist report incorrect in relation to the number of trees to be retained and removed resulting in 50% reduction. Number of tall trees to be replanted*

Comment:

The Arboricultural Impact Assessment has investigated seventy-seven (77) trees within the subject site and the adjacent road reserve area impacted by the driveway access. Following detailed discussions with Council's Arborist and Biodiversity specialists, the development will result in the removal of sixteen (16) trees, eight (8) of which are assessed as dead or non-viable. This position will be locked in through conditions of consent and will be supervised onsite by a Project Ecologist. Council has no concerns in relation to the content of the Arborist report and the trees for removal have been carefully reviewed by Council's experts as acceptable. This issue does not hold determining weight.

- **Scale of driveway, safety and impact on No.68 McCarrs Creek Road**

*There is no road shoulder delivering and unloading materials*

Comment:

The structural and geotechnical detail and requirements for the proposed driveway structure have been further detailed in structural drawings prepared by GZ Consulting Engineers indicating "the proposed pier layout and structural system for the driveway and parking structure, as well as additional retaining walls and rock underpinning required to ensure the stability of McCarrs Creek Road and the embankment leading into the site."

Appropriate conditions of consent have been recommended to further consolidate the structural engineering requirements to the satisfaction of Council. It is a recommendation of this report that the driveway structure be constructed and completed prior to any commencement of works for the dwelling house. Once complete, the parking platform and driveway will provide safe access for delivery of materials. This issue does not warrant refusal of the application.

- **Building Height**

Comment:

The building height has been considered in detail and a full assessment of the merits of anticipating a height breach have been identified with the Clause 4.6 variation within this report. The amended proposal has satisfied a merit based assessment. This issue does not warrant refusal of the application.



- **Stormwater run-off from Bayview Heights not adequately investigated.**

Comment:

Council's Development Engineers have reviewed the proposal in terms of stormwater and overland flow into the watercourse. No objection has been made subject to conditions in relation to stormwater run-off affecting the site and the proposed development. This issue does not hold determining weight.

- **Overdevelopment of the site**

Comment:

The site is currently a vacant lot within the E4 Environmental Living zone where dwelling houses are permissible. The current amended proposal provides for a reduced footprint providing a low density residential dwelling on the site and retaining approximately 70% of the site as landscaped area. This issue does not warrant refusal of the application.

- **Construction Planning - use of a barge and damage to Mangroves**

Comment:

No access to the site is permitted by barge to facilitate the construction of the dwelling or the elevated driveway and parking platform. Limited access is permissible for the construction of the sea wall and the boat shed to reduce the need to carry materials across the sensitive areas containing the Aboriginal middens and the Littoral Rainforest. Relevant conditions of consent are recommended in this regard to ensure the Mangroves are protected and supervised by the Project Ecologist.

## REFERRALS

Internal Referral Body	Comments
Building Assessment - Fire and Disability upgrades	<p><b>Supported</b></p> <p>The application has been investigated with respect to aspects relevant to the Building Certification and Fire Safety Department. There are no objections to approval of the development.</p> <p>Note: The proposed development may not comply with some requirements of the BCA. Issues such as these however may be determined at Construction Certificate stage.</p>
Landscape Officer	<p><b>Updated comments 5 September 2019:</b></p> <p>Following the amended site planning and design, the application for the erection of a new dwelling, in terms of landscape outcome is supported.</p>

Internal Referral Body	Comments
	<p>The following changes to the site plan assist with softening the development, by way of retaining increased numbers of existing trees and palms, and by increasing built form setbacks to trees and palms to be retained including:</p> <ul style="list-style-type: none"> <li>• The building is moved 3.5m towards the street to allow for the retention of existing T68 (Sandpaper Fig Tree) and T69 (Sandpaper Fig Tree) as requested by Council, and also includes the retention of two smaller palms T82 (Cabbage Tree Palm) and T83 (Cabbage Tree Palm),</li> <li>• Increased building setbacks to existing T49 (Coachwood) and T50 (Coachwood),</li> <li>• Increased setback to deck and stairs near existing T65 (Sandpaper Fig) and T66 (Cabbage Tree Palm),</li> <li>• Suitable setback from stairs and driveway for retention of T17 (Coachwood) and T20 (Cabbage Tree Palm).</li> </ul> <p>The accumulative benefit of this retention of vegetation (with the retention of T52, T51, T45 in the area between proposed building and boatshed) is that the built form is softened by existing vegetation, as opposed to the previous site plan, which proposed removal of the majority of this vegetation. The successful retention of the listed existing trees and palms satisfies the landscape intent of both C1.1 and D4.2</p> <p>With this amended site plan, the following trees and palms on site are to be retained between the proposed building and boatshed: T35, T37, T38, T42, T44, T45, T46, T47, T49, T50, T51, T52, T66, T68, T69, T70, T82, and T83, and any other smaller Cabbage Tree Palms not identified on the plans and within the reports, as well as new growth trees and palms along the watercourse.</p> <p>Changes to the site plan for the proposed boatshed include:</p> <ul style="list-style-type: none"> <li>• Retention of T42 (Cabbage Tree Palm)</li> </ul> <p>The arboricultural assessment on retaining the existing vegetation impacted by the proposed boatshed, in terms of the difficulties in isolating root systems when such vegetation is close and inter-connected is accepted, such that the existing group of T39 (Rough-barked Apple), T40 (Sandpaper Fig), and T41 (Sandpaper Fig) would require either retention of all species or removal of all species.</p>

Internal Referral Body	Comments
	<p>The amended location of the boatshed provides the opportunity to replace the vegetation proposed for removal of T39, T40 and T41, between the boatshed and the midden, to consist of 3 replacement trees/palms with 1 tree/palm to be located between the water and the boatshed and 2 trees/palms to be located between the boatshed and midden. A condition shall be imposed that the replanting occurs prior to the removal of vegetation for construction of the dwelling.</p> <p>Council's Landscape section have assessed the application against the following Pittwater 21 Development Control Plan guidelines: C1.1 Landscaping. D4.1 Character as viewed from a public place. D4.2 Scenic protection - General D4.13 Construction, Retaining walls, terracing and undercroft areas</p>
NECC (Bushland and Biodiversity)	<p><b>Supported</b></p> <p><u>Updated comments 03/09/2019</u> The applicant has submitted amended plans and reports which detail a reduction in biodiversity impacts onsite and further information relating to formal biodiversity offsets for residual biodiversity impacts.</p> <p><i>Proposal amendments</i> A number of further proposal amendments have been made which minimise impacts to biodiversity onsite. These include the retention of six more trees, further set backs from already retained trees, no vegetation removal specifically for bushfire mitigation, and re-planting and regeneration of the remaining vegetation (onsite and road reserve) with 100% locally native species from the Littoral Rainforest Endangered Ecological Community (EEC).</p> <p><i>Formal biodiversity offsets</i> The <i>Preliminary Application of the Biodiversity Assessment Method</i> report (Aquila Ecological Surveys 21/05/2019) details the methods undertaken to generate the data and parameters for entry into the BAM Calculator, which has resulted a BAM Credit Report package. This report was prepared by Accredited Assessor BAAS18054. The BAM Credit Report details that an offset requirement of 3 ecosystem credits for Littoral Rainforest EEC (PCT 1833), and 6 species credits (3 credits for Powerful Owl and 3 credits for Barking Owl) under the Biodiversity Offset Scheme are required to be retired for the assessed impacts. Council's Biodiversity section, concurs with the methods undertaken and resulting requirement to retire calculated credits in accordance with the Biodiversity Offset Scheme. Council, as the consent authority, will use the general conditioning power at section 4.17 (EP&amp;A Act) to impose a</p>

Internal Referral Body	Comments
	<p>condition requiring the retirement of biodiversity credits in accordance with the mechanisms of the NSW <i>Biodiversity Conservation Act 2016</i> (BC Act).</p> <p>The application includes a Biodiversity Management Plan which details mitigation measures to be implemented throughout construction and which extends for 5-years post-construction to regenerate Littoral Rainforest EEC.</p> <p>The applicant has also included domestic animal control with domestic pets living and no side fencing to allow for safe wildlife passage via a covenant under Section 88E of the Conveyancing Act 1919.</p> <p>Council's Natural Environment - Biodiversity section supports the application, subject to conditions.</p> <p>Please note that due to the Littoral Rainforest EEC being listed as Critically Endangered under the Commonwealth <i>Environment Protection and Biodiversity Conservation Act 1999</i>, any required credits are excluded from application of the variation rules that are established by the NSW <i>Biodiversity Conservation Regulation 2017</i>, as per the ancillary rules.</p> <p><u>Original comments 25/01/2019</u></p> <p>This Section 82 Review of N0538/17 for the construction of a new dwelling and boatshed has been assessed against relevant planning legislation. As previously determined, Council's Natural Environment – Biodiversity section cannot support the application for the following reasons outlined below.</p> <p><b>1. Comments regarding impacts to native vegetation</b></p> <p>a. The Supplement to Statement of Environmental Effects by Turnbull Planning International Pty Ltd dated 5/12/2017, 'the SEE', states that the development now <i>"retains 55 trees, compared with 48 trees as of November 2017, resulting in retention of 81% of the trees determined to be safe to retain on the site"</i>. Council disagrees with this statement as this percentage appears to include trees outside of the site including within the road reserve, adjacent properties (No. 68 and 72) and within Browns Bay. The SEE defines the site as follows, <i>"No 70 McCarrs Creek Road, Church Point ('the site')"</i>. Council estimates that only 41% (11 of 27) of viable trees within the subject property can be retained due to the proposal and construction activities.</p> <p>b. The SEE states that there will be <i>"retention of 355 m2</i></p>

Internal Referral Body	Comments
	<p>(63%) of the vegetation on the site compared to previous (May 2018) retention of 206 m<sup>2</sup> (36%) of the site, significantly increasing retention of vegetation". Firstly, the "landscaped area" cannot be directly used for the native vegetation area. The architect plans submitted for review (DA-01 Rev C, dated 02/11/2018) report the proposed landscaped area, coloured green, as 354.8m<sup>2</sup> (62.8%) but this area appears to include the sea wall, the boat shed "lawn", the RFS required 1-2m defendable area surrounding the proposed dwelling and the watercourse, and the dwelling footprint also appears to be a different shape than seen elsewhere. Council estimates that only 265m<sup>2</sup> (46.9%) for native vegetation will be retained within the subject property and this total includes the modified community for the protection area required for the midden. Secondly, Council disagrees with this statement as plans (DA-01 Rev A dated 05/04/2018) lodged with the original DA (N0538/17) reports the proposed landscape area as being 339.4m<sup>2</sup> (60.1%), hence this REV2018/0034 does not "significantly" increase retention of vegetation.</p> <p>c. The REV2018/0034 supporting ecological document titled <i>Additional Report Addressing Reasons for Refusal and Rural Fire Service Issues</i> by Molino Stewart dated 3/12/2018, 'REV2018/0034 Ecological Addendum', relies on the native vegetation impact calculations presented in the SEE, plus their assessment of Littoral Rainforest EEC to be retained. The REV2018/0034 Ecological Addendum states that,</p> <p><i>"Tree retention within the Littoral Rainforest (based on the mapped canopy species<sup>1</sup>) is now:</i></p> <ul style="list-style-type: none"> <li>- <i>Total number of trees within 5m of proposed works: 46</i></li> <li>- <i>Dangerous or dead trees to be removed: 5</i></li> <li>- <i>Trees to be removed for development: 12</i></li> <li>- <i>Trees to be retained: 38 out of 50, equals 76%."</i></li> </ul> <p>The footnote<sup>1</sup> states: <i>"Note: due to the scale of the Molino Stewart vegetation map compared to the Arborists map, the Arborists map has been used to refine the boundary of Littoral Rainforest based on canopy trees and aerial photography, thus shifting its boundary approximately 15m upslope from the original MS vegetation map."</i></p> <p>Council does not agree with the above as this percentage appears to include trees outside of the site including within the road reserve and adjacent properties (No. 68 and 72). Council estimates that only 61.5% (16 of 26) of viable</p>



Internal Referral Body	Comments
	<p>Littoral Rainforest EEC trees within the subject property can be retained due to the proposal, therefore, 38.5% of viable trees are to be removed. Council's consultant Arborist has raised concern the retention of 5 of these due to proposed impacts and construction activities. Considering this point, it is estimated that only 42% of Littoral Rainforest EEC trees are to be safely retained, and many of these are to be impacted by the proposal.</p> <p><b>2. Unachievable and unacceptable proposed offsets</b></p> <p>The SEE lists offsets within the subject property and surrounding land, as well as an offsite offset of similar vegetation. The SEE states as follows:</p> <p><i>"Proposed offset of 57 trees to compensate for removal of 12 trees at a greater than 3:1 ratio, compared with previous (May 2018) offset of 54 trees to compensate for removal of 18 trees"</i></p> <p>The proposed offset of 57 trees within the subject property and Council's road reserve is unachievable due to the spatial limitations rendering the majority of plantings likely to be impacted trees proposed to be retained or the aboriginal midden or unlikely to be viable in the long-term. Council's consultant Arborist estimates at least 20 of the 57 proposed plantings are not possible due to site constraints. It should also be noted that the majority of these plantings are not considered to be "canopy" tree species, with mature heights of 29 plantings being 6m or less. The locations of many plantings are underneath existing canopy trees to be retained, this is not considered to be replacing canopy.</p> <p><i>"Vegetation offsets of 1077 m2 to offset the loss of 210 m2 vegetation at greater than 3:1 ratio at either North Whale Beach Littoral Rainforest (369 Whale Beach Road, Lot 234 DP 15376) or other suitable reserve, compared with previous (May 2018) vegetation offsets of 1077 m2 to compensate for the loss of 359 m2 of vegetation at Browns Bay, Kennedy Park and/or Kennedy Place Reserve; and Consideration of consent conditions and VPA to allow an offset on Council land."</i></p> <p>As previously stated by Council, vegetation offsets on Council-owned land is not supported as Council-owned land is already a secure asset and as such does not result in net gain of vegetation. In addition, Council has no legal mechanism to approve developers to fund bush regeneration works in Council reserves.</p> <p><b>3. Unacceptable impacts to existing vegetation and non-</b></p>

Internal Referral Body	Comments
	<p><b><i>compliance with planning controls</i></b></p> <p>In view of points 1 and 2 above, the minor amendments to the proposal do not change Council's original assessment, being that the proposed development results in a significant net loss of Littoral Rainforest Endangered Ecological Community on the site, and loss of threatened species habitat, inconsistent with the provisions of clause B4.3 and B4.17 of P21 DCP. The extent of clearing and tree removal has not been appropriately minimised, attributing to inconsistency with the objectives of the E4 Environmental Management Zone, and the desired future character of the Church Point and Bayview Locality prescribed by clause A4.4 (Church Point and Bayview Locality) of P21 DCP.</p>
NECC (Coast and Catchments)	<p><b>Supported</b></p> <p>The Supplement to Statement of Environmental Effects for the review of Council's determination of DA N0538/17 prepared by Turnbull Planning International Pty Ltd contends that:</p> <ul style="list-style-type: none"> <li>the provisions of the <i>Coastal Management Act 2016</i> (CM Act) and <i>State Environmental Planning Policy (Coastal Management) 2018</i> (CM SEPP) do not apply to the subject Application for Review as DA N0538/17 had been lodged but not finally determined immediately before 3 April 2018 when the CM Act and CM SEPP commenced; and</li> <li>the proposed rebuilding of the seawall is permissible as an ancillary use to the carrying out of development for the purposes of a waterfront dwelling and a boat shed.</li> </ul> <p>The following referral comments are provided on the assumption that the Development Assessment Unit concurs with this position.</p> <p>The property at 70 McCarrs Creek Road, Church Point has been identified as being affected by estuarine wave action and tidal inundation on Council's Estuarine Hazard Mapping. The Estuarine Risk Management Policy for Development in Pittwater (the Policy) in Appendix 7 of Pittwater 21 DCP and the relevant B3.7 Estuarine Hazard controls will apply to new development at the site.</p> <p>Based upon the foreshore edge treatment type and crest height shown in survey submitted with DA N0538/17 and in accordance with the Pittwater Estuary Mapping of Sea Level Rise Impacts Study (2015), an estuarine planning level (EPL) of RL 2.58m AHD has been adopted by Council for the subject site. A component of the EPL is a freeboard allowance of 0.3m which is applicable to all new development including boat sheds. As an estuarine planning level (EPL) has not been independently derived by the applicant's coastal engineer, the EPL adopted by Council (RL 2.58m AHD) will apply to the proposed development at the foreshore.</p>

Internal Referral Body	Comments
	<p>An Estuarine Risk Assessment (WRL2018031 JTC LR20180510) prepared by UNSW Water Research Laboratory dated 10 May 2018 was submitted in support of DA N0538/17 which was subsequently refused. The letter report concluded that the risks from wave action and tidal inundation hazards are acceptable for the design life of the proposed boat shed. The report was silent however, on the proposed new seawall which is shown on the Review Application plans as realigned slightly seaward of the existing concrete seawall and extending eastward towards the creekline.</p> <p>A revised Estuarine Risk Assessment Report (WRL 2018031 JTC LR20181203, dated 3 December 2018) has been submitted in support of the Review Application and addresses matters raised in regard to the impacts of the proposed seawall on estuarine processes and surrounding land.</p> <p>The revised report confirms that at the proposed finished floor level of 1.9m AHD the new boat shed is at an acceptably low level of risk from wave action and tidal inundation hazards for its design life. The coastal engineer further states that 'the proposed seawall will not have adverse erosion impacts on the surrounding foreshore, but will require detailed engineering design. As such the development proposal for the new boat shed and seawall is able to satisfy the requirements of the Estuarine Risk Management Policy and associated B3.7 Estuarine Hazard controls subject to conditions.</p>
NECC (Development Engineering)	Development Engineers have reviewed the amended proposal and supporting documentation and raise no objections subject to the imposition of relevant conditions of consent.
NECC (Riparian Lands and Creeks)	<p><b>Supported</b></p> <p>This application is recommended for approval with conditions.</p> <p>The stormwater management plan 11149.C1.00-B and 11149-C1.01-B prepared by Waddington Consulting Pty Ltd adequately address the requirements of Pittwater 21 DCP B5.8 (Water Quality) and B5.11 (Stormwater Discharge into Waterways). This plan should be implemented with particular attention to the discharge outlet into the creek and the possible need for stabilisation of the creek and creek banks at the discharge location. The filter pit will be required to be maintained on an ongoing basis and must not be decommissioned unless it is being replaced with a device that performs a similar function.</p> <p>Sediment and erosion controls must be installed prior to any work on site according to the construction methodology prepared by James de Soyres + Associates (Drawings DA-41-44 Rev-C) and maintained, with particular attention to ensuring the sediment boom remains in place and that all sediment controls are in place before major storms and cleaned immediately following storms until</p>

Internal Referral Body	Comments
	groundcover has re-established.
NECC (Stormwater and Floodplain Engineering – Flood risk)	<p><b>Supported</b></p> <p>The proposed development generally complies with the flood requirements of the DCP and LEP.</p> <p>The Flood Planning Levels (FPL) and Probable Maximum Flood (PMF) levels vary throughout the property, and are as per the Flood Risk Assessment by Waddington Consulting Pty Ltd (4 Dec, 2018).</p> <p>All potential entry points are located well clear of the adjacent ground and provide at least 500mm freeboard to the maximum predicted local flood depth in the vicinity.</p> <p>The footings for the ground floor may have some slight impact on conveyance, but this would be contained within the property with no impact on any neighbouring property.</p>
Road Reserve	<p><i>As a Classified Secondary Road (No 2110), RMS comments on the proposed driveway are required for concurrence. Subject to RMS concurrence, we have no objection to the proposed driveway development provided the following requirements are met:</i></p> <ol style="list-style-type: none"> <li><i>1. The driveway access is to be approved by Council &amp; RMS and built prior to commencement of the dwelling building works. This will require a Deferred Commencement Condition to ensure there is no absence of doubt that the driveway vehicle access can safely be constructed and any identified geotechnical risks to the road carriageway and embankment, and the future dwelling can be addressed to Council's satisfaction.</i></li> <li><i>2. A Section 138 application for submission to Council must fully address the stability of the road embankment by the applicant's Geotechnical Engineer and associated risks on completion of the development. That is, the risks assessment must be evaluated for the property on the completed development, not the current state. Given the complexity of the proposal and the geotechnical report must be peer reviewed at the applicants cost to Council's satisfaction</i></li> <li><i>3. The Section 138 application will need to be lodged with Council for the structural, geometric design details of the proposed driveway and any remedial works required for the existing road embankment. The proposed driveway location will make access to the embankment for future maintenance difficult for Council. As a result a detailed geotechnical assessment of the stability of the road embankment fronting the proposed access to the property shall be taken into consideration and shall form part of the embankment</i></li> </ol>



Internal Referral Body	Comments
	<p><i>design. A detailed risk assessment must be undertaken and details provided of proposed measures to address any identified risks. The measures must reduce any risk to proposed dwelling to acceptable levels.</i></p> <p><i>Traffic Control and Management plan for the above works will need to be assessed by RMS and Council's Transport Network Team.</i></p> <p><u>Planner's Comment:</u> The requirements identified will be actioned as part of the Deferred Commencement Conditions for this development. Concurrence from the RMS will be required as part of the s138 application process which is a separate process.</p>

External Referral Body	Comments
Ausgrid: (SEPP Infra.)	The proposal was referred to Ausgrid. No response has been received within the 21 day statutory period and therefore, it is assumed that no objections are raised and no conditions are recommended.
NSW Rural Fire Service – local branch (s79BA EPAA)	<p><b>Supported</b> The application was referred to the NSW Rural Fire Service seeking advice regarding bushfire protection in accordance with s4.14 of the EP&amp;A Act, 1979 as the site is identified as a 'flame zone'.</p> <p>The RFS provided a number of conditions for the development in their response dated 5 February 2019 with the following comment:</p> <p><i>The NSW RFS recognises that the site is constrained and that the proposed development falls within the Flame Zone. The Service has undertaken a merit based assessment and provides the above advice in accordance with 'Planning for Bush Fire Protection 2006'.</i></p> <p>Accordingly, the development is considered acceptable in terms of its consistency with <i>Planning for Bush Fire Protection 2006</i>.</p>
Nominated Integrated Development – NSW Office of Environment and Heritage	<p><b>Supported</b> The application was previously referred to the Office of Environment and Heritage for General Terms of Approval (GTA's) as Integrated Development. GTA were issued for REV2018/0034 on 14 March 2019.</p> <p>The Applicant submitted further detail in the form of an Aboriginal Heritage Assessment Report (ACHAR) prepared by Comer Consultants, dated 19 November 2018 in support of REV2018/0034. OEH have provided the following response:</p>

External Referral Body	Comments
	<p><i>"The report has identified that a shell midden is located on the property and will potentially be impacted upon by the proposed development. It is proposed to protect a portion of the midden between the dwelling and the boatshed through the laying of geo-technical fabric which will be covered with introduced sterile sand or soil and then landscaped with shallow-rooted plants. OEH notes that this activity may potentially impact upon the midden.</i></p> <p><i>It is recommended in the report that an AHIP, with testing and salvage, should be applied for prior to construction of the dwelling. It is further recommended that archaeological testing and salvage in accordance with OEH's Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales ('the Code') should be undertaken after the AHIP has been issued and prior to construction of the dwelling and landscaping.</i></p> <p><i>OEH is unable to issue an AHIP for both test excavation and harm (including salvage excavation). In addition, as it has been identified that a midden is present at the subject site, test excavation could not be conducted under the Code. An AHIP for test excavation would therefore be required and, dependent on the results of the test excavation, a subsequent AHIP for harm may be necessary. The subsequent AHIP may include mitigation of harm to Aboriginal objects, such as salvage excavation and protection of a portion of the midden, if appropriate.</i></p> <p><i>Please also note that the midden must be registered as a site on the Aboriginal Heritage Information Management System (AHIMS) prior to the AHIP application for test excavation being submitted to OEH. Based on the information presented in the ACHAR, the AHIMS registration does not appear to have been completed.</i></p> <p><i>Considering the above, OEH provides the following general terms of approval:</i></p> <ul style="list-style-type: none"> <li><i>• The midden must be registered on the Aboriginal Heritage Information Management System (AHIMS)</i></li> <li><i>• A s.90 Aboriginal Heritage Impact Permit (AHIP) for Aboriginal archaeological test excavations must be sought and granted, and the test excavations must be undertaken, prior to the commencement of works. The results of this testing must inform recommendations for the appropriate management and mitigation of harm to Aboriginal objects. These options can include (but are not limited to) avoidance of harm and/or salvage excavation where harm cannot be</i></li> </ul>

External Referral Body	Comments
	<p>avoided.</p> <ul style="list-style-type: none"> <li>The AHIP application must be accompanied by appropriate documentation and mapping as outlined on page 6 of Applying for an Aboriginal Heritage Impact Permit, Guide for Applicants. Please ensure that the supporting documentation includes the results of an extensive search of AHIMS that has been undertaken within the last 12 months.</li> <li>The AHIP application must include an appropriate Aboriginal archaeological research design and test excavation methodology. Documentary evidence that this has been provided to the registered Aboriginal parties (RAPs) for mandatory 28-day review and comment must be presented. It must also be documented how any issues raised by the RAPs have been addressed.</li> <li>Consultation with the Aboriginal community undertaken as part of an AHIP application must be in accordance with the Aboriginal Cultural Heritage Community Consultation Requirements for Proponents 2010.</li> <li>Long term management of Aboriginal objects must be considered as part of the AHIP application.</li> </ul>
Nominated Integrated Development – Department of Industry – Natural Resources Access Regulator (Controlled Activity Approval for works within 40m of watercourse)	<p>The proposal submitted as part of the original application N0538/17 were referred to the Natural Resources Access Regulator (NRAR). General Terms of Approval (GTA's) were provided to Council on 20 April 2018.</p> <p>The revised documentation submitted with REV2018/0034 was referred to the NRAR as a nominated integrated development (Controlled Activity Approval for works within 40m of a watercourse). No further objection or conditions have been received in relation to the revised proposal.</p>
Concurrence – NSW Roads and Maritime Services (s100 – Dev. on proposed classified road)	<p>While McCarrs Creek Road is under the care, control and maintenance of Council, the works proposed for private access within the road reserve will require comments and concurrence from Roads and Maritime Services (RMS) in relation to the location of the proposed elevated driveway structure and the design of the works within the McCarrs Creek Road Reserve. Deferred Commencement requirements for an application under s138 of the Roads Act has been included.</p>

#### ENVIRONMENTAL PLANNING INSTRUMENTS (EPIS)\*

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

In this regard, whilst all provisions of each Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the assessment,

many provisions contained within the document are not relevant or are enacting, definitions and operational provisions which the proposal is considered to be acceptable against.

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

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

#### **SEPP 55 - Remediation of Land**

Clause 7 (1) (a) of SEPP 55 requires the Consent Authority to consider whether land is contaminated. Council records indicate that the subject site is in its natural state for the most part and has not been developed. In this regard it is considered that the site poses no risk of contamination and therefore, no further consideration is required under Clause 7 (1) (b) and (c) of SEPP 55 and the land is considered to be suitable for the residential land use.

#### **SEPP (Building Sustainability Index: BASIX) 2004**

A BASIX certificate has been submitted with the application (see Certificate No. 847522S\_04 dated 14 August 2019).

The BASIX Certificate indicates that the development will achieve the following:

<b>Commitment</b>	<b>Required Target</b>	<b>Proposed</b>
<b>Water</b>	40	40
<b>Thermal Comfort</b>	Pass	Pass
<b>Energy</b>	50	50

A condition has been included in the recommendation of this report requiring compliance with the commitments indicated in the BASIX Certificate.

#### **SEPP (Infrastructure) 2007**

##### Ausgrid

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

- within or immediately adjacent to an easement for electricity purposes (whether or not the electricity infrastructure exists).
- immediately adjacent to an electricity substation.
- within 5.0m of an overhead power line.
- includes installation of a swimming pool any part of which is: within 30m of a structure supporting an overhead electricity transmission line and/or within 5.0m of an overhead electricity power line.

##### Comment:



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

### **SEPP (Coastal Management) 2018**

When the original application N0538/17 was lodged with Council, State Environmental Planning Policy No. 71 - Coastal Protection was in force and applied to the subject site. The amended proposal is considered against the requirements of Clause 7 of the SEPP as follows:

*a. the aims of this Policy set out in clause 2,*

Comment: The proposed amendments have satisfied Council's Bushland & Biodiversity Officer, in relation to the adequate protection and preservation of native coastal vegetation, particularly the retention of a greater proportion of the Littoral Rainforest EEC. The amendments to the built form and reduction of the building footprint in conjunction with new planting has demonstrated that the type, bulk, scale and size of development is appropriate for the location and protects and improves the natural scenic quality of the surrounding area.

*b. existing public access to and along the coastal foreshore for pedestrians or persons with a disability should be retained and, where possible, public access to and along the coastal foreshore for pedestrians or persons with a disability should be improved,*

Comment: Public access along the foreshore is neither helped or hindered as a result of the proposal.

*c. opportunities to provide new public access to and along the coastal foreshore for pedestrians or persons with a disability,*

Comment: Public access is not required through the site to the foreshore, and as above, access along the foreshore is neither helped nor hindered as a result of the proposal.

*d. the suitability of development given its type, location and design and its relationship with the surrounding area,*

Comment: The suitability of the development is considered compatible with surrounding development both in terms of its scale given the many constraints on the site.

*e. any detrimental impact that development may have on the amenity of the coastal foreshore, including any significant overshadowing of the coastal foreshore and any significant loss of views from a public place to the coastal foreshore,*

Comment: The proposal will not result in any detrimental impacts upon the amenity of the foreshore with regard to views to the coastline or solar access to the coastline.

*f. measures to conserve animals (within the meaning of the Threatened Species Conservation Act 1995) and plants (within the meaning of that Act), and their habitats,*

Comment: Whilst the proposal does not warrant the provision of an SIS, in so far as the development will not result in significant impact upon the Littoral Rainforest EEC in the NSW North Coast, Sydney Basin and South East Corner Bioregions, the proposal will result in some net loss of the area of Littoral Rainforest EEC on the subject site. As a result, the Applicant has nominated to enter into a formal biodiversity offset scheme in accordance with the requirements of the *NSW Biodiversity Conservation Act 2016*. Council's Bushland and Biodiversity team support this process and have provided appropriate conditions in this regard.

*g. measures to conserve fish (within the meaning of Part 7A of the Fisheries Management Act 1994) and marine vegetation (within the meaning of that Part), and their habitats,*

Comment: The proposal will not result in any unreasonable impacts upon fish and marine vegetation and their habitats.

*h. existing wildlife corridors and the impact of development on these corridors,*

Comment: The site is not mapped as a wildlife corridor under the provisions of P21 DCP. However, the site has been identified as a wildlife corridor in the Biodiversity Management Plan provided to support the application. The level of impact upon existing canopy trees and rock outcrops has been considered by Council's Biodiversity section as acceptable. The Biodiversity Management Plan provide for the regeneration of Littoral Rainforest EEC and incorporates domestic animal control measures.

*i. the likely impact of coastal processes and coastal hazards on development and any likely impacts of development on coastal processes and coastal hazards,*

Comment: Conditions can be imposed to ensure that likely impacts associated with coastal processes and coastal hazards are appropriately addressed.

*j. measures to reduce the potential for conflict between land-based and water-based coastal*

activities,

Comment: The proposal does not increase or reduce potential for conflict between land-based and water-based activities.

k. *measures to protect the cultural places, values, customs, beliefs and traditional knowledge of Aboriginals,*

Comment: The application was referred to OEH who issued GTAs in relation to the proposed impact upon the shell midden on the site.

l. *likely impacts of development on the water quality of coastal waterbodies,*

Comment: Conditions of consent can be imposed to ensure that the water quality of the waterway is not adversely affected.

m. *the conservation and preservation of items of heritage, archaeological or historic significance,*

Comment: The proposal does not affect any items of European heritage.

n. *only in cases in which a council prepares a draft local environmental plan that applies to land to which this Policy applies, the means to encourage compact towns and cities,*

Comment: N/A

On 3 April 2018, the State Environmental Planning Policy (Coastal Management) 2018 came into force. As the review of determination was lodged after this time, consideration is given to the requirements of the SEPP .

### **State Environmental Planning Policy (Coastal Management) 2018**

#### **13 Development on land within the coastal environment area**

*(1) Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following:*

- (a) the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,*
- (b) coastal environmental values and natural coastal processes,*
- (c) the water quality of the marine estate (within the meaning of the Marine Estate Management Act 2014), in particular, the cumulative impacts of the proposed development*

- on any of the sensitive coastal lakes identified in Schedule 1,  
(d) marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,  
(e) existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,  
(f) Aboriginal cultural heritage, practices and places,  
(g) the use of the surf zone.

Comment: Subject to the detailed reports provided in relation to Aboriginal Heritage, bushland and biodiversity, hydrological design and geotechnical management of the development, the proposal is unlikely to have an adverse impact on any of the above.

*(2) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:*

- (a) the development is designed, sited and will be managed to avoid an adverse impact referred to in subclause (1), or  
(b) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or  
(c) if that impact cannot be minimised—the development will be managed to mitigate that impact.*

Comment: The proposal design has undergone extensive investigation and redesign to ensure that the current building siting will avoid any unnecessary adverse impacts.

#### **14 Development on land within the coastal use area**

*(1) Development consent must not be granted to development on land that is within the coastal use area unless the consent authority:*

*(a) has considered whether the proposed development is likely to cause an adverse impact on the following:*

- (i) existing, safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,  
(ii) overshadowing, wind funnelling and the loss of views from public places to foreshores,  
(iii) the visual amenity and scenic qualities of the coast, including coastal headlands,  
(iv) Aboriginal cultural heritage, practices and places,  
(v) cultural and built environment heritage, and*

*(b) is satisfied that:*

- (i) the development is designed, sited and will be managed to avoid an adverse impact referred to in paragraph (a), or  
(ii) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or  
(iii) if that impact cannot be minimised—the development will be managed to mitigate that impact, and*

*(c) has taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.*

Comment: The proposed dwelling and ancillary boat shed, sea wall and parking structure has been reconsidered in detail reducing the overall footprint and projection of the dwelling structure to facilitate the retention of as many significant trees as possible and ensuring the protection of the Aboriginal Midden within the lower third of the site.

The full scope of the works will provide an additional 59 trees with a mature height of between 5m and 16m consisting of species which are endemic to the Littoral Rainforest EEC features of the site. On balance, the development is not likely to have an adverse impact on the surrounding coastal environment.



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

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

Comment: The development is unlikely to cause increased risk of coastal hazards on the subject site or other land.

The proposed development for construction of a new dwelling house, parking structure, boat shed and sea wall has been considered by Council's Natural Environment Coastal and Catchments (NECC) section. The proposed construction methods are considered suitable by NECC and the development is not considered likely to result in any increased coastal hazard risk or any adverse impact on the coastal environment area or coastal use area. The development is considered to adequately satisfy the requirements of the SEPP.

### Pittwater Local Environmental Plan 2014

Is the development permissible?	Yes
After consideration of the merits of the proposal, is the development consistent with:	
aims of the LEP?	Yes
zone objectives of the LEP?	Yes

### Principal Development Standards

Standard	Requirement	Proposed	% Variation	Complies
Height of Buildings:	8.5m 10m	12.3m to living room roof 11.5m to parking structure	44.7% over 8.5m 23% over 10m	No No

### Compliance Assessment

Clause	Compliance with Requirements
1.9A Suspension of covenants, agreements and instruments	Yes
4.3 Height of buildings	No
4.6 Exceptions to development standards	Yes
5.9 Preservation of trees or vegetation	Yes
7.1 Acid sulfate soils	Yes
7.2 Earthworks	Yes
7.3 Flood planning	Yes
7.7 Geotechnical hazards	Yes
7.8 Limited development on foreshore area	Yes

Clause	Compliance with Requirements
7.10 Essential services	Yes

#### Detailed Assessment

#### **4.6 Exceptions to development standards**

##### Description of non-compliance:

Development standard:	Height of buildings
Requirement:	10m
Proposed:	12.3m
Percentage variation to requirement:	23%

##### Assessment of request to vary a development standard:

The maximum building height prescribed for the subject site according to Clause 4.3(2) of PLEP is 8.5m. However, Clause 4.3(2D) stipulates that development on land that has a maximum building height of 8.5m may exceed 8.5m but be no more than 10.0m if the following is met:

- The consent authority is satisfied that the portion of the building above the maximum height shown on that land on the Height of Buildings Map is minor, and
- The objectives of Clause 4.3 are achieved; and
- The building footprint is situated on a slope that is in excess of 16.7 degrees (that is 30%); and
- The buildings are sited and designed to take into account the slope of the land to minimise the need for cut and fill by design that allow the building to step down the slope.

##### Clause 4.6 Exceptions to development standards:

Clause 4.6 'Exceptions to development standards' is the mechanism by which an applicant's request to vary a development standard can be considered. The development standard that this request seeks approval to vary is the Height of Buildings control, in Clause 4.3(2D) of the PLEP, as the building footprint is located on a slope that is in excess of 16.7 degrees (that is 30%). The following assessment of the variation to Clause 4.3 (2D) - Height of Buildings development standard, has taken into consideration the recent judgement contained within *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118. Clause 4.6 provides flexibility in applying certain development standards on the following grounds:

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

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

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

Comment:

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

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

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

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

*(a) the consent authority is satisfied that:*

- (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
- (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- (b) the concurrence of the Secretary has been obtained.*

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

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

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

Comment:

The appropriate methodology for the consideration of this question is enunciated in the decision of Chief Justice Preston in *Wehbe v Pittwater Council*. In this decision, the Chief Justice summarised the case law on the consideration of this question and expressed the view that there are five ways in which an applicant may demonstrate that compliance with a development standard is unreasonable or unnecessary.

The Applicant's written request (attached to this report as an Appendix) argues in part:

1. *The proposed development is consistent with such of the aims of PLEP as are of relevance to the development: see section 5.3.3 of this document. That, in and of itself, constitutes a 'good' environmental planning ground justifying a contravention of the maximum height of buildings development standard contained in clause 4.3(2D) of PLEP.*
2. *The height breaches above what would be the applicable 10 metres maximum height occur in relation to the lift, the front part of the main roof and a small section of the balcony and terrace area in the south west corner, which are located for the most part, where the slope of the land is at its greatest. In more general terms it is noted that the site is one where there are radical changes in topography over a large area, making it difficult, particularly in the light of other constraints, to locate an appropriate footprint where height above NGL is at its least.*

3. *The built form will be compatible with the height and scale of surrounding and nearby development.*
4. *The built form in the location now chosen will facilitate minimisation of overshadowing of neighbouring property.*
5. *The built form will respond sensitively to the natural topography. In that regard, the proposed development demonstrates overall a better planning outcome within the planning controls through minimising the amount of cut and fill (thus limiting the extent of excavation required as well as ground works, by taking advantage of the sloping site), loss of views, loss of privacy and overshadowing to and from adjoining properties as opposed to circumstances where the development were to 'hug the ground' and step down the site over multiple levels. The development respects the sloping terrain and touches the ground lightly and this design approach leads almost inevitably given the demands of modern housing, to a breach of the height control.*
6. *In addition, a departure from the height of buildings development standard is acceptable and in the public interest because it will result in the preservation/regeneration of rainforest vegetation, particularly spanning across the width of the property towards the foreshore. The building has been stepped back towards the street to achieve this objective, in concert with the suggestions of the Council planning/biodiversity officers and the applicants consultants. This allows for increased screening vegetation so reducing the impression of bulk and scale when the site is viewed from the water, or on land close to water level.*

Comment:

The Applicant's written request (attached to this report as an Appendix) has demonstrated that the objectives of the development standard are achieved, notwithstanding the non-compliance with the development standard. In doing so, the Applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by cl 4.6(3)(a).

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

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ stated:

- *The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
- *The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

*The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15].*

*Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately*



*addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

The applicant's clause 4.6 variation request specifically identifies the 'environmental planning grounds' that support the case for a variation, which is reproduced below:

*"The built form will respond sensitively to the natural topography (refer clause 4.3(1)(e), PLEP). In that regard, the proposed development demonstrates overall a better planning outcome within the otherwise permissible planning controls through minimising the amount of cut and fill (thus limiting the extent of excavation required as well as ground works, by taking advantage of the sloping site), loss of views, loss of privacy and overshadowing to and from adjoining properties as opposed to circumstances where the development hugged the ground and were to step down the site in an elongated fashion (refer clause 4.3(2D)(d), PLEP)."*

Comment:

The applicant's justification is concurred with and it is considered that the written request does contain sufficient environmental planning grounds to justify contravening the development standard to that proposed.

The applicant's justification has been prepared on the grounds of there being sufficient environmental planning grounds. As such, the grounds for the variation that are particular to the circumstances of the proposed development are that the site is significantly sloping and the proposed height responds to the existing topography and constraints on the site with the location of Aboriginal middens and significant trees. In view of the particular circumstances of this case, strict compliance with Clause 4.3 of the LEP is considered to be both unnecessary and unreasonable on the following environmental planning grounds:

- The proposal is consistent with the intent of Clause 4.3 which is to maintain the character of the area which focuses on low density residential development in a landscaped setting. The proposal achieves this outcome, notwithstanding the proposed numerical variation;
- In this instance, it is considered that removal of the non-complying elements to achieve strict compliance would not result in an improved planning outcome and the additional height does not cause any material impact in terms of privacy or view loss to neighbouring residential properties, or adverse overshadowing to residential properties or the public domain. The minor variation results in an improved level of retention of the natural Littoral Rainforest canopy and protection of Aboriginal Heritage artifacts within this property and provides a built form in keeping with adjoining development and in essence, would result in a better planning outcome;
- Despite the additional height, the scale of the proposed dwelling is comparable to other dwellings along McCarrs Creek Road, creating a unified scale in this part of the locality; and
- The amenity of adjoining properties is not significantly impacted by the non-compliance.

Conclusion on Environmental Planning Grounds

The applicant's written request is therefore considered to have adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by cl 4.6 (3)(b) and Council is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

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

Comment:

In considering whether or not the proposed development will be in the public interest, consideration must be given to the underlying objectives of the Height of Buildings development standard and the objectives of the E4 Environmental Living zone. An assessment against these objectives is provided below.

**Objectives of development standard**

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

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

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

Comment:

The non-compliant section of the development occurs at the south-western end of the first floor level roof structure where the topography of the site naturally drops down. The height and scale of the amended dwelling design is considered consistent with the Church Point and Bayview Locality.

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

Comment:

The amended design provides for what is essentially a two storey dwelling which an elevated parking platform at the front of the site linking to the dwelling. The proposed development is considered consistent with this objective.

*c) to minimise any overshadowing of neighbouring properties,*

Comment:

The proposed development does not result in any unacceptable overshadowing due to the separation with the adjoining property and the steep topography.

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

Comment:

The location of the proposed structure does not result in any impact on any views identified.

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

Comment:

The amended design has been reduced in scale and set back closer to the front boundary to reduce the volume of dwelling previously incorporated to connect with the parking structure. Further, the footprint has been massaged to protect important trees identified on the site by Council's Arborist and provided greater separation with the Aboriginal middens. The design response is considered a suitable solution for the site.

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

Comment:

The reduction in the bulk, footprint, tree removal, proximity to the Aboriginal middens and the foreshore area have reduced the originally proposed visual impact of the development to provide an acceptable design response with minimised visual impact.

**Zone objectives**

The underlying objectives of the E4 Environmental Living zone are:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- *To ensure that residential development does not have an adverse effect on those values.*
- *To provide for the continuance of a limited range of existing small-scale water-related business and leisure uses.*
- *To ensure that development, by way of its character, design, location and materials of construction, is integrated into the site and natural surroundings, complements and enhances the natural environment and has minimal visual impact.*
- *To protect and enhance the natural landscape by conserving remnant bushland and rock outcrops and by encouraging the spread of an indigenous tree canopy.*

Comment:

The proposed development is found to be consistent with the zone objectives for the following reasons:

- The proposed development is low impact providing a single light weight dwelling house which has been redesigned and located to reduce the footprint and impact on established Littoral Rainforest species.
- The current design has been manipulated to preserve additional canopy trees on the site and provide adequate space for new contributory planting that does not impact on the preservation of Aboriginal middens.
- The proposed single dwelling does not impact on any water related businesses.
- The design and siting of the dwelling seeks to integrate with the biodiversity and Aboriginal heritage values for the site and its context with the surrounding locality.
- The current design revision has been meticulous in identifying and maintaining as many of the indigenous Littoral Rainforest canopy trees as possible and avoiding significant rock outcrops. The works include a revegetation plan which will provide additional infill planting to supplement and enhance the retained Rainforest species on the site.

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the E4 Environmental Living zone.

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

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

Planning Circular PS 18-003 dated 21 February 2018, as issued by the NSW Department of

Planning, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument. In this regard, given the consistency of the variation to the objectives of the zone, the concurrence of the Secretary for the variation to the Height of buildings controls for certain residential accommodation Development Standard is assumed by the Local Planning Panel, for which Council has an exemption for dwelling houses that can be determined by the Development Determination Panel.

## Pittwater 21 Development Control Plan

### Built Form Controls

Built Form Control	Requirement	Original Proposal	Amended Proposed
Front building line	10m		2.75m to dwelling
Rear building line	Foreshore Building Line	At FBL	3.9m-6.3m from FBL
Side building line	2.5m	SE - 4.1m	1.08m to stairs
	1m	NW - Nil	1.6m to dwelling
Building envelope	3.5m	SE - 3.2m	up to 2.2m
	3.5m	NW - 3.0m	up to 4m
Landscaped area	60%	55.9%	70%

### Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
A1.7 Considerations before consent is granted	Yes	Yes
A4.4 Church Point and Bayview Locality	Yes	Yes
A5.1 Exhibition, Advertisement and Notification of Applications	Yes	Yes
B1.4 Aboriginal Heritage Significance	Yes	Yes
B3.1 Landslip Hazard	Yes	Yes
B3.2 Bushfire Hazard	Yes	Yes
B3.7 Estuarine Hazard - Low density residential	Yes	Yes
B3.11 Flood Prone Land	Yes	Yes
B4.20 Protection of Estuarine Water Quality	Yes	
B5.4 Stormwater Harvesting	Yes	Yes
B5.9 Stormwater Management - Water Quality - Other than Low Density Residential	Yes	Yes
B5.11 Stormwater Discharge into Waterways and Coastal Areas	Yes	Yes
B6.1 Access driveways and Works on the Public Road Reserve	Yes	Yes
B6.2 Internal Driveways	Yes	Yes
B6.3 Off-Street Vehicle Parking Requirements	Yes	Yes
B6.7 Transport and Traffic Management	Yes	Yes



Clause	Compliance with Requirements	Consistency Aims/Objectives
B8.1 Construction and Demolition - Excavation and Landfill	Yes	Yes
B8.2 Construction and Demolition - Erosion and Sediment Management	Yes	Yes
B8.3 Construction and Demolition - Waste Minimisation	Yes	Yes
B8.5 Construction and Demolition - Works in the Public Domain	Yes	Yes
B8.6 Construction and Demolition - Traffic Management Plan	Yes	Yes
C1.1 Landscaping	Yes	Yes
C1.2 Safety and Security	Yes	Yes
C1.3 View Sharing	Yes	Yes
C1.4 Solar Access	Yes	Yes
C1.5 Visual Privacy	Yes	Yes
C1.6 Acoustic Privacy	Yes	Yes
C1.7 Private Open Space	Yes	Yes
C1.13 Pollution Control	Yes	Yes
C1.23 Eaves	Yes	Yes
C1.24 Public Road Reserve - Landscaping and Infrastructure	Yes	Yes
C1.25 Plant, Equipment Boxes and Lift Over-Run	Yes	Yes
C5.21 Plant, Equipment Boxes and Lift Over-Run	Yes	Yes
D4.1 Character as viewed from a public place	Yes	Yes
D4.3 Building colours and materials	Yes	Yes
D4.5 Front building line	No	Yes
D4.6 Side and rear building line	Yes	Yes
D4.8 Building envelope	No	Yes
D4.10 Landscaped Area - Environmentally Sensitive Land	Yes	Yes
D4.12 Fences - Flora and Fauna Conservation Areas	Yes	Yes
D4.13 Construction, Retaining walls, terracing and undercroft areas	Yes	Yes
D4.14 Scenic Protection Category One Areas	Yes	Yes
D15.11 Waterfront lighting	Yes	Yes
D15.14 Minimum frontage for waterfront development	Yes	Yes
D15.15 Waterfront development	Yes	Yes
D15.18 Seawalls	Yes	Yes

#### Detailed Assessment

#### **D4.5 Front building line**

##### **Front Building Line**

The Front Building Line requirement for this site is 10m or the established building line. The amendments to the proposed development have pushed the building footprint closer to the front

boundary of the site to reduce the greater impact on important trees and the Aboriginal middens on the site. As a result, the new works will provide non-compliance with the front building line and includes part of the elevated parking platform, lift, entry and pantry areas on the first and second levels of the development.

The control provides a variation for parking structures on steeply sloping sites conditional on all other structures being consistent with the minimum applicable building line.

In this instance, the site presents significant constraints in the form of Littoral Rainforest, Aboriginal middens and a watercourse in conjunction with steeply sloping topography. It is therefore considered reasonable in this particular instance for some flexibility in applying this requirement as the amended scheme achieves conservation of a large proportion of significant trees and provides for new vegetation to supplement the retained canopy trees which will contribute to the final developed impact of the site.

The proposed development is considered to adequately satisfy the control.

#### D4.8 Building envelope

The proposed modifications to the development maintain a non-compliance with the building envelope requirements of P21 DCP. The extent of non-compliance while numerically large are considered on merit to be acceptable on this site where there are numerous environmental attributes which dictate the most desirable location for a dwelling. The overall impact of the amended proposal is a development which relates better to the constraints of the site and sits below the remnant canopy trees.



**THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES**

Refer to Assessment by Council's Natural Environment Unit elsewhere within this report.

**CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN**

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

**POLICY CONTROLS****Northern Beaches Section 7.12 Contributions Plan 2019**

The proposal is subject to the application of Northern Beaches Section 7.12 Contributions Plan 2019.

A monetary contribution of \$16,399 is required for the provision of new and augmented public infrastructure. The contribution is calculated as 1% of the total development cost of \$1,639,910.

**CONCLUSION**

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

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

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

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

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

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

## RECOMMENDATION

Accordingly, the Northern Beaches Local Planning Panel, on behalf of Northern Beaches Council as the consent authority grant Development Consent to REV2018/0034 for Review of Determination of Application N0538/17 for construction of a new dwelling on land at Lot 1 DP 1121456, 70 McCarrs Creek Road, CHURCH POINT, subject to the conditions printed below:

### DEFERRED COMMENCEMENT CONDITIONS

**1. Structural Certification, Deed of road lease and s138 Approval for Elevated Driveway Access**

This is a “deferred commencement consent” issued under section 4.16(3) of the Environmental Planning and Assessment Act 1979. The following deferred commencement conditions must be complied with to the satisfaction of Council, prior to the issue of an operative Development Consent.

#### PART A

##### Utilities Services

Prior to the activation of the consent, written concurrence from all underground utilities service providers to the proposed works is to be submitted to Council for approval. All requirements of these providers must be satisfied and documented on the engineering design / construction plan.

#### PART B

##### Positive Covenant

The applicant is required to meet Council's requirements in establishing a Positive Covenant on the property, including:

1. A detailed survey plan is to be provided to Council for approval indicating the extent of the position of the driveway, stabilising measures, and associated structures by reference to the road reserve.
2. The applicant is to pay any associated fees and charges for the establishment of a Positive Covenant including all legal fees and associated costs.
3. A draft Positive Covenant of the proposed structures must be provided to Council for approval. The property owner benefiting from the driveway, stabilising measures, and associated structures is to enter into the Positive Covenant. The Positive Covenant must detail the obligations of the registered proprietors in relation to the annual inspection, maintenance, repair and insurance of the proposed structures. The Positive Covenant shall also include provision for future access by Council (for maintenance of the road embankment/formation and/or other structures) or adjoining property owners for access to adjoining property/s and in that eventuality, the manner in which costs are to be shared amongst property owners using the driveway. Written agreement to the Positive Covenant from Council must be obtained prior to the activation of the Consent.



### PART C

- ❑ A Section 139 Consent for Works on the Public Road Reserve issued by the Council under the provisions of S138 of the *Roads Act 1993* for the design and construction of any works located on the road reserve; and
- ❑ The issue of a Road Opening Permit required under the provisions of Section 138 of the *Roads Act 1993* issued by the Council for utility services installation activities (gas, electricity, sewer, water, communications etc) not covered by a Section 139 Consent for Works on the Public Road Reserve.

Reason: To ensure the structural integrity and right of access of the elevated driveway for the life of the structures.

Evidence required to satisfy the deferred commencement condition/s must be submitted to Council within five (5) years of the date of this consent, or the consent will lapse in accordance with Section 95 of the Environmental Planning and Assessment Regulation 2000. This evidence is to be submitted along with a completed 'Deferred Commencement Document Review Form' (available on Council's website) and the application fee, as per Council's Schedule of Fees and Charges.

Upon satisfaction of the deferred commencement condition/s, the following conditions apply:

### DEVELOPMENT CONSENT OPERATIONAL CONDITIONS

#### 2. Polluting or Toxic Substances Must be Stored Above Estuarine Planning Level

The storage of toxic or potentially polluting goods, chemicals or materials which may be hazardous to estuarine ecology or pollute the waterway is not permitted below Council's adopted estuarine planning level (EPL) of RL 2.58m AHD for the site.

Reason: To reduce the potential for pollution of the estuarine environment for the design life of the development. (DACNEBOC1)

#### 3. Boat Shed Not to be Used for Habitable Purposes

At no time shall the boat shed be utilised or converted to provide for habitation. The boat shed must not be used for any other purpose than the storage of small boats, light watercraft and boating and marine equipment. The incorporation of any internal kitchen facilities, habitable rooms, shower or toilet facilities is not permitted.

Reason: To minimise risk to life and property associated with estuarine hazards for development in the coastal zone. (DACNEBOC2)

#### 4. Approved Plans and Supporting Documentation

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

a) Approved Plans

Architectural Plans - Endorsed with Council's stamp		

<b>Drawing No.</b>	<b>Dated</b>	<b>Prepared By</b>
DA-L01C - Landscape Revegetation Site Plan - Rev C	12.08.2019	Trish Dobson Landscape Architecture
DA-L02C - Revegetation Planting Plan - Rev C	12.08.2019	Trish Dobson Landscape Architecture
DA-L03C - Tree Retention Plan - Rev C	12.08.2019	Trish Dobson Landscape Architecture
DA-L04A - Landscape Management Plan for Bushfire Protection - Rev A	12.08.2019	Trish Dobson Landscape Architecture
DA-01 - Site Plan, Site Analysis & Landscaped Area Plan - Rev E	8.07.2019	James de Soyres & Associates
DA-02 - Excavation & Fill Plan - Rev E	8.07.2019	James de Soyres & Associates
DA-03 - Services Management Plan - Rev E	8.07.2019	James de Soyres & Associates
DA-07 - Footings Plan - Rev E	8.07.2019	James de Soyres & Associates
DA-08 - Key to Flood Sections and Sections SG-SG & SH-SH - Rev E	8.07.2019	James de Soyres & Associates
DA-09 - Tree Impact Schematic - Rev E	8.07.2019	James de Soyres & Associates
DA-11 - Boatshed Level Plan - Rev E	8.07.2019	James de Soyres & Associates
DA-12 - Ground Floor Level - Rev E	8.07.2019	James de Soyres & Associates
DA-13 - First Floor Level - Rev E	8.07.2019	James de Soyres & Associates
DA-14 - Second Floor Level - Rev E	8.07.2019	James de Soyres & Associates
DA-16 - Parking Level - Rev E	8.07.2019	James de Soyres & Associates
DA-21 - North-West Elevation - Rev E	8.07.2019	James de Soyres & Associates
DA-22 - South-East Elevation - Rev E	8.07.2019	James de Soyres & Associates
DA-23 - South-West Elevation and Finishes Schedule - Rev E	8.07.2019	James de Soyres & Associates
DA-31 - Section A-A - Rev E	8.07.2019	James de Soyres & Associates
DA-32 - Sections X-X, Y-Y and Z,Z - Rev E	8.07.2019	James de Soyres & Associates
DA-33 - Driveway Sections - Rev E	8.07.2019	James de Soyres & Associates
DA-34 - Parking Platform Sections - Rev E	8.07.2019	James de Soyres & Associates
DA-35 - Flood Levels Cross Sections -	8.07.2019	James de Soyres &

Rev E		Associates
DA-36 - Flood Levels Long Sections - rev E	8.07.2019	James de Soyres & Associates

<b>Reports / Documentation – All recommendations and requirements contained within:</b>		
<b>Report No. / Page No. / Section No.</b>	<b>Dated</b>	<b>Prepared By</b>
Aboriginal Cultural Heritage Assessment Report - Rev C	November 2018	Comber Consultants
Structural Engineering Letter of Design Intent (Ref J18240)	8 August 2019	GZ Consulting Engineers
Traffic and Parking Impact Assessment Report (N1716923N Version 1a)	October 2017	Motion Traffic Engineers Pty Ltd
Flood Risk Assessment (11149-L6)	13 August 2019	Waddington Consulting Pty Ltd
Additional report - Ecological Assessment and Biodiversity Management Plan	14 August 2019	Aquila Ecological Surveys
Addendum Report	17 September 2019	
Bushfire Risk Assessment	22 November 2017	Bushfire Planning Services Pty Ltd
Arboricultural Impact Assessment	August 2019	Bluegum Tree Care and Consultancy
Geotechnical Site Investigation	August 2019	Crozier Geotechnical Consultants
BASIX Certificate (No. 847522S_04)	14 August 2019	NSW Planning & Environment
Marine Habitat Survey	11 July 2016	Waterfront Surveys Australia

b) Any plans and / or documentation submitted to satisfy the Deferred Commencement Conditions of this consent as approved in writing by Council.

c) Any plans and / or documentation submitted to satisfy the Conditions of this consent.

d) The development is to be undertaken generally in accordance with the following:

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

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

#### **5. Compliance with Other Department, Authority or Service Requirements**

The development must be carried out in compliance with all recommendations and

requirements, excluding general advice, within the following:

Other Department, Authority or Service	EDMS Reference	Dated
NSW Rural Fire Service	NSW Rural Fire Service Response	5 February 2019
Office of Environment & Heritage	OEHS GTA's	14 March 2019
Department of Primary Industries	DPI Water GTA's	20 April 2018

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

Reason: To ensure the work is carried out in accordance with the determination and the statutory requirements of other Department, Authority or Body's.

#### 6. Prescribed Conditions

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

Any such sign is to be maintained while the building work, subdivision work or demolition work is being carried out, but must be removed when the work has been completed.
- (d) Residential building work within the meaning of the Home Building Act 1989 must not be carried out unless the Principal Certifying Authority for the development to which the work relates (not being the Council) has given the Council written notice of the following information:
  - (i) in the case of work for which a principal contractor is required to be appointed:
    - A. the name and licence number of the principal contractor, and
    - B. the name of the insurer by which the work is insured under Part 6 of that Act,
  - (ii) in the case of work to be done by an owner-builder:
    - A. the name of the owner-builder, and
    - B. if the owner-builder is required to hold an owner-builder permit under that Act, the number of the owner-builder permit.

If arrangements for doing the residential building work are changed while the work



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

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

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

Reason: Legislative Requirement

## 7. General Requirements

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

Demolition and excavation works are restricted to:

- 8.00 am to 5.00 pm Monday to Friday only.

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

- (b) At all times after the submission the Notice of Commencement to Council, a copy of the Development Consent and Construction Certificate is to remain onsite at all times until the issue of a final Occupation Certificate. The consent shall be available for perusal of any Authorised Officer.
- (c) Where demolition works have been completed and new construction works have not commenced within 4 weeks of the completion of the demolition works that area affected by the demolition works shall be fully stabilised and the site must be maintained in a safe and clean state until such time as new construction works

commence.

- (d) Onsite toilet facilities (being either connected to the sewer or an accredited sewer management facility) for workers are to be provided for construction sites at a rate of 1 per 20 persons.
- (e) Prior to the release of the Construction Certificate, payment of the Long Service Levy is required. This payment can be made at Council or to the Long Services Payments Corporation. Payment is not required where the value of the works is less than \$25,000. The Long Service Levy is calculated on 0.35% of the building and construction work. The levy rate and level in which it applies is subject to legislative change. The applicable fee at the time of payment of the Long Service Levy will apply.
- (f) The applicant shall bear the cost of all works associated with the development that occurs on Council's property.
- (g) No building, demolition, excavation or material of any nature and no hoist, plant and machinery (crane, concrete pump or lift) shall be placed on Council's footpaths, roadways, parks or grass verges without Council Approval.
- (h) Demolition materials and builders' wastes are to be removed to approved waste/recycling centres.
- (i) No trees or native shrubs or understorey vegetation on public property (footpaths, roads, reserves, etc.) or on the land to be developed shall be removed or damaged during construction unless specifically approved in this consent including for the erection of any fences, hoardings or other temporary works.
- (j) Prior to the commencement of any development onsite for:
  - i) Building/s that are to be erected
  - ii) Building/s that are situated in the immediate vicinity of a public place and is dangerous to persons or property on or in the public place
  - iii) Building/s that are to be demolished
  - iv) For any work/s that is to be carried out
  - v) For any work/s that is to be demolished

The person responsible for the development site is to erect or install on or around the development area such temporary structures or appliances (wholly within the development site) as are necessary to protect persons or property and to prevent unauthorised access to the site in order for the land or premises to be maintained in a safe or healthy condition. Upon completion of the development, such temporary structures or appliances are to be removed within 7 days.

- (k) Requirements for new swimming pools/spas or existing swimming pools/spas affected by building works.
  - (1) Child resistant fencing is to be provided to any swimming pool or lockable cover to any spa containing water and is to be consistent with the following;

Relevant legislative requirements and relevant Australian Standards (including but not limited) to:

- (i) Swimming Pools Act 1992
- (ii) Swimming Pools Amendment Act 2009
- (iii) Swimming Pools Regulation 2008
- (iv) Australian Standard AS1926 Swimming Pool Safety
- (v) Australian Standard AS1926.1 Part 1: Safety barriers for swimming

- pools
- (vi) Australian Standard AS1926.2 Part 2: Location of safety barriers for swimming pools.
  - (2) A 'KEEP WATCH' pool safety and aquatic based emergency sign, issued by Royal Life Saving is to be displayed in a prominent position within the pool/spa area.
  - (3) Filter backwash waters shall be conveyed to the Sydney Water sewerage system in sewered areas or managed on-site in unsewered areas in a manner that does not cause pollution, erosion or run off, is separate from the irrigation area for any wastewater system and is separate from any onsite stormwater management system.
  - (4) Swimming pools and spas must be registered with the Division of Local Government.

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

## FEES / CHARGES / CONTRIBUTIONS

### 8. Policy Controls

Northern Beaches 7.12 Contributions Plan 2019

A monetary contribution of \$16,399.10 is payable to Northern Beaches Council for the provision of local infrastructure and services pursuant to section 7.12 of the Environmental Planning & Assessment Act 1979 and the Northern Beaches Section 7.12 Contributions Plan 2019. The monetary contribution is based on a development cost of \$1,639,910.00.

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

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

The Northern Beaches Section 7.12 Contributions Plan 2019 may be inspected at 725 Pittwater Rd, Dee Why and at Council's Customer Service Centres or alternatively, on Council's website at [www.northernbeaches.nsw.gov.au](http://www.northernbeaches.nsw.gov.au)

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

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

### 9. Security Bond

A bond (determined from cost of works) of \$10,000 and an inspection fee in accordance with

Council's Fees and Charges paid as security to ensure the rectification of any damage that may occur to the Council infrastructure contained within the road reserve adjoining the site as a result of construction or the transportation of materials and equipment to and from the development site.

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

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

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

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

**10. Construction, Excavation and Associated Works Bond (Road)**

A Bond of \$100,000 as security against any damage or failure to complete the construction of road pavement/shoulder reconstruction works and driveway as part of this consent. This bond may be refunded upon submission to Council of the registration of the Positive Covenant referred in this consent.

Reason: Protection of Council's Infrastructure

**11. Construction, Excavation and Associated Works Bond (Drainage)**

A Bond of \$[INSERT] as security against any damage or failure to complete the construction of Stormwater drainage works as part of this consent.

Reason: Protection of Council's Infrastructure

**12. Construction, Excavation and Associated Works Bond (Maintenance for civil works)**

The developer/applicant must lodge with Council a Maintenance Bond of \$5000 for the construction of the driveway and retaining structures. The Maintenance Bond will only be refunded on completion of the six month Maintenance Period, if work has been completed in accordance with the approved plans and to the satisfaction of Council. The maintenance bond is to be apaid prior to Council issuing practical completion and may be exchanged for the works bond.

Reason: To ensure adequate protection of Council infrastructure

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

**13. Geotechnical Report Recommendations have been Incorporated into Designs and Structural Plans**

The recommendations of the risk assessment required to manage the hazards as identified in the Geotechnical Report prepared by Crozier Geotechnical Consultants dated August 2019 are to be incorporated into the construction plans. Prior to issue of the Construction Certificate, Form 2 of the Geotechnical Risk Management Policy for Pittwater (Appendix 5 of P21 DCP) is to be completed and submitted to the Accredited Certifier. Details



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

Reason: To ensure geotechnical risk is mitigated appropriately. (DACENCPCC4)

#### **14. Certification of Structures Located Adjacent to Council Pipeline or Council Easement**

All structures are to be located clear of any Council pipeline or easement. Footings of any structure adjacent to an easement or pipeline are to be designed in accordance with Council's Pittwater 21 DCP 2014 Clause B5.12. A statement of compliance is to be prepared by a suitably qualified Civil Engineer and submitted to Council for approval. The approval from Council is to be submitted to Certifying Authority prior to the issue of the Construction Certificate.

Reason: Protection of Council's Infrastructure

#### **15. Shoring of Adjoining Property**

Should the proposal require shoring to support an adjoining property or Council land, owner's consent for the encroachment onto the affected property owner shall be provided with the engineering drawings.

Council approval is required if temporary ground anchors are to be used within Council land. A Temporary Ground Anchors (Road Reserve) Application is to be submitted with Council for assessment and approval subject to Council's Fees and Charges. Details demonstrating compliance are to be submitted to the Principal Certifying Authority prior to the issue of the Construction Certificate

Reason: To ensure that owners consent is obtained for ancillary works, and to ensure the protection of adjoining properties and Council land.

#### **16. Works on Council Roadway**

An Application for Works on Council Roadway, including engineering plans is to be submitted to Council for approval under the provisions of Sections 138 and 139 of the Roads Act 1993. The application is to include four (4) copies of Civil Engineering plans for the design of the driveway and associated structures which are to be generally in accordance with the Development Application, RMS's standard and Council's specification for engineering works - AUS-SPEC #1 and/or Council's Minor Works Policy. The plans shall be prepared by a qualified structural and civil engineer. The design must include the following information:

1. The detailed structural design of the driveway and the associated supporting structures.
2. The detailed structural design of the retaining walls.
3. The detailed design of driveway in comply with Australian Standard: Parking facilities part 1: off- street car parking AS 2890.1.
4. A written concurrence form Roads and Maritime Service for the driveway work must be submitted.
5. The detailed design of drainage system in accordance with Council's stormwater specification.
6. All public and private utility services are to be located on the plan and cross-section plan. All requirements of these providers must be satisfied and documented on the engineering design/ construction plan.

7. The corrosion protection must be applied to the structures.
8. Construction management plan.
9. Reinststate the existing footpath into the grass.
10. A geotechnical engineering certification must be submitted.

The fee associated with the assessment and approval of the application is to be in accordance with Council's Fee and Charges. An approval is to be submitted to the Principal Certifying Authority prior to the issue of the Construction Certificate.

**Reason:** To provide public and private safety.  
> (DACENCPCC2)

**17. Structural and Geotechnical documentation for the Elevated Parking Platform**

Structural Engineering documentation certifying the construction of the elevated parking platform within the McCarrs Creek Road Reserve to be submitted to Council for approval prior to the issue of a Construction Certificate.

Detailed documentation addressing the following to be provided:

1. *All measures to reduce the risk to the proposed dwelling to "Acceptable Risk" must be identified and included in the final design plans.*
2. *Detail for structural and geometric design of the suspended driveway slab, all remedial embankment design as outlined in the Crozier Geotechnical Report eg retaining walls, (fronting and adjoining the driveway) and design of any ancillary road works necessary must be prepared by a registered Structural Civil Engineer in consultation with the applicant's Geotechnical Engineer shall be submitted for Council approval.*
3. *A detailed traffic control plan and traffic management for the proposed works.*

Reason: To ensure the structural integrity and right of access of the elevated driveway structure is designed for the life of the structures.

**18. Flooding**

In order to protect property and occupants from flood risk the following is required:

Building Components and Structural Soundness – C1

All new development shall be designed and constructed as flood compatible buildings in accordance with Reducing Vulnerability of Buildings to Flood Damage: Guidance on Building in Flood Prone Areas, Hawkesbury-Nepean Floodplain Management Steering Committee (2006).

Building Components and Structural Soundness – C2

All new development must be designed and constructed to ensure structural integrity up to the Probable Maximum Flood level, taking into account the forces of floodwater, wave action, flowing water with debris, buoyancy and immersion. Structural certification shall be provided confirming the above.

Building Components and Structural Soundness – C3

All new electrical equipment, power points, wiring, fuel lines, sewerage systems or

any other service pipes and connections must be waterproofed and/or located above the Flood Planning Level.

Storage of Goods – D1

Hazardous or potentially polluting materials shall not be stored below the Flood Planning Level unless adequately protected from floodwaters in accordance with industry standards.

Recommendations

The development must comply with all recommendations outlined in the Flood Risk Assessment by Waddington Consulting Pty Ltd (4 Dec 2018).

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

**Reason:** To reduce the impact of flooding and flood liability on owners and occupiers of flood-prone property and reduce public and private losses in accordance with Council and NSW Government policy.

**19. Pre-Construction Stormwater Assets Dilapidation Report**

Survey a pre-construction / demolition Dilapidation Survey of Council's Stormwater Assets is to be prepared by a suitably qualified person in accordance with Council's Guidelines for Preparing a Dilapidation Survey of Council Stormwater Asset, to record the existing condition of the asset prior to the commencement of works. Council's Guidelines are available at:

<https://files.northernbeaches.nsw.gov.au/sites/default/files/documents/general-information/engineering-specifications/2009084729guidelineforpreparingadilapidationsurveyofcouncilstormwaterasset>

The pre-construction / demolition dilapidation report must be submitted to Council for approval and the Principal Certifying Authority prior to the issue of the Construction Certificate.

Reason: Protection of Council's Infrastructure

**20. Engage a Project Arborist**

A Project Arborist with a minimum of AQF Level 5 is to be appointed for the duration of the works.

The Project Arborist is to implement pre-construction tree protection measures and direct supervision all works within 5m of significant trees.

Evidence demonstrating Project Arborist engagement is to be provided to the Principal Certifying Authority prior to the issue of Construction Certificate.

**Reason:** Tree protection in accordance with relevant Natural Environment LEP/DCP controls.

**21. Water Quality - Low Density Residential**

To comply with Pittwater 21 DCP B5.8, the applicant must install stormwater quality improvement measures as follows:

- Pre-screening of organic matter (eg. leaf litter) prior to the collection of rainwater in the rainwater tank
- filtration of stormwater to capture organic matter and coarse sediments prior to discharge from the land.

Provision must be made for maintenance access.

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

Reason: Protection of the receiving environment (DACNECPCC1)

**22. BOS - Like for like credit retirement conditions - Species credit retirement conditions**

Prior to issue of the relevant construction certificate the class and number of species credits in Table 2 must be retired to offset the impacts of development.

The requirement to retire credits outlined in Table 2 may be satisfied by payment to the Biodiversity Conservation Fund of an amount equivalent to the class and number of ecosystem credits, as calculated by the Biodiversity Offsets Payment Calculator.

Evidence of the retirement of credits or payment to the Biodiversity Conservation Fund in satisfaction of Table 2 requirements must be provided to the Executive Manager Environment & Climate Change of Northern Beaches Council prior to release of construction certification.

**Table 2 Species credits required to be retired – like for like**

Impacted species credit species	Number of species credits	IBRA region
10561 - <i>Ninox connivens</i> (Barking Owl)	3	Sydney Basin
10562 - <i>Ninox strenua</i> (Powerful Owl)	3	Sydney Basin

**Reason:** To offset the residual biodiversity impacts of the development in accordance with the NSW Biodiversity Offset Scheme.

**23. BOS - Like for like credit retirement conditions - Ecosystem credit retirement conditions**

Prior to issue of the relevant construction certificate the class and number of ecosystem credits in Table 1 must be retired to offset the impacts of the development.

The requirement to retire credits outlined in Table 1 may be satisfied by payment to the Biodiversity Conservation Fund of an amount equivalent to the class and number of ecosystem credits, as calculated by the Biodiversity Offsets Payment Calculator.

Evidence of the retirement of credits or payment to the Biodiversity Conservation Fund in satisfaction of Table 1 requirements must be provided to the Executive Manager



Environment & Climate Change of Northern Beaches Council prior to release of construction certification.

**Table 1 Ecosystem credits required to be retired – like for like**

Impacted plant community type	TEC	Number of ecosystem credits	Containing HBT	IBRA sub-region	Plant community type(s) that can be used to offset the impacts from development
1833-Lilly Pilly - Cabbage Tree Palm littoral rainforest on escarpment slopes and gullies of the Sydney basin	Littoral Rainforest in the New South Wales North Coast, Sydney Basin and South East Corner Bioregions	3	Yes	Pittwater, Cumberland, Sydney Cataract, Wyong and Yengo. or Any IBRA subregion that is within 100 kilometers of the outer edge of the impacted site.	Littoral Rainforest in the New South Wales North Coast, Sydney Basin and South East Corner Bioregions (including PCT's 670, 751, 910, 1534, 1536, 1537, 1832, 1833)

**Reason:** To offset the residual biodiversity impacts of the development in accordance with the NSW Biodiversity Offset Scheme.

**24. BOS - Notification of determination to which the Biodiversity Offset Scheme applies**

The applicant or Project Ecologist, on behalf of the applicant, must download and complete the "Biodiversity Offsets Scheme – Notification of Determination" form.

The completed form and attachments, including a copy of the determination and any conditions of approval, must be emailed to the LMBC Service Centre <lmbc.support@environment.nsw.gov.au>. The LMBC Service Centre arranges for determination outcomes to be recorded in the Biodiversity Offset and Agreement Management System (BOAMS).

Council and the Principal Certifying Authority must be copied into the notification email to confirm compliance.

**Reason:** to ensure the NSW Department of Planning, Industry and Environment are notified of determinations where the Biodiversity Offsets Scheme applies and Council are notified for compliance.

**25. Estuarine Hazard Design Requirements**

The following applies to all development:

All development or activities must be designed and constructed such that they will not

increase the level of risk from estuarine processes for any people, assets or infrastructure in surrounding properties; they will not adversely affect estuarine processes; they will not be adversely affected by estuarine processes; they will not reduce access to or diminish the amenity of adjoining public foreshore land.

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

Reason: To minimise potential risk associated with estuarine hazards for development in the coastal zone.

#### **26. Estuarine Planning Level Requirements**

An Estuarine Planning Level (EPL) of RL 2.58m AHD has been adopted by Council for the subject site and shall be applied to all development proposed below this level as follows:

- ☐ All structural elements below RL 2.58m AHD shall be of flood compatible materials;
- ☐ All electrical equipment, wiring, fuel lines or any other service pipes and connections must be located either above RL 2.58m AHD or waterproofed to this level; and
- ☐ The storage of toxic or potentially polluting goods, chemicals or materials, which may be hazardous or pollute the waterway, is not permitted below RL 2.58m AHD.

Reason: To ensure aspects of the development that may be affected by estuarine processes are built at the appropriate level

#### **27. Compliance with Estuarine Risk Management Report**

The development is to comply with all recommendations of the approved Estuarine Risk Assessment Reports (WRL2018031 JTC LR20180510, dated 10/05/2018 and WRL2018031 JTC LR2018203, dated 3/12/2018) prepared by UNSW Water Research Laboratory and these recommendations are to be incorporated into construction plans as necessary.

Reason: To minimise risk associated with estuarine hazards for development in the coastal zone.

#### **28. Structural Engineering for Estuarine Risk**

Structural engineering design for new development at the foreshore including the boat shed and seawall shall be prepared, with input as necessary from a specialist coastal engineer who is a chartered professional engineer with coastal engineering as a core competency and a specialist geotechnical engineer who is a registered professional engineer with chartered professional status (CP Eng, CP Geo or RP Geo), to ensure that for its design life the development is able to withstand the wave impact forces and loadings identified in the approved Estuarine Risk Assessment Reports prepared by UNSW Water Research Laboratory, dated 10 May 2018 and 3 December 2018.

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

Reason: To ensure structural engineering design is prepared by appropriately qualified professionals.

#### **29. Engineers Certification of Plans**

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

Reason: To ensure structural engineering design and specification is certified by an appropriately qualified, registered professional.

**30. Engage a Project Ecologist and preparation of Environmental Management Checklist**

A Project Ecologist is to be employed for the duration of the approved works and 5 years post-construction works, to ensure all bushland / biodiversity protection and restoration measures are carried out according to these conditions of consent and the approved biodiversity reports/plans including, but not limited to:

- ❑ *McCarrs Creek Road Biodiversity Management Plan* (Molino Stewart November 2017)
- ❑ Updated Program Version 2 "Table 1 - Program of works" as amended by and attached to *Ecological Assessment and Biodiversity Management Plan – Report Addressing Reasons for Refusal - EIA and BMP - 70 McCarrs Creek Rd* (Aquila Ecological Surveys 14/08/2019)
- ❑ *Marine Habitat Survey* (Waterfront Surveys Australia Pty Ltd, 15 November 2017)
- ❑ *Ecological Impact Assessment – 70 McCarrs Creek Rd, Church Point*, (Molino Stewart, 22 November 2017)
- ❑ Bushland/biodiversity works within the detailed Construction Methodology (stages 1-1) by James de Soyres & Associates Pty Ltd dated 08/07/2019

The following minor amendments shall be made to the requirements:

- ❑ Removal of the requirement for "rat treatment" due to potential for local native fauna to become exposed directly or secondarily
- ❑ Removal of the need to undertake any bushfire native vegetation modification requirements which have since been superseded by the final RFS referral

A Environmental Management Checklist is to be prepared by the Project Ecologist and is to incorporate all measures for the protection of native vegetation, wildlife and habitats during the construction phase (pre-construction and during construction) and also post-construction/ongoing management phases. Measures specified in the checklist must include all requirements of conditions of this consent addressing construction-related impacts on biodiversity. The Checklist must detail at a minimum, all requirements, actions, timing and responsibility for each mitigation measure within the reports/plans listed above.

The Project Ecologist must have one of the following memberships/accreditation,

- ❑ Practising member of the NSW Ecological Consultants Association (<https://www.ecansw.org.au/find-a-consultant/>) OR
- ❑ An Accredited Assessor under the NSW *Biodiversity Conservation Act 2016* (<https://customer.lmbc.nsw.gov.au/assessment/AccreditedAssessor>)

The Project Ecologist is to provide an engagement letter to certify engagement and the Schedule of Works, which is to be submitted to and certified by the Principal Certifying Authority Prior to issue of Construction Certificate.

**Reason:** To protect native vegetation and wildlife in accordance with relevant Natural Environment LEP/DCP controls.

**31. Compliance with Standards**

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

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

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

### 32. External Finishes to Roof

The external finish to the roof shall have a medium to dark range (BCA classification M and D) in order to minimise solar reflections to neighbouring properties. Any roof with a metallic steel finish is not permitted.

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

Reason: To ensure that excessive glare or reflectivity nuisance does not occur as a result of the development. (DACPLC03)

## CONDITIONS THAT MUST BE ADDRESSED PRIOR TO ANY COMMENCEMENT

### 33. Tree protection measures

An Arborist with AQZ Level 5 qualifications in arboriculture/horticulture shall be engaged to provide the following:

- ❑ site establishment attendance in accordance with the Arboricultural Impact Assessment prepared by Bluegum Tree Care and Consultancy dated August 2019, section 6.1 Site Establishment - prior to construction,
- ❑ site attendance, inspection and certification of all recommended trunk protection works near existing trees identified as 1, 9, 10, 17, 18, 20, 37, 38, 42, 58, 62, 65, 66, 68, 69 and 80,
- ❑ site attendance, inspection and certification of all recommended ground protection works near existing trees identified as 38, 42, 51, 52, 58, 59, 61, 62, 65, 66, 68, 69, 82 and 83,
- ❑ site attendance, inspection and certification of all excavation for pier and building footings works near existing trees identified as 17, 18, 20, 49, 62, 65, 66, 68, 69 and 70,
- ❑ site attendance, inspection and certification of the re-construction of the sea-wall works near existing trees identified as 35 and 37,
- ❑ site attendance, inspection and certification of the excavation for boatshed construction works near existing trees identified as 38 and 42,
- ❑ site attendance, inspection and certification of the lawn area works near existing trees identified as 46, 47, 51, and 82, and
- ❑ site attendance, inspection and certification of the Tree protection Fencing works recommended in Tree Protection Plan.

The tree protection measures and fencing specified in this clause must:

- i) be in place before work commences on the site, and
- ii) be maintained in good condition during the construction period, and
- iii) remain in place for the duration of the construction works.

Additionally, the Certifying Authority or a Project Arborist AQZ Level 5 must ensure that:

- i) the activities listed in section 4.2 of AS4970- 2009 Protection of Trees on Development Sites, do not occur within the tree protection zone of any tree, and
- ii) any temporary access to, or location of scaffolding within the tree protection zone of a protected tree, or any other tree to be retained on the site during the construction, is



undertaken using the protection measures specified in sections 4.5.3 and 4.5.6 of that standard.

The Arborist shall provide the Certifying Authority with certification details that the tree protection measures are in place at the commencement of works.

A separate permit or development consent may be required if the branches or roots of a protected tree on the site or on an adjoining site are required to be pruned or removed.

Reason: to ensure tree protection is provided and maintained.

**34. Public Liability Insurance - Works on Public Land**

Any person or contractor undertaking works on public land must take out Public Risk Insurance with a minimum cover of \$20 million in relation to the occupation of, and approved works within Council's road reserve or public land, as approved in this consent. The Policy is to note, and provide protection for Northern Beaches Council, as an interested party and a copy of the Policy must be submitted to Council prior to commencement of the works. The Policy must be valid for the entire period that the works are being undertaken on public land.

Reason: To ensure the community is protected from the cost of any claim for damages arising from works on public land.

**35. Tree removal within the site**

The following existing trees located within the site boundaries are granted approval for removal as recommended in the Arboricultural Impact Assessment prepared by Bluegum Tree Care and Consultancy dated August 2019, based on the assessment of development impact:

- Trees numbered 21, 39, 40, 41, 43, 48, 63, 64, 67, 71, and 72.

**36. Tree removal within the road reserve**

i) the following existing trees located within the road reserve are granted approval for removal as recommended in the Arboricultural Impact Assessment prepared by Bluegum Tree Care and Consultancy dated August 2019, based on the assessment of development impact:

- Trees numbered 13, 14, 15, 16, 19, 73 and 78.

ii) removal of approved tree/s in the road reserve shall only be undertaken by a Council approved tree contractor.

iii) details of currently approved tree contractors can be obtained from Northern Beaches Council's Tree Services section prior to removal.

Reason: Public liability

**37. Installation and Maintenance of Sediment and Erosion Control**

Sediment and erosion controls must be installed in accordance with Landcom's 'Managing Urban Stormwater: Soils and Construction' (2004) and the Construction Methodology prepared by James Soyres + Associates DA-41-44 Revision C, 2/11/2018.

Erosion and sediment controls are to be adequately maintained and monitored at all times, particularly after periods of rain, and shall remain in proper operation until all development

activities have been completed and the site is sufficiently stabilised with vegetation.

Reason: Protection of the receiving environment (DACNED06)

### 38. Compliance with Ecologist's Recommendations – Pre-construction

All pre-construction biodiversity-related measures specified in the approved biodiversity reports/plans (listed below) and these conditions of consent are to be implemented at the appropriate stage of the development.

The approved biodiversity reports/plans including, but not limited to:

- ❑ McCarrs Creek Road Biodiversity Management Plan (Molino Stewart November 2017)
- ❑ Updated Program Version 2 "Table 1 - Program of works" as amended by and attached to Ecological Assessment and Biodiversity Management Plan – Report Addressing Reasons for Refusal - EIA and BMP - 70 McCarrs Creek Rd (Aquila Ecological Surveys 14/08/2019)
- ❑ Marine Habitat Survey (Waterfront Surveys Australia Pty Ltd, 15 November 2017)
- ❑ Ecological Impact Assessment – 70 McCarrs Creek Rd, Church Point, (Molino Stewart, 22 November 2017)
- ❑ Bushland/biodiversity works within the detailed Construction Methodology (stages 1-8) by James de Soyres & Associates Pty Ltd dated 08/07/2019

Compliance with pre-construction measures detailed within the Environmental Management Checklist is to be certified by the project ecologist prior to issue of the Construction Certificate.

**Reason:** To confirm compliance with wildlife and habitat protection/replacement measures in accordance with relevant Natural Environment LEP/DCP controls.

### 39. Construction Environmental Management Checklist Inductions

All workers, including site inspectors and sub-contractors, are to be briefed on measures specified in the Construction Environmental Management Checklist through a site induction presented by the Project Ecologist prior to workers commencing their works.

Evidence of the site induction is to be documented and provided to the Principal Certifying Authority prior to issue any commencement.

**Reason:** To protect native vegetation, wildlife and habitats in accordance with relevant Natural Environment LEP/DCP controls.

### 40. Compliance with Arborist's Recommendations – Pre-construction

All pre-construction tree protection measures specified in Section 6 of the submitted Arboricultural Impact Assessment (Bluegum Tree Care and Consultancy August 2019) and these conditions of consent are to be implemented at the appropriate stage of development in accordance with the Construction Methodology (James de Soyres & Associates Pty Ltd dated 08/07/2019).

In addition to the requirements of above, the Project Arborist must also undertake direct supervision of the following:

- ❑ Tree marking and removal of 8 trees (tree's numbered 19, 39, 40 , 41, 63, 64, 67, 78) to facilitate the development and the removal of 8 trees (trees numbered 13, 15, 16,

21, 43, 48, 71, 73) due to poor structure and health, as shown on Architectural drawings, 1501a DA-09 E – Tree Impact Schematic, by James de Soyres & Associates Pty Ltd dated 08/07/2019

- ❑ Installation of tree protection measures
- ❑ A minimum of weekly inspections throughout construction to monitor tree protection measures (if not required to supervise onsite)

Compliance with pre-construction measures is to be certified by the Project Arborist and details submitted to the Principal Certifying Authority prior to issue of the Construction Certificate.

**Reason:** To confirm compliance with tree protection/replacement measures in accordance with relevant Natural Environment LEP/DCP controls.

**41. Compliance with the Office of Environment and Heritage (OEH) General Terms of Approval**

A s.90 Aboriginal Heritage Impact Permit (AHIP) for Aboriginal archaeological test excavations must be sought and granted, and the test excavations must be undertaken, prior to the commencement of works. The results of this testing must inform recommendations for the appropriate management and mitigation of harm to Aboriginal objects. These options can include (but are not limited to) avoidance of harm and/or salvage excavation where harm cannot be avoided.

Details demonstrating compliance with the requirements of the OEH must be submitted to the Principal Certifying Authority prior to Commencement of Works.

**Reason:** To ensure compliance with the General Terms of Approval issued in relation to the Aboriginal shell midden on the site. (DACPLDPC1)

**CONDITIONS TO BE COMPLIED WITH DURING DEMOLITION AND BUILDING WORK**

**42. Road Reserve**

The public footways and roadways adjacent to the site shall be maintained in a safe condition at all times during the course of the work.

**Reason:** Public Safety.

**43. Civil Works Supervision**

All civil works approved in the Construction Certificate are to be supervised by an appropriately qualified and practising Civil Engineer. Details demonstrating compliance are to be submitted to the Principal Certifying Authority

**Reason:** To ensure compliance of civil works with Council's specification for engineering works.

**44. Traffic Control During Road Works**

Lighting, fencing, traffic control and advanced warning signs shall be provided for the protection of the works and for the safety and convenience of the public and others in accordance with RMS Traffic Control At Work Sites Manual (<http://www.rms.nsw.gov.au/business-industry/partners-suppliers/documents/technical-manuals/tcws-version-4/tcwsv4i2.pdf>) and to the satisfaction of the Principal Certifying Authority. Traffic movement in both directions on public roads, and vehicular access to private properties is to be maintained at all times during the works

Reason: Public Safety

#### 45. Site Fencing

The site must be fenced throughout construction and must comply with WorkCover New South Wales requirements and be a minimum of 1.8m in height.

Reason: To ensure public safety.

#### 46. Structural Adequacy and Excavation Work

Excavation work is to ensure the stability of the soil material of adjoining properties, the protection of adjoining buildings, services, structures, and/or public infrastructure from damage using underpinning, shoring, retaining, walls, and support where required.

All retaining walls are to be structurally adequate for the intended purpose, designed and certified by a Structural Engineer, except where site conditions permit the following:

- a) maximum height of 900mm above or below ground level and at least 900mm from any property boundary, and
- b) comply with AS3700, AS3600 and AS1170 and timber walls with AS1720 and AS1170.

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

Reason: Safety. (DACENEDW2)

#### 47. Tree and vegetation works

a) Existing trees and vegetation shall be retained and protected in accordance with AS4970-2009 Protection of Trees on Development Sites, and the Arboricultural Impact Assessment prepared by Bluegum Tree Care and Consultancy dated August 2019 including:

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

b) Tree protection shall be generally undertaken as follows:

- i) all tree protection shall be in accordance with AS4970-2009 Protection of Trees on Development Sites, including the provision of temporary fencing to protect existing trees within 5 metres of development,
- ii) removal of existing tree roots greater than 25mm is not permitted without consultation with a AQF Level 5 Arborist,
- iii) existing ground levels shall remain under the tree protection zone of trees to be retained, unless authorised by AQF Level 5 Arborist,
- iv) any tree roots exposed during excavation with a diameter greater than 25mm within the tree protection zone must be assessed by an AQF Level 5 Arborist. Details including photographic evidence of works undertaken shall be submitted to the Certifying Authority,



- v) to minimise the impact on trees and vegetation to be retained and protected, no excavated material, building material storage, site facilities, nor landscape materials are to be placed within the canopy dripline of trees and other vegetation required to be retained,
- vi) no tree roots greater than 25mm diameter are to be cut from protected trees unless authorised by a AQF Level 5 Project Arborist on site,
- vii) all structures are to bridge tree roots greater than 25mm diameter unless directed by a AQF Level 5 Arborist on site,
- viii) excavation for stormwater lines and all other utility services is not permitted within the tree protection zone, without consultation with a AQF Level 5 Arborist, including advice on root protection measures,
- ix) should either or all of vi), vii) and viii) occur during site establishment and construction works, a AQF Level 5 Arborist shall provide recommendations for tree protection measures. Details including photographic evidence of works undertaken shall be submitted by the Arborist to the Certifying Authority,
- x) any temporary access to, or location of scaffolding within the tree protection zone of a protected tree or any other tree to be retained during the construction works, is to be undertaken using the protection measures specified in sections 4.5.3 and 4.5.6 of AS 4970-2009,
- xi) tree pruning to enable construction shall not exceed 10% of any tree canopy, and shall be in accordance with AS4373-2009 Pruning of Amenity Trees.

c) All protected trees are to be retained for the life of the development, or for their safe natural life. Trees that die or are removed by approval must be replaced with a locally native canopy tree.

Reason: to retain and protect significant planting on development and adjoining sites.

#### **48. Compliance with Ecologist's Recommendations and Supervision During Construction**

All biodiversity-related measures are to be implemented during construction, as specified in the approved reports/plans (listed below) and these conditions of consent are to be implemented at the appropriate stage of the development.

The approved biodiversity reports/plans including, but not limited to:

- ❑ McCarrs Creek Road Biodiversity Management Plan (Molino Stewart November 2017)
- ❑ Updated Program Version 2 "Table 1 - Program of works" as amended by and attached to Ecological Assessment and Biodiversity Management Plan – Report Addressing Reasons for Refusal - EIA and BMP - 70 McCarrs Creek Rd (Aquila Ecological Surveys 14/08/2019)
- ❑ Marine Habitat Survey (Waterfront Surveys Australia Pty Ltd, 15 November 2017)
- ❑ Ecological Impact Assessment – 70 McCarrs Creek Rd, Church Point, (Molino Stewart, 22 November 2017)
- ❑ Bushland/biodiversity works within the detailed Construction Methodology (stages 1-8) by James de Soyres & Associates Pty Ltd dated 08/07/2019

#### **Supervision of barge activities for construction of sea wall and boat shed**

The Project Ecologist must be physically present onsite to undertake direct supervision of all barge activities (access, egress and mooring) to ensure no impacts to the protected mangroves (including pneumatophores). The water access by barge during construction is only to be scheduled at high tide and is only to be for the construction of the boat shed and sea wall to minimise impacts to the protected mangroves. Sediment and erosion must be minimised at all times.

Compliance during construction with all measures detailed within the Environmental Management Checklist is to be certified by the project ecologist in writing to the Principal Certifying Authority prior to issue of the Occupation Certificate.

**Reason:** To confirm compliance with wildlife and habitat protection/replacement measures in accordance with relevant Natural Environment LEP/DCP controls.

#### 49. Compliance with Arborist's Recommendations – During Construction

All tree protection measures to be implemented during construction, as specified in Section 6 of the submitted Arboricultural Impact Assessment (Bluegum Tree Care and Consultancy August 2019) and these conditions of consent are to be implemented at the appropriate stage of development in accordance with the Construction Methodology (James de Soyres & Associates Pty Ltd dated 08/07/2019).

Compliance with these measures is to be certified by the project arborist in writing, including photographic evidence, and details submitted to the Principal Certifying Authority prior to issue of the Occupation Certificate.

**Reason:** To confirm compliance with tree protection/replacement measures in accordance with relevant Natural Environment LEP/DCP controls.

#### 50. Implementation of Landscape Plan

Landscaping is to be implemented in accordance with the approved Landscape Plans (listed below) and these conditions of consent.

Landscape Plan Package by Trish Dobson Landscape Architecture and dated 12.08.19

- ☐ 1713/DA-L01C – Landscape / Revegetation Site Plan;
- ☐ 1713/DA-L02C – Revegetation Planting Plan;
- ☐ 1713/DA-L03C - Tree Retention Plan;
- ☐ 1713/DA-L04 A – Landscape Management Plan for Bushfire Protection

The new landscaping is to be certified in accordance with approved Landscape Plans and these conditions of consent by a the Project Ecologist prior to issue of the Occupation Certificate.

**Reason:** To ensure landscaping is consistent with relevant Natural Environment LEP/DCP controls.

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

#### 51. Landscape works

Landscaping is to be implemented in accordance with the landscape documents prepared by Trish Dodson Landscape Architecture, drawing numbers DA-L01C, DA-L02C, DA-L03C, and DA-L04A, inclusive of the following requirements:

- i) all tree planting shall be planted within the site at a minimum 75 litre container size,
- ii) all *Livistona australis* shall be planted within the site at a minimum 500mm container size as scheduled,
- iii) tree planting shall be positioned in locations to minimise significant impacts on neighbours in terms of blocking winter sunlight, or where the proposed tree locations may otherwise be positioned to minimise any significant loss of views,

Prior to the issue of an Occupation Certificate, a landscape report prepared by a landscape architect or landscape designer shall be submitted to the Certifying Authority, certifying that the landscape works have been completed in accordance with the approved plan and inclusive of any conditions of consent.

Reason: to ensure that the landscape treatments are installed to provide landscape amenity and soften the built form.

**52. Condition of retained vegetation**

Prior to the issue of an Occupation Certificate, a report prepared by an Arborist with AQZ Level 5 qualifications in arboriculture/horticulture shall be submitted to the Certifying Authority, assessing the health and impact on all existing trees required to be retained on site and on adjoining properties, as a result of the proposed development, including the following information:

- i) compliance to any Arborist recommendations for tree protection and excavation works.
- ii) extent of damage sustained by vegetation as a result of the construction works.
- iii) any subsequent remedial works required to ensure the long term retention of the vegetation.

Reason: to retain and protect significant planting on development sites.

**53. Authorisation of Legal Documentation Required for Structures on Road Reserve**

The original completed Covenant forms from Land Registry Services NSW must be submitted to Council, with a copy of the Works-as-Executed plan and Compliance Certificate issued by an Accredited Certifier in Civil Works. Details demonstrating compliance are to be submitted to the Principal Certifying Authority prior to the issue of a final Occupation Certificate.

Reason: To create encumbrances on the land.

**54. Registration of Encumbrances for Structures on the Road Reserve**

A copy of the certificate of title demonstrating the creation of the Positive Covenant for shared driveway and associated structures is to be submitted for each of the affected properties. Details demonstrating compliance are to be submitted to the Principal Certifying Authority prior to the issue of a final Occupation Certificate.

Reason: To identify encumbrances on land.

**55. Covenant for Maintenance of Structures on Public Land**

A Positive Covenant, as approved by Council, is to be created on the property title to ensure the on-going maintenance, repair and insurance together with the cost sharing arrangements of the shared driveway and associated structure. The property owner benefiting from the driveway structure are to enter into an Instrument with Council in respect of these structures. The Instrument is to be prepared by the owners and accompanied by a survey plan accurately locating these structures. The Instrument is to detail the obligation of the registered proprietors.

Northern Beaches Council shall be nominated in the Instrument as the only party authorised to release, vary or modify the instrument, and endorsed Northern Beaches Council's delegate shall be affixed to these documents, prior to submission to the NSW Land Registry.

Evidence of the registration of the Instrument referred to in this condition is to be provided to Council. Details demonstrating compliance are to be submitted to Principle Certifying Authority prior to issue of any final Occupation Certificate.

Reason: To ensure pedestrian and public safety and ensure that structures located on public land for private benefit are maintained to an acceptable standard.

**56. Certification of Structures Located Adjacent to Council Pipeline or Council Easement**

All structures are to be located clear of any Council pipeline or easement. Footings of any structure adjacent to an easement or pipeline are to be designed in accordance with Council's Water Management Policy; (in particular Section 6 - Building Over or Adjacent to Constructed Council Drainage Systems and Easements Technical Specification). Any proposed landscaping within a Council easement or over a drainage system is to consist of ground cover or turf only (no trees are permitted) - Structural details prepared by a suitably qualified Civil Engineer demonstrating compliance are to be submitted to the Certifying Authority for approval prior to the issue of the Construction Certificate.

Reason: Protection of Council's Infrastructure

**57. Geotechnical Certification Recommendations have been Implemented**

Prior to issue of the Occupation Certificate, Form 3 of the Geotechnical Risk Management Policy (Appendix 5 of P21 DCP) is to be completed and submitted to the Accredited Certifier.

Reason: To ensure geotechnical risk is mitigated appropriately.

**58. Geotechnical Assurance Maintenance and Inspection Program**

A Geotechnical Assurance Maintenance And Inspection Program in accordance with recommendations of the Crozier Geotechnical Report dated 3 December 2018 (Appendix 3: Table C) must be submitted with a copy provided to Council. Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of a Final Occupation Certificate.

Reason: To ensure the design life of the property can be attained.

**59. Post-Construction Dilapidation Survey**

A post-construction Dilapidation Survey of Council's Stormwater Assets is to be prepared by a suitably qualified person in accordance with Council's Guidelines for Preparing a Dilapidation Survey of Council Stormwater Asset in order to determine if the asset has been damaged by the works. Council's Guidelines are available at



<https://files.northernbeaches.nsw.gov.au/sites/default/files/documents/general-information/engineering-specifications/2009084729guidelineforpreparingadilapidationsurveyofcouncilstormwaterasset>

The post construction dilapidation report must be submitted to the Council for review and the Principal Certifying Authority prior to the issue of the Occupation Certificate. Any damaged to Council's stormwater infrastructure is to be rectified in accordance with Council's technical specifications prior to the release of the security bond.

Reason: Protection of Council's Infrastructure

**60. Certification of Structures on Council Roadway and Works as Executed Data**

A C7 Accredited Certifier of the Building Professionals Board shall certify that the completed works have been constructed in accordance with this consent and the approved Construction Certificate plans. Works as Executed data certified by a registered surveyor prepared in accordance with Council's 'Guideline for preparing Works as Executed data for Council Stormwater Assets' and overdrawn in red on a copy of the approved plans shall be submitted to the Council for approval prior to the issue of the Occupation Certificate - Details demonstrating compliance are to be submitted to the Principal Certifying Authority prior to the issue of the Occupation Certificate

Reason: To ensure compliance of drainage works with Council's specification for engineering works and safety.

**61. Compliance with Ecologist's Recommendations – Post Construction**

All biodiversity-related measures are to be implemented at the appropriate stage of development, as specified in the approved biodiversity reports/plans including, but not limited to:

- ❑ McCarrs Creek Road Biodiversity Management Plan (Molino Stewart November 2017)
- ❑ Updated Program Version 2 "Table 1 - Program of works" as amended by and attached to Ecological Assessment and Biodiversity Management Plan – Report Addressing Reasons for Refusal - EIA and BMP - 70 McCarrs Creek Rd (Aquila Ecological Surveys 14/08/2019)
- ❑ Marine Habitat Survey (Waterfront Surveys Australia Pty Ltd, 15 November 2017)
- ❑ Ecological Impact Assessment – 70 McCarrs Creek Rd, Church Point, (Molino Stewart, 22 November 2017)
- ❑ Bushland/biodiversity works within the detailed Construction Methodology (stages 1-8) by James de Soyres & Associates Pty Ltd dated 08/07/2019

Satisfactory establishment/initiation of post-construction measures detailed within the Environmental Management Checklist is to be certified by the Project Ecologist prior to issue of any Occupation Certificate.

**Reason:** To confirm compliance with wildlife and habitat protection/replacement measures in accordance with relevant Natural Environment LEP/DCP controls.

**62. Stormwater discharge outlet and creek stabilisation**

An appropriately qualified engineer must certify that appropriate stabilisation of the stormwater outlet and creek banks on both sides of the creek near the stormwater discharge

outlet has been installed to prevent future scour and erosion.

Details demonstrating compliance must be submitted to the Principal Certifying Authority prior to the release of the Occupation Certificate.

Reason: To protect the surrounding creek bank from the effects of localised erosion.  
(DACNEFPOC1)

### 63. Certification of Landscape Plan

Landscaping is to be implemented in accordance with the approved Landscape Plans (listed below) and these conditions of consent.

Landscape Plan Package by Trish Dobson Landscape Architecture and dated 12.08.19

- ☐ 1713/DA-L01C – Landscape / Revegetation Site Plan;
- ☐ 1713/DA-L02C – Revegetation Planting Plan;
- ☐ 1713/DA-L03C - Tree Retention Plan;
- ☐ 1713/DA-L04 A – Landscape Management Plan for Bushfire Protection

The new landscaping is to be certified as complete and in accordance with approved Landscape Plans and these conditions of consent by the Project Ecologist prior to issue of any Occupation Certificate.

**Reason:** To ensure landscaping is consistent with relevant Natural Environment LEP/DCP controls.

### 64. Compliance with Arborist's Recommendations – During and Post-construction

All tree protection measures to be implemented, as specified in Section 6 of the submitted Arboricultural Impact Assessment (Bluegum Tree Care and Consultancy August 2019) and these conditions of consent are to be implemented at the appropriate stage of development in accordance with the Construction Methodology (James de Soyres & Associates Pty Ltd dated 08/07/2019).

Completion of arborist requirements and satisfactory establishment/initiation of post-construction measures is to be certified by the consulting arborist and details submitted to the Principal Certifying Authority prior to issue of the Occupation Certificate.

**Reason:** To confirm compliance with tree protection/replacement measures in accordance with relevant Natural Environment LEP/DCP controls.

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

### 65. Landscape maintenance

Any existing landscaping including trees required to be retained together with any additional landscaping required by this Consent is to be maintained for the life of the development.

A 12 month establishment period shall apply for all new landscaping. If any landscape materials/components or planting under this consent fails, they are to be replaced with similar materials/components. All planting must be maintained for the life of the development, or for their safe useful life expectancy. Planting that may die or is approved for removal must be replaced.

Reason: to maintain local environmental amenity and ensure landscaping continues to soften the built form.

**66. Environmental and priority weed control**

All weeds are to be removed and controlled in accordance with the NSW Biosecurity Act 2015.

Reason: preservation of environmental amenity.

**67. Control of Weeds**

Prior to the completion of works, all priority weeds (as listed under the Biosecurity Act 2015) are to be removed/controlled within the subject site using an appropriately registered control method. Information on weeds of the Northern Beaches can be found at the NSW WeedWise website (<http://weeds.dpi.nsw.gov.au/>). All environmental weeds are to be removed and controlled. Refer to Council website [http://www.pittwater.nsw.gov.au/environment/noxious\\_weeds](http://www.pittwater.nsw.gov.au/environment/noxious_weeds)

Reason: Weed management.

**68. Maintenance of Stormwater Quality System**

The stormwater filter pit and filtration device detailed on Stormwater Detail Plan 11149-C1.01-B must be retained in perpetuity and maintained according to the manufacturer's specifications and as necessary to achieve the required stormwater quality targets for the development.

Reason: Protection of the receiving environment (DACNEGOG1)

**69. Retention of Natural Features**

All natural landscape features, including natural rock outcrops, natural vegetation, soil and watercourses, are to remain undisturbed except where affected by necessary works detailed on approved plans.

Reason: To ensure the retention of natural features.

**70. Tree Retention**

In accordance with Pittwater 21 DCP Control B4.22 Protection of Trees and Bushland Vegetation, all existing trees as indicated in the Architectural drawings, 1501a DA-09 E – Tree Impact Schematic, by James de Soyres & Associates Pty Ltd dated 08/07/2019 shall be retained except where Council's prior written consent has been obtained, for trees that stand within the envelope of approved development areas and removal is approved through an arborist report. For all other tree issues not related to a development application, applications must be made to Council's Tree Management Officers.

Reason: To ensure the retention of the Urban Forest/Natural Environment.

**71. No Planting Environmental Weeds**

No environmental weeds are to be planted on the site. Information on weeds of the Northern Beaches can be found at the NSW WeedWise website (<http://weeds.dpi.nsw.gov.au/>).

Reason: Weed management.

**72. Works to cease if item found**

If any Aboriginal Engravings or Relics are unearthed all work is to cease immediately and the Aboriginal Heritage Office (AHO) and Office of Environment and Heritage (OEH) are to be notified.

**Reason:** To protect Aboriginal Heritage.

**73. Dead or Injured Wildlife**

If construction activity associated with this development results in injury or death of a native mammal, bird, reptile or amphibian, a registered wildlife rescue and rehabilitation organisation must be contacted for advice.

**Reason:** To mitigate potential impacts to native wildlife resulting from construction activity.

**74. Control of Domestic Animals**

Domestic pet animals are to be kept from entering wildlife habitat areas at all times. Dogs and cats are to be kept in an enclosed area or on a leash such that they cannot enter areas of bushland or foreshore, unrestrained, on the site or on surrounding properties or reserves. Ferrets and rabbits are to be kept in a locked hutch/run at all times.

**Reason:** Wildlife protection

**75. Boat Shed to be used for Boat Storage, No Habitable Areas**

The boat shed cannot be used for any other purpose than the storage of small boats and/or boating equipment. The incorporation any internal kitchen facilities, habitable rooms, shower or toilet facilities shall not be permitted.

To ensure the boat shed is not used for any purpose other than boat equipment storage.  
(DACPLGOG1)

**76. Restrictions to external artificial night lighting**

Artificial night light is known to disrupt foraging nocturnal fauna, especially threatened microbat species found within the locality.

The following external artificial night light restrictions are to be adhered to for the life of the development:

- ❑ No external artificial night lighting is permitted south-west of the main dwelling, i.e. no artificial night lighting on/surrounding the boat shed or within vegetation.
- ❑ All external artificial night lighting installed on the south-western and south-eastern is to be directed away from surrounding vegetation to avoid light spillage into these habitat areas.
- ❑ Where possible, install motion sensors for external artificial lighting to reduce impacts to wildlife.

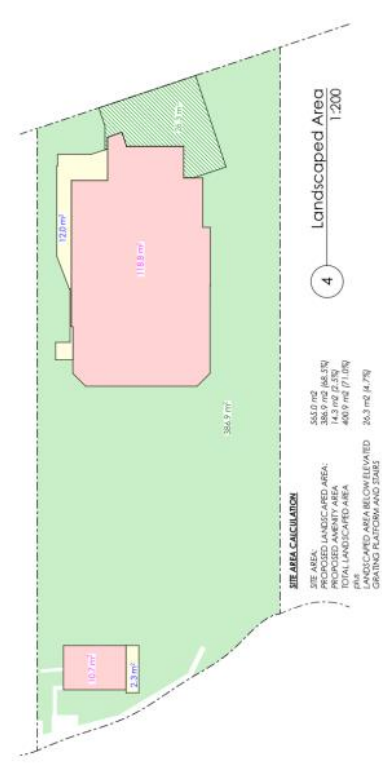
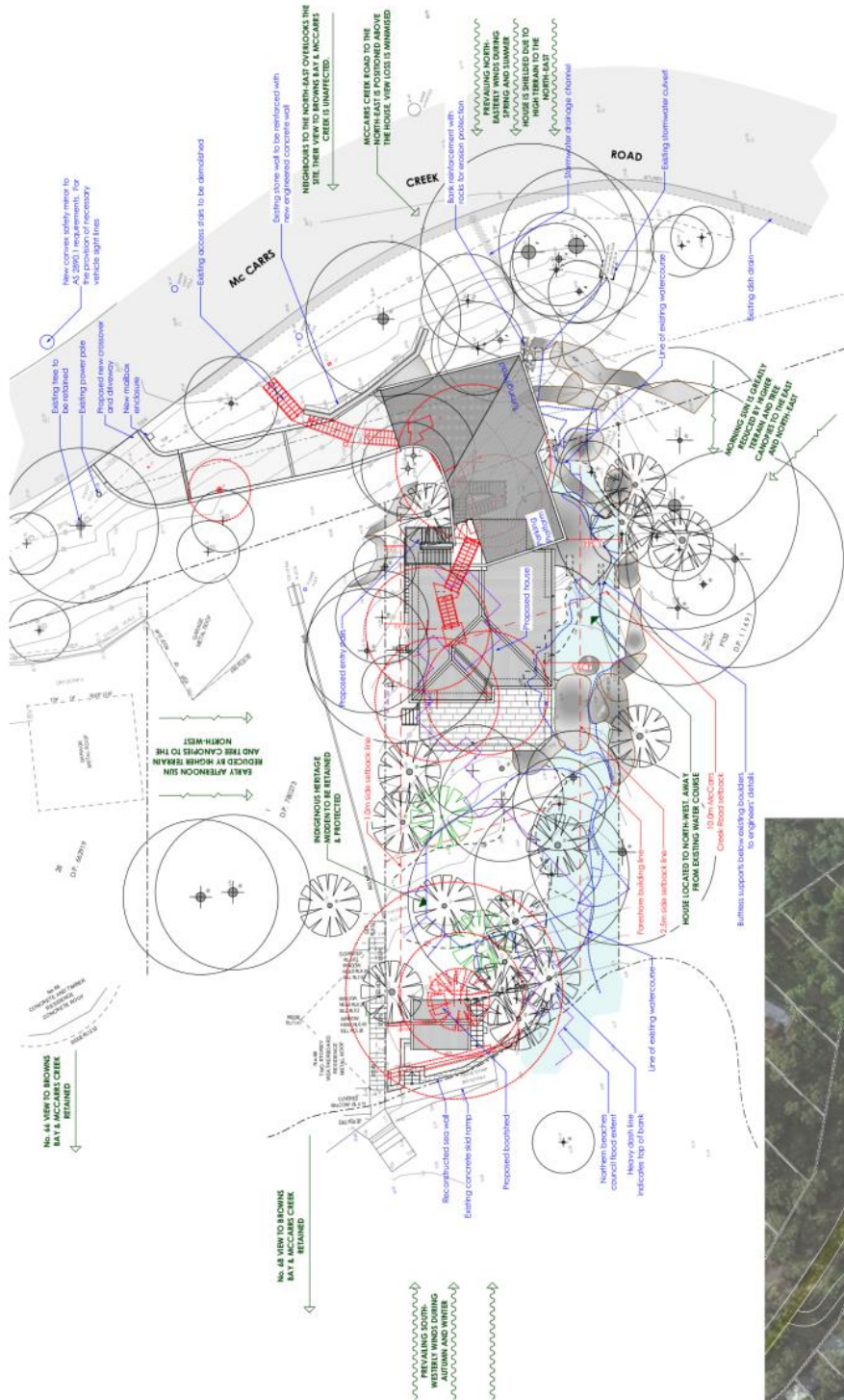
**Reason:** To protect native vegetation and wildlife in accordance with relevant Natural Environment LEP/DCP controls. (DACPLGOG2)



**FOR DEVELOPMENT PURPOSES  
APPLICATION PURPOSES  
ONLY  
NOT FOR  
CONSTRUCTION**

**CONSTRUCTION LEGEND**

1. All construction to NCC & BAS requirements.
2. All construction to BAS-40 requirements.
3. Construction to BAS-12 requirements where noted.
4. Steel frame with RC wall/retention and R20 insulation.
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**James de Soyres  
+ Associates**

**ARCHITECTS**

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5. Website: www.jamesde-soyres.com.au

6. Application number: NS538/17

7. Application date: 10/01/2017

8. Application time: 10:00 AM

9. Application place: 70 McCarrs Creek Road, Church Point NSW 2105

10. Application for: New Dwelling & Boatshed

11. Application by: 70 McCarrs Creek Road, Church Point NSW 2105

12. Application for: S Skidmore & K Tattenall

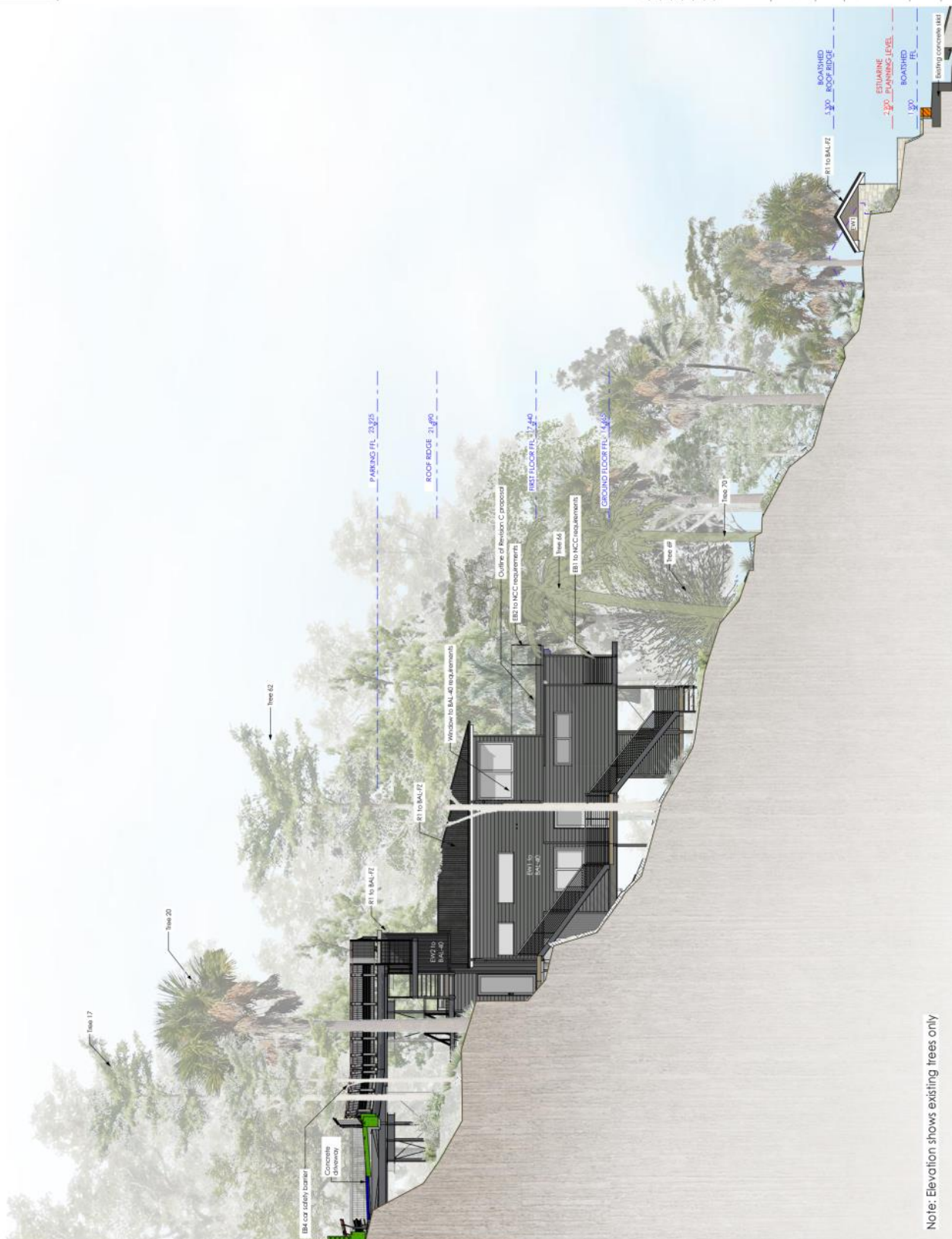
13. Application for: Site Plan, Site Analysis & Landscaped Area Plan

14. Application for: 1:200, 1:100, 08/07/2019

15. Application for: 1501a DA-01 E

FOR DEVELOPMENT  
ONLY  
NOT FOR  
CONSTRUCTION

negativ (b) mit sich selbst in der Hinsicht



Note: Elevation shows existing trees only

26/02/19	Assigned for QA	closed
29/03/19	For Review After Project	closed
02/11/18	Assigned for Section 52 Review	closed
12/09/18	Assigned for a long email msg	closed
05/04/18	Assigned for QA	closed
26/11/17	closed for QA	open

James de Soyres  
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— — — — —

**Notified Architect:** Reg. No. 6789  
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New Dwelling & Boatshed

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Church Point NSW 2105  
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E: [info@skidmore.com.au](mailto:info@skidmore.com.au)  
W: [www.skidmore.com.au](http://www.skidmore.com.au)

North-West Elevation

Index	Date of printing
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3:100 08/07/2019  
Project No: DA-21 E



FOR DEVELOPMENT  
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CONSTRUCTION

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26/02/19	Assigned for QA	Issued
29/03/19	For Review After Project	Issued
02/11/18	Assigned for Section 52 Review	Issued
12/09/18	Assigned for a long meeting	Issued
05/04/18	Assigned for QA	Issued
26/11/17	Issued for QA	Issued

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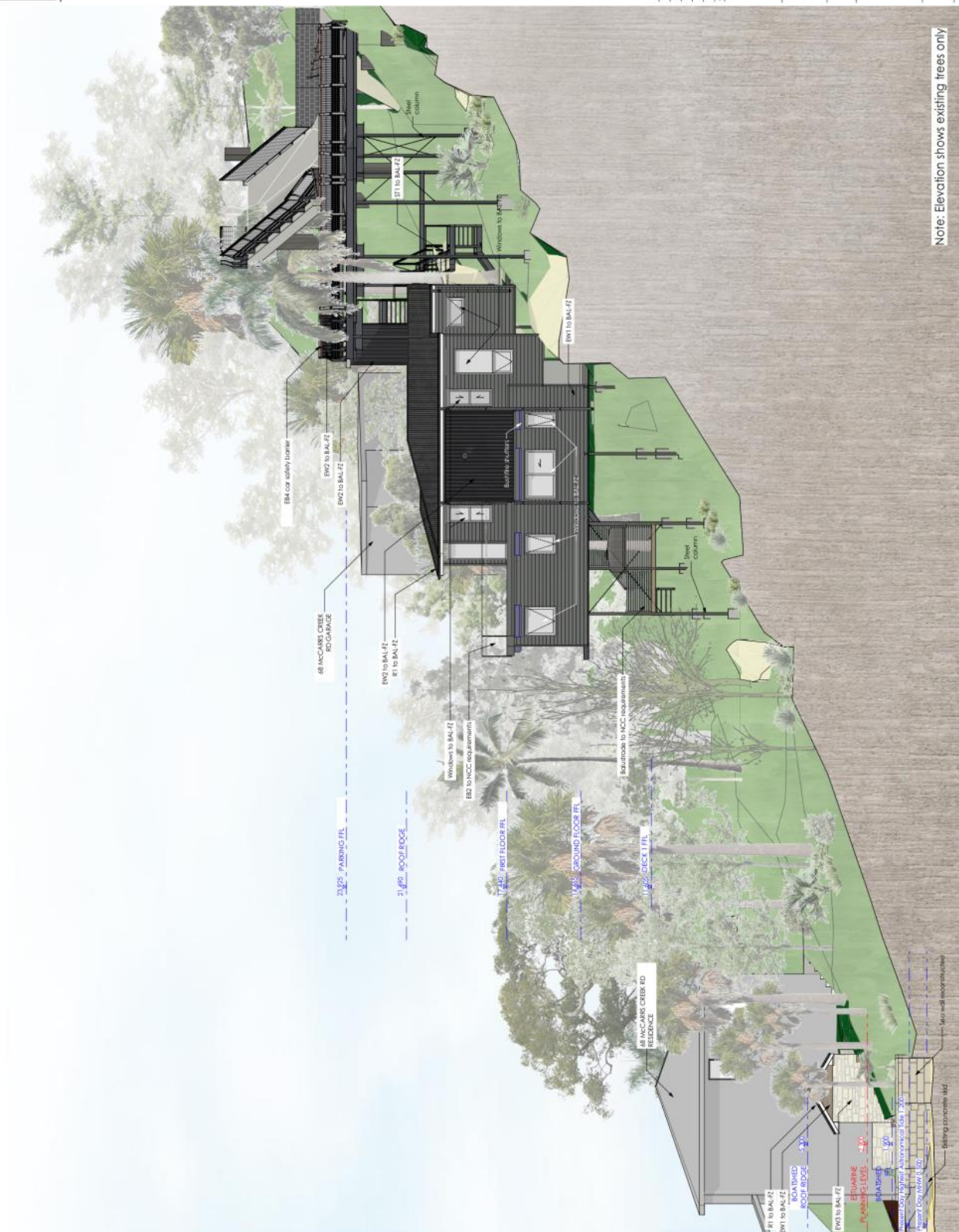
Nominated Architect Reg. No. 6749  
 PO Box 637, Newport Beach, NSW 2106  
 (02) 9979 1823  
[contact@clayco.com.au](mailto:contact@clayco.com.au)

Amended Plans for Review of  
Determined Development  
Application number NQ538/17

70 McCams Creek Road  
Church Point NSW 2105  
Skidmore & K Tattersall

South-East Elevation

Scale:	Date of printing:
3:100	08/07/2019
Project no:	Drawing no:
1501a	DA-22 E





**TOWN PLANNERS**

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ABN 12 061 186 409

13 August 2019

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

Dear Chief Executive Officer

**70 MCCARRS CREEK ROAD CHURCH POINT  
DEVELOPMENT APPLICATION N0538/17 – DIV 8.2 EPAA REVIEW  
PROPOSED ERECTION OF DWELLING HOUSE WITH CARPORT AND  
BOAT SHED TOGETHER WITH REBUILDING OF EXISTING SEA WALL**

**FURTHER REVISED CLAUSE 4.6 PLEP WRITTEN REQUEST**

We act for the owners of No 70 McCarrs Creek Road, Church Point ('the site') in connection with, an application for a review of Council's determination of Development Application N0538/17 (the 'development application') for the erection on the site of a dwelling house with carport and boat shed, together with the rebuilding of the existing sea wall located at the interface of the site and the Pittwater waterway.

A clause 4.6 variation request as regards DA N0538/17, was originally submitted to the Council as part of a development application for a dwelling house and ancillary structures, on or around 17 November 2017. On 6 December 2018 a revised clause 4.6 written variation request made under clause 4.6 of *Pittwater Local Environmental Plan 2014* ('PLEP') was submitted to Council in the context of the abovementioned application for review of Council's determination of the development application by refusal.

This present document is a further revised/redrafted written variation request under clause 4.6 of PLEP in connection with the application for review of the development application and specifically in the context of the current Class 1 appeal filed in the Land and Environment Court.



*Northern Beaches Council – 70 McCarrs Creek Rd Church Point – Further Revised Cl 4.6 Page 2*

This present document takes into account the issues raised, and views expressed inter alia, in:

- the instrument of determination of the development application which was refused on 15 August 2018;
- a pre-lodgement (review) report PLM2018/0247 (meeting date: 18 October 2018);
- various 'without prejudice' communications between the parties and a Without Prejudice meeting held at the Northern Beaches Council Offices on 16 May 2019; and
- a current Class 1 appeal filed in the Land and Environment Court of NSW.

## **1.0 INTRODUCTION**

### **The proposed development**

The development application, which was lodged with Council on 23 November 2017, sought consent from Council, as consent authority, for the erection of a new dwelling house on the site.

In association with the erection of the proposed new dwelling house, the applicant also sought consent to 'disturb'—but, in fact, *protect*—an Aboriginal shell midden, being integrated development under the provisions of s4.46 of the EPAA and s.90 of the *National Parks and Wildlife Act 1974*.

The development application also sought consent for the construction of a seawall, being integrated development under the provisions of s4.46 of the EPAA and s.91 of the *Water Management Act 2000*.

We note that a proposed elevated access driveway and turning bay requires a separate consent under s.138 of the *Roads Act 1993*.

### **Council's determination**

On 15 August 2018, at a meeting of the Northern Beaches Local Planning Panel ('the Panel'), the Panel made a decision to refuse development consent to the development application ('Council's determination').

Insofar as this revised clause 4.6 request is concerned, one of the reasons for refusal of consent of the development application was the height of the proposed development, with the Panel stating:

## **Height**

The proposed development exceeds the 8.5m maximum building height prescribed by clause 4.3 (Height of Buildings) of PLEP 2014 and the request to vary this development standard does not adequately address the matters required by clause 4.6 (Exceptions to development standards) of PLEP 2014.

### Application for review

The applicant has chosen to make an application for review of Council's determination under Division 8.2 of the *Environmental Planning and Assessment Act 1979* (NSW) [the 'EPAA'] (the 'application for review').

The application for review comprises the application itself, amended plans, a supplement to the statement of environmental effects, other reports and documents, and this further revised clause 4.6 request.

### Further amended plans

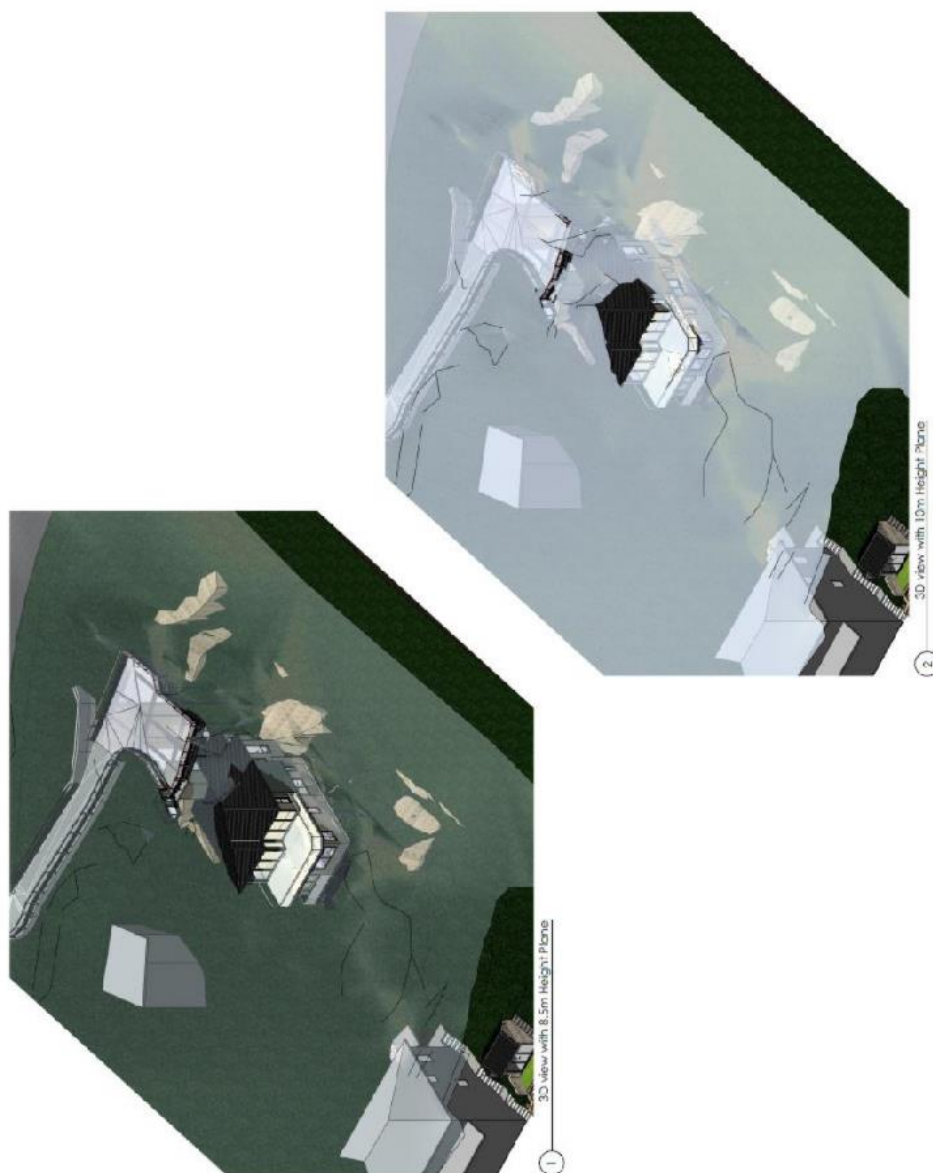
The further amended plans (prepared by James de Soyres, Architects, Project No 1501a, Revision E, dated 8 July 2019) accompanying and forming part of the application for review have made a number of changes as respects the height of the building, which is the subject of this revised clause 4.6 request. Those changes, insofar as they relate to height and related planning issues, are discussed in the body of this document.

The main changes to the proposed dwelling house are that the two main levels have been moved 3.5m further towards the street and raised 3.295m. Insofar as building height is concerned, the maximum height above existing ground level is **12.3m** for the dwelling house itself and **11.5m** for the parking area. (It should be noted that the lift has been moved 165mm closer to the street to locate it further under the parking platform; the reason for so doing is to reduce building height. This notwithstanding the lift marginally exceeds the height control by some 100mm.)

In order to address concerns for there not to be a break in the vegetation/rainforest across the front of the site when viewed from the water, a decision has been made to move the proposed dwelling house further back, that is, closer to the road, in response to a suggestion made by Council. For all intents and purposes, this results in a reduction in the horizontal footprint of the development, with a consequential increase in height over that originally proposed.

Set out below is a 3D view of structures more than 8.5m/10m above EGL. The plan is Drawing No DA-25 prepared by James de Soyres, Architects (Project No 1501a, Revision E, dated 8 July 2019). The first image on the drawing is a 3D view with the 8.5m height plane. The second image on the drawing is a 3D view with the 10m height plane.

FOR DEVELOPMENT  
ONLY  
NOT FOR  
CONSTRUCTION

[illegible]

Drawing No DA-25 prepared by James de Soyres, Architects (Project No 1501a, Revision E, 8 July 2019). Copyright © James de Soyres. All rights reserved.

### Status and purpose of this present document

As mentioned at the outset of this document, this present document is a further revised written variation request submitted under clause 4.6 of PLEP in connection with the application for review of the development application and specifically in the context of the current Class 1 appeal filed in the Land and Environment Court. The document takes into account the issues raised, and views expressed, in the instrument of determination of the development application, the pre-lodgement report PLM2018/0247 (meeting date: 18 October 2018), and various 'without prejudice' communications and a meeting between the parties as regards the current Class 1 appeal.

The various matters raised by the Council officer who wrote the original assessment report, to the extent to which they are relevant to the amended plans in light of the development standard the subject of this request, are discussed in the body of this present document.

The essential purpose of this clause 4.6 request is to comprehensively address the matters required to be addressed by clause 4.6 of PLEP and to demonstrate that there would be no unreasonable impacts caused by the exceedance of the height of building development standard. In that regard, we submit, for the reasons and on the grounds set out in this document, that this written request justifies the contravention of the standard by demonstrating, firstly, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard.

Additionally, the proposed development will be in the public interest because it is consistent with such of the objectives of the standard as are of relevance to the subject-matter of the development application and the objectives for development within the E4 Environmental Living zone (PLEP) in which the development is proposed to be carried out.

## **2.0 REQUEST TO VARY A DEVELOPMENT STANDARD**

This variation request under clause 4.6 of PLEP has been prepared by Turnbull Planning International Pty Limited on behalf of the client.

The development standard sought to be varied is the height of buildings control contained in, relevantly, clause 4.3(2D) of PLEP, *read in conjunction* with the other provisions of that clause including but not limited to subclauses (1) and (2).

The present document is in support of the application for review and is to be read in conjunction with both:



- the statement of environmental effects ('SEE') prepared by our firm, dated November 2017, and submitted to Council in support of, and to inform, the development application; and
- the supplement to the SEE prepared as part of the application for review.

To the extent, if any, that there is an inconsistency between the SEE and the supplement to the SEE, the latter prevails.

The SEE deals with the impacts of the development proposal in detail, indicates measures to mitigate those impacts, and provides full details relating to the relevantly applicable statutory planning regime and compliance with the relevant planning controls and objectives. The supplement to the SEE is primarily intended to address the stated reason for refusal of consent to the development application as well as the issues and matters referred to in the pre-lodgement report PLM2018/0247.

This variation request made under clause 4.6 of PLEP has been prepared in light of the stated reason for refusal of consent to the development application as well as all communications received from Council including but not limited to Council's pre-lodgement report PLM2018/0247.

Clause 4.6 of PLEP allows Council to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- that the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

The consent authority's satisfaction as to those matters must be informed by the objective of providing flexibility in the application of the relevant control to achieve better outcomes for and from the development in question.

The Land and Environment Court of New South Wales has provided judicial interpretation and clarification of the matters to be addressed in relation to variations to developments standards lodged under State *Environmental Planning Policy 1 – Development Standards* ('SEPP 1') through the judgment of Lloyd J in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89 ('*Winten*'). The *Winten* test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 ('*Wehbe*'). These tests and considerations can also be applied to the assessment of variations under clause 4.6 of the LEP and other standard LEP instruments. Accordingly, this clause 4.6 variation request is set out using the relevant principles established by the Court.

More recently, the NSW Court of Appeal in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 has had some very important things to say about the use and construction of clause 4.6. That case, and some others, are discussed in section 5.2 of this document.

We observe that many written requests considered by the Court over recent years appear to have failed because the environmental planning grounds provided in the written request are unrelated to the subject matter, scope and purpose of the EPAA.

Written requests that do not:

- address the specific provisions of clause 4.6 of the relevant plan;
- address each of the objectives of the relevant standard; and/or
- include well-articulated reasons to justify the non-compliance

are more than likely, not to be upheld by the consent authority, with the consequence that the development application must and will be refused.

### **3.0 DEVELOPMENT STANDARD TO BE VARIED**

Clause 4.3 ('Height of buildings') of PLEP controls the height of buildings.

The site is within Area 1 as shown on, relevantly, PLEP *Height of Buildings Map – Sheet HOB\_017*. Area 1 provides for what is *ordinarily* a maximum building height of 8.5m pursuant to clause 4.3(2) of PLEP.

However, despite clause 4.3(2), development on land that has a maximum building height of 8.5m shown for that land on the Height of Buildings Map

may exceed a height of 8.5m, but not be more than 10.0 metres, if (refer clause 4.3(2D)):

- (a) the consent authority is satisfied that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, and
- (b) the objectives of this clause are achieved, and
- (c) the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and
- (d) the buildings are sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.

Thus, provided all of the requirements of clause 4.3(2D) are satisfied – in that regard, see below – the relevantly applicable *maximum* height of buildings control is 10.0 metres, being the control which, subject to the successful invocation of clause 4.6, is the relevantly applicable benchmark. As a matter of statutory construction, there cannot be two applicable maximum height of building development standards, despite what appears to have been the approach and opinion of the Council officer who prepared the original assessment report.

Now, in the case of the amended development proposal, the redesign of the dwelling house and removal of an entire floor resulted in the proposed dwelling house structure being at a height largely below 10.0 metres, being the ordinarily applicable height of building standard under clause 4.3(2) of PLEP.

As a result of the meeting held on 16<sup>th</sup> May 2019, further changes to the development have occurred. Insofar as building height is concerned, the maximum height above existing ground level is now proposed to be **approximately 12.3m** for the dwelling house and **11.5m** for the parking area.

For the sake of completeness, it could be argued, wrongly in our view, that there is also another height exceedance as respects the height of the balustrade on the driveway. In our view, that exceedance, to the extent to which it is an exceedance, is **not** an exceedance as respects the height of a *building*. In legal terms, the driveway is a 'work', not a 'building'. The balustrade to the work, is an appendage to that work. If, however, it were to be argued that the balustrade is a 'structure' in and of itself, the legal reality is that it is not a 'structure in the nature of a building': see *Mulcahy v Blue Mountains City Council* (1993) 81 LGERA 302; cf *R v Lowe* (1954) 19 LGR 348. In a 'planning sense' also, we note that the balustrade comprises a safety railing rather than a solid structure that does not significantly contribute to the bulk and scale of the building.

The building exceedances of the 10 metre height control as respects the height of the access lift tower, the roof and the height of one corner of the elevated terrace can only be considered to be minor, on any test of reasonableness, and otherwise acceptable having regard to the matters set out below.

The 'exceedance' as respects the balustrade on the driveway is, in our view, irrelevant as a matter of law and also in planning terms. We will not make mention of it any further.

Now, the Council officer who prepared the original assessment report stated that the height non-compliances with the 8.5m height plane [sic], as respects the development proposal as it then stood, occurred 'in association with the parking platform, the lift shaft, the second floor and the first floor' (p 24) and that, in relation to the first floor roof, 'the non-compliance extends up to 8.4m deep into the building along the ridgeline, with the majority of the roof area, and a reasonable proportion of the floor space above the 8.5m height limit'. With respect, that was a somewhat misleading description of the proposal as it then was, overstating the degree of non-compliance and the areas of non-compliance, with the purported non-compliances being assessed against the purportedly applicable 8.5 height of building standard.

As mentioned above:

- the applicable height control with respect to which compliance would otherwise be sought to be achieved (subject to satisfying the matters referred to in clause 2.3(2d)(a)-(d) as well as the successful invocation of clause 4.6) is 10.0 metres; and
- in the case of the further amended development proposal (the subject of this review application) now submitted, the proposal results the exceedances of approximately 2.3m for the dwelling house and 1.5m for the parking area.

The Council officer who prepared the original assessment report on the development application noted (on p 5 of that report) that a number of submissions had been received in objection to the height of the car parking platform and driveway and the resultant visual impact as seen from across the waterway. The Council officer who prepared the report expressed the view (on p 24) that the proposal was not considered to meet the variation provisions of clause 4.3(2D)(a) and (b) of PLEP. In addition, the Council officer opined that the applicant had not satisfactorily demonstrated that the proposal was consistent with the objectives of the building height development standard (cf clause 4.3(1), PLEP) insofar as, in the officer's view (refer p 25 of the assessment report):

- the height and scale of the development is inconsistent with the desired character of the locality,



- the development has not been designed to sensitively respond to the natural topography of the land, and
- the proposal does not minimise adverse visual impacts on the natural environment.

The Council officer who prepared the original assessment report also opined that the relevantly applicable maximum height of building development standard is 8.5m (cf clause 4.3(2), PLEP), with there being a '10m possible variation prescribed by clause 4.3(2D) of PLEP' (p 25). Regrettably, the council officer appears to have proceeded on the basis that the 8.5m height control is the primary control against which the proposal is to be assessed. In that regard, the officer refers to the '8.5m height limit' (p 24), the 'extent of non-compliance with the 8.5 height plane' (p 24), and 'the maximum building height development standard to be varied is 8.5m' (p 25).

With respect, the Council officer fails to recognise that, when construing a composite statutory provision (eg a section or clause), it is a rule of construction that words must be read in context, that is, in the light of the section or clause as a whole: see *Davies v Western Australia* (1904) 2 CLR 29; *Minister for Lands v Jeremias* (1917) 23 CLR 32 at 332 per Isaacs J (later Isaacs CJ); *Braunack v Goers* (1979) 23 SASR 1 at 16 per White J.

Now, while it is true that the 8.5m height of building standard is the *ordinarily* relevantly applicable standard, where a proposal seeks to rely upon the concession afforded by, relevantly, clause 4.3(2D) of PLEP, then, as a matter of statutory construction, that subclause becomes the relevant development standard, read in the light of the objectives of clause 4.3 as set out in subclause (1).

The Council officer's other concerns referred to above have been taken care of by way of the amended plans submitted herewith.

#### **4.0 IS THE PLANNING CONTROL A DEVELOPMENT STANDARD?**

The expression 'development standards' is defined under section 4(1) of the EPA Act as follows:

**development standards** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

...

(c) the character, location, siting, bulk, scale, shape, size, **height**, density, design or external appearance of a building or work ... [*emphasis added*]

The height of building standard prescribed under clause 4.3(2D) of PLEP is clearly, demonstrably and unambiguously a development standard, being

relevantly a provision of an environmental planning instrument (viz PLEP) in relation to the carrying out of development, being a provision by which a requirement is specified in respect of an aspect of that development, the *aspect* of the development being the 'height' of a building on the land upon which the development is proposed to be carried out.

An essential condition of the definition of development standard is that the requirements specified, or standards fixed in respect of any aspect of the development must be requirements or standards which, *ex hypothesi*, are *external* to the aspect(s) of that development: see *Woollahra Municipal Council v Carr* (1985) 62 LGRA 263 at 269-270 per McHugh JA. That is the case here.

## **5.0 JUSTIFICATION FOR CONTRAVENTION OF THE STANDARD**

Clause 4.6(3) and (4) of PLEP set out the matters to be satisfied as respects any clause 4.6 written request. Those matters will now be considered and discussed, in light of the relevantly applicable case law.

### **5.1 Clause 4.6 of PLEP**

Clause 4.6 of PLEP are as follows:

#### **4.6 Exceptions to development standards**

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

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

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

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

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.

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

- (a) the consent authority is satisfied that:

- (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
  - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
  - (b) the concurrence of the Secretary has been obtained.
- (5) In deciding whether to grant concurrence, the Secretary must consider:
- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
  - (b) the public benefit of maintaining the development standard, and
  - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.
- (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:
- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
  - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.
- Note.** When this Plan was made it did not include all of these zones.
- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following:
- (a) a development standard for complying development,
  - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004* applies or for the land on which such a building is situated,
  - (c) clause 5.4.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the Land and Environment Court and the NSW Court of Appeal in *Wehbe*, *Four2Five* and the other judicial authorities referred to and discussed in this document.

The relevant matters contained in clause 4.6 of PLEP, with respect to the development standard contained in clause 4.3(2D) of PLEP, are each addressed below, in light of the abovementioned Court decisions.

## **5.2 Relevant Case Law on Clause 4.6**

### ***Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248**

This landmark decision of the NSW Court of Appeal was an appeal from a decision of a judge of the NSW Land and Environment Court's decision, the latter having been an appeal from a commissioner of that Court.

The case upheld Commissioner Pearson's original decision in regard to clause 4.6 but the Court of Appeal interpreted the approach taken by the commissioner differently to that of Pain J in the land and Environment Court. In doing so, the decision largely confined Commissioner Pearson's decision to the particular facts of that case and the particular exercise of discretion by the Commissioner.

In the original decision Commissioner Pearson had refused the request to vary the standard, principally on the basis that:

- the claimed additional housing and employment opportunities arising from the proposal were not sufficient environmental planning grounds as required by clause 4.6(3)(b) because they were *not particular to the site*; and
- the obligation on the applicant to demonstrate that *compliance with the standard was unreasonable or unnecessary* had to be fulfilled separately (i.e. in addition to) to the obligation to demonstrate that the proposed was consistency with the objectives of the standard, which Four2Five had failed to do.

Four2Five then appealed the commissioner's decision to a judge of the Land and Environment Court (Pain J), essentially arguing that the commissioner set the bar for a well-founded clause 4.6 variation request too high. However, Pain J dismissed Four2Five's appeal and endorsed the commissioner's approach to clause 4.6.

On the first ground of appeal Pain J held that the commissioner had a broad discretion under clause 4.6(4)(a)(i) and that there was no specific limitation on that discretion. The commissioner was entitled to require the variation request to identify circumstances particular to the site.

On the second ground of appeal, Pain J held that commissioner was correct in requiring the variation request to demonstrate consistency with the objectives of the standard *in addition to* consistency with the objectives of the standard and zone.

The matter then went on appeal to the NSW Court of Appeal.



Firstly, Leeming JA in the Court of Appeal:

- did not agree that the commissioner's decision in *Four2Five* proceeded on the basis that establishing that compliance with a standard is '*unreasonable or unnecessary*' in clause 4.6(3)(a) must necessarily exclude consideration of consistency with the objectives of the development standard and the objectives for development in the zone; and
- considered that Commissioner Pearson's decision was that '*consistency with objectives remained relevant, but not exclusively so*' (at [16]).

Secondly, while Leeming JA found no error in the approach taken by the Commissioner in relation to her dissatisfaction with the environmental planning grounds relied upon, that was a matter for the Commissioner *on the facts of the particular case and not a general principle*. Leeming JA said (at [16]):

It is sufficient to state that no error, and certainly no error of law, is disclosed ... It is clear that the Commissioner approached the question of power posed by subclause [4.6](3)(b) on the basis that merely pointing to the benefits from additional housing and employment opportunities delivered by the development was not sufficient to constitute environmental planning grounds to justify contravening the development standards in this case ...

The case of *Four2Five* makes it clear that the environmental planning grounds advanced in a clause 4.6 written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole. In addition, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter.

We respectfully request and submit that this decision of the Court be considered as regards the present variation request. In this matter, we have provided the Council with compelling and specific reasons particular to the site, that lend support to the variation being agreed to, notwithstanding the departure from the control.

***Moskovich v Waverley Council*** [2016] NSWLEC 1015

In *Moskovich* a commissioner of the Land and Environment Court applied the Court of Appeal's approach in *Four2Five*, apparently confirming a greater flexibility as respects the availability and use of the facility afforded by clause 4.6.

The case concerned an application to demolish two existing residential flat buildings and construct a single residential flat building on a site within zone R3 Medium Density Residential under *Waverley Local Environmental Plan 2012*.

The application sought to vary the floor space ratio ('FSR') applying to the site. Moskovich submitted that compliance with the FSR standard was unreasonable and unnecessary because the design achieved the objectives of the standard and the R3 zone, in a way that addressed the particular circumstances of the site and resulted in a better streetscape and internal and external amenity outcome than a complying development. Moskovich further submitted that there were 'sufficient environmental planning grounds' to justify the contravention because the proposal would replace two aging poorly designed residential flat buildings with a high quality RFB with exceptional internal and external amenity outcomes.

The Court approved the application and in doing so agreed with Moskovich's justification for the FSR variation. Consistent with the decision in *Four2Five* the Court agreed that the public interest test (in cl 4.6(4)(a)(ii)) is different to the 'unreasonable or unnecessary in the circumstances of the case' test (in cl 4.6(3)(a)). The Court said that 'the latter, being more onerous, would require additional considerations such as the matters outlined by Preston CJ in *Wehbe* at [70-76]'. The Court found that additional reasons applied in this case.

In *Moskovich* the Court adopted the high threshold endorsed by the Court in *Four2Five* and found that Moskovich's variation request met that standard.

Given that this current variation request would meet the public interest test in that the built form and presentation of the proposed development will respond sensitively to the natural topography, having been designed to respond to what are demonstrably complex and challenging site constraints and, more importantly, will not dominate the natural environment, being built to a scale that respects the existing bushland, as well as dealing with the 'unreasonable and unnecessary' test, we respectfully submit that the consent authority's support to this request is additionally compelling.

***Randwick City Council v Micaul Holdings Pty Ltd*** [2016] NSWLEC 7

*Micaul* is a decision of the Chief Judge of the Land and Environment Court in an appeal against a decision of Commissioner Morris to uphold a request under clause 4.6 of the *Randwick Local Environmental Plan 2012* to vary development standards relating to the height and floor space ratio of a building.

The council claimed that the commissioner failed to be satisfied about the requirements in clause 4.6(4), or alternatively failed to give adequate reasons. The council also claimed that the commissioner failed to consider a requirement of a development control plan. Essentially, the council argued that the commissioner set the bar too low for the clause 4.6 variation request.

The Court dismissed the appeal and in doing so endorsed the commissioner's approach to clause 4.6. The Court held that the commissioner had set out the correct tests under clause 4.6 and expressly stated in the judgement that she was satisfied the proposal satisfied those tests.

The degree of satisfaction required under clause 4.6(4) was essentially a matter for the commissioner. The Chief Judge observed in his judgement at [39] that clause 4.6(4) of the *Standard Instrument* does not require the consent authority to be satisfied directly that compliance with *each* development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed those matters.

The Court's decision in *Micaul* lessens the force of the Court's earlier judgement in *Four2Five* that a variation request must demonstrate consistency with the objectives of the standard in addition to consistency with the objectives of the standard and zone.

The decision in *Micaul* is an example of administrative discretion at work. The principal circumstances that Commissioner Morris found to justify the variation to height and FSR was the location of the site at the low point of the locality, its proximity to larger RFBs that would not comply with the building height development standard and its flood affectation. Presumably this was not the only site in the locality having those characteristics, and yet the commissioner was satisfied that the variation was justified. This is by no means a criticism of the commissioner's reasons, but an example of how the satisfaction threshold may vary from one decision maker to another.

Turning now to the current variation request, there are certain similarities to *Micaul* as regards local character that apply in the present circumstances, in that the built form of the proposed development is compatible with the height and scale of surrounding and nearby development. The component of the

scheme that constitutes the dwelling house proper, reflects the height and scale of nearby development. The building also steps with the site slope, to the maximum extent possible in the extant circumstances of a radically sloping site.

***Initial Action Pty Ltd v Woollahra Municipal Council*** [2018] NSWLEC 118

In this case Preston CJ discussed at some length and elaborated upon the various tasks involved in making a clause 4.6 written request:

1. The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii): see *Initial Action* at [14].
2. Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see *Initial Action* at [14].
3. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see *Initial Action* at [14].
4. The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold:
  - a. first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (refer cl 4.6(3)(a)); and
  - b. secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (refer cl 4.6(3)(b)).

The written request needs to demonstrate both of these matters. See *Initial Action* at [15].

5. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be 'environmental planning grounds' by their nature.

The adjectival phrase 'environmental planning' is not defined but refers to grounds that relate to the subject matter, scope and purpose of the



*Environmental Planning and Assessment Act 1979* (NSW) (the 'EPAA'), including the objects in section 1.3 of the EPAA.

The environmental planning grounds relied on in the written request under cl 4.6 must be 'sufficient'. There are two respects in which the written request needs to be 'sufficient':

- a. first, the environmental planning grounds advanced in the written request must be sufficient 'to justify contravening the development standard'. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole.
- b. secondly, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter.

See *Initial Action* at [23]-[24].

6. The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). In that regard:
  - a. The consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b).
  - b. The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction.

See *Initial Action* at [25].

7. The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out.

The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii). See *Initial Action* at [26].

8. The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

See *Initial Action* at [27].

The approach of Preston CJ in *Initial Action* has been followed in subsequent Class 1 merit appeals where the question of whether or not a cl 4.6 request should be granted has needed to be determined. It has been endorsed by the decision of the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

In light of what follows (refer specifically to section 5.4 of this document) we respectfully submit that there are environmental planning grounds advanced in this written request that justify the contravention of the development standard and also enable the consent authority to be satisfied under cl 4.6(4)(a)(i) of PLEP that the written request has adequately addressed this matter. The environmental planning grounds advanced in this written request are essentially as follows:

1. The proposed development is consistent with such of the aims of PLEP as are of relevance to the development: see section 5.3.3 of this document. That, in and of itself, constitutes a 'good' environmental planning ground justifying a contravention of the maximum height of buildings development standard contained in clause 4.3(2D) of PLEP.
2. The height breaches above what would be the applicable 10 metres maximum height occur in relation to the lift, the front part of the main roof and a small section of the balcony and terrace area in the south west corner, which are located for the most part, where the slope of the land is at its greatest. In more general terms it is noted that the site is one where there are radical changes in topography over a large area, making it difficult, particularly in the light of other constraints, to locate an appropriate footprint where height above NGL is at its least.
3. The built form will be compatible with the height and scale of surrounding and nearby development.
4. The built form in the location now chosen will facilitate minimisation of overshadowing of neighbouring property.
5. The built form will respond sensitively to the natural topography. In that regard, the proposed development demonstrates overall a better planning outcome within the planning controls through minimising the amount of cut and fill (thus limiting the extent of excavation required as well as ground works, by taking advantage of the sloping site), loss of views, loss of privacy and overshadowing to and from adjoining properties as opposed to circumstances where the development were to 'hug the ground' and step down the site over multiple levels. The development respects the sloping terrain and touches the ground lightly and this design approach leads almost inevitably given the demands of modern housing, to a breach of the height control.
6. In addition, a departure from the height of buildings development standard is acceptable and in the public interest because it will result in the preservation/regeneration of rainforest vegetation, particularly spanning across the width of the property towards the foreshore. The building has been stepped back towards the street to achieve this objective, in concert with the suggestions of the Council planning/biodiversity officers and the applicants consultants. This allows for increased screening vegetation so reducing the impression of bulk and scale when the site is viewed from the water, or on land close to water level.

***Huajun Investments Pty Ltd v City of Canada Bay Council (No 3)***  
[2019] NSWLEC 42

In this Class 1 appeal, in which consent was sought to erect a residential flat building, Moore J was called upon to consider a clause 4.6 written request in circumstances where it was also necessary, as a matter of jurisdictional fact, for the proposed development to satisfy certain other tests in, relevantly, clause 101 of *State Environmental Planning Policy (Infrastructure) 2007*.

In the matter before his Honour, the proposed development failed to satisfy those other jurisdictional tests and also lacked merit for approval on unrelated grounds, quite irrespective of the substance of the clause 4.6 written request. In any event, the written request was found to be deficient as well in that the request did not demonstrate that the proposed development satisfied the first of the objectives for the height of buildings development standard and was therefore to be refused on that basis.

In terms of merit assessment of the proposed development, even if jurisdiction existed to permit merit assessment of the proposed development, the proposed development was unacceptable.

Moore J quoted extensively from the judgment of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118. (See above.)

Now, as respects the present variation request, we are not aware of any statutory matter operating as a jurisdictional test (eg a jurisdictional fact situation) that would prevent the proposed development or that would otherwise operate such that the development would be unable to satisfy the test.

**5.3 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

In *Wehbe* Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a 'closed' class.

While *Wehbe* related to objections made pursuant to SEPP 1, the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 and this was accepted by the Court in the *Four2Five* case.

As the language used in clause 4.6(3)(a) of PLEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.



The five ways (or methods) outlined in *Wehbe* are as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard.
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

It is important to emphasise that *Wehbe* makes it clear that an objection submitted – in this case, the present clause 4.6 written request – does not necessarily need to satisfy all of the tests referred to above. It is a common misconception that all 5 ways or methods must be satisfied. That is not the case at all. One way will suffice.

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary, is the first method, namely, that the objectives of the standard are still achieved notwithstanding non-compliance with the standard. That is the method used in this request.

In accordance with the provisions of clause 4.6 of PLEP and the decision in *Wehbe*, this written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, that there are sufficient environmental planning grounds to justify contravening the development standard, and that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

**5.3.1 The underlying objectives or purposes of the development standard**

Clause 4.3(1) of PLEP is as follows:

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

- (a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,
- (b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,
- (c) to minimise any overshadowing of neighbouring properties,
- (d) to allow for the reasonable sharing of views,
- (e) to encourage buildings that are designed to respond sensitively to the natural topography,
- (f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

Insofar as the specific height of building controls set out in clause 4.3(2D) is concerned, clause 4.3(2D) of PLEP is as follows:

(2D) Despite subclause (2), development on land that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map may exceed a height of 8.5 metres, but not be more than 10.0 metres if:

- (a) the consent authority is satisfied that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, and
- (b) the objectives of this clause are achieved, and
- (c) the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and
- (d) the buildings are sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.

**5.3.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard**

The objectives specified in clause 4.3(1), as well as the matters specified in clause 4.3(2D), of PLEP will be addressed *seriatim*.

**Objective 4.3(1)(a)**

This objective seeks to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality.

**Comment:**

The built form is consistent with the desired character of the locality for the reasons that follow:

The portions of the *building* above the applicable 10 metres maximum height occur in relation to the lift, the roof and part of the front (water side terrace), which are located for the lost part where the slope of the land is at its greatest and where inconsistencies in the natural grading of ground level are found. That does not result in the building itself, by virtue of its height and scale, being inconsistent with the desired character of the locality.

The site now contains an area (or band) between the building footprint and the water where significant planting can occur and where also existing vegetation is able to be preserved. This means that the bulk of the building is able to be better softened when viewed from the water side.

In addition, the height and scale of the development fits the precinct (i.e. other residential built elements). In that regard, and most significantly, the height of the majority of the surrounding dwelling houses is in the order of 10.0 metres or more, having regard to the provisions outlined above for sloping sites.

It is therefore reasonable to assert that the building, by virtue of its height and scale, is consistent with the desired character of the locality.

Objective 4.3(1)(b)

This objective seeks to ensure that buildings are compatible with the height and scale of surrounding and nearby development.

**Comment:**

As mentioned above, the built form is compatible with the height and scale of surrounding and nearby development. The building steps down with the site slope, to the maximum extent possible.

Please refer to our comments above in relation to objective 4.3(1)(a).

Objective 4.3(1)(c)

This objective seeks to minimise any overshadowing of neighbouring properties.

**Comment:**

The built form minimises any overshadowing of neighbouring properties. See, in that regard, the shadow diagrams accompanying the development application.

Objective 4.3(1)(d)

This objective seeks to allow for the reasonable sharing of views.

**Comment:**

The proposal, especially in its redesigned form, will not materially affect the views from any neighbouring properties. The design of the building is such that all existing views from adjoining properties will be maintained.

Objective 4.3(1)(e)

This objective seeks to encourage buildings that are designed to respond sensitively to the natural topography.

**Comment:**

The proposed development has been designed to respond to what are demonstrably complex and challenging site constraints. The design is open, stepped, 'organic' and responds to the natural context in which the site is located, whilst at the same time touching the ground with respect for existing natural features.

More importantly, the proposed development will not dominate the natural environment, being built to a scale that respects the existing bushland. In order to address concerns for there not to be a break in the vegetation/rainforest across the front of the site when viewed from the water, a decision has been made to move the proposed dwelling house further back, that is, closer to the road, in response to a suggestion made by the Council officers. For all intents and purposes, this results in a reduction in the horizontal footprint of the development, with a consequential increase in height.

The theme adopted by the architect and other consultants is 'bush over building', despite the assertions made by the Council officer who wrote the original assessment report and who opined that 'the height of the development appears to be driven by a desire to provide a lift between the parking level and the dwelling and to maximise views over foreshore vegetation, rather than any desire to minimise site disturbance' (p 25 of the original assessment report). Whilst the former part of the statement is true in that the future residents wish to age in place and therefore maximise their access, the desire for a view has been secondary to the desire to retain natural landform and vegetation. The reality is that the applicant has sought to minimise the disturbance of foreshore vegetation and to work with, not against, the natural



topography of the site and its surrounds. Existing landscape features have been retained wherever possible, thus allowing for and accommodating an integrated built form/landscaped setting which responds to the objectives of PDCP.

The proposal reflects the established built form character (somewhat eclectic) of the immediate area where multi-level, variably stepped houses are noted to predominate, due to the steep topography of the land and difficulty with pedestrian and vehicular access. The dwelling house and the access thereto follows the natural fall of the land, thus preserving as far as possible the natural landscape and existing ecological communities.

**Objective 4.3(1)(f)**

This objective seeks to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

**Comment:**

The proposed dwelling house would be set back from its side boundaries in accordance with the planning controls, thus assisting to preserve visual privacy for neighbours. This is assisted through retention of vegetation to the maximum extent possible. See Trees 22, 38, 62 and 65 on Sheet DA 09 of the architectural set.

Setbacks and planting both existing and new, will go a long way towards ensuring that living spaces do not cause external impacts as regards noise and privacy. Bedrooms would be located on the lower level, and away from noise sources from the road, parking areas, living areas and recreation areas, thus assisting in the maintenance of privacy levels for the dwelling itself.

The site is not located in a heritage conservation area nor is there a heritage item on or near the site. The site is not listed in Schedule 5 ('Environmental heritage') to PLEP nor is listed within the NSW Atlas of Aboriginal Places. This notwithstanding, a shell midden is located on the lower slope of the site and is approximately 15 metres in diameter. The midden, which is protected by Part 6 of the *National Parks and Wildlife Act 1974*, consists of oyster, anadara (bi-valves) and tower shells with some animal bones, also being evident. As the construction of the dwelling house and boat shed and the landscaping have some potential to impact upon the midden, an integrated referral pursuant to section 90 of that Act has been made as part of the assessment process.

**The matter specified in clause 4.3(2D)(a)**

The consent authority is to be satisfied (NOTE: that means 'reasonably satisfied', see *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407) that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor. (NOTE. As a matter of statutory construction, the singular includes the plural except where the context of subject-matter otherwise indicates or requires. Thus, the word 'portion' in clause 4.3(2D)(a) of PLEP also means 'portions'.)

**Comment:**

In the case of the amended development proposal, the redesign of the dwelling house results in the structure being at a height generally below 8.5 metres, being the ordinarily applicable height of building standard under clause 4.3(2) of PLEP. The building exceedances of the 10 metre height control (by 0.1, 2.3m and 1.5m, respectively) are considered to be minor, on any test of reasonableness, and otherwise acceptable having regard to the matters discussed in this variation request. In addition, the portions of the building above what would otherwise be the applicable sought-after 10.0 metres maximum height occurs (the corner of the elevated terrace and part of the roof), for the most part, where the slope of the land is at its greatest or where radical irregularities in ground levels occur. The non-compliance has been exacerbated by virtue of the suggestions by the Council in 'pushing' the dwelling further up the site towards the road. The advantage of this is found in the increased area of the band of vegetation between the house and the boatshed.

In terms of the proposed new dwelling house, the *building* exceedances of the height control are a direct result of the significant fall of the land and we ask Council to note the building will be, to a significant extent screened by existing and proposed vegetation.

The expression 'building height' is defined in PLEP as follows:

**building height** (or height of building) means:

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or
- (b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

Now, what is 'minor' is a question of fact and degree. Each case must be considered as regards its own circumstances. However, a test of

reasonableness must be applied as a matter of lawful administrative decision-making.

In the original clause 4.6 written request we referred to paragraph 3 of Circular B1 from the former Department of Planning, in which the Department stated:

As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small ***in others it may be numerically large***, but nevertheless be consistent with the purpose of the standard. *[emphasis added]*

While the words of the Department quoted above might have been, and in our view were, relevant to the numerical departure as respects the proposal the subject of the original clause 4.6 request, the changes in the proposal mean that whilst the non-compliances have increased the passage above is even more significant. In this case the footprint has been moved to allow a great level of 'green screen' from the water and a continuation of a vegetated corridor off site.

In any event, in considering whether the portion of a building above the maximum height is minor, regard must be had, not to the quantum of the numerical departure itself, but to the quantum (i.e. 'portion') of the building above the maximum height and whether that portion is minor. As mentioned above, the portions of the building above what would otherwise be the applicable sought-after 10.0 metres maximum height occur in relation to the height of the access lift tower and the height of the roof of the living room, which are located for the most part where the slope of the land is at its most radical.

In all the circumstances, we respectfully submit that Council can be reasonably satisfied that the portions of the building above the maximum height shown for that land on the Height of Buildings Map are minor (refer 3D modelling in architectural drawing set).

*The matter specified in clause 4.3(2D)(b)*

The objectives of clause 4.3 of PLEP are to be achieved.

**Comment:**

The objectives of clause 4.3 are set out in clause 4.3(1) and have been addressed above. In our respectful submission, all of those objectives are achieved.

*The matter specified in clause 4.3(2D)(c)*

The building footprint is to be situated on a slope that is in excess of 16.7 degrees (that is, 30%).

**Comment:**

The slope of the site in which the building footprint is located exceeds 30%.

*The matter specified in clause 4.3(2D)(d)*

The buildings are to be sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.

**Comment:**

The excavation will be minimal and the building will be erected on piers. Some digging by hand will take place in the location of the Aboriginal midden. The dwelling house will step down the site and respond to its natural context.

**Concluding comments as regards the relevant clause**

In short, the development is consistent with all of the abovementioned objectives of the standard. In addition, the matters that need to be satisfied by virtue of clause 4.3(2D) of PLEP are also satisfied.

The proposed development demonstrates a better planning outcome within the otherwise permissible planning controls, through minimising the amount of cut and fill (thus limiting the extent of excavation required as well as ground works, by taking advantage of the sloping site), loss of views, loss of privacy and overshadowing to and from adjoining properties as opposed to circumstances where the development were to be of a more elongated and 'lower' design.

The so-called carport will be unroofed, such that it would comprise only a 'platform'. In addition, the position of the carport would be at the lowest level possible in consideration of maximum driveway gradients (refer the architectural plans accompanying the application).

In light of the site constraints which are readily discernible to all upon a visual inspection of the site, and the fact that those site constraints make the installation on the site of an inclinor unfeasible (see section 5.4, below), a lift is considered the most viable, indeed the only viable, option.



The suggestion by Council in the original review pre-lodgement report (meeting date: 14 September 2018) to replace the lift with an inclinator has been extensively explored by the applicant and its consultants. An inclinator would result in the removal of a number of significant trees, damage to the ecological community on the site and could have potential ramifications as regards the Aboriginal midden. Furthermore, the excessive slope, particularly at the top portion, restricts the ability to construct an inclinator spanning the length of the site, hence restricting access for the occupants and visitors. The Council officer who wrote the original assessment report asserted that '[n]either a lift or an inclinator is essential to the development' (p 26 of the assessment report). With the greatest respect to the Council officer, that is a matter on which persons could quite reasonably come to different views, given varying accessibility needs of persons, based on age or disability. As mentioned above, the future occupants of the proposed dwelling house wish to 'age in place'. The client's preference for a lift should be respected in our view, provided it can be demonstrated that the installation of a lift will not have untoward impacts and would otherwise be an improvement on any alternative means of moving through the building.

### **5.3.3 Consistency with the aims of PLEP**

Compliance with the height of buildings development standard is also considered to be unreasonable in these circumstances given that the proposed development supports the achievement of a number of the aims of PLEP.

PLEP aims to make local environmental planning provisions for land in Pittwater in accordance with the relevant standard environmental planning instrument under section 33A of the *Environmental Planning and Assessment Act 1979* (NSW): see clause 1.2(1), PLEP.

The particular aims of this Plan are as follows (refer clause 1.2(2), PLEP):

- (a) to promote development in Pittwater that is economically, environmentally and socially sustainable,
- (b) to ensure development is consistent with the desired character of Pittwater's localities,
- (c) to support a range of mixed-use centres that adequately provide for the needs of the Pittwater community,
- (d) to retain and enhance land used for employment purposes that is needed to meet the economic and employment needs of the community both now and in the future,
- (e) to improve access throughout Pittwater, facilitate the use of public transport and encourage walking and cycling,
- (f) to encourage a range of housing in appropriate locations that provides for the needs of the community both now and in the future,
- (g) to protect and enhance Pittwater's natural environment and recreation areas,

- (h) to conserve Pittwater's European and Aboriginal heritage,
- (i) to minimise risks to the community in areas subject to environmental hazards including climate change,
- (j) to protect and promote the health and well-being of current and future residents of Pittwater.

The proposed development will be environmentally sustainable (cf clause 1.2(2)(a)), will be consistent with the desired character of Pittwater's localities (cf clause 1.2(2)(b)), provides housing in an appropriate location (cf clause 1.2(2)(f)), protects Pittwater's natural environment (cf clause 1.2(2)(g)), and protects and conserves Pittwater's Aboriginal heritage (cf clause 1.2(2)(h)).

In our opinion, the proposed development is consistent with such of the aims of the LEP as are of relevance to the development.

#### **5.4 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard**

As Preston CJ pointed out in the *Initial Action* case, the adjectival phrase 'environmental planning' refers to grounds that relate to the subject matter, scope and purpose of the EPAA, including the objects in section 1.3 of the EPAA. The environmental planning grounds relied on in the written request under cl 4.6 must be 'sufficient' to justify contravening the development standard.

The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole.

In addition, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter.

Now, focusing on the aspect or element of the development that contravenes the development standard and why that contravention is justified on environmental planning grounds, we make the following points by way of submission:

1. The proposed development is consistent with such of the aims of PLEP as are of relevance to the development: see section 5.3.3 of this document. That, in and of itself, constitutes a good environmental planning ground justifying a contravention of the maximum height of buildings development standard contained in clause 4.3(2D) of PLEP.

2. The portions of the building above what would be the applicable 10m maximum height occur in relation to the roof and a corner of a terrace (apart from balustrades), which are located for the most part where the slope of the land is at its greatest, but also where the footprint must be located to protect extant vegetation to the maximum possible extent and in term to allow sufficient screening of the development from the water.
3. The built form will be compatible with the height and scale of surrounding and nearby development ie development in the local precinct to the extent to which the precinct has already been developed (refer clause 4.3(1)(b), PLEP).
4. The built form including the roof form being low pitched, will not create significant overshadowing of neighbouring property (refer clause 4.3(1)(c), PLEP). Regard should also be had to the 'rainforest like' nature of the locality in this context.
5. The built form will respond sensitively to the natural topography (refer clause 4.3(1)(e), PLEP). In that regard, the proposed development demonstrates overall a better planning outcome within the otherwise permissible planning controls through minimising the amount of cut and fill (thus limiting the extent of excavation required as well as ground works, by taking advantage of the sloping site), loss of views, loss of privacy and overshadowing to and from adjoining properties as opposed to circumstances where the development hugged the ground and were to step down the site in an elongated fashion (refer clause 4.3(2D)(d), PLEP).
6. In addition, a departure from the height of buildings development standard is acceptable and in the public interest because it will result in the preservation/regeneration of rainforest vegetation, particularly spanning across the width of the property towards the waterfront. In order to address concerns for there not to be a break in the vegetation/rainforest across the front of the site when viewed from the water, a decision has been made to move the proposed dwelling house further back, that is, closer to the road, in response to a suggestion made by Council. For all intents and purposes, this results in a reduction in the horizontal footprint of the development, with a consequential increase in height.

The Council officer who prepared the original assessment report opined that the development proposal was inconsistent with the desired future character of the Church Point and Bayview Locality (p 26, assessment report). Now, the desired future character statement for the Church Point and Bayview Locality identifies the need for future development to be seen in a natural

landscaped setting, with existing and new vegetation integrated into the development.

Further, a balance is to be achieved between maintaining landforms and other features of the natural environment and the development of the land. As far as possible, the locally native tree canopy and vegetation is to be retained and enhanced to assist development to sit well within the natural environment and to enhance existing wildlife corridors. We strongly submit that the proposal, as now presented to Council, is consistent with the desired future character of the Church Point and Bayview Locality. The proposed development will certainly be low-impact and has been designed to respond sensitively to the existing natural topography. The dwelling house will provide occupant amenity without causing significant environmental impacts to neighbours or to the site itself.

In addition, many of the nearby dwelling houses are built with a vertical focus given site constraints in the area and this demonstrates that there are indeed circumstances where compliance is simply not practically possible. Where slope is extreme (as in this case), so is there greater potential for more significant departures from the height control (this is recognised in the PLEP control itself). In saying that, we note that the Council officer who prepared the original assessment report opined that what is required is not consistency with other development but consistency with the desired future character of the locality (refer p 26 of the report). In response, we submit that:

- i. We don't question and have not questioned the importance of consistency with the desired future character of the locality.
- ii. We submit that the proposal is consistent with the desired future character of the locality.
- iii. We have not sought to interpolate or assert the existence of a purported 'test' of consistency with other development.
- iv. Nevertheless, in considering the merits of any development proposal, the extent or degree of consistency with surrounding development is demonstrably a relevant matter for consideration to be weighed in the balance with other relevant matters for consideration pursuant to section 4.15 of the EPAA.

Despite the Council officer's assertion that neither a lift nor an inclinator is necessary, a lift is considered an essential prerequisite to the development. An inclinator is not a viable option because:

- i. an inclinator would result in an associated undesirable increase, in overall built upon area (the site is recognised as being environmentally sensitive). As well as this the height of the inclinator would likely be up to 4.0m above EGL;



- ii. an inclinator would not be able to traverse the entire length and depth of the site, so resulting in limitations on access for disabled persons given that it could not allow access to different internal levels of the building;
- iii. the site is extremely steep and this makes construction of an inclinator difficult and expensive; and
- iv. an inclinator would be much more environmentally intrusive than a lift, having regard to the need to preserve and retain as much of the natural environment of the site as possible and its existing ecology.

For the above reasons, and also having regard to their own personal preferences, the clients have opted for the installation of a lift in the proposed building.

The car parking area has been designed so as to be at the lowest level possible, in consideration of maximum driveway gradients, and will be unroofed such that it comprises only a platform.

The visual impact of the development has been minimised by utilising, so far as possible, open-style structures and in its most recent iteration a wide band of vegetation sitting in front of the building platform.

The SEE demonstrates that the minor non-compliances with the controls (guidelines) in *Pittwater 21 Development Control Plan 2014* ('PDCP')—relevantly, those pertaining to front setback and building envelope—are justifiable and largely unavoidable in light of the difficult site constraints and the need to create an environmentally appropriate and sensitive built form.

In short, we respectfully submit that there would be no practical utility in enforcing strict compliance with the development standard in this particular instance.

The site is a most difficult one, topographically, and every effort has been made to create a responsible and sensitive development in light of those constraints and the natural environment.

In our opinion, all of the above constitute good environmental planning grounds to justify contravening the height of buildings development standard, in this particular instance.

**5.5 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard**

The two aspects of this matter will be addressed *seriatim*.

**5.5.1 Consistency with objectives of the development standard**

Please refer to section 5.3.2 of this document.

**5.5.2 Consistency with objectives of the zone**

The E4 zone objectives under PLEP are as follows (refer land use table, E4 zone, item 1):

- To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.
- To ensure that residential development does not have an adverse effect on those values.
- To provide for residential development of a low density and scale integrated with the landform and landscape.
- To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.

In our opinion, the development proposal is consistent with such of the zone objectives as are relevance to the subject-matter of the proposal.

The objectives will be addressed *seriatim*.

**Objective 1**

The proposed development will be low-impact as it interfaces with the ground and is a light weight structure that has been designed to respond sensitively to the environment. The dwelling house will provide occupant amenity without causing material environmental impacts to neighbours or to the site itself.

The proposal will provide tangible improvements in landscape quality and result in the construction of a dwelling house which will be integrated into the 'E4 locality' and will have its own unique character. In particular it will utilise materials and colours sympathetic to the local environment.

The design of the proposed dwelling house responds to the slope of the land. Amenity to adjoining properties will be maintained and significant view loss will not occur for the future neighbours. The bulk and scale of the dwelling house respects the natural fall of the land and the non-compliance is considered acceptable on the merits for the reasons, and on the grounds, set out above.

As such, the development is consistent with this stated objective.

### Objective 2

The development will not have a material adverse effect on any special ecological, scientific or aesthetic values. The design of the proposed dwelling house responds to the slope of the land and the natural environment.

The landscaping of the site will preserve as many of the existing trees on the site as possible and minimise any impact on the established gardens and native trees that are located on the site in the band towards the waterfront.

Landscaping will be integrated into the building design. The landscaping is located towards the south west of the property, thus softening the built form when viewed from the foreshore. The natural landscaped bushland to be brought into the subject property will ensure that the proposed dwelling house sits within a natural setting and below the tree canopy, thereby reinforcing Pittwater's special treed context.

As such, the development is consistent with this stated objective.

### Objective 3

The development will be of low density and scale, will be integrated with the landform and landscape and has been designed to respond to what are demonstrably difficult constraints.

The design is open and responding to the natural context in which the site is located.

The development will not dominate the natural environment, being built to a scale that respects the existing bushland setting. Existing landscaping has been retained and will allow for and accommodate an integrated landscaped setting.

Privacy, amenity and solar access are provided for within the proposed development, with negligible impact on surrounding residences.

The development is consistent with this stated objective.

### Objective 4

The development will retain and enhance riparian and foreshore vegetation and wildlife corridors. The development application is accompanied by an extensive flora and fauna report and survey which details all options to avoid, minimise and offset impacts of the proposal.

The proposal has been designed to minimise the removal of the listed endangered ecological community and maintain as much native vegetation as possible.

As such, the development is consistent with this stated objective.

### **5.6 Secretaries Concurrence**

It is understood that the Secretaries concurrence under clause 4.6(5) of the LEP has been delegated to the Council.

The following section provides a response to those matters set out in clause 4.6(5) which must be considered by Council under its delegated authority:

#### **Whether contravention of the development standard raises any matter of significance for the State or Regional environmental planning (cf cl 4.6(5)(a))**

This written request under clause 4.6 of the LEP demonstrates that a variation to the height of buildings development standard is acceptable in terms of significance for State and Regional planning matters.

The variance of the development standard will not contravene any overarching State or regional objectives or standards, or have any effect outside the sites immediate area.

#### **The public benefit of maintaining the development standard (cf cl 4.6(5)(b))**

Maintaining strict numerical compliance with the 10.0 metre height of buildings development standard would not, in our opinion, result in any public benefit in this situation.

To maintain, that is, strictly enforce and apply, the standard in this instance would prevent the carrying out of an otherwise well-designed, sympathetic and attractive development which is eminently suited to the site and the Church Point Locality and which would result in an absence of environmental impacts as regards the local precinct.

#### **Any other matters required to be taken into consideration by the Secretary before granting concurrence (cf cl 4.6(5)(c))**

In our opinion, no other matters require consideration by the Secretary.

### **6.0 CONCLUSION**

We respectfully submit that the written request justifies the contravention of the height of buildings development standard contained in clause 4.3(2D) of PLEP, *read in conjunction* with the other provisions of that clause including



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but not limited to subclauses (1) and (2), by demonstrating, firstly, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard.

Further, the written request shows that the proposed development will be in the public interest because it is consistent with such of the objectives of the standard as are of relevance to the subject-matter of the development application and the objectives for development within the E4 Environmental Living zone under the PLEP, in which the development is to be carried out.

Accordingly, we respectfully submit that the written request is well founded as the variation sought allows for the orderly and economic use of the land in an appropriate manner while also allowing for 'a better outcome' in planning terms.

As such, the development application in the form now presented to Council may be approved with the variation as proposed, in accordance with the flexibility allowed under clause 4.6 of PLEP.

On behalf of our client, we respectfully submit that a grant of development consent is eminently appropriate in this instance.

Yours faithfully

**TURNBULL PLANNING INTERNATIONAL PTY LIMITED**



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