

<b>JRPP No</b>	<b>2011SYE034</b>
<b>DA No</b>	<b>DA11/0218</b>
<b>Local Government Area</b>	<b>Sutherland Shire</b>
<b>Proposed Development</b>	<b>Amalgamation of Three Allotments; Demolition of Existing Dwellings &amp; Structures and Removal of Fuel Tanks; and Construction of a Single Dwelling With Pool, Tunnelled Driveway, Access Tunnel to Waterfront, Vehicle Access &amp; Car Parking for Heritage Building and Site Landscaping</b>
<b>Street Address</b>	<b>321, 325 and 327A Woollooware Road, Burraneer (Lot 2 DP 600577, Lot 9A DP 307110 and Lot 2 DP 562829)</b>
<b>Applicant</b>	<b>Innovative Architects</b>
<b>Submissions</b>	<b>Two (2)</b>
<b>Recommendation</b>	<b>Refusal</b>
<b>Report By</b>	<b>Luke Murtas – Planner</b>

## Assessment Report and Recommendation

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### 1.0 EXECUTIVE SUMMARY

#### 1.1 Reason for Report

Pursuant to the requirements of *State Environmental Planning Policy (Major Development)* 2005, this application is referred to the Joint Regional Planning Panel (JRPP) as the development has a capital investment value (CIV) of more than \$10,000,000. The application nominates the CIV of the project as \$11,466,914.

#### 1.2 Proposal

The application is for the amalgamation of three allotments; demolition of existing buildings and structures above the foreshore building line; and construction of a single dwelling with a pool and landscaping at the above property. The proposal also includes a car parking area to service a heritage-listed commercial boatshed located on the waterfront. It is proposed to make use of two (2) existing rights-of-carriageway to access ground level parking, with a separate internal driveway and tunnel to service sub surface parking. A pedestrian access tunnel to the waterfront is also proposed.

#### 1.3 The Site

The subject site comprises a street-to-waterfront lot and two internal waterfront lots (one either side) located off the western side of Woollooware Road, generally midway between Shell Road and Goobarah Road. The land currently contains two detached dwellings, a tennis court and car park. At the northern side of the waterfront edge of the site is a heritage-listed commercial boatshed. Other works exist below the waterfront boundary.

#### 1.4 Issues

The main issues identified are as follows:

- Site access;
- Building floor space, bulk and scale;
- Landscaping;
- Waterfront development; and
- Heritage.

#### 1.5 Conclusion

Following detailed assessment of the proposed development, the application is considered to have merit and would ordinarily be recommended for approval. However, the proposed scheme of vehicular access to and from the site makes use of two (2) existing rights of way to access a lot that is not benefitted by either carriageway. Council is not satisfied that this arrangement is lawful or fair to the neighbouring properties that are burdened by the rights of way and for this reason the application is recommended for refusal.

It is noted that the applicant has attempted to resolve this issue by negotiating with the neighbours. At the time of reporting, however, a satisfactory solution had not been presented to Council.

## 2.0 DESCRIPTION OF PROPOSAL

A development application has been received for a residential development at the above property. The proposal includes:

- Amalgamation of the three (3) allotments (which will make up the subject site).
- Demolition of the existing houses, tennis court and ancillary buildings above the 20m Foreshore Building Line (FBL) that affects the site.
- Decommissioning and removal of fuel tanks and lines that service an existing commercial boatshed.
- Construction of a multi-level, 1304m<sup>2</sup> single dwelling and a swimming pool. These works will be above the FBL, apart from stairs and a section of landscaping.
- Construction of an access tunnel from the dwelling to the waterfront.
- Construction of an above ground car park accessed via existing rights-of-carriageway (RoC) and below ground car parking accessed via a tunnel from Woollooware Road and over existing No. 325 Woollooware Road. The tunnel will be landscaped over so that the eastern (front) half of No. 325 will have the appearance of an extensive landscaped garden.
- Minor works below the foreshore building line, including the construction of an access tunnel, the removal of fuel lines, landscaping and sections of a stairway.
- No works below the Mean High Water Mark



**Figure 1: Indicative Site Plan with developed and landscaped areas shown.**

### **3.0 SITE DESCRIPTION AND LOCALITY**

The subject site comprises three (3) allotments currently known as 321, 325 and 327A Woollooware Road, Burraneer and is located on the western side of Woollooware Road generally mid way between Shell Road and Goobarah Road. The central lot, No. 325, is a street-to-waterfront site with a frontage of 15.7m to Woollooware Road. Nos. 321 and 327A adjoin to the north and south. No.321 is accessed via a RoC over No. 323 and No. 327A is accessed via a RoC over No. 327.

The site has a combined area of 4376m<sup>2</sup> and is approximately 140m deep from the street to the waterfront. The land falls by approximately 19m from east to west. The combined width of the amalgamated site at the waterfront is approximately 45m.

The site currently contains detached dwellings upon Nos. 325 and 327A and a tennis court and car park upon No. 321. Hard-stand customer and staff parking for 'Attwell's Boatshed' (described below) is provided at the upper east section of No. 321 Woollooware Road and this area is accessed via the RoC over No. 323.

There are various structures along the waterfront and these are almost entirely below the Mean High Water Mark (MHWM). A two (2) storey boatshed building exists mostly below No. 321. A boat chandlery business known as 'Attwell's Boatshed' is conducted from this building. "Attwell's Boat Brokerage (boatshed/house)" is identified as a heritage item under Sutherland Shire Local Environmental Plan 2006 (SSLEP 2006). There is a reclamation and 'boathouse' type building mostly below the MHWM of No. 325 and a reclamation and swimming pool below the MHWM of No. 327A.

There are a number of mature and healthy native trees on the site, particularly between the FBL and MHWM.

The immediate surrounds of the site are characterised by low density residential development, predominantly made up of larger one and two storey detached dwellings and ancillary waterfront development such as boat sheds and pontoons. The prevailing pattern of subdivision is of street-to-waterfront lots off Woollooware Road, many of which have been subdivided into two or three lots. Lots without a

street frontage are accessed via rights-of-carriageway. Woollooware Road forms the 'spine' of the Burraneer peninsula, with the land typically falling away from street level down to the waterfront on either side.

The closest non-residential land uses include the Royal Motor Yacht Club, which is located approximately 300m to the north-east of the site at Nos. 228-232 Woollooware Road, and a small group of neighbourhood shops located approximately 1km to the north of the site at Nos.145-149 Woollooware Road. In a regional context, the site is located 1.5km from Cronulla railway station and mall, 3.5km from Sutherland Hospital and 4.5km from the Westfield Miranda shopping centre.



**Figure 2: The site in local context.**



Figure 3: Aerial photograph of site and immediate surrounds.

## 4.0 BACKGROUND

A history of the development proposal is as follows:

- A pre-application discussion (PAD) was held on 11 October 2010 regarding the proposed development. It should be noted that the proposal discussed at the PAD included works to the buildings below the MHWL, including restoration of the heritage-listed boatshed. As a result of the PAD a formal letter of response was issued by Council on 25 October 2010. A full copy of the advice provided to the Applicant is contained within **Appendix A** of this report. The main points contained in this letter are as follows:
  - The proposed vehicular access was not well resolved, appeared to be unnecessarily complex and detracted from landscaped area.
  - The landscaped area was significantly less than required.
  - The floor space ratio (FSR) exceeded the maximum permissible.
  - The building encroached slightly above the permissible height.
  - A merits argument/ SEPP 1 Objection in respect of the landscaping and FSR standards (as the 'sliding scales' in the LEP do not necessarily contemplate lot sizes as large as the subject site) would be considered.
  - The proposed building should be broken into 'pavilions' and streetscape impacts should be analysed.
  - The restoration of the Attwell's boatshed (which is not part of the DA as lodged) was supported and a Conservation Management Plan (CMP) should be submitted.
  - Further detail was sought on the proposed works to the other waterfront structures (which have also been excluded from the DA).
  - The design should be amended to remove encroachments beyond the foreshore building line.
- The current application was submitted on 14 March 2011.
- The application was placed on exhibition, with the last date for public submissions being 21 April 2011. Two (2) submissions were received.

- An Information Session for the public was held on 11 April 2011 and three (3) persons attended.
- Council wrote to the Applicant on 01 April 2011 and requested that the following additional information be provided by 22 April 2011:
  - Long sections and elevations which include the buildings below the MHWL, including the heritage-listed boatshed.
  - Clarification on the extent of decommissioning works required for the fuel lines to the boatshed.
  - Justification for not undertaking any conservation works in respect of the heritage-listed Attwell's Boatshed building.
  - An analysis of the impact of increased vehicular traffic on the rights-of-carriageway which traverse the adjacent properties at 323 and 327 Woollooware Road and details of proposed measures to mitigate identified impacts.
- Amended plans and a response were lodged on 13 April 2011.
- Council wrote to the applicant on 21 April 2011 and requested that the applicant address outstanding issues relating to the use of the rights-of-carriageway. This was in light of Council's position that the rights-of-carriageway could not be 'extended' to provide access to the property at 325 Woollooware Road without the consent of the affected owners and/or some legal amendment to the terms of the two carriageways. In response, the applicant indicated that negotiations with the affected neighbours were underway, with a view to securing redefinition by private agreement.
- At the time of reporting, these negotiations have not been successful and the principle of the proposed scheme of access has not been modified. The applicant provided indicative sketch plans of a number of alternative arrangements for accessing the site. None of these has resolved the fundamental legal issues relating to the use of the rights-of-carriageway.
- On 01 July 2011, the applicant submitted a further revision to the scheme of access and a legal opinion in respect of the rights-of-carriageway (attached as **Appendix B** to this report). At the time of finalising this report, Council has not had sufficient time to assess the merits of this submission. Council will endeavour to have a position on the submission to present to the JRPP. Affected neighbours will also be consulted.

## 5.0 ADEQUACY OF APPLICANT'S SUBMISSION

The Statement of Environmental Effects, plans, SEPP 1 Objections (requesting variations to the FSR and landscaped area development standards) and other documentation submitted with the application, or after a request from Council, enabled a detailed assessment of the proposal to be undertaken.

However, and as mentioned above, with regard to the proposed site access and use of the rights-of-carriageway, the applicant has not provided a satisfactory resolution to Council's concerns at the time of reporting. Specifically, the applicant has not provided evidence that the rights-of-carriageway on the adjoining properties provide a legal right to service the development as proposed.

In addition, despite Council's request, the applicant has not given any consideration to reasonable alternatives such as providing access solely over and within No. 325.

The Applicant's position that conservation works to the heritage-listed boatshed are 'unwarranted' is considered to be unsatisfactory and a significant deficiency of the application. The lack of any proposal for conservation or ongoing maintenance of the building is a significant concern, although this matter could be readily addressed by conditions of consent if the application were to be approved.

Although a relatively minor matter, the application does not clearly set out the extent of decommissioning works required for the fuel lines. This matter could be readily addressed by conditions of consent if the application were to be approved.

## 6.0 PUBLIC PARTICIPATION

The application was advertised in accordance with the provisions of Chapter 12 of Sutherland Shire Development Control Plan 2006 (SSDCP 2006) and Council's policy on extended exhibition for applications to be determined by the JRPP.

Fifteen (15) adjoining or affected owners were notified of the proposal and two (2) submissions were received. Submissions were received from the following properties:

Address	Date of Letter/s	Issues
327 Woollooware Road	18 April 2011	1
323 Woollooware Road	19 April 2011	1 and 2

These are the two properties burdened by the rights-of-carriageway which benefit parts of the subject site. The issues raised in these submissions are as follows:

### 6.1 Issue 1 – Traffic Impacts

*The proposal would increase traffic volumes on either right of carriageway beyond the existing 'terms'. This would lead to amenity, health and safety impacts. Given that the site has access from the street and is relatively large, this would be an unfair imposition on the (smaller) properties burdened by the rights of way.*

Comment: This matter is discussed in detail below in the "Assessment" section of this report.

### 6.2 Issue 2 – Construction Impacts

*Construction activity, particularly the extensive excavation proposed, may cause damage to adjacent properties.*

Comment: For the purposes of excavation and construction it appears that construction site access could be made directly from Woollooware Road, without the need to use the rights-of-carriageway. However, if the rights-of-carriageway were to be used then this matter could be addressed by the imposition of conditions to require a dilapidation report to be undertaken by an Engineer. Any repair work subsequently required would be a matter to be resolved between the private land owners.

## 7.0 STATUTORY CONSIDERATIONS

The subject land is located within Zone 2 – Environmental Housing (Scenic Quality) pursuant to the provisions of Sutherland Shire Local Environmental Plan 2006 (SSLEP 2006). The proposed development, being a dwelling house and ancillary development, is a permissible land use within the zone with development consent from Council.

The following Environmental Planning Instruments (EPI's), Development Control Plans (DCP's), Codes or Policies are relevant to this application:

- State Environmental Planning Policy No. 1 – Development Standards (SEPP 1)
- State Environmental Planning Policy No. 55 – Remediation of Land (SEPP 55)
- State Environmental Planning Policy No. 71 – Coastal Protection (SEPP 71)
- State Environmental Planning Policy (Major Development) 2005 (MD SEPP)
- State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (BASIX SEPP)
- Sutherland Shire Local Environmental Plan 2006 (SSLEP 2006)
- Sutherland Shire Development Control Plan 2006 (SSDCP 2006)

## 8.0 STATEMENT OF COMPLIANCE

The statement of compliance below contains a summary of applicable development standards and controls and a compliance checklist relative to these:

Standard/Control	Required	Proposed	Complies? (% Variation)
<b>Sutherland Shire Local Environmental Plan 2006</b>			
Clause 33(4) – Height	Maximum 2 storeys/ 7.2m to ceiling/ 9m to ridge	2 storeys/ <7.2m to ceiling/ <9m to ridge	Yes Yes Yes
Clause 35(5) – Building Density	Maximum Gross Floor Area (GFA) of 1110.2m <sup>2</sup>	Stated GFA of 1304m <sup>2</sup>	No – at least 17.5% variation (see discussion below)
Clause 36(3) – Landscaped Area	Minimum 2741.2m <sup>2</sup>	2208m <sup>2</sup>	No – 19.5% variation (see discussion below)
Clause 39(2) – Minimum Lot Size and Dimensions	Minimum 700m <sup>2</sup> / 18m width/ 27m depth	4376m <sup>2</sup> 15-45m wide 64-140m deep	Yes No, but existing Yes
Clause 17(7) – Foreshore Building Line (FBL)	No work (with minor exceptions) below 20m FBL	Only stairs and access tunnel below FBL	Yes
Clause 18 Waterway Development	Structures below MHWL removed if unlawful	All waterfront structures retained	No – second boathouse unlawful – to be addressed by conditions
Clause 54 Heritage (Attwell's	Heritage significance	No conservation works to item (Attwell's) and	No – to be addressed by

boatshed on the site and Woollooware Rd at the front of the site are items under LEP)	conserved, including fabric, setting and views	trees removed	conditions
<b>Sutherland Shire Development Control Plan 2006</b>			
Clause 3.2.b.2 – Street Setbacks	7.5m	~70m	Yes
Clause 3.3.b.2 – Side and Rear Setbacks	Minimum 1.5m side/ 6m rear setback	Basement min. 0.3m to sides Above ground min. 3m to side Basement min. 0.8m to rear Above ground min. 14m	Basement does not comply, but acceptable as above ground structures comply and basement does not impact on neighbours.
Clause 3.6.b.3 Landform (cut and fill)	Excavation (or fill) no more than 1m below (or above) ground level. Maximum cut/fill area no more than 60% of building footprint – exceptions for steep sites	Excavation up to 2.5m deep  Cut/fill exceeds 100% of building footprint (due to tunnels)	No, but acceptable on steep site  No, but acceptable on steep site (see discussion below)
Clause 3.6.b.5 Landform (pools)	No point of pool >500mm above existing ground level	Pool up to 3.5m above ground	No, but acceptable as pool is part of building and not readily visible from the public domain
Clause 3.6.b.5 Landform (stairs)	Stairs visible from a waterway maximum 1.2m wide	Stairs up to 6m wide in one section	No, but acceptable as not readily visible from the public domain (screened by Attwell's boatshed)
Clause 3.7.b.2 Open Space	Minimum 6x6m area provided, mostly open to sky	Areas of 10x22m, 20x45m and 35x15m provided	Yes
Clause 3.11.b.1 Streetscape	Building must have a 'street address' and a clearly defined entry	Refer to ARAP commentary	Entry point is clearly defined. Building 'presence' not relevant as set back ~65m from street frontage.
Clause 3.12.b.1 Landscape	Canopy trees of min. 8m mature height provided. Side & rear screen planting of min 3m height provided	Canopy trees up to 20m/  Height of screen planting not shown	Yes  Able to comply subject to condition
Clause 3.14.b.1 Daylight Access	Roofs designed to allow for PV panels At least 10m <sup>2</sup> of private open space	Extensive array of solar panels >500m <sup>2</sup> exposed to >4hrs midwinter sun	Yes  Yes

	to receive 4 hours sunlight between 9am-3pm midwinter/ Must not reduce midwinter sun to neighbours' open space/ living areas by more than $\frac{1}{3}$	No net shadow increase anticipated to southern neighbour	Yes
Clause 3.15.b.1 Views	Impacts minimised by reducing building height, 'stepping', and breaking up building mass	Dwelling complies with height control, steps down and is set into landform	Yes
Clause 3.19.b.2 Fences	Front fences to be no more than 1.5m high, if masonry, set back equal to height	1500mm masonry fence; set back 1500mm from street	Yes
Chapter 4 Natural Resource Management	Waterways and vegetation protected appropriately	See Landscape Architect/Environmental Scientist's advice	Yes, subject to conditions
Clause 7.1.b.3 Car Parking	2 spaces per dwelling  1 space per 30m <sup>2</sup> of 'business premises' floor area (Attwells = ~120m <sup>2</sup> = 4 spaces)	2 resident + 2 visitor provided  5 spaces for Attwells	Exceeds requirement – and areas potentially used for parking labelled "storage" Exceeds requirement - acceptable as replaces existing
Chapter 8 Ecologically Sustainable Development	Development adopts ESD principles, manages waste, groundwater and stormwater effectively	See Engineering/ Environmental Scientist's advice below	Yes, subject to conditions
<b>State Environmental Planning Policy No. 71 – Coastal Protection</b>			
Clause 8 Matters for consideration	See discussion below	Satisfactory, subject to conditions	Yes
Clause 14 Public Access	Development not to impede or diminish public access to foreshore	Semi-public (Attwell's) access maintained and improved	Yes
Clause 15 Effluent Disposal	Effluent disposal not to have a negative impact on water quality	Not specified	Able to comply, subject to conditions
Clause 16 Stormwater	Development must not discharge 'untreated' stormwater into waterway or onto rock platform	Not specified	Able to comply, subject to conditions

## 9.0 SPECIALIST COMMENTS AND EXTERNAL REFERRALS

The application was referred to the following internal and external specialists for assessment and the following comments were received:

### 9.1. Architectural Review Advisory Panel (ARAP)

The proposal was reviewed by Council's ARAP on 14 April 2011. A full copy of the ARAP report is contained within **Appendix C** of this report. The main issues raised by the ARAP include:

- In light of the size and setting of the site, and heritage and access issues, a 'master plan' should have been prepared for the development.
- There are opportunities to improve the proposed landscaping to reinforce the character of the surrounding area and to improve the 'street address' of the development.
- Built form (in terms of height, density and architectural presentation) was considered acceptable, although planted areas and vehicular access could be more sensitively arranged.
- Concern was raised in respect of the definition and function of access points and the amount of excavation proposed. The Panel was '*not convinced the most appropriate solution has been adopted*' in terms of vehicular access and the division of public and private spaces on the site.

In addition, Council's design assessment officer reviewed the proposed development and generally agreed with the ARAP's assessment. The applicant did not respond formally to the ARAP report, although a revised sketch plan for the dwelling entry was submitted. The revised design is considered acceptable.

### 9.2. Engineering

Council's Development Engineer has undertaken an assessment of the application and recommends refusal unless the access issues can be appropriately resolved.

Apart from this specific matter, the Engineer did not raise any other significant objection to the proposal, subject to the imposition of appropriate conditions to address stormwater drainage, excavation methods and lot amalgamation.

### 9.3. Landscape Architect

Council's Landscape Architect inspected the site and reviewed the proposed landscaping scheme. No significant issues were raised. It has been recommended that:

- The species schedule be amended so that local native species are used, and non-endemic species removed in the riparian zone buffer (waterfront).
- The selection of proposed trees have a more open canopy than some of the proposed trees in order to allow for views to the waterway to be maintained without the need for future lopping.
- The existing Tree 19 (a local native - *Angophora Costata*) be retained and existing Trees 8 (an Olive) and 32 (a Cotoneaster) be removed.

#### 9.4. Environmental Scientist

Council's Environmental Scientist inspected the site and reviewed the Preliminary Environmental Site Assessment (PESA) submitted with the proposal in relation to the decommissioning and removal of Attwell's fuel tanks. The Environmental Scientist advised that the proposal was acceptable, subject to:

- The imposition of appropriate conditions in relation to the removal of the fuel tanks and lines (including remediation and validation requirements).
- The imposition of appropriate conditions in relation to sediment and erosion control, including the use of silt curtains within the waterway to minimise impacts on identified seagrass beds in front of the site.

#### 9.5. Heritage Architect

Council's Heritage Planner/Architect has acknowledged the local heritage significance of the Attwell's boatshed building, providing background information on the SSLEP 2006 listing of the building taken from Council's heritage inventory. Based on the inventory and the Heritage Impact Statement supplied with the application, the Heritage Specialist noted that:

- The building is a '*landmark*' of '*unusual construction*' and also a '*rare example of original two storey [and] early twentieth century construction*'.
- The commercial use of the boatshed is an important, '*rare*' aspect of the heritage significance (in addition to the built form itself), providing historic evidence of the boatbuilding industry on the Port Hacking.
- The building and boatshed operation have social significance in terms of links to historic activity along the Port Hacking and to a notable local family.
- The landscaped setting, built form, wall finishes, timber window frames, slipways and painted signage of the building should be conserved.

The Heritage Specialist recommended a condition requiring the submission of a conservation management plan and maintenance schedule for the boatshed building, including a plan for future adaptive reuse of the building, with conservation works to be undertaken to Council's satisfaction. In addition, it is recommended that a tree adjacent to the boatshed, identified as being important to the heritage significance of the building, be retained.

### 10.0 ASSESSMENT

Following a detailed assessment of the application having regard to the Heads of Consideration under Section 79C(1) of the Environmental Planning and Assessment Act 1979, the following matters are considered important to this application:

#### 10.1 Vehicular Access, Traffic and Parking

The application proposes a number of distinct means of vehicular access to and from the site. The first, and least problematic of these, is the 'private' driveway entry for the residence. This is proposed to be by way of a new driveway directly off Woollooware Road that leads via a tunnel to the basement parking levels. The basement levels have direct access to the interior of the proposed dwelling and the driveway tunnel is well integrated into the overall scheme of landscaping for the site. Council does hold any significant concerns in respect of this driveway.

Nos. 321 and 327A Woollooware Road, the two smaller internal waterfront lots that form part of the overall development site, are benefitted by two different rights-of-carriageway over Nos. 323 and 327 Woollooware Road, respectively. The proposed means of 'public' or visitor access to the site is to be achieved by utilising these carriageways.

As submitted, the application proposes access for visitors to the dwelling and Attwell's Boatshed patrons by linking the rights-of-carriageway in a U-shape pattern across No. 325 (the central lot). In addition, the applicant provided a number of sketched alternatives during the assessment period, including an option to provide visitor parking for the dwelling at the western end of the right-of-carriageway over No. 327 and a walled-off parking area generally in place of the existing Attwell's parking accessed by the right-of-carriageway over No. 323.

The issue with the proposed U-shape arrangement is that neither right-of-carriageway benefits the middle lot (No. 325) of the development site. As such, the proposed means of vehicle access to the site (apart from the 'private' driveway) is beyond the legal terms of both rights-of-carriageway. It was suggested at an early stage in the assessment that the applicant must resolve this problem before Council could support the application.

One option available to the owner of the site is to make private arrangements with the owners of the two burdened properties to amend the terms of the rights-of-carriageway so that No. 325 is added as a beneficiary. The applicant advised that the owner made a number of attempts to negotiate and resolve the access issue by dealing directly with the owners of the burdened properties. However, at the time of finalising this report, the owner has not been able to secure the agreement of the neighbouring landowners to redefine either right-of-carriageway.

The owner of the site also has the option of requesting that the Supreme Court create new easements, to service the development, under Section 88K of the *Conveyancing Act 1919* (NSW). Alternatively, Section 89 of that Act allows the Court to modify existing easements. No evidence has been supplied to Council indicating that this option has been explored. There may be difficulties in sustaining a s.88k argument to have rights of way granted given that the amalgamated site does have its own street frontage capable of providing practical access.

It is a matter of concern that the proponent has not given genuine consideration to accessing the development solely over their own land given that the site has direct street access to Woollooware Road via the middle lot (i.e. No. 325). Council requested a number of times that this option be explored. No formal response or explanation as to why this would not be feasible has been received to date.

It is understandable that the landowner purchased the two waterfront lots with the benefit of the rights-of-carriageway attached and would feel entitled to their ongoing use. However, the normal and reasonable purpose of such easements is to provide access over another private property where there is no other practical means of access. This is not the case in the current circumstances and there is a practical alternative.

Regardless of the legal implications of the proposed access, on merits alone it would seem more equitable to the neighbouring properties to provide access solely over and within the subject site, given that it has an area of more than 4300m<sup>2</sup> and a direct street frontage. Extension of access rights over all of the affected properties and the adoption of a one-way movement system would potentially increase the amount of traffic passing the adjoining affected residences compared to the current situation. Access over No. 321 would, however, remain necessary for the commercial operation of Attwells Boatshed whilst ever that business was in operation.

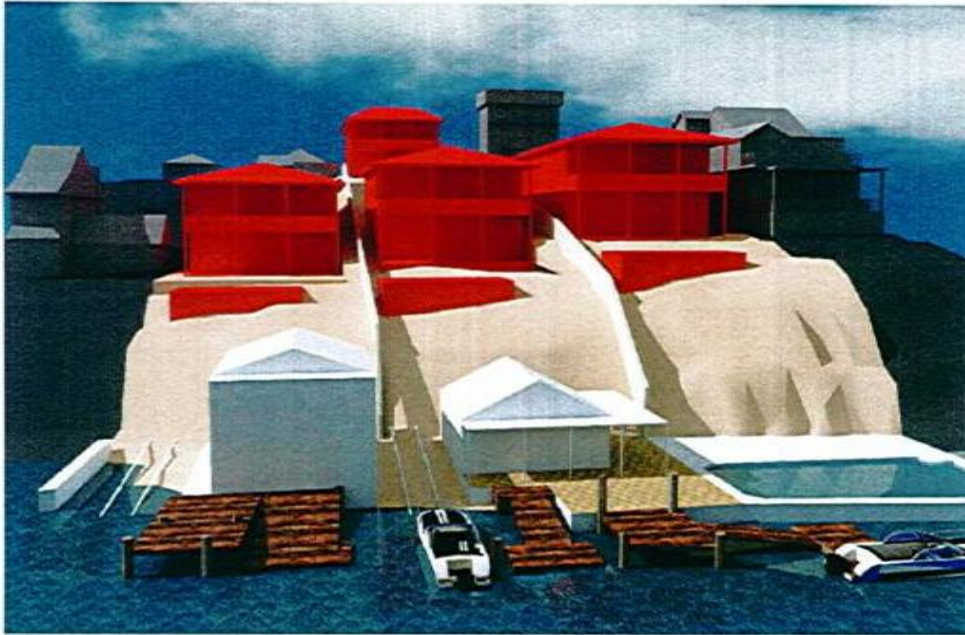
The proposed development relies on an arrangement of site access to which it is not legally entitled, and so the only option available to Council is to recommend refusal of the application on this point.

The applicant's negotiations with neighbouring landowners have proven unsuccessful to date and the applicant is not prepared to consider redesigning the proposal to provide access solely over the subject site. Whilst a deferred commencement or similar conditional approval could potentially be considered, there is insufficient certainty as to the outcome to make a determination of this kind at this point in time.

#### 10.2 Building Bulk and Scale

It is noted that the proposed development is relatively unusual in that a single, very large dwelling is proposed across three waterfront sites. Given that No. 325 could potentially be subdivided, the total site could reasonably accommodate four (4) lots, each with detached dwelling houses, pools, etc.

The applicant argues that Council's development controls for the site did not anticipate a dwelling (or a consolidated site) of the size proposed. Further, the applicant provided a comparative analysis in support of the proposal based around the alternative development potential of the land. It is suggested that, whilst the proposed building is larger than a conventional dwelling in the area, it is less bulky and intrusive than four compliant building envelopes that could be developed on the land. The applicant supplied 3D models of the potential development of the site in support of this argument, as shown below:



**Figure 4: Applicant's indicative 3D model of four potential dwellings on the site.**

To some extent, this argument is considered to have merit. Council acknowledged at the pre-lodgement stage that the proposal was atypical in its scale and that a reasonable justification for a larger than typical individual building might be made by comparing the proposed bulk with the permissible bulk of two or three individual dwellings.

It is, however, necessary to consider the proposed development with regard to Council's controls and objectives for building bulk and scale to ensure that the development is in keeping with the existing and desired future character of the surrounding area. The appropriateness of the proposed building height and floor space ratio are discussed in detail below.

#### 10.2.1 Building Height

Clause 33(4) of SSLEP 2006 stipulates three (3) height controls. These are that the building must be a maximum of two (2) storeys; a maximum of 7.2m from ground level to the uppermost ceiling; and a maximum of 9m from ground level to the highest point of the roof.

The applicant submitted plans and height plane models that demonstrate that the development satisfies these requirements. It is noted that the proposal has been revised from the pre-application stage to comply with the development standards.

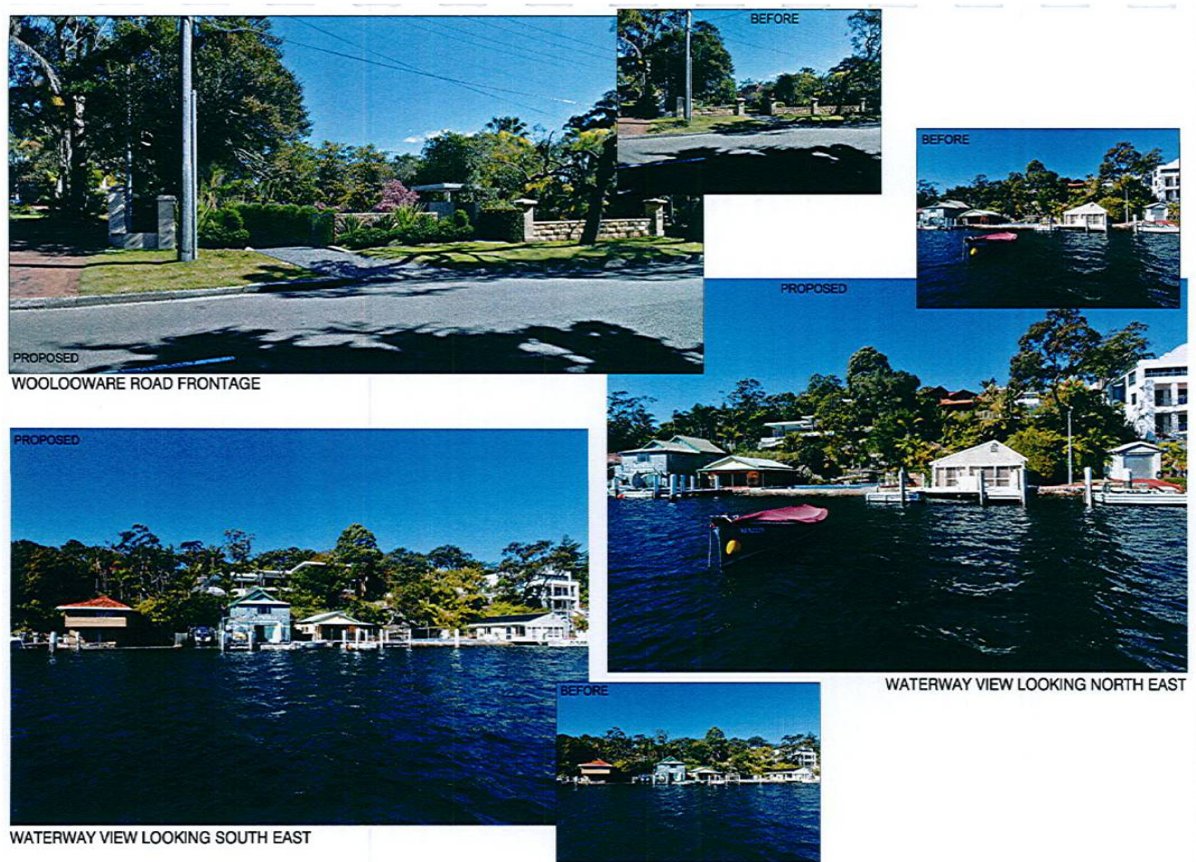
Whilst these height controls are expressed in maximums, the appropriateness of the proposed heights must also be assessed with regard to the objectives of SSLEP 2006 for building height. These include:

- Ensuring the scale of new buildings is in keeping with the desired scale and character of the neighbourhood and compliments the natural landscape.
- Allowing reasonable daylight access.
- Minimising impacts in terms of view loss, privacy, overshadowing and visual intrusiveness.

- Minimising visual impact on public and private land and waterways.

Under the proposed scheme, a substantial amount of the building bulk is buried below natural ground level and the site is also extensively landscaped at both the street and waterway frontages. The building would be virtually unseen from the street and the building form responds to the topography of the site by stepping down towards the water's edge. The area between the dwelling and MHWMM will be heavily landscaped. In this respect, the visual impact of the building's height as perceived from the public domain is relatively minimal.

The applicant supplied the following montages to provide an impression of the building bulk when viewed from the public domain.



**Figure 5: Applicant's 'before and after' photomontage of the proposed building.**

The proposed building height does not result in unacceptable impacts in terms of solar access to neighbouring properties or the public domain. This is largely by virtue of the extensive excavation of the building into the landform, compliance with the 20m foreshore building line and by providing larger than the required minimum setbacks to the southern boundary.

The applicant submitted shadow diagrams that satisfactorily demonstrate that the proposed building will not increase overshadowing by any significant extent upon the properties to the south of the site. The proposal will, in fact, be likely to reduce the existing shadows cast on both Nos. 327 and 331 Woollooware Road as the new building will be set back further and will be lower at the southern side than the existing buildings on the site.

The proposed design will not result in unacceptable view loss impacts. No objections were received from owners or occupiers of neighbouring properties in relation to view loss. This is likely due to the large proportion of the building's bulk being situated below ground level and, as outlined above, the building having a less significant impact on the views enjoyed by neighbouring properties than three or four otherwise permissible individual dwellings on the land.

The proposed development will in fact reduce the existing vertical projection of built form upon the site when viewed from the street, improving the views to the water from the public domain.

Likewise, the reduced height of the development will not result in adverse visual impacts on the waterway. Although the building itself is a substantial size, its proportions are broad, rather than tall, and the significant amount of vegetation to be planted or retained in the 20m foreshore building line setback area will screen much of the building mass as viewed from the waterway. This is in contrast to other buildings in the vicinity which have been less sensitively designed and more visually dominate the foreshore.

Having regard to all of the above matters, the height of the proposed building is considered acceptable.

#### 10.2.2 Floor Space Ratio

Clause 35(5) of SSLEP 2006 contains a formula that prescribes a maximum permissible gross floor area (GFA) for sites within the applicable zone. Applying the formula to the combined site area, the maximum GFA permitted on the site is 1110.2m<sup>2</sup>. This is equivalent to a permissible floor space ratio (FSR) of 0.254:1.

The quoted GFA for the proposal is 1304m<sup>2</sup>, or an FSR of 0.298:1. This equates to a variation of approximately 17.3%.

The proposed dwelling has a plant area of approximately 180m<sup>2</sup> at the 'Lower Entertainment' level. This appears extraordinarily large for a single dwelling. The applicant has supplied certification from a registered engineer that the plant room is genuinely required for a dwelling of the size proposed. By virtue of the definition of GFA contained within SSLEP 2006, plant rooms are excluded from calculations.

It is noted that the applicant has not included internal stairs and lobby areas in the GFA calculation.

A substantial area in the upper basement was labelled as car parking at the pre-DA stage and would have been included in GFA calculations because the spaces are in excess of Council's requirements. This area has now been shown as 'boat storage' and 'office compactus' on the plans submitted with the DA. The basement area is accessed directly from a driveway ramp and has exactly the same proportions as a parking and manoeuvring area for five (5) cars. Another area shown on the pre-DA plans as a parking space on the mid-level has also been hatched and labelled 'storage'.

The excluded stair and lobby sections have an area of approximately 99m<sup>2</sup> over three floors and the 'storage' areas have an area of approximately 257m<sup>2</sup>, all of which would normally be counted as gross floor area in the assessment of a dwelling house.

The SSLEP 2006 definition of GFA also excludes '*any area for common vertical circulation, such as lifts and stairs*' from GFA calculations. The applicant argues that this exclusion should extend to the stairs within a private dwelling. The use of the term 'common' is normally interpreted by Council to distinguish stairs which allow for communal circulation in the 'public' areas of a residential flat building or mixed use building, as distinct from 'private' stairs within a split-level apartment, dwelling or the like. In the later instances stairwells would be counted towards GFA/FSR.

It is noted that Commissioner Tuor (in the merits appeal *Lord v Manly Council* [2010] NSWLEC 1223) recently interpreted an LEP with the same definition of GFA as contained with SSLEP 2006, and determined that stairs should not be counted towards FSR in respect of a new dwelling.

Regardless of either argument in respect of the stairs, Council's assessment is that the applicant has understated the true overall GFA of the proposed building. Even without the stairs, the 'storage' areas entail significant additional GFA, which would take the proposed FSR to approximately 0.312:1, or a 23% variation.

In any case, the applicant concedes that the proposal exceeds the permissible FSR under SSLEP 2006. In support of this variation to the development standard, the applicant has lodged an Objection under *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1). The full submission is in **Appendix D** of this report and the most relevant section is reproduced below:

*'Compliance with the maximum density (FSR) in accordance with the provisions of Clause 35 of the SSLEP 2006 is both unnecessary and unreasonable in the circumstances of the case, for the following reasons:*

- *The sliding scale formula for calculating the density (FSR) requirement did not anticipate very large single dwelling residential sites...*
- *If habitable basement areas are excluded from the calculations the proposed GFA would comply with the sliding scale requirement...*
- *The waterfront impact of a 4 lot development could be greater than the proposed development...*
- *The excavated GFA area will assist in reducing the visual impact of the additional FSR...*
- *The FSR non compliance will have no streetscape implications...*
- *There will be no unreasonable amenity impacts on adjoining properties...*
- *The proposal will be consistent with Zone 2 objectives... [and]*
- *The proposal will be consistent with the objectives in Clause 35 [the FSR Clause of the SSLEP 2006].'*

Analysis: Some of the points raised in the applicant's SEPP 1 Objection are considered valid and reasonable points of objection to the development standard.

It is noted that the subject site, at 4376m<sup>2</sup>, is more than six times the minimum lot size required for dwelling houses pursuant to SSLEP 2006. Although this does not render the building density control irrelevant or invalid, it does lend weight to the applicant's position that SSLEP 2006 did not anticipate a single dwelling or an amalgamated allotment of the size proposed.

The development standard sets out to control building density and the 'bulk and scale' of a development. A development of unacceptable bulk and scale would be one which is not in keeping with the character of the area, or which would have impacts on the amenity of neighbouring properties or the public domain as a direct result of bulk and scale. Such impacts may include overshadowing, view loss or visual dominance.

When considered in this light, the applicant's argument that the extent of below-ground floor space is an appropriate method for reducing the impact of the bulk and scale of the building is considered to have merit. The proposed building does not result in any non-compliant or otherwise unacceptable overshadowing or view loss impacts and its visual impact on the waterway is relatively minor for such a large building. It is also accepted that if the 'basement' areas were excluded from the GFA calculation then the building would be generally compliant.

It is also accepted that the building has less of a visual impact (and provides more landscaping, as discussed below) than four compliant dwellings which could potentially be developed on the site.

In *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46, Lloyd J established a set of five (5) questions which now are an accepted convention for assessing a SEPP 1 Objection. An assessment of the SEPP 1 in accordance with this convention has been undertaken below.

(a) Is the Requirement a Development Standard?

Yes, Clause 35(5) of SSLEP 2006 sets out a numerical maximum GFA for the site.

(b) What is the underlying object or purpose of the Standard?

SSLEP 2006 sets out the following objectives for the density development standard:

- (a) *to ensure that development is in keeping with the characteristics of the site and the local area;*
- (b) *to provide a degree of consistency in the bulk and scale of new buildings that relates to the context and environmental qualities of the locality;*
- (c) *to minimise the impact of buildings on the amenity of adjoining residential properties; [and]*
- (d) *to ensure, where possible, that non-residential buildings in residential zones are compatible with the scale and character of residential buildings on land in those zones...*

It is noted that objective (d) is not relevant to the application.

(c) Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Environmental Planning & Assessment Act?

SEPP 1 aims to provide *'flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act'*.

The relevant objects of the Act are:

5(a)(i) - *to encourage the proper management, development and conservation of natural and man-made resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*

5(a)(ii) - *to encourage the promotion and coordination of the orderly and economic use and development of land.*

The reasonableness and necessity of strict adherence to the FSR development standard are discussed in (d) below. In this case, the proposed development is not considered to be contrary to the objects of the Act or the aims of SEPP 1.

(d) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The applicant has not demonstrated that compliance with the development standard for building density would be unreasonable. The development could potentially proceed without the excavated floor space and achieve strict compliance. It is accepted that four generally permissible building envelopes on the site would have greater visual and amenity impacts than the proposed single dwelling, which seems inequitable, but does not render the standard unreasonable.

However, it is considered that compliance with the development standard is unnecessary in the circumstances of the case as the applicant has satisfactorily demonstrated that the variation will not result in unacceptable impacts on the natural environment or on the amenity of neighbouring properties and that the objectives of the standard are achieved.

(e) Is the Objection Well Founded?

Yes. The SEPP 1 Objection demonstrates that compliance with the standard is unnecessary in the circumstances of the case, as the objectives of the standard are achieved and the variation will not result in unacceptable impacts on the natural environment or on the amenity of neighbouring properties.

SEPP 1 Conclusion:

Having regard to the objectives of the standard for maximum building density it is considered that:

- (i) The SEPP 1 Objection is well founded and demonstrates that compliance with the development standard is unnecessary.

- (ii) The granting of consent would not be inconsistent with the aims of SEPP1, the objects of the Act or the relevant objectives of the SSLEP 2006.

In light of the above analysis, the proposed variation to the development standard for building density contained within Clause 35(5) of SSLEP 2006 is considered acceptable in the circumstances and the SEPP 1 Objection is supported.

### 10.3 Landscaped Area

Clause 36(3) of SSLEP 2006 requires a minimum landscaped area on the site of 2741.2m<sup>2</sup>. This equates to 63.2% of the site area. The proposal provides a landscaped area of 2208m<sup>2</sup> or 51% of the site, a shortfall of 533.2m<sup>2</sup>. This represents a variation of approximately 19.5% of the development standard.

SSLEP 2006 defines 'landscaped area' as *'that part of a site that is used for growing plants, grasses or trees (including bushland), but does not include any building, structure, hard paved area, driveway, garbage storage area or swimming pool, or any planting over a basement, on a podium or roof top or within a planter box'*. The definition can be regarded as similar to a 'deep soil' requirement.

The applicant's justification for the proposed variation to the landscaping control incorporates three main points of contention. Firstly, it is argued that the proposal would be compliant if landscaped areas over basement levels were included in overall landscaped area calculations. The applicant accepts that the SSLEP 2006 definition excludes areas of 'planting over a basement', but argues that the areas over the driveway tunnel and the waterfront access tunnel should be included as the tunnels provide vehicle or pedestrian access and are not 'a basement'.

Regardless of the best description of the tunnels, it is clear that SSLEP 2006 sets out to exclude 'over-podium planting' from landscaped area calculations. However, it is acknowledged that the proposal would be compliant if the discounted planting were included.

Secondly, the landscaped area control applicable is a sliding scale, like the floor space ratio control. It operates such that as the land area increases, the proportion of landscaped area required increases. The same argument is made that the control was not framed with such a large site in mind and in this circumstance the development is unreasonably disadvantaged by being on an unusually large lot.

The third main point raised by the applicant derives from the argument discussed above in relation to floor space ratio, which compares the proposal with an alternative permissible scheme for redevelopment of the site. The redevelopment of the land for four generally compliant dwellings would require approximately 1950m<sup>2</sup> (or 45% of the site) to be landscaped. This is significantly less (almost 800m<sup>2</sup>) than the requirement generated by the current application. The proposed landscaped area exceeds the alternative requirement by 10%.

In any case, the applicant concedes that the proposal falls short of the minimum landscaped area required under SSLEP 2006. In support of this variation to the development standard the applicant has lodged an Objection under *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1). The full

submission is in **Appendix E** of this report and the most relevant section is reproduced below:

*‘Compliance with the minimum landscaped area standard in accordance with the provisions of Clause 36 of the SSLEP 2006 is both unnecessary and unreasonable in the circumstances of the case, for the following reasons:*

- *The sliding scale formula for calculating the landscaping requirement did not anticipate very large single dwelling residential sites...*
- *The proposed development will be providing substantially more landscaped area than exists on the site...*
- *Many existing vegetated areas are to be maintained...*
- *The proposal will be consistent with Zone 2 objectives... [and]*
- *The proposal will be consistent with the objectives in Clause 36 [the Landscaped Area Clause of the SSLEP 2006]...*

Analysis: Some of the points raised in the applicant’s SEPP 1 Objection are considered valid and reasonable points of objection.

The development standard sets out to maintain an appropriate ratio of landscaped area to built-upon area and to provide adequate space for significant vegetation to grow on the site. A development with an unacceptably low amount of landscaped area would be one which is not in keeping with the character of the surrounds or that would cause adverse environmental impacts, such as insufficient shade or habitat provision or low water permeability.

Particularly within the applicable zone, it would be unacceptable if buildings visually dominated vegetation and other natural features, were highly visually intrusive or set in contrast with the landscape qualities of the area.

In more general terms, whilst a minimum quantity of landscaped area is an important consideration, particularly in light of the zoning of the site, it is considered that the quality of the landscaping should be given weight in assessing the proposal. Subject to a handful of relatively minor revisions, the quality of the proposed landscaping is high and is considered to exhibit substantial merit in terms of the retention of significant vegetation along the foreshore.

As mentioned above, SSLEP 2006 requires a landscaped area of 2741.2m<sup>2</sup>. By contrast, the minimum residential lot size permitted within the zone is 700m<sup>2</sup>. The development is therefore required to provide landscaped area equivalent to the entire site area of four smaller yet permissible residential allotments. It is also accepted that the development provides 10% (or 200m<sup>2</sup>) more landscaped area than an alternative potential redevelopment of the site for four permissible dwellings on larger-than-minimum lot sizes.

Although these matters do not render the minimum landscaped area requirement irrelevant or invalid, they do support the applicant’s argument that SSLEP 2006 did not anticipate a development of the scale proposed.

An assessment of the SEPP 1 Objection following the *Winten* method is below:

(a) Is the Requirement a Development Standard?

Yes, Clause 36(3) of SSLEP 2006 sets out a numerical minimum landscaped area for the site.

(b) What is the underlying object or purpose of the Standard?

SSLEP 2006 sets out the following objectives for the landscaped area development standard:

- (a) *to ensure adequate opportunities for the retention or provision of vegetation that contributes to biodiversity;*
- (b) *to ensure adequate opportunities for tree retention and tree planting so as to preserve and enhance the tree canopy of Sutherland Shire;*
- (c) *to minimise urban run-off by maximising pervious areas on the sites of development;*
- (d) *to ensure that the visual impact of development is minimised by appropriate landscaping and that the landscaping is maintained; [and]*
- (f) *to ensure that landscaping carried out in connection with development on land in Zone 11—Employment is sufficient to complement the scale of buildings, provide shade, screen parking areas and enhance workforce amenities...*

It is noted that objective (e) has been repealed.

(c) Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Environmental Planning & Assessment Act?

SEPP 1 aims to provide *'flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act'.*

The relevant objects of the Act are:

- 5(a)(i) - to encourage the proper management, development and conservation of natural and man-made resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- 5(a)(ii) - to encourage the promotion and coordination of the orderly and economic use and development of land.*

The reasonableness and necessity of strict adherence to the landscaped area development standard are discussed below. In this case, the proposed development is not considered to be contrary to the objects of the Act or the aims of SEPP 1.

(d) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The applicant has not demonstrated that compliance with Clause 36(3) of SSLEP 2006 for landscaped area would be unreasonable. The development could potentially proceed with a smaller building footprint and reduced tunnelled area and

achieve numerical compliance. It is accepted a generally permissible alternative redevelopment of the site for four new dwellings would have a lesser landscaped area than the proposed landscaping. This seems inequitable, yet does not render the standard unreasonable.

However, it is considered that compliance with the development standard is unnecessary in the circumstances of the case as the applicant has satisfactorily demonstrated that the variation will not result in unacceptable impacts on the natural environment or the amenity of neighbouring properties and that the objectives of the standard are achieved.

The quality of the proposed landscaping is a key component in the overall merit of the application. The development will have virtually no streetscape impacts by virtue of the extensive landscaped 'front yard'. The landscaped buffer to the foreshore will screen the proposed dwelling effectively and maintain a substantial number of significant native trees in an environmentally sensitive location.

(e) Is the Objection Well Founded?

Yes. The SEPP 1 Objection demonstrates that compliance with the standard would be unnecessary in the circumstances of the case as the objectives of the standard are achieved and the variation will not result in unacceptable impacts on the natural environment or on the amenity of neighbouring properties. The overall quality of the proposed scheme of landscaping is sufficient to warrant a variation in this case.

SEPP 1 Conclusion:

Having regard to the objectives of the standard for landscaped area it is considered that:

- (iii) The SEPP 1 Objection is well founded; and
- (iv) The granting of consent to the development application would not be inconsistent with the aims of SEPP 1, the objects of the Act or the relevant objectives of the SSLEP 2006.

In light of the above analysis, the proposed variation to Clause 36(6) of SSLEP 2006 is considered acceptable in the circumstances and the SEPP 1 Objection to the development standard is supported. As discussed above, Council's Landscape Architect has recommended minor revisions to the proposed landscape scheme to improve the overall quality of vegetation on the site.

#### 10.4 Waterfront Development

Apart from decommissioning and removal of the existing fuel lines (to Attwell's Boatshed), minor landscaping, the access tunnel and a small section of stairs, no new physical works are proposed below the 20m Foreshore Building Line. Along the water's edge of the site and extending out beyond the MHWL are three (3) distinct structures. These are:

- The Attwell's Boatshed building, which includes a pontoon and slipway (below No. 321).
- A single-level boathouse footed on a reclamation, also with a pontoon (below No. 325).

- A substantial reclamation with an inset pool and a deck/recreation area (below No. 327A).

The applicant proposes to retain all of these structures without modification. An aerial perspective of the waterfront structures is below:



**Figure 6: Aerial perspective from west, with waterfront buildings visible in foreground (source: NearMap).**

The Attwell's Boatshed building is historically significant and identified within Schedule 6 of SSLEP 2006 as a heritage item as "[Attwells] Boat Brokerage, boatshed/house" (see discussion below).

There are no development consents evident on Council's records for the 'boathouse' or pool to the south of the Attwell's building. However, Council's aerial photography archive indicates that the pool was installed between 1955 and 1961 and that the boathouse was developed between 1994 and 2001. The retention of the waterfront structures raises heritage issues and entails other environmental impacts, as discussed below.

#### 10.4.1 Retention of Waterfront Structures

Clause 18 of SSLEP 2006 applies to the site as it is traversed by a foreshore building line (FBL). The clause thus applies to the waterfront structures mentioned above as they are (mostly) situated below the MHWL. The clause seeks to:

- “(a) ensure that any development does not result in the obstruction or interference with navigation in waterways;*
- (b) ensure restoration of land below any foreshore building line, to a natural state (so far as is practicable), with a minimum intrusion of man-made structures;*
- (c) reduce the number of structures below any foreshore building line, particularly following the redevelopment of a site; [and]*
- (d) promote the public use of intertidal areas below the mean high water mark or high water mark, where appropriate.”*

Clause 18 states that the consent authority must not grant consent to development on land to which the Clause applies unless it is satisfied that the following *“will be removed before, or within a reasonable time after, the development is carried out:*

- “(a) Any building or work, other than an excluded building or work, that is:*
  - (i) on the lot concerned or an adjoining lot owned by the person carrying out the development, or on adjacent land that person occupies under a lease or a licence, and*
  - (ii) between a foreshore building line and any waterway or waterfront reserve in respect of which the line is fixed,*
- (b) Any building or work (other than a watercraft facility [a pontoon, jetty or the like]) that is:*
  - (i) on the lot concerned or on an adjoining lot that is owned by a person carrying out the development, or on adjacent land that person occupies under a lease or a licence, and*
  - (ii) below the mean high water mark...”*

Clause 18 does not require the removal of such structures if:

- (a) The proposed development is relatively minor, such as for the construction of a fence, carport, deck or awning; or*
- (b) Where the use of the structure is lawful; or*
- (c) Where the removal of the building or work would be inconsistent with, or is not necessary to achieve, any of the objectives mentioned above, or is unreasonable or unnecessary in the circumstances of the case.*

The clause is often invoked by Council, in reasonable circumstances, to require the removal of unauthorised waterfront structures, especially where they are visually intrusive or would have an adverse impact on the environmental or public amenity of the waterway. Council's use of the provision has been supported by the Land and Environment Court on several occasions. As set out above, there are three (3) waterfront structures to be considered with regard to Clause 18.

In light of the heritage status of the Attwell's boatshed building, and the above recommendation for ongoing conservation works to be undertaken, Council would not invoke Clause 18 to require its removal.

The pool and surrounding reclamation is a long-standing structure and in light of the fact that it is largely inset into the landscape with little vertical projection, it is considered to have less of an adverse visual impact on the waterway.

Even if it were deemed visually intrusive, the pool is excavated and concreted into the rock face of the foreshore. In Council's assessment its removal would be likely to cause a degree of environmental harm that would outweigh the benefit of its removal, particularly in light of the identified bed of *posidonia* seagrass (an endangered environmental community) that spans its frontage to the waterway.

In light of the lack of visual impact and the potential for environmental harm to be caused by its removal, the invocation of Clause 18 to require its removal is not recommended.

The middle building is a structure of the type which Clause 18 seeks to address. Although it provides access to the waterway, it does not appear to be used as a boatshed and has been fitted out as more of a recreational building. Regardless of the true nature of its use, the building is considered to be an unlawful structure as it does not have development consent nor established existing use rights.

The applicant argues that a form of consent for the building has been granted, as in 1999 the Land and Environment Court ordered that Council issue a Building Certificate for it. The certificate was issued by Council on 15 August 2000 and its terms state that the certificate lapsed seven years thereafter. Council's records do not reveal any further building certificate approval for the boatshed and so this lapsed certificate cannot be relied upon. Regardless, an entire redevelopment of the site is now sought, opening the provisions and objectives of Clause 18 for fresh consideration.

The applicant also points to Council's 2001 development assessment (DA01/1561) for a dwelling upon No. 325 Woollooware Road, which acknowledged the existence of the boatshed and did not seek its removal. This is likely because the application did not concern the boatshed and because the building certificate for the boatshed was still in force. In any case, the DA did not give express consent for the boatshed and so cannot be relied upon as a valid consent.

The applicant has also supplied copies of permissive occupancy/Crown Lands leases in respect of the boatshed to establish its 'lawfulness'. These documents do not constitute development consent.

The building is not an impediment to maritime navigation and does not affect public access to the foreshore. Therefore the relevant objectives of Clause 18 are [to]:

- (b) *ensure restoration of land below any foreshore building line, to a natural state (so far as is practicable), with a minimum intrusion of man-made structures;*  
*and*
- (c) *reduce the number of structures below any foreshore building line, particularly following the redevelopment of a site.*

The site is proposed to be amalgamated for redevelopment and that redevelopment is in the form of a substantial new dwelling. The removal of the middle building as part of this redevelopment will reduce visual clutter along the waterfront and partly restore the natural state of the foreshore. If the proposed development is undertaken, it is highly unlikely that the site would be redeveloped again in the near

future and so this point in time is considered to be the appropriate occasion for remediating the foreshore.

As discussed above, the removal of the Attwell's Boatshed building and the pool and surrounding reclamation are not recommended. Even with removal of the middle building, the new dwelling would enjoy access to substantial waterfront facilities, considered appropriate for a dwelling house. The removal of the middle building would allow the natural state of the foreshore to be reinstated.

The removal of the middle building would lead to reduced visual clutter, reduced intrusion of man-made structures and an improved visual setting for the heritage-listed Attwell's building by reducing the prevalence of other dominant structures surrounding it.

As for the Attwell's boatshed mentioned above, the tenure of the waterfront structures is permitted by way of a permissive occupancy over Crown Land. In the course of its assessment, Council contacted the authority responsible for administering permissive occupancies over Crown Land. This authority has confirmed that they raise no objection in principle to Council imposing a requirement for unauthorised structures to be removed, subject to the applicant seeking [their] owner's consent prior to any works being undertaken.

In light of the above analysis, it is recommended that the middle waterfront structure be removed in the event that the application is approved.

#### 10.4.2 Waterfront Access Tunnel

The proposed waterfront access tunnel is an unusual structure and one which is not contemplated by Council's planning controls.

The tunnel is considered a reasonable approach to minimising the visual impact of the development upon the waterway. The tunnel also assists in keeping the curtilage of the heritage-listed boatshed relatively clear of intrusive structures and in maintaining the integrity of the foreshore building line buffer. Council's Environmental Scientist has advised that any environmental impacts associated with the construction of the tunnel can be mitigated by the imposition of consent conditions.

Although it may not be an appropriate method of waterfront access on a site with different conditions, in this instance the proposed tunnel is considered acceptable.

#### 10.5 Heritage

The Attwell's Boatshed building is identified in Schedule 6 of SSLEP 2006 as heritage item number B321.

At the pre-DA stage, the applicant presented a scheme for the site that included the restoration of the Attwell's Boatshed building to its original appearance. This was considered a positive aspect of the initial proposal and was considered by Council as a public benefit that could balance against non-compliant aspects of the original scheme. The application as lodged does not include any work, maintenance or restoration at all to the heritage building.

The applicant submitted a Statement of Heritage Impact from NBRIS & Partners Architects, which concludes that the proposed new building will '*not adversely affect the identified heritage significance of the property or compromise the role of the place as an item of local heritage significance in Burraneer Bay*'. The NBRIS & Partners assessment indicates that the tiered built form and the substantial foreshore vegetation will maintain an appropriate setting for the heritage item, and that the '*continuing public use and commercial operation*' of the boatshed will serve to reinforce and maintain its heritage significance.

Council's Heritage Officer agrees with this assessment in principle, subject to the retention of a significant tree located close to eastern wall of the boatshed to maintain the landscaped setting of the building and provide additional screening from the new building.

In this respect, the proposed building is considered to be satisfactorily respectful of the heritage significance of the building and the proposed scheme of landscaping successfully protects its setting (subject to appropriate conditions). However, the lack of any restoration or conservation works to the heritage-listed boatshed is a significant concern given the poor state of the building.

In light of the scale of the proposed development, the ongoing use of the boatshed and the heritage conservation provisions of SSLEP 2006 it is reasonable to require the applicant to make some effort to protect and maintain the heritage item. Whilst a full restoration of the boatshed would not be a reasonable imposition on a consent for a dwelling house, in order to achieve the objectives of the SSLEP 2006 it is recommended that a Conservation Management Plan (CMP) be required prior to the commencement of work on the site. The CMP should include (as a minimum) a schedule of short-term conservation works and ongoing basic maintenance of the boatshed.

It is noted that the boatshed is located mostly within the waterway and accordingly its tenure is permitted by way of a permissive occupancy over Crown Land. In the course of its assessment, Council has contacted the Crown Lands Division of the former Land and Property Management Authority (which became part of the NSW Department of Primary Industries during the assessment of the application), being the authority responsible for administering permissive occupancies. This authority has confirmed that they raise no objection in principle to Council imposing a requirement for a CMP on any consent for the proposal, subject to the applicant seeking [their] owner's consent prior to any works being undertaken.

It is also noted that the site fronts Woollooware Road, which is identified in Schedule 6 of the SSLEP 2006 as heritage item number A006. The road marks the alignment of the first road in the Sutherland Shire. Given that the application does not seek to alter the alignment of the road and will have no appreciable adverse streetscape impacts, it is not considered to detract from the heritage significance of the item.

## **11.0 SECTION 94 CONTRIBUTIONS**

Due to its nature, the proposed development will not require or increase the demand for local facilities and services. Accordingly, it does not generate a requirement for Section 94 contributions.

## **12.0 DECLARATION OF AFFILIATION**

There was no declaration of affiliation, gifts or political donations noted on the development application form submitted with this application.

## **13.0 CONCLUSION**

The site is located within Zone 2 – Environmental Housing (Scenic Quality) under the Sutherland Shire Local Environmental Plan 2006. The proposed development, being for a single dwelling and associated work, is a permissible land use within the zone.

Two (2) submissions were received in response to public exhibition of the proposal. The matters raised in these submissions relate to the rights of carriageway and are considered to be well-founded.

Despite allowing the applicant time to negotiate with neighbours, resulting in the application being delayed from being put before the Panel for determination, legal rights to use the rights-of-carriageway in the manner shown on the submitted plans have not been obtained. While a number of alternative arrangements have been proposed, none of them overcome the legal impediment of gaining access via the rights-of-carriageway to properties that do not legally enjoy the benefits of those rights.

Given that the amalgamated site will have its own street frontage, there appears to be little reason why all vehicles (other than those needing to access Attwell's Boatshed whilst it continues its commercial operation) cannot enter the site directly from Woollooware Road. The applicant is unwilling to embrace this option.

In essence, the proposal is acceptable and ready to be approved with conditions, except that the issue of access has not been resolved. Rather than holding the determination of the application in abeyance indefinitely, it was felt most prudent to bring the matter to a conclusion by reporting it to the Panel. The applicant is also keen to have the matter determined.

The proposal includes variations to the applicable development standards in respect of building density (FSR) and landscaped area. These variations have been discussed and are considered acceptable. Justification for the departures comes from the absence of any unacceptable adverse impacts and the fact that the planning controls for these aspects of the development do not function in a reasonable way when applied to such a large site for a single dwelling.

It is considered that to achieve the objectives of Clause 18 of SSLEP 2006 the existing structure below the MHWL of No. 325 Woollooware Road, which has been built without prior development consent, should be removed in its entirety.

To satisfy the provisions of Clause 54 of SSLEP 2006, it is considered that a Conservation Management Plan should be provided in respect to Attwell's Boatshed, and the immediately necessary conservation works be carried out.

The application has been assessed having regard to the Heads of Consideration under Section 79C (1) of the Environmental Planning and Assessment Act 1979 and all relevant Environmental Planning Instruments and SSDCP 2006. Following detailed assessment it is considered that Development Application No. 11/0218 is generally worthy of support. However, the unresolved and fundamental issue of site access leaves Council with no other reasonable option but to recommend refusal of the application.

#### **14.0 RECOMMENDATION**

That Development Application No. 11/0218 for Amalgamation of Three Allotments; Demolition of Existing Structures and Removal of Fuel Tanks; and Construction of a Single Dwelling with Pool, Vehicle Access and Parking and Site Landscaping at Lot 2 DP 600577, Lot 9A DP 307110 and Lot 2 DP 562829 (Nos. 321, 325 and 327A) Woollooware Road, Burraneer be refused in light of critical unresolved issues relating to site access and the unlawful use of the rights of carriageway over the two neighbouring properties.