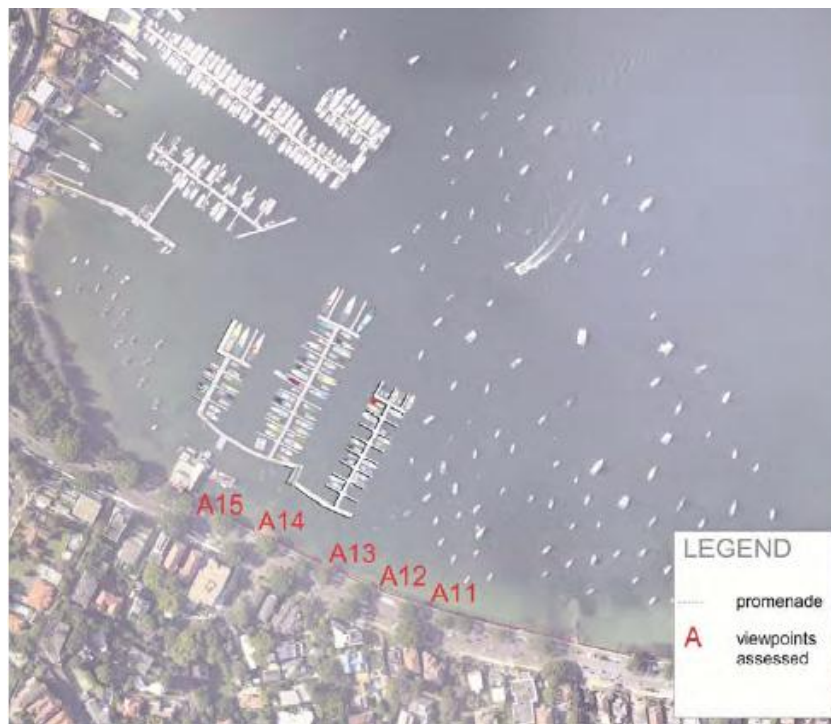


## DEVELOPMENT APPLICATION ASSESSMENT REPORT

<b>FILE No.</b>	DA 136/2012/1
<b>ADDRESS</b>	594-596 New South Head Road ROSE BAY
<b>SITE AREA</b>	3607m <sup>2</sup>
<b>ZONING</b>	W5 – Water Recreation (SREP (Sydney Harbour Catchment) 2005)
<b>PROPOSAL</b>	<p>Extension to Rose Bay Marina comprising of:</p> <ul style="list-style-type: none"><li>- An additional 9 x 10m berths on Arm A</li><li>- The addition of a new marina arm (Arm C) which is proposed to be a floating pontoon system that incorporates 37 x 15m berths. The height of vessels to be berthed on the new Arm C is proposed to be limited to 3.5m in height</li><li>- A new walkway connecting Arms B and C incorporating a viewing platform and bench seat</li><li>- Retention of 24 commercial swing moorings</li></ul>
<b>TYPE OF CONSENT</b>	Local/Integrated development
<b>COST OF WORKS</b>	\$2,408,774.00
<b>DATE LODGED</b>	02/04/2012
<b>APPLICANT</b>	Rose Bay Marina Pty Ltd
<b>OWNER</b>	Rose Bay Marina Pty Ltd
<b>AUTHOR</b>	Mrs L Holbert

## EXECUTIVE SUMMARY

### 1. LOCALITY PLAN



**Aerial Photo (Source: EIS)**

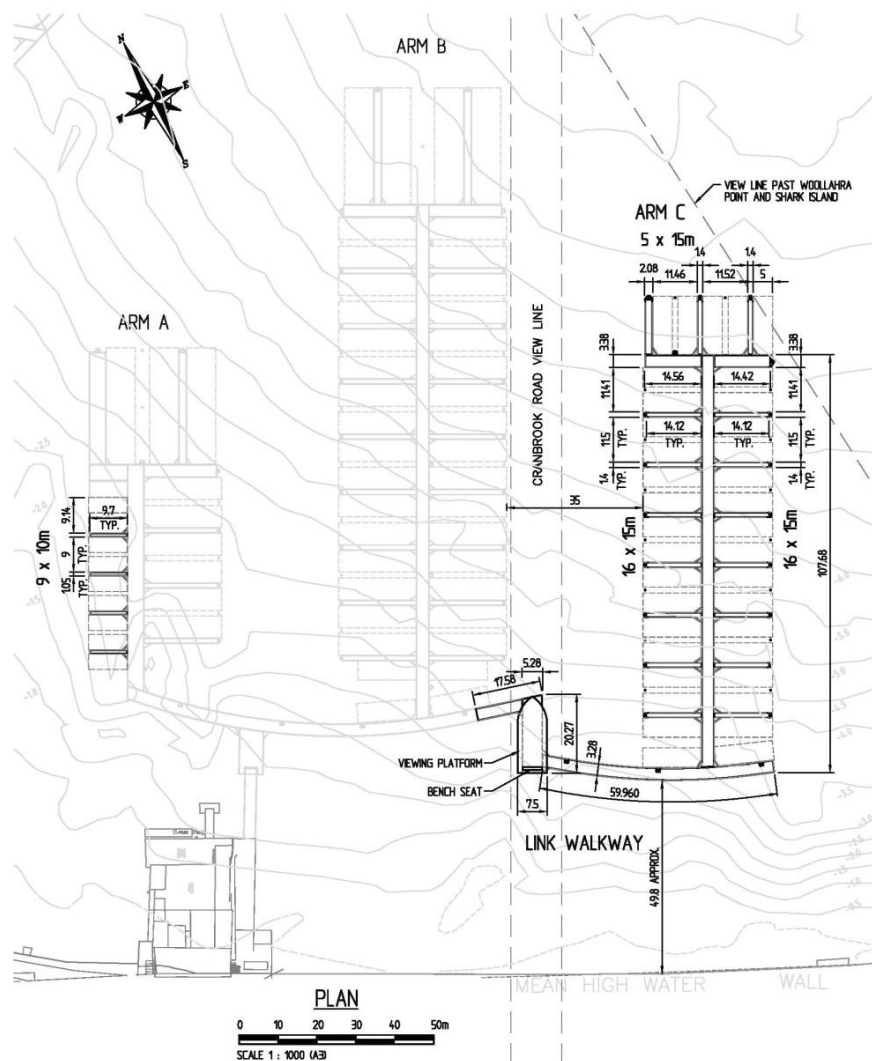
## 2. DELEGATIONS SUMMARY

Level of Delegation	Recommendation of Report
The application is to be determined by the Joint Regional Planning Panel as the proposed development is designated development.	Refusal because of visual/view impacts

## 3. PROPOSAL SUMMARY

The proposed development is for alterations and additions to the Rose Bay Marina (refer to figure 1). The proposal involves the following works:

- Construction of a new marina arm to the east of the existing marina arms. The new arm (Arm C) consists of 37 berths capable of mooring boats up to 15m in length. The height of vessels to be berthed on the new Arm C is proposed to be limited to 3.5m.
- Nine additional berths are proposed to the existing western arm (Arm A). The nine new berths on Arm A could accommodate boats up to 10m in length.
- A new walkway connecting Arms B and C incorporating a viewing platform and bench seat.



**Figure 1:** Proposed plan of the marina. (Source: EIS)

The proposed new marina arm (Arm C) will be linked to the existing marina arm (Arm B) by a curved walkway, running parallel to the shoreline. Arm C (eastern arm) includes 37 berths with

services pedestals located at the junction of the marina arm and at each finger. The 5 berths at the T-head will accommodate boats perpendicular to the shore.

The marina extension has been designed in accordance with the Australian Standard AS 3962-2001 “Guideline for the Design of Marinas” and the NSW Maritime Guidance Note 8.3.02 (see Table 1).

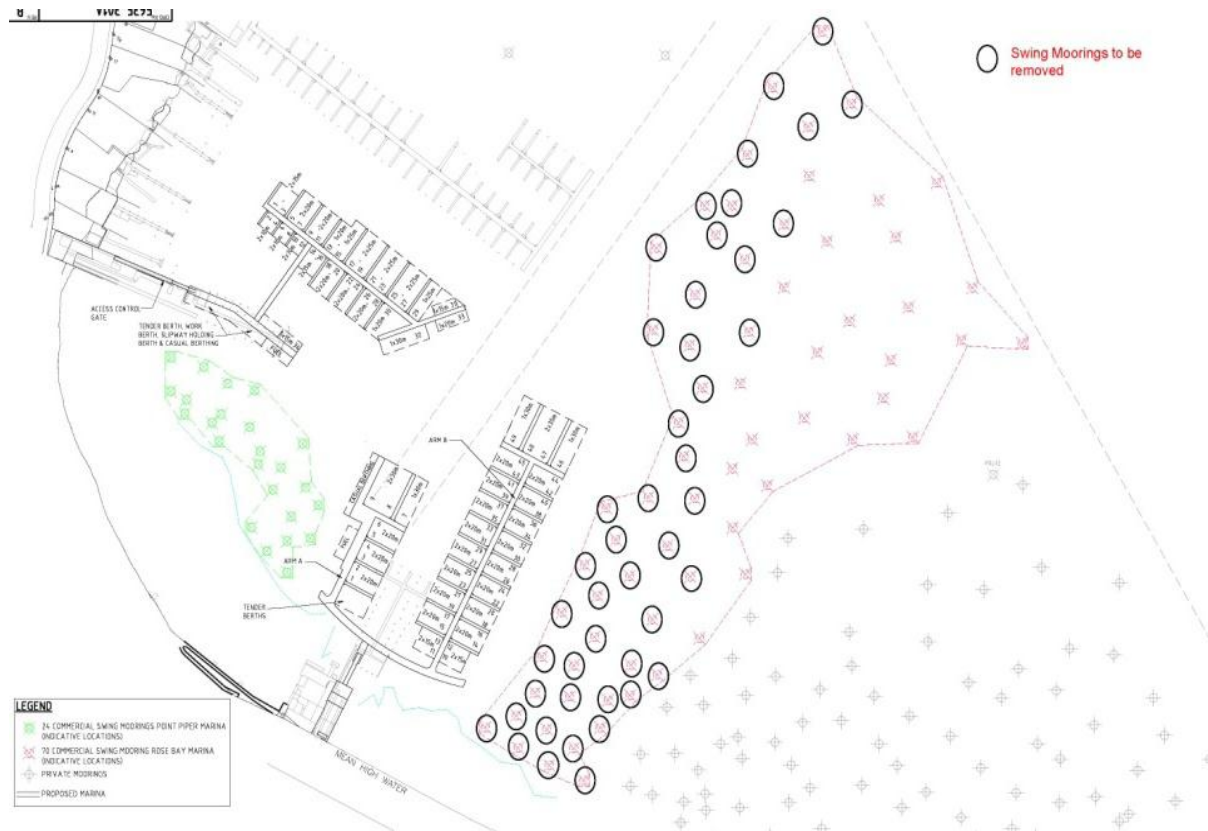
Element	Design
Walkway width	3.2m
Width of fingers	1.4m to 2.08m
Length of fingers	15m
Minimum clear width of double berths	11.4 to 11.5m
Minimum width of fairways	35m (west side of Arm C) 30m (east side of Arm C)

**Table 1** – Arm C Proposed Marina Design

The 9 additional berths proposed to Arm A are to be incorporated into an area previously approved for refuelling. The additional berths on Arm A will accommodate boats up to 10m in length. The clear width of the double berths ranges from 9m to 10.5m and the length of the fingers are 9.7m.

The marina berths will comprise a floating system of walkways, with finger units at right angles to the walkways creating the berthing pens and providing access alongside the craft. The floating berths would be located in place by vertical piles driven into the harbour bed. These piles are proposed to comprise circular steel piles with HOPE plastic sleeves. Mooring piles would be provided between the majority of double berths for ease of berthing and additional mooring security (with the exception of the new berths to Arm A). This is consistent with AS 3962-2001 which recommends mooring piles in double berths where wind generated waves or boat wake exceed 300mm in height. The width of the double berths is increased by the width of the pile.

The proposal involves the marina relinquishing 46 of its existing commercial swing moorings and for the retention of the remaining 24 moorings. As a result of the proposed development the total number vessels moored at the marina would remain unchanged. However, there would be an increase in the number of floating berths from 49 to 95 and a decrease in the number of swing moorings from 70 to 24 (see figure 2).



**Figure 2:** Plan showing the swing moorings to be retained and relinquished. (Source: EIS)

The proposed hours of operation of the marina walkways are as follows:

- Summer (Daylight Saving): seven (7) days a week, 7.00am to 6.00pm
- Winter (Non-Daylight Saving): seven (7) days a week, 7.00am to 5.00pm

Marina berth holders would be able to gain access to their vessels 24 hours a day, 7 days a week. An access control gate is located on the timber hardstand leading to the marina.

The proposed additional berths to Arm A are located in the area of the approved fuelling berth. It is proposed to use the area at the north-west corner of Arm A as a combination of casual berthing, fuelling and sewage pump-out berth. There also a pontoon adjacent to the Marina Kiosk available for casual berthing.

The berths to Arm C will be supplied with water, power, lighting and Wi-Fi. These services will be available to the berths via low height carbon fibre service pedestals. The service pedestals would be located at the junctions between the fingers and arms and along the main walkway. The pedestals will be the same as those already installed to Arms A and B. The various services to the pedestals will be supplied from the land-based infrastructure via pipework and conduits which will run down the access gangway (incorporating flexible couplings) and be fitted under the floating walkway deck, out of view but accessible for inspection and maintenance.

Fire fighting equipment will be provided in accordance with AS 3962-2001 and to the requirements of the relevant authorities. The equipment will include fire hose reels and fire extinguishers.

The marina redevelopment is classified as designated development under Schedule 3 of the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation) as the marina would have an intended capacity of more than 30 vessels and the ratio of car parking spaces to vessels is

less than 0.5:1. The proposal is also Integrated Development, as a license from the Office of Environment and Heritage under the *Protection of the Environment Operations Act 1997* and a permit from the Department of Primary Industries under the *Fisheries Management Act 1994* are required.

## 4. ISSUES SUMMARY

Issue	Conclusion	Section
View loss/visual impact	The visual impact of the new berths to Arm A are considered acceptable however the visual impact and view loss created by the new Arm C are unacceptable. This is further discussed in section 16.1 of this report.	16.1
Traffic & Parking	The parking and traffic impacts are considered satisfactory. These impacts are further discussed in section 16.2.1 of this report.	16.2.1
Heritage	The heritage impacts of the proposal are considered satisfactory. These impacts are discussed in section 16.2.3 of this report.	16.2.3
Cumulative impact	The proposed Arm C is considered to create unacceptable cumulative impacts on views. This is further discussed in section 16.1 of this report.	16.1
Noise	The noise impacts of the proposal are considered satisfactory and could be conditioned to ensure both construction and operational noise impacts are minimised. These impacts are discussed in section 16.2.5 of this report.	16.2.5
Navigation/Safety	The proposed navigation and safety impacts are generally considered to be acceptable. This is further discussed in section 16.4 of this report.	16.2.4
Ecology	The proposed ecology impacts are considered to be acceptable and are discussed in section 16.2.2 of this report.	16.2.2

### 4.1 SEPP 1 Objections

None.

### 4.2 Submissions

Issue	No. of Objectors	Conclusion	Section
No demonstrated demand for the facility	12	The previous court case involving a similar amount of marina berths demonstrated demand for the facility. Further to this the applicant has stated that: <ul style="list-style-type: none"> <li>all of the 10m and 15m berths at the marina are occupied and have a wait list for those berths.</li> <li>demand for 10m and 15m boats is the greatest out of any size category.</li> <li>the marina was due for completion in December 2011 but due to delays with the connection of power and water the marinas did not fully open until April 2012 (this meant a lot of our target customers deferred coming to the marina until Summer 2012/13).</li> </ul> It is considered that there is a demonstrated demand for the facility.	
Pollution/marine ecology	69	Pollution and marine ecology impacts are considered satisfactory. These impacts are discussed in section 16.2.2 of this report.	16.2.2
View loss/visual impact	1419	The visual impact of the new berths to Arm A is considered acceptable however the visual impact and view loss created by the new Arm C are unacceptable. This is discussed in section 16.1 of this report.	16.1
Safety and navigation	227	Safety and navigation issues are considered satisfactory. These impacts are discussed in section 16.2.4 of this report.	16.2.4
Privatisation of public assets	825	The proposed extension of is Arm C not supported.	

Issue	No. of Objectors	Conclusion	Section
Parking/traffic	1136	The parking and traffic impacts are considered satisfactory. These impacts are discussed in section 16.2.1 of this report.	16.2.1
Cumulative impact/previous refusal	779	The proposed Arm C is considered to create unacceptable cumulative impacts on views. This is discussed in section 16.1 of this report. The reinstatement of an eastern arm has not been supported for similar reasons to the previous development.	16.1
Noise/Lights	235	The noise impacts of the proposal are considered satisfactory and could be conditioned to ensure both construction and operational noise impacts are minimised. These impacts are discussed in section 16.2.5 of this report.	16.2.5
Heritage impacts	705	The heritage impacts of the proposal are considered satisfactory and are discussed in section 16.2.3 of this report.	16.2.3
Scale of development.	520	The proposed extension of Arm C is not considered to be acceptable.	

## 5. SITE AND LOCALITY

<b>Physical features</b>
<p>Rose Bay Marina is located at the western end of Rose Bay. Rose Bay is a wide, open bay on the southern foreshore of Sydney Harbour. The main sweep of the bay extends from Dumeresq Reserve in the east to Rose Bay Park in the west. The wider bay extends from Neilson Park in the east to Point Piper in the west. The main sweep of the bay is broken by Lyne Park which forms a physical division between east and west Rose Bay.</p> <p>Rose Bay Park is located in the south west corner of the bay. The park is bounded by New South Head Road to the south, Wunulla Road to the west and the waters of the Harbour. Rose Bay marina is at the eastern end of Rose Bay Park.</p>
<b>Topography</b>
<p>The land adjoining Rose Bay to the south is generally low lying. To the west of the bay, in the vicinity of the marina, the land rises to form the Point Piper peninsula. To the east of the Rose Bay marina New South Head Road is fairly level being RL2.75 AHD (approx.) and approximately 2.2m above the MHW (RL0.517 AHD). To the west it grades up and at the intersection of Wunulla Road is RL13.5 AHD (approx.). Wunulla Road is at a fairly consistent level.</p>
<b>Existing buildings and structures</b>
<p>Rose Bay marina consists of a 2 storey building on the northern side of New South Head Road to the east of Rose Bay Park, floating marina berths and swing moorings. The 2 storey building abuts the alignment of New South Head Road. The building is supported on piers over the water. The upper floor, which is located at the New South Head Road level, accommodates a restaurant (the 'Pier Restaurant'). The lower level accommodates marina related facilities (offices, workshop, and brokerage) and a kiosk on the north western corner with a seating area on an adjoining deck. Pedestrian access to the marina facilities is by steps and walkways from New South Head Road on both sides of the building.</p> <p>The redevelopment of Rose Bay marina was completed in April 2012 and comprises of 49 floating marina berths and 70 registered swing moorings. The marina incorporates fuelling and sewage pump-out facilities. The Rose Bay marina is located on land which is below the MHW and leased from NSW Maritime, occupying an area of 3,607m<sup>2</sup> (lot 1 DP 1014928). A small portion at the southern end of the building is located above the MHW. The swing moorings associated with the marina are spread over a larger area of waterway to the north east and west of the leased area.</p>
<b>Environment</b>
<p>Rose Bay Park consists of a vegetated embankment which slopes down from New South Head and Wunulla Roads to a sandy beach. There are pedestrian paths and steps intersecting the park and a service vehicle access ramp. The beach is used for passive recreation and the informal storage of small craft, e.g. dinghies, kayaks and the like. The Rose Bay Police Station is located in the south western corner of the park at the intersection of New South Head and Wunulla Roads.</p> <p>Cranbrook School is located in New South Head Road, opposite Wunulla Road. The majority of development in the vicinity is residential, consisting of detached dwellings and low and medium rise apartment buildings. Immediately to the north of the Point Piper marina are Harbour frontage properties occupied by detached dwellings, most of which have private jetties.</p>

To the west of the Rose Bay Marina is the Point Piper marina and Royal Motor Yacht Club. Point Piper marina has a capacity of 58 boats comprising of 34 floating berths and 24 swing moorings. The land based facilities of the Point Piper marina consist of offices, boat brokerage and toilets. The Royal Motor Yacht Club has a total of 90 floating berths and 18 swing moorings. The land based facilities include a club and car parking adjacent to Wunulla Road.

Between the Rose Bay marina and Lyne Park is Rose Bay promenade, sea wall and concrete balustrade. There is a series of stormwater pipes at the base of the sea wall and small sandy areas, subject to tidal influences. Access points to the Harbour waters, consisting of openings in the balustrade and steps are located along the promenade. The promenade consists of paving and grassed nature strip with isolated indents for on-street parking spaces for use by the general public. Large fig trees within the nature strip are a feature of the promenade.

The western side of this section of New South Head Road is occupied mainly by medium rise apartment buildings of various styles and ages. An exception is shops at the intersection of O'Sullivan Road.

Lyne Park supports a number of different uses including the Urban Transit Ferry Wharf, Catalina Restaurant, flying boat base, Woollahra Sailing Club, Rose Bay RSL Club, playing fields, tennis courts and café.

To the north east of Lyne Park is Tingira Reserve, a vegetated park with a sandy beach. Kayak and dinghy hire businesses operate from the beach. Beyond Tingira Reserve are residential, water front properties behind which is the Rose Bay commercial area.

## 6. RELEVANT PROPERTY HISTORY

Current use
Marina
Previous Relevant Applications
DA766/2006 proposed the redevelopment of both the Rose Bay and Point Piper marinas. It proposed 35 floating pontoon marina berths at Point Piper marina and the relinquishment of all swing moorings. In relation to the Rose Bay marina it proposed 124 floating pontoon marina berths and the relinquishment of all swing moorings.
On 5/12/07, at an extra ordinary meeting, the council resolve to resist a 'deemed refusal' appeal by the applicant to the Land & Environment Court in relation to DA766/2066. The appeal was heard by Biscoe J (assisted by Commissioner Tuor) in April 2008. On 13/6/08 Biscoe J ruled that the appeal be dismissed. This is discussed below ( <i>Addenbrooke Pty Ltd v Woollahra Municipal Council [2008] NSWLEC 190</i> ) (the 2008 judgement).
In October 2008, two separate DAs for the redevelopment of the Rose Bay Marina (DA 682/2008) and Point Piper Marina (DA706/2008) were lodged. The Rose Bay Marina proposal included the removal of the 29 existing fixed marina berths and the construction of 82 floating marina berths on three marina arms. Also, 37 commercial swing moorings were proposed to be retained. The DA was recommended for approval by Council's staff, subject to a range of conditions and amendments. However, the application was refused by Council for a number of reasons including visual impact, traffic and parking impacts and residential amenity impacts.
The applicant, Addenbrooke Pty Ltd, lodged appeals with the LEC in relation to both applications. On 18 August 2009, the LEC approved the redevelopment of the Rose Bay marina with the exception of the eastern arm (Arm C) and the associated walkway providing access to the eastern arm, 4 x 20m berths on the middle arm (Arm B) and 2 x 20m berths on the western arm (Arm A). This is discussed below ( <i>Addenbrooke Pty Ltd v Woollahra Municipal Council (No 2)[2009] NSWLEC 134</i> ) (the 2009 judgement).
In October 2009 a s96 application was lodged seeking to modify the consent granted by the Court by increasing the width of Arm B and the walkway to 3.2m. Condition C.1(a) of the development consent requires that Arm B be reduced in width to 1.8m and the walkway be reduced in width to 2.4m. The original development application indicated Arm B (the middle arm) to be 3.25m wide and for the walkway to be 4.2m wide. This S96 application was approved by Council's Development Control Committee on 7/12/2009.
Pre-DA
N/A
Requests for Additional Information
The following additional information was requested: <ul style="list-style-type: none"> <li>The applicant was requested to respond to all of the Director General's requirements on 17/04/2012. The information was provided by the applicant on 26/04/2012.</li> <li>Additional information relating to the ecology that was requested on 15/06/2012 and was submitted on 19/06/2012.</li> </ul>



<ul style="list-style-type: none"> <li>The applicant was asked to provide information which supported that there was a demonstrated demand for the new berths on 10/7/2012. This information was received on the same day.</li> </ul>
<b>Amended Plans/Replacement Application</b>
N/A
<b>Land and Environment Court Appeal</b>
<p>There is no LEC appeal in respect of the current development application.</p> <p>In relation to DA766/2006 the primary reason for the appeal being dismissed related to the adverse visual impact the proposed Rose Bay marina berths would have on the promenade and New South Head Road.</p> <p>In relation to DA682/2008 (Rose Bay Marina) the LEC conditionally approved the redevelopment of the Rose Bay marina with the exception of the eastern arm (Arm C), the associated walkway providing access to the eastern arm, 4 x 20m berths on the middle arm (Arm B) and 2 x 20m berths on the western arm (Arm A). A maximum height of 7m was imposed for the 4 x 30m berths and a 6m height limit was imposed for all other berths. The LEC considered that the removal of the eastern arm and shortening of the middle arm would reduce the loss of views to Manly from the Promenade. In addition the shortening of the middle arm was also considered to achieve visual separation between the RBM and the RMYC when viewed from the Promenade, and reduced the visual impact on Rose Bay beach.</p>

## 7. REFERRALS

Referral	Summary of Comment	Annexure
Traffic Engineer	Satisfactory. <i>'Council's Traffic and Transport section have reviewed the development application and have no objection to the proposal'.</i>	2
Heritage Officer	<i>The application is not acceptable as it does not comply with all the provisions of the relevant statutory and policy documents and would have an unsatisfactory heritage impact.</i>	3
Urban Design Officer	<p>That the additional berths on Arm A are supported and that Arm C is recommended for refusal for the following reasons:</p> <p><i>Although relatively few additional boats are to be berthed on Arm C in comparison to those existing in this part of Rose Bay, they will have a disproportionality large visual impact. The unique experience of the view opening up to reveal the whole extent of the bay and harbour beyond will be lost.</i></p> <p><i>The SHREP allows marina development only if it results in a visual outcome that harmonises with the planned character of the locality. Arm C does not harmonise with the character of the locality. In particular the final objective of zone W5 in the SHREP;</i></p> <p><i>(g) 'to ensure that the scale and size of development are appropriate to the locality, and protect and improve the natural assets and natural and cultural scenic quality of the surrounding area, particularly when viewed from waters in this zone or from areas of public access' is not achieved.</i></p>	4
Environmental Health Officer	<p>Satisfactory.</p> <p><u>Site Contamination:</u></p> <p><i>The Auditor considers that the EMPs will provide an adequate framework for the management of the remnant sediment contamination at the site. The results of the sediment testing and the Site Audit have concluded that remediation of sediments at the site is not required; accordingly, the 'land' is suitable for the purpose of the proposed development.</i></p> <p><u>Noise:</u></p> <p><i>With regards to noise arising from construction activities, Rose Bay Marina Pty Ltd will abide by the same conditions for the proposed extension. Impact pile driving is not proposed to be used for the installation of piles. The piles will be installed using a screwing</i></p>	5

Referral	Summary of Comment	Annexure
	<p><i>method, with the steel piles screwed into the seabed.</i></p> <p><i>With regards to noise arising from operational activities, a Noise Management Plan (NMP), which is at Appendix D of the marina Environmental Management Plan (refer to Appendix L of the EIS) has been prepared in accordance with the Conditions of Consent for DA 682/2008. The NMP seeks to ensure that amenity is preserved for local residents and marina users by controlling noise emissions and other disturbing influences and incorporates the Conditions of Consent imposed by the LEC. The marina operations will be undertaken in accordance with the Environmental Management Plan.</i></p>	
Fire Safety Officer	Satisfactory, subject to conditions.	6
Public Open Space	<ul style="list-style-type: none"> <li><i>Public toilet access for Rose Bay Park users should be provided. Public access to the marina toilet is available.</i></li> <li><i>Inclusion of Dinghy Storage Racks within the Rose Bay Marina. This has not been proposed as part of the development.</i></li> <li><i>Separate approval is required if construction access across Rose Bay Park is required. A condition of consent could be imposed.</i></li> </ul>	7
Environmental Sustainability	<p>Further information was sought from the application in relation to the following:</p> <ul style="list-style-type: none"> <li>Environmental construction impacts created by the redeveloped marina</li> <li>Updated sea grass study</li> <li>Implementation of the Caulerpa Taxifolia Management Plan</li> <li>Location of fuel tanks</li> <li>Location of waste and recycling facilities.</li> </ul> <p>The applicant has responded to the issues identified. Council's Environmental Sustainability Team Leader is satisfied with the applicant's response.</p>	8
NSW Primary Industries (Approval Body s.205 of the <i>Fisheries Management Act</i> 1994)	No objections subject to general terms of approval.	9
NSW EPA (Approval Body, <i>Protection of the Environment</i> <i>Operations Act 1997</i> )	<p><i>In assessing the proposal the EPA has also identified a number of environmental issues that Woollahra Municipal Council may wish to consider in its overall assessment of the application. These include:</i></p> <ul style="list-style-type: none"> <li><i>Construction noise from piling works;</i></li> <li><i>Operational noise once extension is completed.</i></li> </ul> <p><i>To ensure the EPA is satisfied that the operational noise from the marina. The development will need to comply with the limits set out in Table 3.1. The EPA intends to include a Special Condition on the applicants scheduled activity licence to undertake and provide a noise assessment report. If the development is approved the applicant will also need to apply to vary its scheduled development works licence to a scheduled activity licence once the development is completed. General Terms of Approval should be applied.</i></p>	10
Heritage Council of NSW	<p><i>'It is requested that Council assesses the visual impact of the proposal on the significance of other heritage items which have views to this part of Rose Bay. Particular consideration would include the following issues:</i></p> <ul style="list-style-type: none"> <li><i>Retention of view corridors from heritage items such as Dunara;</i></li> <li><i>Retention of characteristic setting of this part of Rose Bay</i></li> <li><i>Design style and character of the existing and the proposed</i></li> <li><i>Exterior materials, finishes and colour schemes of the existing and proposed;</i></li> <li><i>Signage of the existing and proposed;</i></li> </ul>	11

Referral	Summary of Comment	Annexure
	<ul style="list-style-type: none"> <li><i>Landscaping of the existing and proposed.</i></li> </ul> <p><i>The Heritage Council recommends that Council ensures that the above water elements of the alterations do not visually dominate the local area, but remain recessive elements in the area.</i></p> <p><i>The Heritage Council recommends that Council:</i></p> <p><i>(a) Reconsiders the cumulative impact of the proposed works on the subject property and surrounding similar properties.</i></p> <p><i>Takes into account the recommendations of Council's Heritage adviser in relation to the proposal.'</i></p>	
Foreshores and Waterways Planning and Development Advisory Committee (cl. 29 of the Sydney Harbour Regional Environmental Plan (Sydney Harbour Catchment) 2005)	<p><i>The Committee recommends that:</i></p> <p><i>(a) the consent authority takes into account the relevant provisions of Part 6-Wetland Protection of the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (Deemed SEPP)</i></p> <p><i>(b) The consent authority takes into account the other relevant provisions of the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (Deemed SEPP) in particular Clause 25, Clause 26 and Clause 27 as they relate to visual impact, scenic quality, environmental protection and boat storage considerations.</i></p> <p><i>The consent authority takes into account the other relevant provisions of the Sydney Harbour Foreshores and Waterways Area DCP 2005, in particular Section 4.7 and Appendix D- How to undertake a visual impact assessment for marinas.</i></p>	12
NSW Office of Water	<i>Works as shown, below the mean high water mark, require the consent of the property owner. They do not require assessment under IDAS or a Controlled Activity Approval'.</i>	13
NSW Fire Brigades (cl. 77 of the Environmental Planning and Assessment Regulation 2000)	<p>The following comments have been provided:</p> <ol style="list-style-type: none"> <li><i>1. Fires involving marine vessels tend to burn fiercely and propagate quickly due to the nature of the composite material used in their construction. It is the opinion of the FRNSW that due to the size of the marina, the number and size of the marine craft moored alongside, the potential fire risk is significant. An effective hydrant system will assist in the extinguishment and control of potential fires and mitigate fire spread within the facility.</i></li> <li><i>2. Section 5.12 of the EIS provided states that the hydrant system has been designed in accordance with AS3962-2001 "Guidelines for design of marinas". FRNSW believes a hydrant system should be installed to the requirements of Clause 3.4 of AS2419.1-2005 "Fire hydrant installations Part 1: System design, installation and commissioning.</i></li> <li><i>3. In addition it is noted that Section 5.12 of the EIS, does not reference fire hose reel foam making capability or isolation/shut-off valves at the existing and proposed refuelling facility along Arm A.</i></li> <li><i>4. To ensure the storage and handling of flammable liquids is satisfactory, it is the recommendation of FRNSW that the refuelling facility is installed to the requirements of Clause 11.9.2 &amp; Clause 7.5 of AS1940-2004.</i></li> </ol>	14
Roads and Maritime Services	<p>No objection, however the following comments are provided for Council's consideration:</p> <ul style="list-style-type: none"> <li><i>The existing development provides opportunities for casual</i></li> </ul>	15

Referral	Summary of Comment	Annexure
	<p><i>berthing. Casual berthing facilitates access between the waterway and foreshore. Any extension should ensure that at a minimum, a berthing area of 20m should be provided for the purpose of short term drop-off and pick-up only</i></p> <ul style="list-style-type: none"> <li><i>No permanent berthing being allowed at North West Corner of Arm A where the Fuel and Sewage Pump out are to be located.</i></li> <li><i>The applicant should ensure that reasonable access to the site is available during construction.</i></li> </ul> <p><i>The applicant must notify the Maritime Division of Roads and Maritime prior to the removal of any commercial moorings.</i></p>	
Sydney Ports	No objection subject to the applicant applying for Harbour Master Approval after the issue of development consent.	16
NSW Police	No response	-
CASA	No response	-
Sydney Ferries	No response	-
Energy Australia	No response	-

## ENVIRONMENTAL ASSESSMENT UNDER SECTION 79C

The relevant matters for consideration under Section 79C of the Environmental Planning and Assessment Act 1979 include the following:

1. The provisions of any environmental planning instrument
2. The provisions of any proposed instrument that is/has been the subject of public consultation
3. The provisions of any development control plan
4. Any planning agreement that has been entered into
5. Any draft planning agreement that a developer has offered to enter into
6. The regulations
7. Any coastal zone management plan
8. The likely impacts of that development:
9. Environmental impacts on the natural and built environments
10. Social and economic impacts
11. The suitability of the site
12. Any submissions
13. The public interest

## 8. PUBLIC EXHIBITION

### 8.1 Submissions

In accordance with the relevant provisions of the EPA Act and EPA Regs relating to designated development, the application was publicly exhibited from 03/05/2012 to 01/06/2012. As a result 1,475 objections were received. See Annexure 19 for a full list of the names and addresses of these objectors.

The issues raised in the objections can be summarised as follows:

- No demonstrated demand for the facility
- Pollution/marine ecology
- View loss/visual impact
- Safety and navigation
- Privatisation of public assets

- Parking/traffic
- Cumulative impact
- Noise
- Heritage impacts
- Scale of development.

## 8.2 Statutory Declaration

The applicant has completed a statutory declaration dated 19/06/2012 declaring that the site notice for DA 136/2012/1 was erected and maintained during the exhibition period.

## 9. PLANNING FRAMEWORK

### 9.1 Designated development

Section 77A of the EPA Act provides that development is designated development if it is declared to be designated development under an environmental planning instrument or the *Environmental Planning and Assessment Regulation 2000* (EPA Reg). Schedule 3 of the EPA Reg includes certain categories of marinas as being designated development. Alterations and additions are not designated development if, in the opinion of the consent authority, they do not significantly increase the environmental impacts of the total development.

The DA has been submitted on the basis that the development is designated development and it is being processed accordingly.

An application for designated development is required to be:

- Publicly exhibited in accordance with s.79 of the EPA Act which provides for a notice to be placed on the land in addition to notification of adjoining land owners and advertising in the local newspaper
- Exhibited for 30 days (cl.78(2) of the EPA Reg)
- Notified to public authorities, other than approval and concurrence authorities who, in the opinion of the consent authority, may have an interest in the determination of the DA (cl.77 of the EPA Regs)
- Accompanied by an environmental impact statement (EIS) (schedule 1, part 1, 2(1)(e) of the EPA Regs)

The EPA Reg contains provisions for the form and content of an EIS (cl.71 & 72) and for the applicant to consult with the Director General and have regard to the Director General's requirements (cl.73).

A copy of submissions received during the public exhibition must be forwarded to the Director General (cl.81 of the Regulations).

The DA has been publicly exhibited as required. The form and contents of the EIS are satisfactory with regard to the EPA Reg. A letter dated 30/9/11 was received from the Director General with a copy of his requirements for the preparation of the EIS. The letter also advised that the Council should forward 3 copies of the DA & EIS to the Department for concurrent exhibition. Also, at the end of the exhibition we should send a copy of all submissions received to the Department (as required by cl.81 of the EPA Reg) and noted that *...the Department will only respond during the 21 day statutory period if there is an issue of major significance involved.*

The EIS has regard to the Director General's requirements. Copies of submissions were sent to the Department on 24/07/2012. No response was received.

## 9.2 Integrated development

Section 91 of the EPA Act provides that development is integrated development if it requires consent and it requires approval under certain other Acts. The proposed development is integrated as it requires approval under the following Acts which are listed in s.91:

- *Protection of the Environment Operations Act 1997* (POEO) as marinas which can accommodate 80 or more vessels are scheduled activities and the work required to construct the marinas would involve scheduled activity work and therefore environmental licenses are required. The approval body under the POEO is the Office of Environment and Heritage (EPA).
- *Fisheries Management Act 1994* (FMA) as a permit is required to harm marine vegetation in a protected area. The Department of Primary Industries (DPI) is the approval body under the FMA.

Submissions were forwarded to the approval bodies on 24/07/2012. The Office of Environment and Heritage (EPA) and the Department of Primary Industries have furnished their general terms of approval. If consent is to be granted it will need to incorporate the general terms of approval, refer Annexures 9 & 10 respectively.

## 10. STATE ENVIRONMENTAL PLANNING POLICY 55 - REMEDIATION OF LAND

Clause 7(1) (b) and (c) of SEPP 55 requires that where land is contaminated, Council must be satisfied that the land is suitable in its contaminated state or will be suitable after remediation for the purpose for which the development is proposed. If the land requires remediation Council must be satisfied that the land will be remediated before the land is used for that purpose.

The sediment sampling and testing program that has been carried out has demonstrated that remediation of the sediments at the Rose Bay Marinas was not required. In addition, the sediment testing and testing of the harbour water have shown that there is unlikely to be any impacts on aquatic organisms due to the disturbance of sediments from vessel movements and the proposed construction activities as part of the marina development, having regard to the expected dilution in the overlying harbour water.

In November 2007, a Site Audit Report (Site Audit Report Ref: AS 120699 of 8 November 2007; Michael Hayter, NSW EPA Accredited Site Auditor of Environ Australia Pty Ltd) was prepared for the redevelopment of the Rose Bay and Point Piper Marinas as proposed under DA 766/2006. The Site Audit found:

- The information on the site history and activities provides a satisfactory basis for identifying potential sources of contamination and chemicals of concern.
- The potential contaminants assessed were appropriate.
- There is a satisfactory degree of confidence in the sample data and sufficiently complete data set to draw reliable conclusions.
- TBT is the critical contamination in the sediments near the slipway. The source of contamination is historical and has now ceased.

- The risks to human health and the environment posed by the contaminated sediments are low.
- The site can be made suitable for use as a marina subject to implementation of the Environmental Management Plan (EMP).

The Site Auditor has reviewed the subsequent redesign of the Rose Bay Marina and stated that the conclusions of the Site Audit Report and validity of the Site Audit remain and are not affected by the redesign.

The risks to human health and the environment posed by the contaminated sediments are low and the risks associated with the sediment disturbance can be appropriately managed through the implementation of Environmental Management Plan. In the Auditor's opinion the site can be made suitable for use as a marina subject to implementation of the EMP.

Therefore Council's Environmental Health Officer has concluded the following:

*'Based on the above, the Auditor considers that the EMPs will provide an adequate framework for the management of the remnant sediment contamination at the site. The results of the sediment testing and the Site Audit have concluded that remediation of sediments at the site is not required; accordingly, the 'land' is suitable for the purpose of the proposed development.'*

In terms of SEPP 55 the proposal is considered to be satisfactory.

## **11. SYDNEY REGIONAL ENVIRONMENTAL PLAN (SYDNEY HARBOUR CATCHMENT) 2005 (SHREP) (deemed State Environmental Planning Policy)**

The SHREP aims to establish a balance between promoting a prosperous working harbour, maintaining a healthy and sustainable waterway environment and promoting recreational access to the foreshore and waterways.

Clause 2 sets out the aims of the plan, these are as follows:

*(1) This plan has the followings aims with respect to the Sydney Harbour Catchment:*

*(a) to ensure that the catchment, foreshores, waterways and islands of Sydney Harbour are recognised, protected, enhanced and maintained:*

*(i) as an outstanding natural asset, and*

*(ii) as a public asset of national and heritage significance, for existing and future generations,*

*(b) to ensure a healthy, sustainable environment on land and water,*

*(c) to achieve a high quality and ecologically sustainable urban environment,*

*(d) to ensure a prosperous working harbour and an effective transport corridor,*

*(e) to encourage a culturally rich and vibrant place for people,*

*(f) to ensure accessibility to and along Sydney Harbour and its foreshores,*

*(g) to ensure the protection, maintenance and rehabilitation of watercourses, wetlands, riparian lands, remnant vegetation and ecological connectivity,*

*(h) to provide a consolidated, simplified and updated legislative framework for future planning.*

- (2) *For the purpose of enabling these aims to be achieved in relation to the Foreshores and Waterways Area, this plan adopts the following principles:*

- (a) Sydney Harbour is to be recognised as a public resource, owned by the public, to be protected for the public good,*
- (b) the public good has precedence over the private good whenever and whatever change is proposed for Sydney Harbour or its foreshores,*
- (c) protection of the natural assets of Sydney Harbour has precedence over all other interests.*

The principles which enable the aims to be achieved are relevant to the assessment of this DA as the development is proposed to be carried out in the foreshores and waterways area. They are fundamental to properly understanding the weight which needs to be given to competing interests in respect to development and use of the waterway and foreshore area.

The principles clearly state that protection of the Harbour's natural assets is paramount. Therefore, to properly assess a DA under the SHREP a proper understanding of the impacts of the proposed development on the natural assets is fundamental. The principles also stress the strong public affinity with the Harbour expressed in terms of its public ownership. There is an obligation for a consent authority to uphold the public good over private interests if and whatever changes to the Harbour may be proposed. Consequently the public is entitled to have high expectations that its rights as owner of the Harbour will not be compromised by inappropriate developments.

The proposed development, being for a commercial marina, is defined as *land/water interface development*.

Cl.16 sets out zonings which apply to the Harbour. The proposed development is to be carried out in Zone No W5 – Water Recreation. Cl.17 contains the objectives of the zones. The objectives for the W5 zone are:

- (a) to give preference to and increase public water-dependent development so that people can enjoy and freely access the waters of Sydney Harbour and its tributaries,*
- (b) to allow development only where it is demonstrated that the public use of waters in this zone is enhanced and will not be compromised now or in the future,*
- (c) to minimise the number, scale and extent of artificial structures consistent with their function,*
- (d) to allow commercial water-dependent development, but only where it is demonstrated that it meets a justified demand, provides benefits to the general and boating public and results in a visual outcome that harmonises with the planned character of the locality,*
- (e) to minimise congestion of and conflict between people using waters in this zone and the foreshore,*
- (f) to protect and preserve beach environments and ensure they are free from artificial structures,*
- (g) to ensure that the scale and size of development are appropriate to the locality, and protect and improve the natural assets and natural and cultural scenic quality of the surrounding area, particularly when viewed from waters in this zone or from areas of public access.*

Cl.17(2) provides that a consent authority must not grant development consent to any development unless it is satisfied that the development is consistent with the aims of the plan (i.e. as contained in cl.2) and the zone objectives.



## 11.1 Matters requiring consideration

Cl.18 provides that commercial marinas are development permissible only with development consent in the W5 zone. Matters to be considered in the assessment of a DA are in Part3, Division 2 under the following headings:

- cl.21 – biodiversity, ecology and environment protection
- cl.22 – public access to and use of, foreshores and waterways
- cl.23 – maintenance of a working harbour
- cl.24 – interrelationship of waterway and foreshore uses
- cl.25 – foreshore and waterways scenic quality
- cl.26 – maintenance, protection and enhancement of views
- cl.27 – boat storage facilities

## 11.2 Foreshores and Waterways Planning and Development Advisory Committee (Advisory Committee)

Clause 29 provides that consent cannot be granted to development referred to in schedule 2 on land that is within the foreshore and waterway area unless the DA has been referred to the Advisory Committee. Commercial marinas are referred to in schedule 2 and the land is within the foreshores and waterways area. The DA was considered by the Advisory Committee on 15/06/12 and it commented as follows:

- a) *the consent authority takes into account the relevant provisions of Part 6-Wetland Protection of the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (Deemed SEPP)*
- b) *The consent authority takes into account the other relevant provisions of the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (Deemed SEPP) in particular Clause 25, Clause 26 and Clause 27 as they relate to visual impact, scenic quality, environmental protection and boat storage considerations.*
- c) *The consent authority takes into account the other relevant provisions of the Sydney Harbour Foreshores and Waterways Area DCP 2005, in particular Section 4.7 and Appendix D- How to undertake a visual impact assessment for marinas.*

These matters are discussed in **part 16.1** of this report.

## 11.3 Other relevant SHREP provisions

Other provisions of the SHREP relevant to this proposal are:

- part 5 – Heritage provisions
- part 6 – Wetlands protection

Annexure 17 is a table which summarises the proposal in relation to each of the relevant matters for consideration under the SHREP. Issues arising are further discussed in **part 16** of this report.

## **12. WOOLLAHRA LOCAL ENVIRONMENTAL PLAN 1995 (WLEP)**

### **12.1 Clause 1.1(2): Aims and Objectives of Woollahra LEP 1995**

WLEP applies to all land within the area of Woollahra and under cl.3(1) includes land taken to be within the area by virtue of s.205 of the *Local Government Act 1993*. Section 205(1) includes land and water between the high-water mark and the low-water mark (commonly referred to as the inter-tidal zone).

However, this proposal is located beyond the low-water mark, thus WLEP, 1995 does not apply to the development.

### **12.2 Clause 27: Development in the Vicinity of a Heritage Item**

Clause 27 relates to development in the vicinity of heritage items, heritage item groups, heritage conservation areas, archaeological sites or potential archaeological sites. Council's Heritage Officer recommends refusal of the proposal due to its impact upon the visual setting of the Rose Bay esplanade and sea wall. Council's Heritage Officer considers that:

- there is an important connection with Sydney Harbour and the Promenade and sea wall
- this connection is already compromised by the existing marina
- views from the promenade will be obscured for a greater portion of the promenade by the proposal

Council's Heritage Officer also commented that the proposal will partially obstruct views to Item number 82 of the Sydney REP (Sydney Harbour Catchment) 2005, (Shark Island). Views from the foreshore to the island and from the island to the foreshore will be partially obstructed in places due to the proposed expansion of the existing marina. This issue is further discussed in **part 16.1** of this report.

Council's Heritage Officer identified the following heritage items in vicinity of the proposed development, which were not considered to be adversely impacted:

- Rose Bay Police Station
- 1 Rose Bay Avenue, Bellevue Hill
- 593 New South Head Road 'The Chilterns'
- Site of public baths at Lyne Park (SHREP)
- Remains of the Rose Bay ferry wharf (SHREP)
- Dunara Gardens (State and locally listed heritage item).

The impacts identified by our Heritage Officer occur outside of the area to which WLEP 1995 applies. Therefore it is more appropriate to consider those impacts in the context of the heritage provisions of the SHREP rather than under WLEP, refer to **part 16.2.3** – heritage, of this report.

## 13. DEVELOPMENT CONTROL PLANS

### 13.1 Sydney Harbour Foreshores & Waterways Area Development Control Plan (SHDCP)

The SHDCP applies to the proposed development as it applies to all development within the foreshores and waterways area as identified in the SHREP. All of the proposed development is within such area.

The SHDCP contains provisions for assessing the impact of developments on the ecology (part 2) and landscape (part 3). It also contains general design guidelines for various types of development (part 4) and guidelines for specific developments including marinas (both commercial and private) (part 4.7). Appendix D of the SHDCP contains specific guidelines for assessing the visual impact of marinas.

Annexure 18 is a table which summarises how the proposal relates to the various provisions of the SHDCP. The provisions of the SHDCP are also discussed under parts of **part 16** of this report.

### 13.2 Car parking DCP

Based on the DCP's rates for parking the generation rates for the existing and proposed marinas are as follows:

Existing:

49 wet berths x 0.6	= 29.4
70 swing moorings x 0.2	= 14
Total	= 43.4

Proposed:

95 wet berths x 0.6	= 57
24 swing moorings x 0.2	= 4.8
Total	= 61.8

Based on parking generation rates in the DCP the proposed marina will generate an additional parking demand of 18.4 spaces.

Parking and traffic impacts are discussed in detail under **part 16.2.1** – traffic & parking, of this report.

### 13.3 Access for people with a disability

The previously approved development DA682/2008 involved the provision of upgrades to the existing pedestrian pathway in Rose Bay Park, to the west of the existing marina building and the provision of a person hoist to allow access to and from the water. In addition the ramped section gradients of the link between the fixed and floating portions of the access way were constructed in accordance with the requirements of the *Disability Discrimination Act 1992* (DDA). A condition of consent could be imposed to ensure the new walkways comply with the DDA requirements. Currently there is only assisted disabled access to the marina as the upgrades to the ramp in Rose Bay Park have yet to be undertaken, as the applicant is awaiting final details from the Council relating to

the materials to be used. The person hoist is stored at Point Piper Marina and is transferred when required.

The proposal is considered to make suitable provision for access for people with disabilities.

## **14. OTHER DCPS, CODES AND POLICIES**

### **14.1 Boat Storage Policy for Sydney Harbour**

The policy was prepared by the former Department of Infrastructure, Planning and Natural Resources and the Waterways Authority in June 2004. It aims to provide a more strategic and certain approach to regulating boat storage facilities and to provide a balance between promoting a prosperous working harbour, maintaining a healthy and sustainable waterway environment and promoting recreational access to the foreshores and waterways.

Critical issues are contained in Part 4 of the Policy. Part 4.1 relates to a 'moratorium' on marina development which resulted from concerns about visual impacts of boat storage facilities, environmental impacts and public access to the foreshore and waterway.

Part 4.2 discusses changing demands. It relevantly states that there is a clear trend towards larger motorised boats which are more likely to be stored on marina berths. Consequently, marina operators are looking to convert swing moorings to marina berths. In relation to precincts such as Rose Bay the following statement is made, *'...there are a number of precincts in the harbour, such as The Spit and Rose Bay ... in which demands for growth and change may be most pronounced. A more detailed and localised understanding of such precincts would assist all stakeholders in working together to ensure that growth and change in these areas occurs in the most appropriate manner.'*

The *Rose Bay West Framework Plan*, which is discussed later in this report, is the outcome of stakeholders input regarding the growth and change in Rose Bay.

Part 5, Boat storage policy statement, outlines the State Government's policy for effective boat storage. Part 5.1 relates to commercial marinas. It states that commercial marinas will generally be allowable in certain locations where:

- *Foreshores are already modified through development , including existing maritime commercial and recreational activities*
- *Conflicts with other land and water uses are minimised*
- *Public access to and use of the foreshores and waterways is not reduced*
- *The visual impacts of the development are acceptable, and*
- *There are no adverse impacts on wetland or flora and fauna habitats*

These matters are discussed in **part 16** of this report.

Part 5.3, Single moorings, states *'Single moorings generally have a lower visual impact than fixed berth storage '... However, as boats are able to move more freely on single moorings, they can also impede navigation by other vessels. ... The Government therefore supports the retention of private single mooring areas at their current levels. ... As a means of freeing up water space for navigation, the Government also considers the conversion of commercial single moorings (associated with commercial marinas) to marina berths to be appropriate in suitable locations. This will also potentially facilitate greater public access to the waterway for recreational boating.'*

The visual impact of the proposal is discussed under **part 16.1** – visual impacts, of this report.

Part 6, Implementing the policy, states the moratorium will be lifted by gazettal of SHREP and the release of the land owner's consent manual. The REP and manual are both now effective. In Part 6.2, Simplifying the planning framework, the following comments are included regarding the SHREP ... *The development of new commercial marinas and the conversion of single moorings to fixed marina berths will be permissible in four separate zones ... These zones reflect the primary areas of the harbour used for ... public recreation (such as The Spit, Rose Bay and Rushcutters Bay) ... Also, Private single moorings are permissible without the requirement for development consent in all waterway zones. Such facilities are licensed by the Waterways Authority (Roads and Maritime Services) and numbers will remain at about current levels.*

The proposal includes the reduction of swing moorings and an increase in fixed marina berths. The proposal is considered satisfactory with regard to part 6.2 of the Policy.

Part 6.3, Improving development controls for marinas, states ... *The Harbour DCP.... provides a stronger and comprehensive assessment tool for marinas, which will contribute to improved scenic quality and other environmental outcomes for the harbour.*

Relevant provisions of the DCP are considered under **part 16.1** of this report.

Part 6.5, Planning for high usage precincts, provides:

*The Waterways Authority will prepare 'Framework Plans' for some high usage boating precincts of the harbour. Such a plan is currently being prepared for the Rose Bay West boating precinct.*

*These plans are not statutory documents, however they are used by the Authority to help guide its decisions as land owner in areas of the harbour where there are competing demands for water-based development and particular environmental issues are to be addressed. The plans are prepared in consultation with local councils, relevant state agencies, boating groups and the local community.*

## **14.2 Rose Bay West Framework Plan (RBWFP)**

The RBWFP summarises the land and water use issues and future opportunities relating to Rose Bay West. It is not statutory and has been produced to assist the Roads and Maritime Service in developing policy and planning controls in its role as land owner for the bed of Sydney Harbour. It was adopted in 2004.

The following points are included under *The site and its context, Water use issues*:

- *As a recreational boating hub, this Bay offers the opportunity to provide a higher level of service to the general public, including fuel, sewage pump-out and provisioning.*

The following point is included under *Marina issues*:

- *Any conversion to fixed berths results in a change in the views from both the land and water. A marina based largely on fixed berths presents a more congested picture and in some circumstances results in blocking views.*

The following point is included under *Land use issues*:

- *New South Head Road carries heavy traffic and parking is limited on this road and in Wunulla Road. The Council plan (public domain improvements between Rose Bay and Lyne Park) removed approximately 20 spaces on New South Head Rd as part of the pedestrian and cycle access improvements.*

Under *Future uses and development opportunities* there are 12 factors which any development proposal should take into consideration. The factors cover:

- the consideration of land and water uses in conjunction
- retention of commercial marinas and provision of a range of boating services
- public access to marinas
- vessel manoeuvrability
- protection of seagrass beds
- facilitation of cycle and pedestrian access improvements above the mean high water mark and the possibility of boating facilities and dinghy storage below the mean high water mark
- intertidal access opportunities
- retention of boat repair facilities at Holme Port (Point Piper) marina
- dinghy storage rack in Rose Bay Park.

In particular the following factors are also included:

- *Significant views from Rose Bay Park (near and far), including views of the open water and the eastern shore of Rose Bay, should not be obstructed by marina berthing structures and associated vessels. In order to maximise views from all public vantage points, smaller vessels should be berthed or moored closest to the shore while larger vessels should be further from the shore.*
- *Boat storage in this section of Rose Bay should be limited to the current number of vessels. The configuration of fixed berths, private and public swing moorings can be varied within this maximum. There will be no decrease in the number of mooring spaces available to the general public.*
- *The outer limit of vessel moorings is identified on the map. A maximum vessel size of 15-18 metres is considered appropriate to permit safe and adequate manoeuvring in the Bay to ensure views of the Bay are not impeded.*

The proposed development does not involve any increase to the number of boats to be moored at the marina or any new boats above 15m in size. However the proposed new eastern arm (Arm C) would adversely impact open water views and views of the eastern shore of Rose Bay. This has been further discussed in **part 16.1** of this report.

As the RBWFP reflects the result of consultation with various stakeholders, including the local council, relevant state agencies, boating groups and the local community, it is a useful document for considering the likely impacts of the development.

It is considered that the proposal does not satisfy relevant matters under the RBWFP with particular regard to the impact on the open water views and views of the eastern shore of Rose Bay.

### **14.3 AS 3962-2001 Guidelines for design of marinas (AS 3962)**

AS 3962 contains guidelines for marina designers, manufacturers and operators in relation to recreational marinas and small commercial vessels up to 50m in length. The standard covers

investigations, dimensional criteria, loading & stability, design considerations, services, onshore boat facilities and traffic & parking.

The EIS states that AS 3962 was utilised to assist in the design of the marina extension.

Section 3 – *Dimensional Criteria* of AS 3962 sets out minimum dimensions for various aspects of marinas, including channel widths (3.1), berth sizes (3.3) and walkways, fingers and mooring points (3.5).

Based on this criteria, there is scope to reduce the extent of the floating pontoons by minimising the dimensions of walkways, arms, mooring pen fingers and the eastern fairway. However the width of the eastern walkway will match the width of the other two walkways to Arms A & B. The proposed walkway width of 3.2m is thereby acceptable. The mooring pen fingers that have been proposed to Arm C are 1.4m, which are wider than the approved mooring pen fingers to Arms A and B (1.2m in width). A condition could be imposed to reduce the width of the mooring pen fingers. Reducing the width of the fingers to 1.2m would allow the overall length of the Arm C (which contains 7 fingers) to be reduced by 1.4m. The proposed new mooring pen fingers to Arm A are 1.05m in width and are acceptable.

The width of the eastern fairway is shown to be 35m. However, based on the maximum boat length, AS 3962 allows a minimum width of 30m. This fairway breaks the ‘wall of boats’ as viewed from the promenade and permits views to the north. The eastern extent of the marina could be reduced by 5m which would be beneficial for views to the east and north east from the promenade. A 30m fairway would still break the ‘wall of boats’ and provide some vistas from the promenade. However, reducing the fairway width and the size of the mooring pen fingers would not overcome the issue of visual impact created by the proposed eastern arm (Arm C).

Section 8 – *Traffic and parking* of AS 3962 applies the same car parking rates for marina berths and swing moorings, i.e. 0.3 spaces per commercial berth/mooring. It states that these rates have been found to be acceptable in the absence of traffic and parking studies. Applying these rates to the existing and proposed marinas produces the following outcome.

Parking generation based on existing boat storage capacity       $119 \times 0.3 = 35.7$

Parking generation based on proposed boat storage capacity       $119 \times 0.3 = 35.7$

Based on these parking generation rates the proposed development would not generate any additional demand for car parking. This is further discussed in **part 16.2.1** – traffic & parking, of this report.

#### **14.4 Land owner’s consent**

The EPA Regs, cl.49, provides that a DA may be made by the owner of the land or a person with the written consent of the owner. In the case of Sydney Harbour, the Roads and Maritime Services is the authority which owns the Harbour bed. Therefore the applicant, Addenbrooke Pty Ltd, required the consent of Roads & Maritime Service for this DA.

Roads & Maritime Service issued a Land Owner’s Consent Statement dated 14/11/2011. The application for Land Owner’s Consent was assessed against its *Obtaining Permission to Lodge a Development Application Policy*.

## 14.5 Waste Not Development Control Plan 2010

The Waste Not DCP is applicable to all development and seeks to establish waste minimisation and sustainable waste management during demolition and construction phases and throughout the on-going use of the building. Conditions of consent could be recommended to address the requirements of this DCP.

## 15. APPLICABLE REGULATIONS

N/A

## 16. IMPACTS

S.79C(1)(b) requires the likely impacts of the development (including environmental impacts on both the natural and built environments) and social and economic impacts in the locality to be taken into consideration.

The impacts of redeveloping the Rose Bay marina have been considered by two previous Land and Environment Court decisions, these cases are as follows:

- The deemed refusal of DA766/06 for the redevelopment of both Point Piper and Rose Bay marinas, was considered by Biscoe J in the Land & Environment Court, see *Addenbrooke Pty Ltd v Woollahra Municipal Council [2008] NSWLEC 190*. Biscoe J concluded that the visual impact of that proposal would have been unacceptable in the context of the planning controls that apply to development in Sydney Harbour. Accordingly the appeal against Council's 'deemed refusal' of that DA was dismissed.
- The impact of redeveloping the Rose Bay marina, as proposed by DA682/08, was also considered by Biscoe J in the Land & Environment Court, see *Addenbrooke Pty Ltd v Woollahra Municipal Council (No 2)[2009] NSWLEC 134*. Biscoe J concluded that the visual impact of that proposal was acceptable in the context of the planning controls that apply to development in Sydney Harbour subject to the removal of the eastern arm (Arm C) and 4 x twenty metre berths on the middle arm (Arm B) and two x twenty metre berths on the western arm (Arm A). Accordingly the appeal was upheld.

Both Addenbrooke judgments are considered to be important documents in assessing the impact of marina development in Rose Bay and for interpreting the provisions of the SHREP and SHDCP.

The following is an assessment of the impacts of the current proposal.

### 16.1 Visual Impact

Visual impact is the most critical impact in the assessment of this proposal.

#### 16.1.1 Planning controls

The most relevant planning controls and guidelines are SHREP and SHDCP.

SHREP cl.2(1) includes the following aim:

- (a) *to ensure that the catchment, foreshores, waterways and islands of Sydney Harbour are recognised, protected, enhanced and maintained:*



- (i) as an outstanding natural asset, and*
- (ii) as a public asset of national and heritage significance for existing and future generations*

The W5 zone includes the following objectives in cl.17 that relate to visual impact:

- (d) to allow commercial water-dependent development, but only where it is demonstrated that it meets a justified demand, provides benefits to the general and boating public and results in a visual outcome that harmonises with the planned character of the locality,*
- (g) to ensure the scale and size of development are appropriate to the locality, and protect and improve the natural assets and natural and cultural scenic quality of the surrounding area, particularly when viewed from the waters in this zone or from areas of public access*

As discussed earlier, cl.17(2) precludes the granting of consent unless the consent authority is satisfied that the development is consistent with the aims of the plan and the objectives of the zone.

Cl.25 – *Foreshore and waterways scenic quality*, provides that the following matters be taken into consideration:

- (a) the scale, form, design and siting of any building should be based on an analysis of:*
  - (i) the land on which it is to be erected, and*
  - (ii) the adjoining land, and*
  - (iii) the likely future character of the locality,*
- (b) development should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands, foreshores and tributaries,*
- (c) the cumulative impact of water-based development should not detract from the character of the waterways and adjoining foreshores.*

Cl.26 – *Maintenance, protection and enhancement of views*, provides that the following matters be taken into consideration:

- (a) development should maintain, protect and enhance views (including night views) to and from Sydney Harbour,*
- (b) development should minimise any adverse impacts on views and vistas to and from public places, landmarks and heritage items,*
- (c) the cumulative impact of development on views should be minimised.*

Part 3 of the **SHDCP** – *Landscape assessment*, makes reference to requirements in the SHREP which a consent authority must consider when assessing the visual impact of development from the waterway and foreshores. Also, that visual impact will depend on:

- *the nature of the proposal – its height, width, siting, scale, colour, reflectivity and function;*
- *the landscape setting in which it is proposed;*
- *the degree of change created – whether it will be minimal or not; and*
- *the ability of the proposal to integrate with the landscape character.*

*To assist in considering the landscape characteristics where a development is proposed, the area has been divided into a number of different landscape character types. Performance criteria have been devised for each area. (cl.3.1)*

Cl.3.2 – *General aims*, provides:

*All development should aim to:*

- *minimise any significant impact on views and vistas from and to:*
  - *public places,*
  - *landmarks identified on the maps accompanying the DCP, and*
  - *heritage items;*
- *protect the integrity of foreshores with rock outcrops, dramatic topography or distinctive visual features;*
- *provide a high quality of built and landscape design; and*
- *contribute to the diverse character of the landscape.*

Cl.3.4 – *Performance criteria*, categorises Rose Bay as landscape character type 10. Under the *Statement of Character and intent* it provides:

*Development is suitable for these areas providing consideration is given to:*

- *Preserving the special natural features that form an integral part of the character and vitality of the landscape including the natural shorelines, beaches, rock platforms and outcrops; and*
- *The role of commercial activities within these areas is recognised as providing an important recreational resource and improving public enjoyment of the harbour.*

The *Performance criteria* for landscape character type 10 is:

*Any development within this landscape is to satisfy the following criteria:*

- *It does not obscure, detract from or destroy special natural elements that are significant within the local context of the area;*
- *The open nature of the bays is not lost by overdevelopment of the foreshores; and*
- *It has been demonstrated that the commercial activities proposed within and adjacent to the foreshores are necessary and that their proposed use is compatible with existing and likely future land uses.*

Part 4 of the SHDCP – *Design guidelines for water-based and land/water interface developments*, includes at cl.4.2 – *General requirements*, objectives and requirements that must be considered for land/water interface developments. In relation to visual considerations it includes:

- *Development does not dominate its landscape setting*

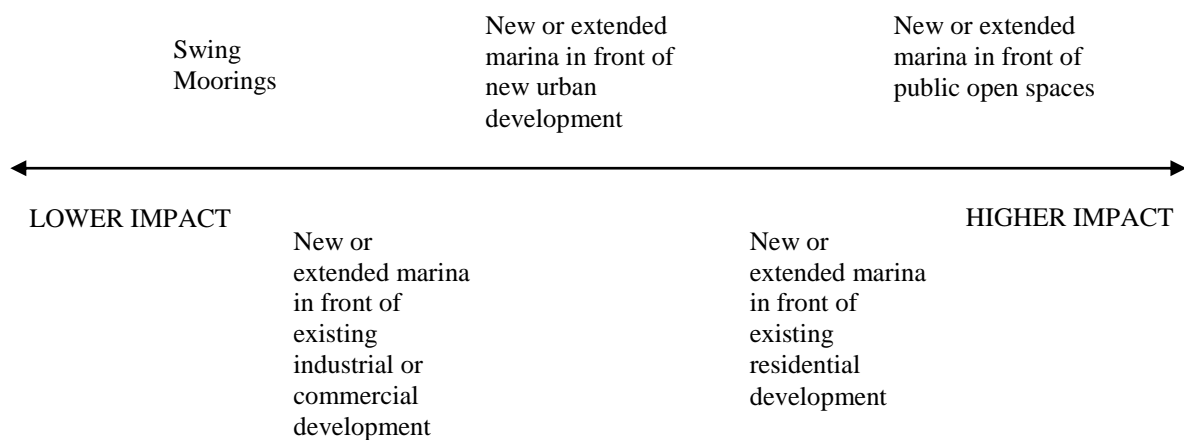
Cl.4.7 – *Marinas (commercial and private)* sets out objectives and principles which must be considered where marinas are permissible and are to be provided. In relation to *visual impact* the objectives and guiding principles are:

*Note: For detailed provisions on how to undertake a visual impact analysis see Appendix D in this DCP*

- *the visual contrast (derived from an analysis of form, line, colour and texture) between the marina and the existing or planned future character of its setting is to be minimised;*

- *the visual impact of the marina on people in the visual catchment (derived from an analysis of the potential number of viewers, their location within the landscape, distance from the marina, and duration of view) is to be minimised;*
- *any visual analysis shall consider the impact of the largest motor vessel(s) capable of being berthed at the marina;*
- *the largest vessels (motorised or otherwise) to be berthed at the marina are to be located as far from shore as possible;*
- *waterside structures and berthed vessels associated with marinas are not to block views from foreshore public open space or views to foreshore public open space from the waterway;*
- *the bulk and scale of buildings and other structures on land is to be minimised through appropriate mitigation measures including landscaping, articulated walls, detailing of surfaces and by using smaller elements (see also Section 4.5 of this DCP);*
- *the visual impact of car parking from the waterway is to be minimised; and*
- *all signage is to be located on dry land below the roofline (or parapet) of buildings. Advertising signs are not to detract from the visual quality or amenity of the foreshores and waterways when viewed from the waterways.*

Appendix D – *How to undertake a visual impact assessment for marinas* starts with *Known characteristics of various types of boat storage facilities*. These are key findings of a study undertaken by URS consulting engineers of 60 existing boat storage facilities within Sydney Harbour. These key findings are summarised in Figure D1. *Indicative potential visual impact of various development scenarios* see figure 3 below:



**Figure 3:** Indicative Potential Visual Impact of Various Development Scenarios (SHDCP)

Cl.1.4 – *How to undertake a visual impact assessment, Carrying out a view analysis*, sets out a number of steps, including the preparation of a matrix. The purpose of the matrix is to assist in determining the potential visual impact for individual viewing locations and an overall potential visual impact. The suggested matrix format includes rating factors that influence visual impact for a viewing location. The factors referred to in Appendix D which influence visual impact are:

1. location of viewer
2. distance of view
3. period of view
4. scale or relative size (boat numbers and mix of vessel types)
5. boat storage type/spatial relationships

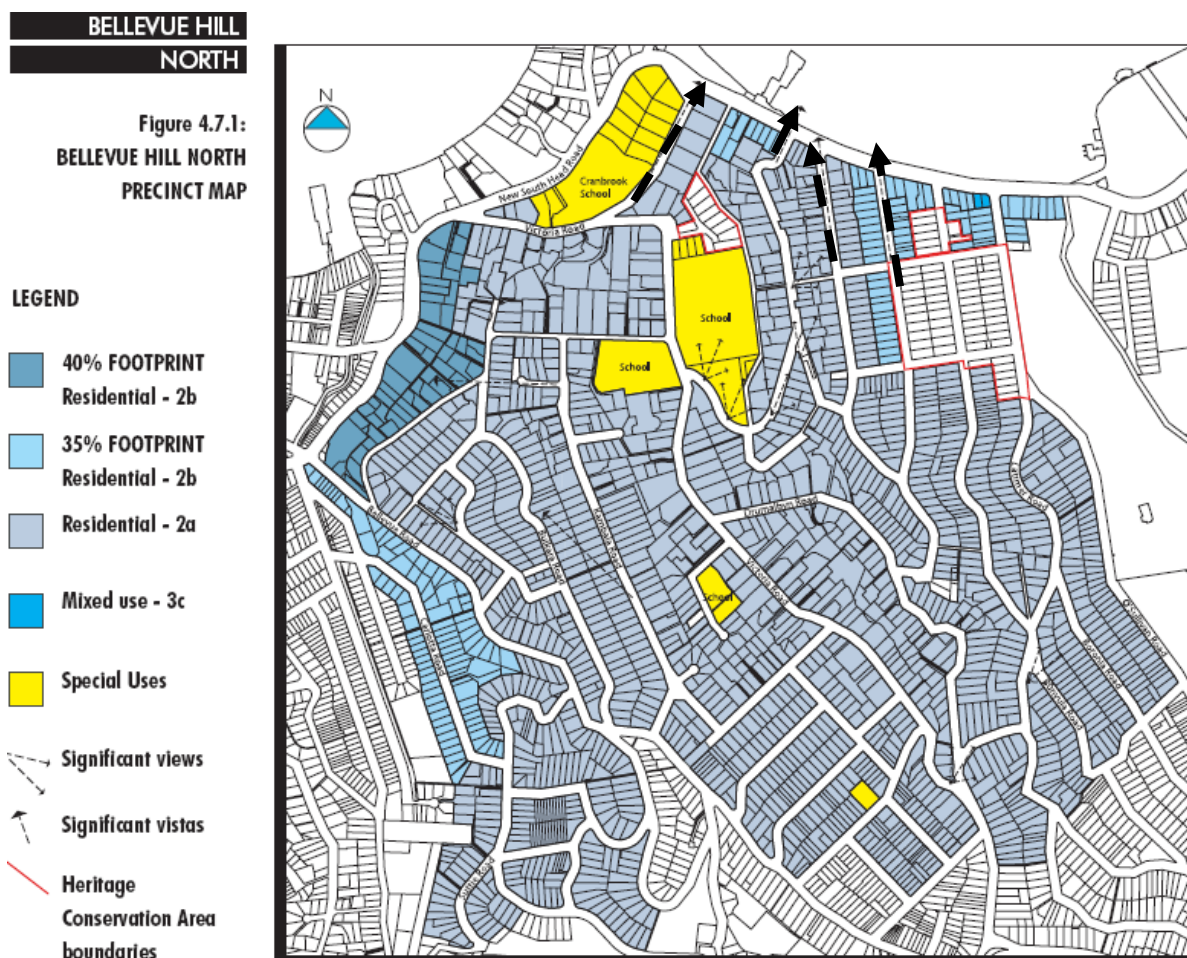
Another factor is motion of objects. It has not been used in the matrix examples contained in Appendix D. Each factor is rated either 1, 2 or 3 for each viewing location. The factor ratings are then averaged to give a degree of impact for each viewing location, 1 (1.000 – 1.666) = low, 2 (1.667 – 2.333) = medium and 3 (2.334 – 3.000) = high.

There are references in SHREP, cl.17 W5 zone objective (d) and cl.25(a)(iii), to the *planned* and *likely future* character of the locality. The landscape character type under the SHDCP, cl.3.4, includes a statement of character and intent. It provides some guide as to the planned/likely future character of the locality. The *Woollahra Residential Development Control Plan* (WRDCP) is also of relevance as it relates to land in the locality. The relevance of the RDCP in this regard is made in the (2008) *Addenbrooke* judgement at p.99, referred to below.

Under the WRDCP the Bellevue Hill North precinct desired future character objectives include:

*O 4.5.7 To protect important views from the public spaces of the precinct to the harbour, the city skyline and to the surrounding districts;*

The following map shows the Bellevue Hill north precinct and in particular significant views and significant vistas (RDCP figure 4.7.1).



**Figure 4:** Bellevue Hill North Precinct Map (RDCP, 2003)

The RDCP identifies significant vistas from New South Head Road and the promenade in a northerly direction from the intersections of Rose Bay Avenue, Cranbrook Road, Beresford Road

and Salisbury Road (highlighted on the Bellevue Hill north map). The identification of these locations is considered relevant in assessing the impact on the planned character of the locality.

The information contained in the following documents is relevant to assessing the visual impact of this proposal:

- EIS and in particular Appendix H, *Rose Bay Marina- Eastern Arm Visual assessment*, by Environmental Resources Management Australia dated March 2012 (ERM report)
- Referral comment by our Urban Design Planner (refer Annexure 4)
- *Addenbrooke* judgments, particularly the 2009 judgment.

#### **16.1.2 ERM report**

This report, submitted as part of the applicant's EIS, evaluates the visual impact from 5 locations along the Rose Bay promenade.

The promenade locations range from the eastern side of the marina kiosk (ERM ref. A15) to approximately 100m to the east of the existing marina (ERM ref. A11). Photomontages have been prepared for viewing points A11 (100m east) and A13 (50m east).

The ERM report has undertaken a visual assessment based on Appendix D of the SHDCP. The results of this assessment are summarised in the table below, (refer to Table 2).

<b>Factor</b>	<b>Location of viewer</b>	<b>Distance of view</b>	<b>Period of view</b>	<b>Scale or relative size</b>	<b>Boat Storage Type / Spatial relationship</b>	<b>Overall potential visual impact Appendix D</b>	<b>Previous viewpoint assessment (Chapter 4)</b>
<b>Viewpoint A11</b>	Clear view past marina	95m	Few Minutes Up to half a day	10-30m long	Marina adjoining relatively straight shoreline		
Appendix D	1	3	2	2	2	<b>2</b>	<b>Low</b>
<b>Viewpoint A12</b>	Clear view past marina	65m	Few Minutes Up to half a day	10-30m long	Marina adjoining relatively straight shoreline		
Appendix D	1	3	2	2	2	<b>2</b>	<b>Low</b>
<b>Viewpoint A13</b>	Slightly elevated with partial view over marina	65m	Few Minutes Up to half a day	10-30m long	Marina adjoining relatively straight shoreline		
Appendix D	2	3	2	2	2	<b>2.2</b>	<b>Medium</b>
<b>Viewpoint A14</b>	Existing view relatively unchanged	65m	Few Minutes Up to half a day	10-30m long	Marina adjoining relatively straight shoreline		
Appendix D	1	3	2	2	2	<b>2</b>	<b>Low</b>
<b>Viewpoint A15</b>	Existing view relatively unchanged	65m	Few Minutes Up to half a day	10-30m long	Marina adjoining relatively straight shoreline		
Appendix D	1	3	2	2	2	<b>2</b>	<b>Low</b>

**Table 2:** ERM Visual Assessment against the SHDCP Criterion in Appendix D (*Source: EIS*)

This report also discusses the visual issues that were raised in the 2009 Addenbrooke judgment and discusses the changes that have been made in response to these issues. It states as follows about the changes to Arm C as proposed by DA682/2009 and the current proposal:

*A reduction in the size of boats and a reduction in the height limit of boats that can be berthed in the proposed eastern arm will provide a different proposal than that which was previously considered by the Land and Environment Court of New South Wales. The maximum berth size has been reduced by 50% from 30 m to 15 m and the maximum boat height has been reduced by 50% from 7m to 3.5m.*

The ERM Report makes the following responses to the visual issues raised in the 2009 Addenbrooke judgment:

Paragraph 5 of the judgment states the following: ... “*The view impact issue now focuses mainly on three aspects: loss of Harbour views from the Rose Bay Promenade as far as Manly caused by the proposed RBM...*”

*This is acknowledged for the previous application, however the revised proposal does not have a significant impact on the harbour views from the Rose Bay Promenade as far as Manly.*

Paragraph 85 of the judgment states the following: *“The other important view is immediately east of the existing RBM where a view line approximately eight kilometres in length is available across the Harbour to Manly. This view line is substantially diminished by the proposed RBM, notwithstanding a view corridor between the middle and eastern arms and a public viewing platform and seating area incorporated into the walkway. This loss of view is the main controversy concerning the RBM proposal.”*

*The revised eastern arm with its boat length and boat height restrictions does not substantially diminish views from the Rose Bay Promenade as far as Manly.*

Paragraph 87 of the judgment states the following: *“The substantial loss of Harbour views to Manly is largely caused by the eastern arm of the proposed RBM. Notwithstanding a viewing channel between the middle and eastern arms, the loss can be measured as somewhere around 31 per cent of those existing views from various points on the Promenade and as a higher percentage of the more complete views. Therefore, the proposed RBM does not maintain views to and from the Harbour, which is a consideration under cl 26(a) of the Harbour REP.*

*Given that the Promenade is a much used public asset of considerable aesthetic and heritage importance, the loss of these views is a considerable public detriment.”*

*The revised eastern arm does maintain views to and from the harbour. The new arm with a publicly accessible viewing platform and seating creates new views to and from the harbour. These new viewing locations are a public benefit.*

Paragraph 89 of the judgment states the following: *“... what is important, in my opinion, is the expansive view of the Harbour and its headlands as far as Manly, rather than a view specifically of particular features of Manly, however Manly is precisely defined.”*

*The revised eastern arm with its boat length and boat height restrictions maintains and preserves views from the Rose Bay Promenade as far as Manly.*

The ERM report does not include any viewpoints from Rose Bay Park and beach. However the proposed development is not considered to adversely affect the visual amenity of Rose Bay Park and beach, this has been further discussed in **part 16.1.5** of this report.

The ERM report concludes as follows:

- *In the view from most locations the proposed marina arm would be set within a backdrop of boats already berthed within existing marinas including the Rose Bay and Point Piper Marinas as well as within the Royal Motor Yacht Club.*
- *The length of the proposed eastern marina arm has been determined so that the view line from the Promenade to open water is preserved at the point where Shark Island separates from Woollahra Point and views are obtained past the Royal Motor Yacht Club.*
- *Height controls for boats moored at the eastern marina arm also minimises the visual impact on views from the Promenade by allowing views over the boats, even at high tide, to the open water of Sydney Harbour and distant views to Manly.*

It should be noted that this report has only submitted photomontages for viewpoints 11 and 13. Ideally photomontages for the remaining viewpoints should have been provided, however the proposal could be adequately assessed with the submitted information.

### 16.1.3 Urban Design Planner's referral response

Council's Urban Design Planner, Tom Jones, provided a Referral Response dated 4/7/12, see Annexure 4.

His assessment is based on 6 viewing locations being:

1. Rose Bay Park and beach
2. New South Head Road 10m east of Rose Bay Pier
3. New South Head Road 100m east of Rose Bay Pier
4. Residential property at Salisbury Road at the corner of New South Head Road
5. The waterway on a ferry
6. Dudley Page Reserve, Dover Heights

The assessment is based on the impact of the development proposed by this DA and contains a matrix prepared in accordance with the approach adopted by the SHDCP, Appendix D, including an assessment of the impacts of the existing marina.

The following table summarises the Urban Design Planner's assessment.

URBAN DESIGN PLANNER'S VISUAL IMPACT ASSESSEMNT			
Viewing location	Existing impact using SHDCP	Proposed impact using SHDCP	Comparison with ERM results
View 1	High	High	-
View 2	Medium	High	Low (A15)
View 3	Medium	High	Low (A11)
View 4	Medium	Medium	Low (A12)
View 5	Medium	Medium	-
View 6	Low	Low	-

**Table 3:** Comparison of the Urban Design Planners Visual Assessment with the Applicants.

The Urban Design Planner's visual impact assessment conclusions are as follows:

***The visual impact of the marina***

*The boats berthed on Arm C will be highly visible. This is due to the number, layout and size of vessels to be accommodated and the low and close viewing points. The berths on Arm A will have very little impact.*

***The visual impact on residential properties***

*Views from residential properties on New South Head Road will be impacted on by Arm C. The existing open water with swing moorings in the foreground view will be filled by consolidated fixed berths. Arm C will change the character of the foreground view from elevated windows of residences, but will not block views of the far shore and skyline beyond.*

***The visual impact from the public domain***

*Arm C will have a significant impact on the view from New South Head Road for 135m eastward from Rose Bay Pier.*

***Visual benefit of the proposal***

*The availability of a new vantage point for viewing the harbour from a floating pontoon is promoted as a public benefit. However the applicant does not establish whether there is a*



*demand from the non-boating public to access pontoon mooring arms. The proposed viewing platform provides little viewing advantage over being on the promenade. It is unlikely to be used for casual visits'.*

#### **16.1.4 Addenbrooke judgements**

As discussed previously there are two judgements relating to the redevelopment of Rose Bay Marina. The most relevant judgement to this application is the 2009 judgment as it relates to a similar form of development. This judgment contains a detailed visual impact assessment concerning the previous proposal to redevelop the Rose Bay marina. Notwithstanding this, the 2008 judgment is of relevance, in particular as it set out the importance of Rose Bay. The 2008 judgment states:

*'Rose Bay ..... extends from Woollahra Point in the west to Steele Point in the east. However, the principle catchment is West Rose Bay, between Lyne Park and Woollahra Point. (p.68)*

*The views within this catchment are primarily from users of the Esplanade and New South Head Road and from the residential development which fronts New South Head Road west of Lyne Park. There are of course other views, including those from Rose Bay Beach, Lyne Park and Wunulla Road. However, the views of greatest significance are those where the full expanse of Rose Bay is viewed from the public domain. This full expanse includes the foreshore, the water, the land/water interface, the land mass of Point Piper and Lyne Park and the extensive views of the harbour to the bush reserves on the north side, including landmarks such as Shark Island. .... Its importance is emphasised not only by the wideness of the bay and the expansiveness of the view to the harbour but also because it is the only location when one travels from the city to Watsons Bay that the harbour can be appreciated in this manner. (p.69)*

*Boats on swing moorings and the existing marina structures and private jetties are important elements within this view. .... (p.70)*

The visual impact conclusions of the 2009 judgment are as follows:

*'The perpendicular arms design of the RBM has been driven by two important views from the Promenade across Rose Bay and the Harbour and by the avoidance of a continuous line of boats parallel to the foreshore. One important view is from the Promenade towards Shark Island, where the form of Shark Island separates from Woollahra Point. This view line is preserved as the eastern arm of the RBM does not interrupt it. Its preservation represents a considerable improvement in design compared with the horizontal arms design the subject of the previous appeal under which that view line was lost. (p.84)*

*The other important view is immediately east of the existing RBM where a view line approximately eight kilometres in length is available across the Harbour to Manly. This viewline is substantially diminished by the proposed RBM, notwithstanding a view corridor between the middle and eastern arms and a public viewing platform and seating area incorporated into the walkway. This loss of view is the main controversy concerning the RBM proposal. (p.85)*

*There are also some adverse visual impacts on parts of the adjacent New South Head Road and ground floor units on the opposite side of that road, but the expert evidence and submissions do not suggest refusal of the proposal on that ground alone. (p.86)*

*The substantial loss of Harbour views to Manly is largely caused by the eastern arm of the proposed RBM. Notwithstanding a viewing channel between the middle and eastern arms, the loss can be measured as somewhere around 31 per cent of those existing views from various points on the Promenade and as a higher percentage of the more complete views. Therefore, the proposed RBM does not maintain views to and from the Harbour, which is a consideration under cl 26(a) of the Harbour REP. Given that the Promenade is a much used public asset of considerable aesthetic and heritage importance, the loss of these views is a considerable public detriment. (p.87)*

*It is an insufficient answer to say that at present there is some loss of the same views caused by boats on swing moorings which the proposed RBM will replace. Berths tend to be occupied by larger, higher profile motorboats and are densely grouped, whereas boats on swing moorings present a moving spectacle and have a substantially less visual impact. (p.88)*

*There was debate as to how Manly should be defined and as to whether particular features of Manly could be identified from the Promenade. I do not think that those matters are of much significance. However Manly is defined, particular features may not be apparent from the Promenade by day (at night when there are lights in buildings particular features might be more identifiable). What is important, in my opinion, is the expansive view of the Harbour and its headlands as far as Manly, rather than a view specifically of particular features of Manly, however Manly is precisely defined. (p.89)*

*In my opinion, the loss of these important views to the large extent proposed, is unreasonable. Consequently, consent should not be granted to the proposal in its current form. (p.90)*

*The Committee (Sydney Harbour Foreshore Committee, the second respondent in the proceedings) suggested that the views to Manly could be improved if the eastern arm were to be rotated some degrees. That was described by Mr Wyatt (the applicant's visual expert) as a minor improvement and by Mr Moody (Council's visual expert) as a very minor improvement. I do not think that it is a sufficient answer to the problem of loss of such views. (p.91)*

*Mr Moody proposed a solution to maintain views to Manly: remove the eastern arm or shift the proposed RBM further westward. The council submits that, assuming this has acceptable impacts on other matters, including the view from Rose Bay beach, it demonstrates that the applicant has not done everything to maintain, protect and enhance views with its current proposal. I disagree that the proposed RBM should be moved further westward because I think that would unacceptably enclose the waterway in front of Rose Bay beach. (p.92)*

*In my opinion, subject to consideration of the impact on Rose Bay beach and conditions, the RBM proposal would be acceptable if the eastern arm (including the portion of the walkway in front of it) were removed, the middle arm shortened by four twenty metre berths (i.e two on each side of that arm), the western arm shortened by two twenty metre berths, and a maximum height imposed for berthed boats as discussed at [135] – [140] below. The removal of the eastern arm reduces the loss of views to Manly from the Promenade to about 14.5 per cent, which is further reduced by the shortening of the middle arm as I have indicated. The shortening of the middle arm also assists in achieving visual separation between the RBM and the RMYC viewed from the Promenade, and reduces the visual impact of the RBM on the Wunulla Residences. The shortening of the*

*middle and western arms reduces the visual impact on Rose Bay beach, as discussed below'. (p.93)*

### **16.1.5 Assessment of visual impact**

The proposed extended marina provides an additional marina arm that extends about 68m to the east of the existing Arm B, i.e. across the New South Head Road promenade. The extended marina also provides an additional 9 berths on the western side of existing Arm A. Currently there are no permanent berths on the western side of Arm A as this area accommodates casual and fuelling berths.

#### **Promenade impacts**

The existing marina consists of two berthing arms separated by a central fairway, which lies perpendicular to the promenade. The central fairway is 30m wide and approximately 90m long (measured from the main walkway to the end of the western arm). The proposed development involves the provision of a new marina arm (Arm C) located directly to the east of the existing marina consisting of 37 x 15m berths. This marina arm is to be separated by a fairway that is 35m in width and 120m in length. A further 9x 10m berths are proposed to be added to the western side of Arm A.

The existing fairway allows for harbour views in a northerly direction to be obtained from the promenade through the berths (views of the open harbour are obstructed by the existing Royal Motor Yacht Club, see photo 1). The proposed new fairway between Arm B and the proposed Arm C will also allow for views to be obtained in a northerly direction from promenade. The views obtained are harbour views that extend up to Manly. However these views are between the fairways and from the proposed new public viewing platform located at the junction of the existing and proposed walkway. They are therefore constricted views that do not allow the viewer to appreciate the wide open expanse of Rose Bay and the Harbour beyond.



**Photo 1:** Existing marina fairway between Arms A & B

This view line from the Rose Bay promenade across the Harbour to Manly was the central visual issue in the 2009 judgment. The applicant has attempted to address the concerns raised in the 2009 judgment by limiting the length of the boats to 15m and the height to 3.5m. The previous eastern arm proposed in DA682/2008 contained 15m boats on its eastern side, 20m boats on its western side (other than the 3 berths closest to the main walkway) and 30m (x2) and 20m (x2) boats at its northern end. No height limit was proposed. The applicant has stated in the submitted visual assessment that the reduction to the length and height of the boats will maintain and preserve views from the Rose Bay promenade as far as Manly. However, the proposed development is not considered to maintain and preserve views from the promenade as far as Manly as the proposal will block a substantial amount of the foreground harbour view. The proposed Arm C will occupy a similar footprint as the proposed Arm C that was previously proposed by DA682/2008, thus essentially the same amount of foreground views will be lost from the promenade (refer to Figure 3). Therefore, whilst views of Manly over the top of the boats will be maintained (only from an eyeline height of 1.55m) from the promenade, the waterway views up to Manly will be highly obstructed by the new arm. Biscoe J states in the 2009 judgement that:

*‘What is important, in my opinion, is the expansive view of the Harbour and its headlands as far as Manly, rather than a view specifically of particular features of Manly, however Manly is precisely defined.’*

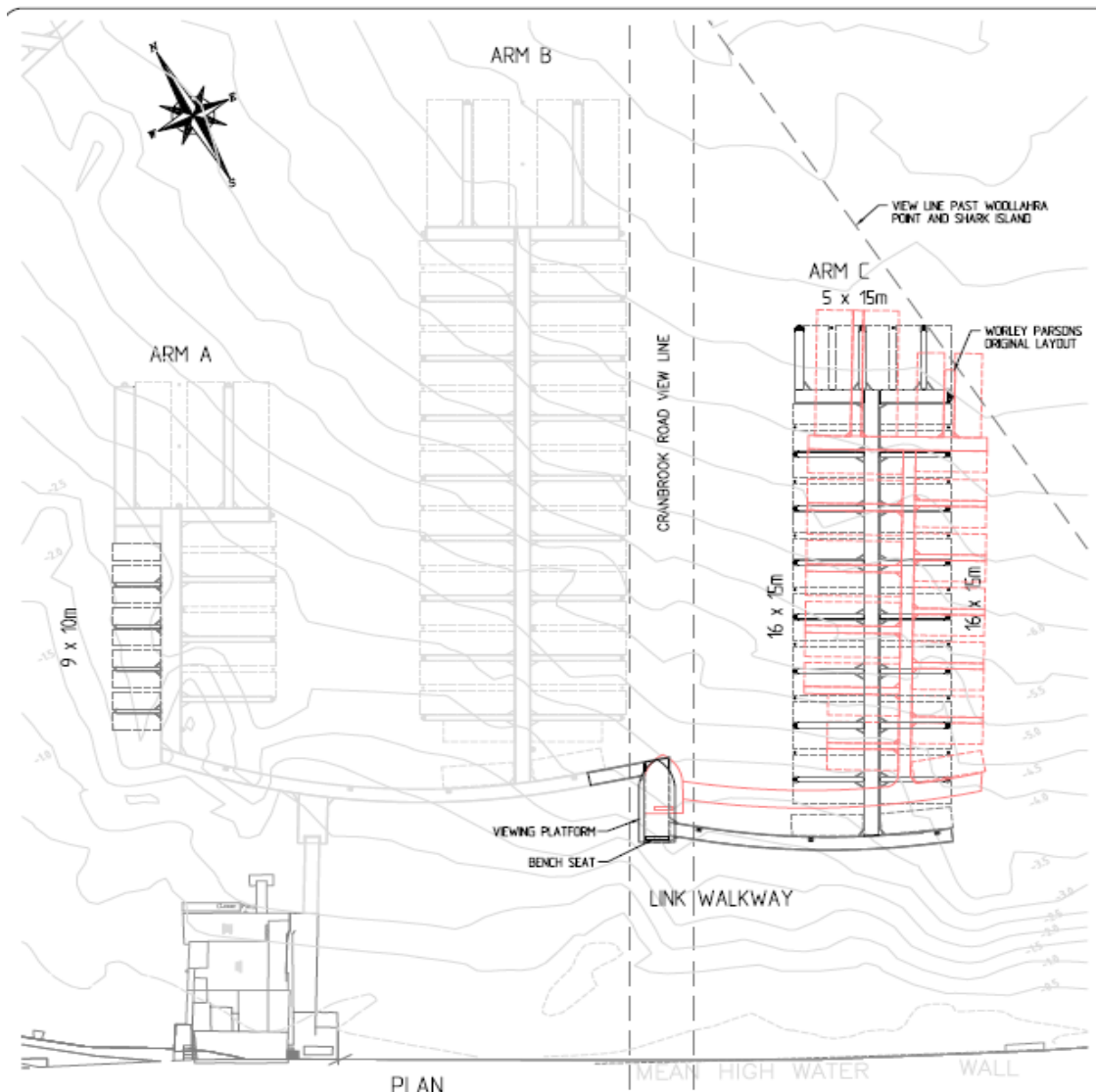
Further, views of Manly and a small amount of the waterway are perceptible above the top of the boats (see photomontage 1) only if the viewer has an eyeline height of 1.55m or greater. Whilst an eyeline of 1.55m is average adult height, any person with an eyeline less than 1.55m, e.g. children and disabled persons, would not be able to see over the boats to Manly. Therefore the proposal not only obstructs substantial foreground Harbour views from the Promenade, the proposal blocks views of Manly to a significant number of people within the community. This is considered to make the proposal unacceptable given the importance of the views from the promenade.



**Photo 2:** Existing view from Rose Bay promenade from view point A13. (Source: EIS)



**Photomontage 1:** Proposed Arm C from the promenade from view point A13. (Source: EIS)



**Figure 5:** Layout plan of the proposed marina showing the previously proposed Arm C

The applicant has stated that the proposed new public viewing platform and seating to be located between Arms B and C would create new views to and from the harbour and would be of public benefit. It is acknowledged that the new viewing platform would create new views to and from the harbour, however the viewing platform is considered to be of limited public benefit as the views towards Manly are constricted views and given its location it would be unlikely to be highly used in comparison to the level of usage of the promenade. Therefore the provision of this viewing platform is not considered to provide sufficient public benefit to outweigh the view loss and loss of visual amenity from the promenade.

The applicant has stated that the proposed development would have a medium impact on views from the promenade at view point A13 and the impact is for a relatively short distance compared with the length of the promenade. It is considered that the proposed development would have a high impact on the views from the promenade at this point. In addition Council's Urban Design Planner has considered that the proposed development would have a high impact at viewpoints A11 and A15. Whilst it is acknowledged that view impact is for short distance in comparison to the overall length of the promenade, the impact extends over a distance of approximately 150 metres, which is a significant distance particularly given the high significance of the promenade.

Further, it is important to acknowledge the cumulative impact on views obtained from the promenade as the proposal adds additional berths to the recently redeveloped marina. The



redeveloped marina already compromises the visual connection between the promenade and the harbour (see photo 3). The additional disruption to this visual connection, as proposed, is considered to be unacceptable. It should be noted that the full visual impacts of the redeveloped marina cannot be fully established until all berths are occupied.



**Photo 3:** Existing Rose Bay Marina as viewed from the promenade.

Views to the north-east from the promenade will be impacted by the proposed reinstatement of Arm C. The existing views are characterised by the tree covered headland of Vacluse which includes the Sydney Harbour National Park, Hermit Bay, Strickland House and the beach to the east of Lyne Park. Much of the headland from the shoreline to the ridgeline is presently visible. The ridgeline and upper hillside will still be visible beyond the proposed moored boats but the shoreline will be lost from most locations on the promenade between the existing marina building and Cranbrook Road (about 90m). Further along the promenade to the east of Cranbrook Road the view, including the shoreline, increases until at a point to the east of Beresford Road (about 150m east of the marina building) the existing north-easterly view is maintained. Views of the Steele Point headland will be maintained by the proposed development.

The proposed development would retain the views from the promenade to Shark Island and views of the point where Shark Island and Woollahra Point separates. This view line was an important consideration in the 2008 judgement. The proposed removal of swing moorings within this location will make a slight improvement to the water break between Shark Island and Woollahra Point. However this does not compensate for the other visual impacts of the proposal as the visual impact of swing moorings have been considered to be either positive or, at worst, neutral.

In the 2009 judgement Biscoe J deleted Arm C in its entirety to overcome visual impact concerns, whereas the visual impacts of the approved arms were overcome by shortening the length of the arms and imposing height limits on the berths. Biscoe J had the opportunity to limit the length and height of the boats to Arm C, however the visual impacts of this arm were considered severe

enough to warrant the deletion of the arm in its entirety. Whilst the proposed reinstatement of Arm C has reduced the length and the height of the boats on this arm this is not considered to overcome the visual impact concerns raised in the 2009.

The Sydney Harbour Foreshore Committee, the second respondent in both of the LEC proceedings, have made a number of suggested changes to the proposed development including:

- the rotation of Arm C
- reduction to the height of the boats on the eastern side of Arm C
- the relocation of the viewing platform to the end of this arm

Whilst, these changes would further reduce the visual impacts of the proposal they would not overcome the visual impacts referred to above.

### **Rose Bay Park and Beach impacts**

An assessment of the visual impact on Rose Bay Park and Beach needs to consider the cumulative impact of the proposed development, the redeveloped Rose Bay and Point Piper marinas and the existing RMYC marina.

Existing views from Rose Bay Park and Beach are characterised by boats on marina berths at the RMYC, Rose Bay and Point Piper marinas and boats on swing moorings. The RMYC has a total of 90 floating berths with boats up to 20m in length. The redeveloped Point Piper Marina has 34 floating berths with boats up to 30m in length and the redeveloped Rose Bay Marina has total of 49 floating berths with boats up to 30m in length. The boats on marina berths are highly visible from Rose Bay Beach, and the outer ends of the Point Piper and Rose Bay marina berths are separated by a distance of approximately 80m. From parts of the park and beach this gap between the marinas allows views in a north-easterly direction towards Vaucluse, including parts of the shoreline, between swing moored boats. From the beach and park Shark Island is not visible and neither is Woollahra Point, Steele Point, the main Harbour channel or northern shoreline. While there is an appreciation that the bay is a large bay, its context in relation to the Harbour is not apparent. This is in contrast to views from the promenade where the full extent of bay can be appreciated including views to the Harbour beyond. This is supported by the comments from the 2008 judgement at p.69 referred to earlier in this report.

By comparison, the visual amenity from the promenade is vastly superior to that from the beach and park. The number of people who use the beach and park is also significantly less than the number of people who use the promenade. Therefore, it may be appropriate to allow a level of intervention in relation to visual amenity from the park and beach which may not be acceptable from the promenade.

The proposed marina expansion will not result in any further narrowing of the gap between Rose Bay and Point Piper marinas, therefore the existing north-easterly views toward Vaucluse including parts of the shoreline, the treed hillside and the ridge will be maintained. The proposed 9 new berths to Arm A will add a degree of visual clutter to the view obtained from Rose Bay Beach and Park. However, the new berths to Arm A only allow for small boats (up to 10m in length) and do not require any mooring piles. Further these berths do not extend beyond the alignment of the existing T-head to Arm A and are located directly in front of existing marina berths that can accommodate boats upto 20m in length. Council's Urban Design Planner was also of a view that these berths would be acceptable in relation to visual impact on Rose Bay Beach and Park.

The proposed Arm C will not be visible from Rose Bay Beach or Park and will therefore not affect their visual amenity. No changes to the swing moorings in the foreground view from the park and beach have been proposed.

## Lighting

An assessment of the impact of the proposed lighting to the marina pontoons and fingers was prepared by Basset Consulting Engineers *Assessment of the impact of the proposed new lighting*, dated 5 September 2008 for the previous development application (DA682/2008). This report is considered relevant and applicable to the proposed marina extension as the previous development application included a third marina arm in the approximate location of the proposed Arm C. The report is based on:

- field measurements of existing lights on the marina, promenade and streets
- a technical assessment of the proposed lighting
- computer modelling

This report concluded that the lighting to the pontoons and fingers to the redeveloped marina will provide less light spill than the lighting that existed at the previous marina. It recommends the use of warm white colour temperature compact fluorescent energy saving lamps as warm white light is perceived to be less bright than neutral white or cool light.

The EMP includes specific provisions to reduce the need for permanent lighting on boats and for lighting to be designed and installed to comply with AS4282 – 1997: *Control of the obtrusive effects of outdoor lighting*.

The expanded marina is proposed to be illuminated from low level (approximately 1000mm high) service pedestals. The pedestals are fitted with light diffusers and are to be located at the junctions of the fingers and walkways and at approximately 10m intervals on the main the walkways and on the viewing platform. The pedestal units proposed are the same as those installed on the recently constructed Point Piper Marina and Rose Bay Marina and are considered acceptable.

No objections from internal or external bodies were received in relation to lighting impacts. Therefore based on the available information the proposal could be suitably conditioned to ensure the lighting impacts of the proposal are minimised.

## Private views

Private properties in New South Head Road, between Salisbury Road and the marina building and in Wunulla Road between New South Head Road and the RMYC have views across the area of waterway to be occupied by the proposed marina. This represents some 14 residential properties in New South Head Road and 9 in Wunulla Road.

The New South Head Road properties are on the opposite side of the road to the marina. The ground level is level with the road and buildings generally comprise medium rise (3 storey) apartment buildings. The private views from these properties to the north includes New South Head Road (a main arterial road), the promenade, including substantial street trees and the concrete balustrade, in some instances the existing marina building and the waterway including moored boats. From ground floor apartments some views of the waterway will be affected by the proposal. This will mainly be a consequence of the upper portion of boats on the proposed marina berths being visible above the promenade balustrade. However, views of the waterway are presently compromised by the intermediate trees and balustrade of the promenade. Most of these buildings



have ground level parking. The apartments on the upper levels are sufficiently elevated so as to maintain their substantial views of the harbour. The marina will occupy the foreground and the appearance of that section of the waterway, which presently is characterised by boats on swing moorings, will be different. However, view loss is not considered to be unreasonable. Further in the 2009 Judgement the following was concluded in relation to visual impact of the previous proposal on views obtained from the ground floor units in New South Head Road:

*'There are also some adverse visual impacts on parts of the adjacent New South Head Road and ground floor units on the opposite side of that road, but the expert evidence and submissions do not suggest refusal of the proposal on that ground alone.'* (p.86)

The Wunulla Road properties have a water frontage to Rose Bay and are generally occupied by detached dwellings on steeply sloping land. The dwellings are sufficiently elevated in relation to the waterway to maintain views. The relatively small increase to marina berths located on this western side of Rose Bay Marina would have a negligible impact on views obtained from these properties.

It should also be noted that the views from individual private properties are private views and the objections from the owners represent private, rather than public, interests. Private interests are important but in the planning context, particularly considering the aims of the SHREP, are of less importance than the public good. This issue is discussed in more detail in **part 17** of this report.

It is considered that the extent of view affectation on adjoining private properties is not such as to justify refusal of the DA.

### **Conformity with planning controls**

Provisions of the SHREP relevant to visual impact considerations are set out in part 16.1.1 of this report. The consent authority must not grant development consent to any development unless it is satisfied that it is consistent with the aims of the plan and the objectives of the zone.

As stated above the proposed reinstatement of Arm C is considered to have an unacceptable visual impact on the Rose Bay Promenade the proposed development is therefore considered to be contrary to aim 2(1)(a) and objectives (d) and (g) of the W5 zone.

Clauses.25 and 26 of the SHREP are matters to be taken into consideration in the assessment of scenic quality and views. The proposed development does not maintain views to and from the harbour from the promenade which is a highly used public asset of considerable aesthetic and heritage importance. The proposal will also result in an unacceptable cumulative impact on views to and from the harbour. The proposed development is therefore considered to be contrary to cls.25(b) and (c) and cls.26 (a), (b) and (c).

Clauses 3.2 and 3.3 of the SHDCP set out criteria for protecting and enhancing identified landscape characteristics. Part 4 of the SHDCP contains guidelines for the visual impact of marinas and Appendix D sets out a specific methodology for gauging that visual impact and which includes the preparation of a visual assessment matrix.

The EIS submitted by the applicant contains a visual assessment matrix based on the applicant's interpretation of Appendix D as does Council's Urban Design Planner's referral response. The applicant concluded that the proposal would have a medium to low impact on views from the promenade, whereas Council's Urban Design Planner has concluded that the proposed development would have a high visual impact on views from the promenade.

The proposed development is considered to create unacceptable impacts on the visual amenity of the highly used and significant public promenade and would therefore be contrary to:

- part 3.2 - the 1<sup>st</sup> and 2<sup>nd</sup> dot points:
  - *Minimise any significant impact on views and vistas from and to:*
    - *Public places*
    - *Landmarks identified on the maps accompanying the DCP, and*
    - *Heritage items*
  - *Ensure it complements the scenic character of the area*
- part 4.2 - the 8th dot point
  - *development does not dominate its landscape setting*
- part 4.7 - Marinas (Private and Commercial), Visual Impact - 2<sup>nd</sup> and 5<sup>th</sup> dot points
  - *the visual impact of the marina on people in the visual catchment (derived from an analysis of the potential number of viewers, their location within the landscape, distance from the marina, and duration of view) is to be minimised;*
  - *waterside structures and berthed vessels associated with marinas are not to block views from foreshore public open space or views to foreshore public open space from the waterway;*

[NOTE: Compliance tables for all of the relevant provisions of the SHREP and the SHDCP are included in Annexures 17 and 18 respectively of this report]

## Conclusion

The proposed eastern arm to the marina has made improvements to the visual impact from the promenade from the previously proposed eastern arm that was deleted by the Land and Environment Court. Views of Manly and some waterway view will be maintained over the top of the boats to be moored on Arm C. However, the foreground ground views up to Manly will still be obstructed. Therefore the proposal is not considered to overcome the central visual issue in 2009 judgment as stated by Biscoe J:

*‘What is important, in my opinion, the expansive view of the Harbour and its headlands as far as Manly, rather than a view specifically of particular features of Manly’.*

Further these views of Manly will be obstructed when the viewer has an eyeline less than 1.55m. The proposed eastern arm is therefore considered to have an unacceptable visual impact on the Rose Bay Promenade, and be contrary to the aims of the SHREP and objectives of the W5 zone.

The proposed development does not maintain views to and from the harbour from the promenade which is a highly used public asset of considerable aesthetic and heritage importance. The proposal will also result in an unacceptable cumulative impact on views to and from the harbour. The proposed development is therefore contrary to cls.25(b) and (c) and cls.26(a), (b) and (c) of the SHREP and the provisions of the SHDCP as mentioned earlier.

The additional berths to Arm A do not have an adverse visual impact on Rose Bay Park and Beach and the promenade.

## 16.2 Other Impacts

### 16.2.1 Traffic and parking

The EIS includes an assessment by Christopher Hallam & Associates Pty Ltd, dated 27<sup>th</sup> October 2011. The report makes reference to findings of the 2008 Addenbrooke proceedings and the following previous studies undertaken by Christopher Hallam & Associates including:

- The Traffic and Parking Assessment of Proposed Modifications to Rose & Point Piper Marinas (September 2006);
- Supplementary Report on Traffic and Parking Implications of Proposed Modifications to Rose Bay & Point Piper Marinas (May 2007)
- Review of Large Boat Operations and Implications for Traffic & Parking (September 2007)

It should be noted that a further traffic and parking report was prepared on behalf of Woollahra Council for the 2008 LEC proceedings by Sinclair Knight Merz (SKM).

The traffic and parking implications of the marina extension have been assessed based upon the boat usage and parking rates agreed in the LEC appeal of DA766/2006. These rates were based on extensive research into the parking demands generated by marinas. The experts agreed that the parking demand rates for peak summer weekend boat usage, for boats up to 20m in length are:

Marina Berths: 0.166

Swing moorings: 0.224

The proposed marina extension proposes to construct an additional 46 marina berths and relinquish 46 swing mooring. Based on the above car parking generation rates the proposed development would result in the following car parking demand:

Existing:

Marina Berths:  $0.166 \times 49 = 8.134$

Swing moorings:  $0.224 \times 70 = 15.68$

Total = 23.814

Proposed:

Marina Berths:  $0.166 \times 95 = 15.77$

Swing moorings:  $0.224 \times 24 = 5.376$

Total = 21.147

Therefore based on the above the proposed development will result in a net reduction to the demand for car parking by 2.66 spaces.

The 2008 judgment concluded the following in relation to car parking impacts:

*'Based on the evidence of the traffic experts, the proposal will not generate an unacceptable demand for parking which cannot be met by the availability of on street parking'.*

NOTE: The parking rates used by the traffic consultants differ from those used earlier in the assessment of parking under our car parking DCP and AS 3962, refer to parts 13.2 and 14.3 The rates used earlier for AS 3962 are those which are referred to as having been *found to be acceptable* in the absence of traffic and parking studies. It is considered that, in this situation, the use of the results from the surveys undertaken on behalf of the applicant and by Woollahra Council are a more appropriate assessment of parking impacts.

The applicant has stated that the proposal will not have adverse traffic implications. As the development essentially replaces swing moorings with an equivalent number of fixed marina berths there is not anticipated to be any substantial increase to traffic to the Marina.

### **Servicing**

There is an existing 11.6m loading zone located on the northern side of New South Head Road, in front of the Pier Restaurant that was installed as part of the previous development DA682/2008. This loading zone operates between the hours of 7am to 5pm Monday to Friday. This existing loading zone is considered to be sufficient to accommodate the servicing demands of the proposed development.

### **Construction**

The applicant has stated that the construction program is estimated to take 18 weeks and that the majority of the works will be undertaken from barges, work boats and barge mounted cranes. The deliveries of materials will be also be mostly delivered by water. The applicant anticipates that there will be some materials delivered by road via light commercial vehicles and some specialist contractors will also travel to the site by vehicle.

Council's Traffic Department did not consider that the previous works in connection with DA2008/682 to create any substantial interruption to the surrounding traffic and parking conditions. The application of the standard condition of consent relating to the submission of a construction management plan and compliance with this plan could be imposed to address construction management issues.

### **Traffic and Transport Planner's comments**

Council's Traffic and Transport Planner has not raised any objection to the proposed development and has provided the following comments in relation to the parking impact of the proposal:

*The applicants Traffic Report has presented parking demand rates deduced from studies undertaken in association with the previous development application. The report states that both the applicant and Council's engaged traffic consultant both agreed in the LEC court proceedings on the resulting parking demand rates from swing moorings and marina berths for boats under 20m.*

*Applying these rates (0.224 cars/ swing mooring and 0.166 cars / berth) to the proposed development produces a parking demand of -2.7 car spaces (ie a reduced parking demand) in comparison to the existing use.*

*As Council's Traffic and Transport section has no further data to counter the validity of these rates, their use in the analysis is accepted.*

Council's Traffic and Transport Planner has provided the following comments in relation to the traffic impacts of the proposal:

*Given the proposed development does not have a allocated parking area, traffic resulting from the proposal will be dispersed over the surrounding area and therefore no adverse traffic effects are anticipated.*

Council's Traffic and Transport Planner has provided the following comments in relation to the service, loading and delivery impacts of the proposal:

*The applicant has not provided details regarding service requirements resulting from the proposal. Notwithstanding this, the development essentially replaces swing moorings with an equivalent number of berths and so there is not anticipated to be any substantial increase to traffic to service the Marina.*

Council's Traffic and Transport Planner has provided the following comments in relation to the construction management impacts of the proposal:

*The application does not contain any construction management details. Despite this, the applicant is currently undertaking works in association with the previous Development Application and Council's Traffic and Transport section is aware the construction management of this has not caused any substantial interruption to the surrounding traffic and parking conditions. The application of the standard condition of consent regarding submission of a construction management plan and compliance with this plan is advised.*

## **Conclusion**

Based on the above, the survey information commissioned by the applicant and by Woollahra Council and having regard to comments contained in the 2008 judgment it is considered that the existing street network has sufficient capacity to accommodate parking demand generated by the proposal. It is also considered that the street network can accommodate traffic movements generated by the proposal. There is an existing loading zone in respect to servicing needs.

### **16.2.2 Ecology**

The EIS includes (at Appendix I) a report by WorleyParsons, *Proposed Rose Bay Marina Aquatic Ecology*, dated 16 October 2008 (WP ecology report). This report is the same report that was submitted for DA682/2008. The reuse of this report for this new development application is considered acceptable as the proposed development occupies a similar area the previous development application (DA682/2008). This report and the proposed plans were reviewed by Council's Environmental Sustainability Team Leader on 15/06/2012 and was generally found to be acceptable, refer to Annexure 8.

The Department of Primary Industries (DPI) is an integrated approval body for the development and accordingly the proposal was referred to it. The DPI responded with its general terms of approval by letter dated 16/05/2012, see Annexure 9 of this report. If consent is granted to the DA, DPI's general terms of approval need to be included as conditions. The proposal was also referred to Office of Environment and Heritage (EPA) as an integrated approval body. The EPA responded with its general terms of approval by letter dated 13/07/2012, see Annexure 10 of this report. If consent is granted to the DA, the EPA's general terms of approval also need to be included as conditions.

The 2008 judgement also discusses the ecological implications of the redevelopment proposal (DA766/06) based on evidence produced as part of those proceedings.

Both the SHREP and SHDCP include provisions which are relevant to assessing the ecological impacts of the proposal. Other relevant legislation is the *Fisheries Management Act 1994* (FMA) & the *Environmental Protection and Biodiversity Conservation Act, 1999* (EPBC).

## WP report

The WP ecology report was prepared and submitted as part of the previous development application (DA2008/682). The report draws from reports prepared for DA766/06 by Marine Pollution Research, peer review literature and additional field work. It includes a threatened species assessment in accordance with the '7 part test' under s.94 of the *Threatened Species Conservation Act* regarding the impact on black cod. Black cod is a fish species listed as vulnerable under the FMA. Findings of the WP ecology report's impact assessment are summarised as follows:

- fish assemblages will benefit from additional piles and pontoons while turbidity from construction activity and propeller action from operational activities are not considered likely to result in any measurable or ecologically meaningful impacts
- impacts on soft sediment macrobenthic assemblages is considered to be minor
- seagrass beds are not predicted to be impacted as there is no spatial overlap with proposed marine infrastructure. Construction mitigation measures will be employed to prevent turbidity from seagrass beds and the impact is considered to be negligible. Vessel induced turbidity is not predicted to impact on seagrass beds as the proposed conditions will be similar to existing.
- epibenthic assemblages on hard substrata are considered to benefit as the addition of piles and pontoons will provide an additional area of novel habitat
- recreational fishing access is not predicted to be impacted
- water quality is expected to benefit because of the provision of sewage pump-out facilities and improved fuel dispensing arrangements. Increased copper concentrations are expected to have negligible impacts having regard to ANZECC/ARMCANZ trigger values for protection of aquatic ecosystems. Subject to appropriate measures being put in place (e.g. turbidity curtains and a construction monitoring program) water quality impacts during construction are considered to be negligible
- *Caulerpa taxifolia* mapping shows that the area where it occurs will not be disturbed. An action plan will be implemented in accordance with DPI guidelines. Potential impacts during construction and operational phases are considered to be negligible
- The protected species, syngnathiformes (pipefish and seahorses), habitat will not be disturbed
- threatened species – black cod, habitats will not be reduced. Applying the 7-part test under the TSCA indicates that the proposal will be satisfactory
- cumulative impacts, from the proposed redevelopment of the Point Piper marina, are considered to be limited.

Council's Environmental Sustainability Team Leader has reviewed this report and the proposed plans and has not raised any objections to the proposal, however the following concerns were raised:

- *Impacts during the construction of the new marina arms - were there any environmental impacts during construction of the rose bay marina upgrade. Were the sediment control measures successful? Has there been any impacts on the surrounding sea grass beds since construction?*

The applicant provided the following response to this issue:

*We originally proposed to use a hammer pile technique but eventually used a contractor that used a spinning pile rig. This means the turbidity and noise generated during the piling was greatly reduced. We used sediment controls such as turbidity curtains during the piling and our post completion inspection of the seabed showed no impacts on the surrounding sea grass beds.*

Council's Sustainability Department is satisfied with the applicant's response to this issue.

- *The Seagrass study has not been updated since 2008. Sea grass beds may have moved or changed. Are the sea grass beds in the same condition/locations?*

The applicant provided the following response to this issue:

*Our post completion seabed inspection used the previous sea grass bed mapping as a reference and the inspection showed that sea grass beds remained in approximately the same locations. There was no new or additional areas identified and the sea grass beds adjacent to the promenade seemed in good condition.*

Council's Sustainability Department is satisfied with the applicant's response to this issue.

- *Caulerpa Taxifolia Management Plan - has this been implemented ? What data is being collect at the marina? How much Caulerpa Taxifolia has been collected?*

The applicant provided the following response to this issue:

*There has been no evidence of Caulerpa Taxifolia on the boats currently berthed within the marinas. The marina actively encourages customers firstly not to berth in areas where seagrass is found and secondly to check anchors and anchor wells for any sea grass (including caulerpa taxifolia) when using their vessels. Compliance with this plan is part of the marina berthing agreement and a full copy of the EMP is available at the marinas for review in both digital and hard copy.*

Council's Sustainability Department is satisfied with the applicant's response to this issue.

- *EMP - The location of fuel tanks and fuel storage is not marked on plans. The plan (Appendix A) in the EMP was approved by Council as part of the deferred commencement conditions.*

The applicant provided the following response to this issue:

*We are happy to update this Appendix to include clear labelling of the fuel tanks.*

The plan that has been submitted shows the location of the fuel tanks and is considered suitable by Council's Sustainability Department.

- *EMP - The location of waste management and recycling facilities is not marked on plans. The plan (Appendix A) in the EMP was approved by Council as part of the deferred commencement conditions.*

The plan that has been submitted shows the location of the waste management and recycling facilities and is considered suitable by Council's Sustainability Department.

## **Addenbrooke judgement**

The 2008 judgment includes the following comments in relation to ecological impacts:

*The council submits that the application is inconclusive in that it is not established that the proposed development either protects or enhances aquatic species.*

*The ecology experts Mr Anink (representing Addenbrooke) and Dr Lincoln Smith (representing council) agreed that:*

*[S]ome quantitative data provided in the Marine Ecology Report (Appendix L of EIS – Marine Pollution Research 2006 in Appendix B) could not be used to provide statistically valid conclusions for impact assessment and that these data are not suitable as baseline data for future monitoring.*

*Nevertheless, Mr Anink maintained that the data that had been provided to council in the Supplementary Report (Marine Pollution Research 2007) dealt satisfactorily with marine ecology issues. The Marine Pollution Research 2007 report concluded:*

*The marina as proposed would not have any significant impact on aquatic ecology of the locality.*

*This report was not addressed by the council or Dr Lincoln Smith. It seems to me that it should lead to rejection of the council's submission. (p.152-154)*

It is noted that the WP report refers to the Marine Pollution Research 2007 supplementary report as a source of existing information utilised in its preparation.

## **DPI**

The DA, including the EIS, was referred to the DPI as an integrated approval body. This is because, in addition to the granting of development consent, DPI approval would be required under the FMA to harm marine vegetation before the work could be carried out. The DPI wrote to Council on 16/05/2012 saying it has reviewed the proposal in light of policies and provisions under the FMA and has no objections, subject to 4 provisions, refer to Annexure 9 of this report. The provisions need to be imposed as conditions if development consent is granted.

## **EPA**

The DA was also referred to Office of Environment and Heritage (EPA) as an integrated approval body. This is because EPA needs to issue an Environmental Protection License under the Protection of the Environment Operations Act. The EPA commented by letter dated 13/07/2012 and has no objections, subject to provisions, referred to Annexure 10 of this report. These provisions need to be imposed as conditions if development consent is granted.

## **EPBC Act**

Referral to the Commonwealth Department of the Environment is not a pre-requisite to the granting of development consent. It is the proponent's responsibility to ensure that any approvals which may be required under the EPBC are obtained prior to the development proceeding.



## Site Audit Report/Environmental Health Officer's comments

The site audit report was prepared for the previous redevelopment proposal for Rose Bay and Point Piper marinas, DA766/06. The EIS includes a letter dated 9/07/2008 from Mike Hayter, the accredited site auditor, which states:

*The conclusions of the Site Audit Report and the validity of the Site audit Statement are not affected by minor redesign of the marinas and the submission of separate DAs for each marina.*

This letter was prepared for the previous development application (DA682/2008), however it is relevant to the current proposal given that the previous development occupies essentially the same area as this development.

The EIS also includes a Site Audit Report by an EPA accredited site auditor, Mike Hayter of Environ. It identifies existing contaminants and acknowledges their potential to cause localised adverse effects on benthic communities. The main contaminant is TBT (Tributyltin), used for maintenance of vessels, with highest concentrations in the vicinity of the slipway that previously existed at the site. This slipway was removed as part of the previous approved works under DA682/2008, and subject to the provisions of the EMP that was submitted with this application (which can be made legally enforceable through conditions of development consent), the auditor concludes that remnant contamination is not considered to pose an unacceptable risk to onsite or offsite environments.

Council's Senior Environmental Health Officer's referral comment (refer Annexure 5 of this report) has reviewed the above documentation and has provided the following comment:

*Based on the above, the Auditor considers that the EMPs will provide an adequate framework for the management of the remnant sediment contamination at the site. The results of the sediment testing and the Site Audit have concluded that remediation of sediments at the site is not required; accordingly, the 'land' is suitable for the purpose of the proposed'.*

## Conclusion

The SHREP, cl.21 contains matters to be taken into consideration in relation to biodiversity, ecology and environment protection. These include:

- (b) *Development should protect and enhance terrestrial and aquatic species, populations and ecological communities and, in particular, should avoid physical damage and shading of aquatic vegetation (such as seagrass, saltmarsh and algal and mangrove communities),*

There are specific matters for consideration in part 6 of the SHREP for development within a wetlands protection area. These include cl.63(2)(b)(i):

- (b) *The environmental effects of the development, including effects on:*
  - (i) *The growth of native plant communities,*

Under the SHREP the area to be occupied by the proposed marina is mostly in a wetlands protection area. The SHDCP identifies sea grass communities in the area. Sea grass has a high

conservation status. It also identifies sandy beaches in the area, which have a medium conservation status. The performance criteria for development within or adjoining high conservation communities mainly relates to controlling shading/maintaining light penetration.

The proposal does not involve dredging. The slipway that existed on the eastern side of the marina building has been removed. This removed slipway was an identified source of contamination associated with boat repair/maintenance with the potential to harm marine ecology. The number of swing moorings are also to be reduced. This reduces the cause of chain drag damage to sea grass beds. The CMP and EMP submitted as part of the EIS include measures to protect the ecology during both the construction and operational phases of the development.

Having regard to:

- the information contained in the EIS, including the WP ecology report, the CMP, EMP and the Site Audit Report
- the comments relating to ecology contained in the 2008 judgment
- the integrated referral response from DPI
- the integrated referral response from the EPA and
- the relevant provisions of the SHREP and SHDCP

It is considered that the ecological impacts of the proposal will be acceptable and conditions of consent could be imposed to ensure the ecological impacts are minimised.

**NOTE:** Ecology related matters are also discussed in **part 19** of this report.

### 16.2.3 Heritage

The impact on the significance of heritage items listed under WLEP 95 has been discussed earlier in this report, refer to **part 12.2**.

The principle matter for consideration regarding heritage items under SHREP is the impact on Shark Island. Shark Island is identified as a heritage item under the SHREP. The SHREP, part 5, contains heritage provisions. Cl.59 provides as follows:

- (1) Before granting development consent to development in the vicinity of a heritage item, the consent authority must assess the impact of the proposed development on the heritage significance of the heritage item.*
- (2) This clause extends to development:*
  - (a) That may have an impact on the setting of a heritage item, for example, by affecting a significant view to or from the item or by overshadowing, or .....*

Council's Heritage Officer's referral comment (see Annexure 3 of this report) states that although the proposal seeks to limit the visual impact of the new wing by placing a size limit on the boats moored there, the additional boats and structure will have a negative impact on the appreciation of the harbour. The provision of a public viewing platform is positive; however the overall impact of the new development and additional boats will adversely impact on the significance of the place. An additional fixed berth arm will create an unacceptable amount of visual bulk that will adversely affect the exceptionally significant character and open waters of Sydney Harbour. Council's Heritage Officer also has stated that the proposal will adversely impact views from the foreshore to the heritage listed Shark Island. The Heritage Officer concludes that the proposal is not acceptable as it does not comply with relevant statutory and policy documents and recommends refusal.

Heritage was an issue in the 2008 proceedings. The principle contention was the impact on the significance of Shark Island. This judgment states:

*'The proposal will impact on significant views of Shark Island but I do not accept that the degree of impact or the loss of significance is such that, of itself, it would warrant refusal of the application.'* (p.123)

Impacts on views to and from Shark Island were not raised as an issue in the 2009 judgment as the marina arms were realigned. This realignment improved the perception of Shark Island as a separate feature from the Point Piper Headland (Woollahra Point). The proposed development will maintain the same alignment as proposed in the 2009 judgment. Further proposed removal of swing moorings will make a slight improvement to the existing view from the Promenade (refer to photo 4 and photomontage 2). The development will not physically impact on any heritage item under the SHREP and under cl.59(2)(a) it is not considered that the setting of Shark Island will be unduly affected.



**Photo 4:** Existing view from Rose Bay promenade from view point A11. (Source: EIS)



**Photomontage 2:** Proposed Arm C from the promenade from view point A11. (Source: EIS)

The impacts on the significance of the waterway is considered to be a visual impact rather than a heritage impact.

## Conclusion

It is considered that the proposal will be acceptable in terms of heritage significance having particular regard to the relevant planning controls under SHREP. The concerns raised by Council's Heritage Officer in relation to the Harbour and Shark Island are considered to be more relevant to the assessment of visual impact but are not considered to be well founded in respect to impacts on heritage significance.

## 16.2.4 Navigation

The following documents are relevant to the assessment of navigation impacts and are discussed below:

- letter from Greg Britton, director of Royal Haskoning, *Rose Bay Marina Expansion- Navigation and Related Aspects*, dated 24 January 2012
- report by Worley Parsons, *Rose Bay Marina Redevelopment vessel navigation report*, dated October 2008 (WP navigation report) submitted as part of the EIS
- response from Roads and Maritime Services
- response from Sydney Ports
- the 2008 judgment

### Royal Haskoning letter

This letter reviews the potential navigation and other related issues of the proposed marina extension. This letter also reviewed the WP navigation report. This letter has stated the following:

- *The proposed marina expansion would not impact on the “The runway”, the waterway area between the seawall and the inner most swing moorings (a popular clear straight section of waterway used by small craft)*
- *The proposed new arm would not further impact the navigation routes of dragon boats*
- *The risk associated with interaction between larger vessels using the marina and small craft was reviewed extensively during the both 2008 and 2009 court cases. The Joint Maritime Experts Report for the revised Rose Bay Marina (DA2008/682) included an eastern arm with boats up to 30m in length concluded that the navigation risks could be adequately addressed through the preparation of an Emergency Management and Resource Strategic Plan. Note: the applicant has prepared an Emergency Evacuation Plan, and an EMP and berth and mooring holders are required a Marine Craft Berthing & Mooring Agreement. These plans are in operation.*
- *The deletion of the eastern arm from DA682/2008 was not due to any adverse navigation or safety issues.*
- *The proposed relocation of the fuelling, sewage pump-out to the north-western corner of the western arm (Arm A) would provide better isolation of the fuel berth reducing the risk that fire or explosion could spread to the marina berths or vice versa*
- *The relocation of the casual berthing to the pontoon in front of the marina café where approximately 20m berthing is available would provide a more suitable location as the most demand for casual berthing is created by the marina café and the upstairs restaurant. Note only 12m of casual berthing is available in this location.*

### WP navigation report

The WP navigation report was prepared and submitted as part of the previous development application (DA682/2008), however this report is considered to be relevant to this application as the previous application included a new eastern arm to the marina in a similar location. This report identifies boat users of Rose Bay as rowing boats (Cranbrook School & Cranbrook Master Rowers), surf club crews, dragon boats, kayaks, paddle boards, sailing dinghies and boats on existing marina berths and swing moorings and commercial vessels (including Sydney Ferry services). Rowing boats are said to use the ‘runway’, the area adjacent to the promenade sea wall, particularly during adverse conditions.

The WP navigation report recommended that a Plan of Management be developed, with reference to the joint experts report prepared as part of the 2008 proceedings. The applicant has prepared an Emergency Evacuation Report, and an EMP and berth and mooring holders are required to sign a Marine Craft Berthing & Mooring Agreement. These plans are in operation.

### **Roads and Maritimes Services**

Roads and Maritimes letter dated 14/05/2012 advises the following:

No objection, however the following comments are provided for Council's consideration:

- *The existing development provides opportunities for casual berthing. Casual berthing facilitates access between the waterway and foreshore. Any extension should ensure that at a minimum, a berthing area of 20m should be provided for the purpose of short term drop-off and pick-up only*
- *No permanent berthing being allowed at North West Corner of Arm A where the Fuel and Sewage Pump out are to be located.*
- *The applicant should ensure that reasonable access to the site is available during construction.*

*The applicant must notify the Maritime Division of Roads and Maritime prior to the removal of any commercial moorings.*

There is an area that is 38m in length to the north-west of the proposed new berths available for casual berthing facilities. This is a shared zone for both casual berthing and refueling and sewage pump-out. There is an additional area of casual berthing available for vessels up to 12m in length at the pontoon adjacent to the Marina Café. Conditions of consent could be recommended that required the applicant to notify the RMS prior to the removal of any commercial moorings and to ensure that no permanent berthing is permitted at the north western corner of Arm A.

### **Sydney Ports**

The Sydney Ports letter dated 16/05/2012 advises the following:

*Written approval of the Harbour Master is required for any proposed works that will disturb the bed of the special port areas of Botany Bay and Sydney Harbour under Clause 67 of the Management of Waters and Waterside Land Lands Regulations'*

It should be noted that Sydney Ports have advised that Harbour Master Approval is sought after consent is issued.

### **Addenbrooke judgement**

Marine safety and navigation issues were discussed in the 2008 judgment. Biscoe J concluded this discussion as follows:

*'I consider that a plan of management, including a code of conduct, should be finalised prior to any approval of an application such as this to ensure that the measures required to ensure navigation safety and mitigate conflict are reasonably achievable. In the absence of more research on the extent of the existing and proposed users of the Bay, it maybe insufficient to assume that all boat owners will "do the right thing".' (p.170)*

The Joint Maritime Experts Report for the revised Rose Bay Marina (DA2008/682), which included an eastern arm with boats up to 30m in length, concluded that the navigation risks could be adequately addressed through the preparation of an Emergency Management and Resource Strategic Plan. Whilst the applicant has not prepared an Emergency Management and Resource Strategic Plan an Emergency Evacuation Report, and an EMP has been prepared and berth and mooring holders are required to sign a Marine Craft Berthing & Mooring Agreement. These plans are in operation to address navigation and safety issues. These plans require, among other things, that marina customers have a current valid NSW Boat License (or equivalent) and for marina users to be instructed not to exceed 4 knots around the marina and to navigate with caution in the main shipping lanes. The *Marine craft berthing, storage and mooring agreement* covers a broad range of matters relating to the responsibilities of the parties. Licence obligations cover the mooring, operation and storage of vessels. A condition of consent could be imposed that requires the proposed marina expansion to be operated in accordance with these plans and agreement.

Another important user of the Rose Bay waterway is the seaplanes. The seaplane base is located at Lyne Park. Council referred the proposal to the Civil Aviation Safety Authority (CASA) for comment. No response was received. In relation to the 2008 proposal CASA advised that the seaplanes are required to operate under a manual which places the responsibility for safety on the operator.

## **Conclusion**

The proposed reinstatement of Arm C would not result in any adverse navigational impacts and the proposed relocation of the fuelling and sewage pump-out would be in an improved more isolated location. Whilst the casual berthing will be reduced by the proposed development as 9 additional berths are to be located to Arm A, sufficient casual berthing will be available at Rose Bay Marina. Particularly as the majority of vessels that utilise the casual berthing facilities at the marina are 10m or less in length.

### **16.2.5 Noise**

Council's Environmental Health Officer has reviewed the proposed development and has considered the proposed development would be acceptable in terms of construction noise as piling will be installed using a screwing method and similar conditions of consent that were imposed for the previous approved development (DA682/2008) could be imposed to further minimise construction noise.

Council's Environmental Health Officer has considered the proposed development would be acceptable in terms of noise from operational activities of the extended marina, subject to the imposition of a condition of consent that requires the development to be operated in accordance with the Noise Management Plan (NMP), Appendix D of the Environmental Management Plan. This EMP was prepared in accordance with the conditions of consent of the previous approved development for the redevelopment of Rose Bay Marina (DA 682/2008). The NMP seeks to ensure that the amenity is preserved for local residents and marina users by controlling noise emissions and other disturbing influences.

Appendix D to the EMP is a noise management plan. It contains specific rules for the conduct/behavior of marina users and was developed from work done by the joint experts for the *Addenbrooke* proceedings. However, it appears that a couple of the rules have been altered. These pertain to the times of use of hand operated tools and the time for vessels to be vacated each night. It is considered that these rules should be reinstated. The vacation of vessels is a potentially noisy activity and it is not intended to prevent 24 hour access to vessels by their owners.

The EPA's integrated referral response identifies construction and operational noise as key environmental issues. In relation to noise mitigation the EPA comments that the proponent is to comply with the limits specified in Table 3.1 of the general terms of approval and that the EPA intends to include a special condition on the applicants scheduled activity licence to undertake and provide a noise assessment report if the development is approved.

The SHDCP, cl.4.7 provides as follows in relation to noise associated with marinas:

- *the adverse impacts of noise (considering hours of operation existing background noise, expected departure/arrival times for vessels, noise level of marina patrons, noise level from repair and testing of vessels and motors) are to be minimized through appropriate design and management measures, and .....*

## Conclusion

The adjoining land use is predominantly residential. Noise impacts in this situation will be primarily influenced by the noise source, the ambient noise and the distance to adjoining properties. Based on the available information the construction and operation of the proposed development will not unreasonably impact on the amenity of neighbouring properties and accord with the relevant criteria under the SHDCP, subject to appropriate conditions that could be imposed.

## 17. THE SUITABILITY OF THE SITE

Site suitability issues have been addressed under **part 16.2.2** of this report. The conclusion that the site can be made suitable for marina purposes usage is supported by the site audit report prepared by Environ. The site audit report states that the site can be made suitable for use as a marina subject to the implementation of the EMP.

The area to be developed has a history of marina and boat storage use and marinas are a permissible use under the SHREP zoning, i.e. W5 – Water Recreation. However the visual impacts of the proposed eastern arm have been considered to be unacceptable. The subject site is therefore considered to be unsuitable for the proposed development.

## 18. THE PUBLIC INTEREST

In the Land & Environment Court judgement, *Double Bay Marina v Woollahra Council [2009] NSWLEC 1001*, (Double Bay Marina) Roseth SC set out a planning principle for discerning the public interest. Although the planning principle was intended to apply to the assessment of all DAs, it is particularly relevant to this proposal as it also related to a proposed marina development.

It is noted that the planning principle set out in the *Double Bay Marina* judgement has not been adopted by the Land & Environment Court as a planning principle. Advice from the Court suggests it will not be adopted as a planning principle. Nevertheless, the judgement does set out a methodology for assessing public interest that is considered to be of some relevance and is therefore discussed below. However, caution needs to be exercised in drawing conclusions from application of the process considering it has no formal status as an adopted Land and Environment Court planning principle.

There are also matters contained in the 2008 judgment which assist in assessing public interest issues relating to the current DA. These are also discussed in this assessment.

The *Double Bay Marina* judgement sets out 3 steps for discerning the public interest in the assessment of a development proposal:

1. define the public whose interest is being invoked
2. define the benefit towards which a proposal claims to make a contribution (or from which it is claimed to detract)
3. make explicit the weight given to the public interest relative to other considerations

### **Who is the public?**

In *Double Bay Marina* the Senior Commissioner stated that ‘*the public*’ requires redefinition in every case.

*.....the public may be all people in the world. At its narrowest, the public may be the people who live or work in a locality or a business centre or use a public facility, such as a park or a beach. (p.48)*

*Councils often confuse the public interest with the complaints of individual objectors. In most cases the interest of objectors is a private interest. The fact that the number of objectors is large does not, by itself, render their interest public. For the interest of objectors to be equated with the public interest, the objectors must be identifiable as a section of the public as described above. The fact that their number may be small (for example the users of a park), does not deny the public nature of their interest. (p.49)*

In applying this step in *Double Bay Marina* the Senior Commissioner states:

*In my opinion, the loss of these views (from the ground floor of some 10-20 dwellings) is a private detriment. The owners or occupants of those dwellings do not constitute the “public” or even a “section of the public”. They are a collection of private interests. (p.54)*

*In support of its contention that the renewal of the marina represents a private interest, the council tendered the Articles of Association of the applicant company. Even without the Articles of Association (which seem little different from those of other private business organisation) it seems clear that the application serves a private rather than the public interest. The berths will be available for purchase under Strata title. This is no different from an apartment building. .... (p.56)*

Applying the Senior Commissioner’s approach to the current proposal, the public is considered to be the users of the nearby public domain areas. These areas are specifically considered to be New South Head Road between Lyne Park and Wunulla Road, Wunulla Road between New South Head Road and the Point Piper marina, the promenade, Rose Bay Park and Beach, Lyne Park and the waters of Rose Bay.

The people who made submissions opposing the DA are considered to be the public only if they are also users of the public domain areas referred to above. However, some of the issues raised in some of the submissions relate to matters of public interest, e.g. the loss of Harbour views from areas of the promenade. Similarly the holders of marina berths and moorings are considered to be the public only if they are also users of the public domain areas. Otherwise those people who made submissions or are holders of marina berths or moorings are considered to represent private interests.



## What is the benefit/detriment?

The *Double Bay Marina* judgement states:

*The next step is to make explicit the benefit to which a proposal contributes or from which it detracts. Where the detriment or benefit can be quantified, this should be done; however, not all benefits lend themselves to accurate measurement. Moreover, not all benefits are universally recognised as benefits. In the case of some benefits there is likely to be general agreement that they are benefits. .... When it comes to changing a view composed of natural elements of the landscape into one dominated by man-made elements, the benefit-detriment debate becomes less clear-cut, though most people would prefer natural landscapes. .... Where there are competing and feasible claims whether a proposal contributes to or detracts from the public interest, there is no option for the decision-maker but to make a subjective choice between them. (p. 50)*

In applying this step in *Double Bay Marina* the Senior Commissioner referred to the loss of view from the beach as follows:

*..... the loss of views from the intertidal beach between the marina and the private jetty at the end of Beach Street constitutes a diminution of the public interest, in other words it is a public detriment. (p.53)*

He considered that provision of the proposed marina facilities ..... *serves a private rather than the public interest.* This followed an acknowledgement of the Double Bay Marina's Articles of Association although they did not seem to significantly influence the Senior Commissioner's opinion, refer to the earlier quote from p. 56.

At the conclusion of p.56 the Senior Commissioner goes on to say:

*..... I accept, however, that a minor part of the application, the provision of disabled facilities (that proposal included alterations to create a disabled toilet, installation of approved lifting devices for transferring disabled people to and from vessels and access for Sailability Australia activities), is in the public interest.*

It should be noted that the Double Bay marina proposal also included sewage pump out and fuel and water available to the public, tender service available for public use and public access onto the marina. These proposed features are not specifically referred to in the judgement. It is presumed that they were considered to be benefits for the marina users rather than for the general public. This presumption is considered to be supported by the following comment:

- *the provision of improved mooring facilities for the future users of the existing marina, which is a private benefit. (p. 58)*

In relation to the inclusion of swing moorings into marina berths the Senior Commissioner commented as follows:

*The conversion of swing moorings into marina berths therefore increases the area of water available for navigation. Against this is the consideration that the visual impact of a swing-moored boat is much less than that of a boat berthed in a marina ..... Therefore if one considers ease of navigation more important than visual impact, the conversion of swing moorings to marina berths is a public benefit; while, if one adopts the opposite position, it becomes a public detriment. (p.57)*

The competing public and private interests were summarised as:

- *view loss from the intertidal beach, which is a public detriment;*
- *the provision of disabled facilities in the renewed marina, which is a public benefit;*
- *the significant loss of views of ten to twenty dwellings behind the intertidal beach, which is a private detriment;*
- *the provision of improved mooring facilities for the future users of the existing marina, which is a private benefit. (p. 58)*

Applying the Senior Commissioner's approach to the current proposal, the impact on the outlook of people using New South Head Road, the promenade and Rose Bay Park and beach is a public detriment. Provision of a public viewing platform and seating would be a public benefit. The loss of amenity, including views, from properties on the southern side of New South Head Road and Wunulla Road would represent a private detriment. The improved mooring facilities would be a private benefit.

### **Weighing up the public interest**

In *Double Bay Marina* the Senior Commissioner discussed this step as follows:

*The final and most difficult step is the ranking of the various interests. This may require weighting one public interest against another or balancing the public interest against private interests. Although only few planning instruments contain a statement that the public interest is paramount, in planning decisions, other things being equal, the public interest overrides the private interest. However, other things are rarely equal, and where a public detriment is minor, a major private benefit may take precedence over it. (p. 51)*

*The hardest conundrum occurs when the decision-maker must choose between competing public interests. .... In these cases the decision makers cannot avoid making value judgements but they owe it to the readers of their judgement to make the value judgements explicit. (p. 52)*

In applying this step the Senior Commissioner said:

*It seems to me that the two matters that determine the fate of this application are the weight one gives to the loss of views from the intertidal beach and the balancing of the private benefit of better boat accommodation against the private detriment of view loss from the dwellings behind the intertidal beach. (p. 59)*

*In my opinion, the public interest of preserving the views from the intertidal beach, because of its low accessibility, should be given moderate weight. Even so, it outweighs the public benefit of providing disabled facilities in the new marina, which is likely to be used by a very small number of people. (p. 60)*

*The nature of the benefit and detriment greatly influences the balancing of the private interest of boat owners against the private detriment of the occupants of the affected dwellings. The interest of boat owners is to have more up-to-date accommodation for their boats. The detriment to the occupants of the dwellings is to deprive them of their water view, which is probably the amenity they value the highest in their dwelling. It seems to me the loss of water views is a devastating (and, in a waterfront dwelling, unexpected) experience. (p.61)*

In weighting the public interest in the current application, the SHREP, cl.2(2) under *Aims of the plan*, relevantly provides:

(2) *For the purpose of enabling these aims to be achieved in relation to the Foreshores and Waterways Area, this plan adopts the following principles:*

- (a) *Sydney Harbour is to be recognised as a public resource, owned by the public, to be protected for the public good,*
- (b) *the public good has precedence over the private good whenever and whatever change is proposed for Sydney Harbour or its foreshores,*
- (c) *protection of the natural assets of Sydney Harbour has precedence over all other interests.*

It is clear that this provision strongly underpins the Senior Commissioner's view that ..... *the public interest overrides the private interest.*

The impact on views from the promenade and New South Head Road must rate higher than the intertidal beach at Double Bay (considered by the Senior Commissioner to be moderate) because the promenade and New South Head Road are highly accessible to the public. Similarly Rose Bay Beach and Park are comparatively more accessible than the intertidal beach although not used by the same volumes of people who use the promenade and New South Head Road.

North-westerly views from the promenade of Woollahra Point and Shark Island will be maintained by the proposed reinstatement of the eastern arm (Arm C).

The proposed Arm C under this proposal has reduced the length of the boats from a maximum of 30m and has reduced the height of the boats from a maximum of 7m to 3.5m. These reductions to the size and height of the boats has a reduced visual impact than the visual impact of the Arm C previously proposed under DA682/2008 as views of Manly and some waterway views will be maintained over the top of the boats. However the foreground views up to Manly will still be obstructed. Further these views of Manly will be obstructed when the viewer has an eyeline less than 1.55m. Therefore the proposal is not considered to overcome the central visual issue as stated by Biscoe J in his 2009 judgment as Biscoe J:

*'What is important, in my opinion, is the expansive view of the Harbour and its headlands as far as Manly, rather than a view specifically of particular features of Manly'.*

Views from the promenade and New South Head Road in a north easterly direction presently include the expanse of the Vacluse headland, including the shoreline, from Steele Point to Lyne Park. Impacts on these views were not raised as an issue in the 2009 LEC proceedings. The proposed reduction to the length and height of the boats to the proposed Arm C will have a reduced visual impact than the Arm C that was proposed under DA682/2008.

The proposed marina expansion will not result in any further narrowing of the gap between Rose Bay and Point Piper marinas, therefore the existing north-easterly views toward Vacluse including parts of the shoreline, the treed hillside and the ridge will be maintained. The additional 10m berths to existing Arm A do not extend beyond the alignment of the existing T-head to Arm A and are located directly in front of existing marina berths that can accommodate boats up 20m in length. Therefore these berths would not adversely affect the visual amenity of Rose Bay Beach and Park.

This final step for discerning public interest as set out in the *Double Bay marina* judgement is to weigh the public disbenefits, as described above, against the public benefits. The public benefit in the case of *Double Bay Marina* was considered by the Senior Commissioner to be limited to the provision of facilities for use by people with a disability. The current proposal includes the

provision of a public view platform and seating. The previous development application for the redevelopment of the marina included the provision of unassisted disabled access.

Other proposed public benefits referred to in the EIS are:

- public access to marina walkways during business hours
- better access to the Harbour for small craft
- casual berthing for public use
- facilities will be clear of seagrass beds
- removal of swing moorings will have a benefit to the marine ecology

Essentially these other ‘public benefits’, as they are referred to in the EIS, were features of the Double Bay proposal. However, they were not referred to by the Senior Commissioner as public benefits. This is presumably because they were seen to benefit the marina users or other private interests or perhaps because they were benefit neutral.

The 2009 judgment makes references to general benefits of facilities intended by that proposal:

*General benefits of the proposals include public access to the walkways of the marinas during normal business hours; a public viewing platform at the RBM; casual berthing for the general boating public; toilets available to the general public during business hours; fuelling and pump-out facilities for the general boating public; upgraded boating facilities; the provision of a navigation channel between the marinas; a reduced marina “footprint” through a reduction in swing moorings (although there is a greater concentration of boats creating a greater visual mass), and reduction in the ecological impact of swing moorings (chain drag impact on sea grasses). For the RBM only, the development will also provide benefits for improved (unassisted) disabled access including to Rose Bay Park and disabled access to vessels through the provision of a person hoist. (p.72)*

Out of the features referred to above the proposed development will provide the benefit of a reduced marina footprint and improved ecological impacts due to the reduction to the amount of swing moorings. However the proposed development will have an unacceptable visual impact on the Rose Bay Promenade which is a highly used and significant area.

The private disbenefits relate primarily to view loss from properties on the southern side of New South Head Road between the marina building and Salisbury Road. These view impacts are, at their worst, moderate. It is not considered that view impacts on private properties would be unacceptable.

## Conclusion

Although this assessment has endeavoured to quantify the benefits and disbenefits, in the words of Roseth SC, in this case it is considered that ..... *there is no option for the decision-maker but to make a subjective choice.* However, the foregoing discussion is considered to make the benefits and disbenefits explicit.

Even though the viewing platform would create new views to and from the harbour the viewing platform is considered to be of limited public benefit as the views towards Manly are constricted views. Also given its location, the viewing platform would be unlikely to be highly used, particularly, in comparison to the level of usage of the promenade. However the proposed public disbenefit associated with loss of visual amenity from the promenade and New South Head Road is not considered to outweigh the public benefit of providing public viewing platform and seating to

be located between Arms B and C. Therefore the provision of this viewing platform is not considered to provide sufficient public benefit to outweigh the view loss and loss of visual amenity from the promenade.

Likewise the public disbenefit of view loss from the promenade and New South Head Road would not be offset by the public benefits associated with a reduced marina footprint and improved ecological impacts due to the reduction to the amount of swing moorings. Also swing moorings are considered to contribute to the character of the views obtained from these areas.

The private benefits to boat owners, through improved boating facilities, is not of sufficient weight to justify the introduction of an eastern arm to the marina nevertheless, the private disbenefits to the owners of individual properties in terms of loss of amenity/views is not considered to be of sufficient weight to justify rejection of the DA.

The proposal is not considered to be satisfactory in terms of the public interest.

## 19. ECOLOGICALLY SUSTAINABLE DEVELOPMENT (ESD)

Section 5(a)(vii) of the EPA Act provides that an objective of the Act is to encourage ESD. Under s.79C(1)(e) of the EPA Act consideration of the public interest is required if it is relevant to the development. Whether this development is ESD is a matter for consideration.

Section 8 of the *Local Government Act 1993* contains a charter for Councils, i.e. *a set of principles that are to guide a council in the carrying out of its functions*. S.8(1) includes:

8 *The council's charter*

(1) *A council has the following charter:*

.....

- *to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development* (emphasis added)

There are a number of Land & Environment Court cases involving ESD principles. *BGP Properties Pty Limited v Lake Macquarie City Council* [2004] NSWLEC399 (12 August 2004) and *Telstra Corporation v Hornsby Shire Council* [2006] NSWLEC 133 are among those more frequently referenced. These judgements explain the concept of the precautionary principle, its constituent elements and an analytical framework for its application, including in NSW environmental and planning laws.

ESD in its most basic formulation is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (World Commission on Environment and Development, *Our Common Future*, 1987 p.44, also known as the Brundtland Report).

Mandatory issues for an EIS are included in schedule 2 of the EPA Reg. They include reasons justifying the development including the following principles of ESD:

- a. precautionary principal
- b. inter-generational equity
- c. conservation of biological diversity and ecological integrity
- d. improved valuation, pricing and incentive mechanisms

Part 9.4 of the EIS comments on these ESD principles. Each of the ESD principles is discussed below. The comments rely on assessments and conclusions reached earlier in the report. They have not been reproduced in this part to avoid repetition.

### **Precautionary principle**

#### *Meaning*

This means if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

#### *EIS*

The applicant maintains that:

- the environmental impacts associated with the development can be identified and quantified to an adequate degree
- the impacts can be mitigated and are reversible
- redevelopment of the site will have a beneficial outcome
- there are no significant risks arising to community health.

#### *Comment*

Various scientifically based documents have been used to assess the environmental impacts of the proposal, e.g. aquatic ecology, sediment quality, noise/vibration. These have established the likely environmental impacts of the development. It is concluded that the proposal does not pose a threat of serious or irreversible environmental damage. Precautions to avoid environmental damage can effectively be implemented through the imposition of consent conditions.

### **Inter-generational equity**

#### *Meaning*

This means that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations.

#### *EIS*

The applicant maintains the marina, *which aims to provide boat storage facilities and services to meet demand and incorporate best practice environmental controls*, is consistent with the objectives of social equity including intergenerational equity. In particular the development aims to ensure that the environment of Rose Bay is maintained or enhanced for the benefit of future generations.

#### *Comment*

The applicant's reference to the provision of boat storage facilities is noted. However, the incorporation of best practice controls is more appropriately associated with environmental considerations. The proposal will continue historical use of west Rose Bay for marina purposes. It has been concluded that biological impacts are either satisfactory or manageable.

The change in the visual appearance of Rose Bay from sections of the promenade would impact on future (and current) generation's perception and appreciation of the Bay's aesthetic qualities. Although this raises inter (and intra)-generational equity issues it does not go to the health, diversity and productivity of the environment.

Inter-generational principles are considered to be satisfactory.

## **Conservation of biological diversity and ecological integrity**

### *Meaning*

Conservation of biological diversity and ecological integrity should be a fundamental consideration.

### *EIS*

The applicant maintains that impacts on flora and fauna will be minimal and in some cases positive. The proposal should enhance biological diversity and ecological integrity through provision of additional habitat (on floating marine pontoons) and reduced seagrass damage through the relocation of swing moorings.

### *Comment*

It is agreed that the proposal will conserve biological diversity and ecological integrity. Biological and ecological impacts are discussed under **part 16.2.2, Ecology**.

## **Improved valuation, pricing and incentive mechanisms**

### *Meaning*

Environmental factors should be included in the valuation of assets and services, e.g. polluter pays. Environmental goals should be pursued in the most cost effective way.

### *EIS*

The applicant maintains that the value of the environmental resources affected by the proposal has been acknowledged and provided for through the examination of environmental consequences of the proposal and identification of mitigation measures to address potential impacts, including any short term construction impacts.

### *Comment*

Pricing mechanisms in relation to matters such as waste disposal, electrical power and fuel consumption factor environmental levies. The cost of managing environmental protection can be transferred to the applicant through consent conditions.

## **Conclusion**

The proposal is considered to be satisfactory when assessed against the principles of ESD.

## **20. CONCLUSION**

The principle planning instrument for the assessment of this proposed development is the SHREP. It was prepared by the Department of Planning, rather than by Council, in accordance with the provisions of part 3 of the EPA Act. Its objectives reflect the State Government's aspirations for Sydney Harbour. The SHREP applies to development throughout Sydney Harbour and not just that part of the Harbour which for which Woollahra Council is the consent authority. It therefore needs to be applied by a number of Harbour councils which have control over different parts of the waterway.

In relation to boat storage, the zonings under the SHREP permit commercial marinas in most of the waterway. The W5 zoned waterway areas, which applies to most of Rose Bay west, represents the main areas where commercial marina development is likely to occur. However, land uses adjacent to the W5 zoned areas vary, e.g. adjacent land use in Rose Bay west is primarily residential whereas in an area such as Rozelle Bay it is industrial. Impacts of commercial marina development on adjacent areas will therefore vary. The matters for consideration under the SHREP acknowledge

this and it is clear that what may be an acceptable form of development in a particular area of the waterway zoned W5 may not be acceptable in another area with the same zoning.

In relation to this proposal we have the benefit of the both judgments handed down by Biscoe J in the *Addenbrooke* cases for redevelopment schemes for both the Rose Bay and Point Piper marinas.

This report finds that the proposed additional Arm C is not consistent with, and is unacceptable having regard to, the provisions of the SHREP and its related DCP (SHDCP) that concern visual impact.

There are other matters relating to protection of the environment and the amenity of neighbouring properties which could be overcome by imposing specific conditions.



## 21. RECOMMENDATION

THAT the Joint Regional Planning Panel, as the consent authority, refuse development consent to DA 136/2012/1 for extension to Rose Bay Marina comprising of:

- An additional 9 x 10m berths on existing Arm A
- The addition of a new marina arm (Arm C) which is proposed to be a floating pontoon system accommodating 37 x 15m berths. The height of vessels to be berthed on the new Arm C is proposed to be limited to 3.5m in height
- A new walkway connecting Arms B and C incorporating a viewing platform and bench seat
- Retention of 24 commercial swing moorings

on land at 594-596 New South Head Road ROSE BAY, for the following reasons:

1. The proposal is inconsistent with and unacceptable having regard to the aims of the *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* (deemed State Environmental Planning Policy), contained in clause 2(1)(a), having particular regard to the principles set out in clause 2(2).
2. The proposal is inconsistent with and unacceptable having regard to objectives (d) and (g) of the W5 – Water Recreation zone of the *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* (deemed State Environmental Planning Policy).
3. The proposal is inconsistent with and unacceptable having regard to clauses 25(b) and (c) - *Foreshore and waterways scenic quality* of the *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* (deemed State Environmental Planning Policy).
4. The proposal is inconsistent with and unacceptable having regard to Clause 26 - *Maintenance, protection and enhancement of views* of the *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* (deemed State Environmental Planning Policy).
5. The proposal is inconsistent with and unacceptable having regard to part 3.2 (1<sup>st</sup> and 2<sup>nd</sup> dot points), part 4.2 (8<sup>th</sup> dot point) and part 4.7 – Marinas (Private and Commercial); Visual Impact (2<sup>nd</sup> and 5<sup>th</sup> dot points) of the *Sydney Harbour and Waterways Area Development Control Plan 2005*.
6. The proposal is not in the public interest.



Mrs L Holbert  
**ASSESSMENT OFFICER**



Mr P Kauter  
**EXECUTIVE PLANNER**

## **ANNEXURES**

1. Plans
2. Traffic Engineer Referral Response
3. Heritage Officer Referral Response
4. Urban Design Officer Referral Response
5. Environmental Health Officer Referral Response
6. Fire Safety Officer Referral Response
7. Public Open Space Referral Response
8. Environmental Sustainability comments
9. NSW Primary Industries-general terms of approval
10. NSW EPA- general terms of approval
11. Heritage Council of NSW comments
12. Foreshore & Waterways Planning & Development Advisory Committee comments
13. NSW Office of Water comments
14. NSW Fire Brigades comments
15. Roads & Maritime Services comments
16. Sydney Ports comments
17. Compliance Table SHREP
18. Compliance Table SHDCP
19. Names and address of objectors