

COUNCIL ASSESSMENT REPORT

SOUTHERN REGIONAL PLANNING PANEL

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| PANEL REFERENCE & DA NUMBER | PPSSTH-414 – DA0095/24 |
| PROPOSAL | Attached dual occupancy, relocation of sewer main including coastal and environmental cliff works, beach storage shed and retaining walls |
| ADDRESS | Lot 2 DP 773132, 217A Beach Road, Denhams Beach |
| APPLICANT | Adhami Pender Architecture |
| OWNER | Canplay Pty Ltd |
| DA LODGEMENT DATE | 25 November 2023 |
| APPLICATION TYPE (DA, Concept DA, CROWN DA, INTEGRATED, DESIGNATED) | DA |
| REGIONALLY SIGNIFICANT CRITERIA | Clause 8A Schedule 6 of <i>State Environmental Planning Policy (Planning Systems) 2021</i> : Certain coastal protection works |
| CIV | \$ 1,140,678 (excluding GST)* <i>*refer comment in report</i> |
| CLAUSE 4.6 REQUESTS | Clause 4.3 Height of Buildings R2 Low Density Residential zone |
| KEY SEPP/LEP | <ul style="list-style-type: none"> • State Environmental Planning Policy Sustainable Buildings) 2022 • State Environmental Planning Policy (Planning Systems) 2021 • State Environmental Planning Policy (Biodiversity and Conservation) 2021 • State Environmental Planning Policy (Resilience and Hazards) 2021 • Eurobodalla Local Environmental Plan 2012 |
| TOTAL & UNIQUE SUBMISSIONS ISSUES KEY IN SUBMISSIONS | Exhibition #1 – 3 submissions Exhibition #2 – 2 submissions |
| DOCUMENTS SUBMITTED FOR CONSIDERATION | Refer attachments to this report: <ul style="list-style-type: none"> • Architectural Plans • Civil Engineering Plans • Survey plan • Clause 4.6 Request |

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| | <ul style="list-style-type: none"> • Statement of Environmental Effects • Low Rise Density Design Verification Statement • Low Rise Density Assessment • DCP Variation Requests • BASIX and Nathers • Geotechnical Report • Preliminary Environmental Assessment (22/12/23) • Preliminary Environmental Assessment (16/5/24) • Structural Design Statement • Arborist statement • Construction Management Plan • AHIMS Search • Deposited Plan/s • Cost of Works |
| SPECIAL INFRASTRUCTURE CONTRIBUTIONS (\$7.24) | N/A |
| RECOMMENDATION | Refusal |
| DRAFT CONDITIONS TO APPLICANT | NO. Identified issues cannot be resolved through conditions of consent. |
| SCHEDULED MEETING DATE | 29 January 2025 |
| PLAN VERSION | - |
| PREPARED BY | C Watkins. Senior Development Assessment Planner Eurobodalla Shire Council |
| DATE OF REPORT | 21 January 2025 |

EXECUTIVE SUMMARY

The subject site is located at 217A Beach Road, Denhams Beach, fronting an unnamed beach located to the north of Denhams Beach. The subject site is comprised of a single allotment legally identified as Lot 2 DP 773132. The site has a width of approximately 18.835 metres and a depth of between 53.64 metres and 59.91 metres and a site area of 1,069m².

The site is located on the eastern side of Beach Road that adjoins residential properties to the north and south, Beach Road to the west and the Batemans Bay coastline to the east (cliff area).

The development works

The development application (DA 0095/24) was lodged on 25/9/23 seeking consent for a dual occupancy development. The application has been amended during the assessment process to include additional ancillary works and is best described as involving an *Attached dual occupancy, relocation of sewer main including coastal and environmental cliff works, beach storage shed and retaining walls* ('the proposal').

The existing site topography and development on the site consists of cleared areas within the upper portion of the site fronting beach road and a cliff and beach area within the eastern portion of the site, adjoining the coast to the east.

Unauthorised works have been undertaken consisting of vegetation and tree removal, significant changes to site topography including earthworks (excavation and filling of land), construction of significant retaining walls, stormwater works, construction of stairs and ramps and associated geotechnical soil works which are considered to include coastal protection works.

Legislation

The site is located in the R2 - Low Density Residential zone pursuant to Clause 2.2 of the *Eurobodalla Local Environmental Plan 2012* ('LEP 2012'). The site adjoins R2 zoned land to the north, west and south and C2 - Environmental Conservation zone to the east (the beach areas).

While the construction of a dual occupancy for residential use is permissible with consent in the R2 zone, the applicant has failed to adequately address the coastal protection works and ancillary works associated with the cliff and beach areas of the site. Works have been undertaken without development consent since the application was lodged on 25/11/23. The application has not adequately addressed the unauthorised works and provided insufficient and inconsistent information to support the proposal including an inadequate Clause 4.6 Variation and supporting documentation. Significant construction works have been undertaken without consent, proposing a development which has the ability to create significant environmental impacts, is incompatible with the coastal environment or the residential character of the area, all fundamental issues which require refusal of the application.

A number of State Environmental Planning Policies apply to the development including *State Environmental Planning Policy Sustainable Buildings* 2022; *State Environmental Planning Policy (Planning Systems)* 2021; *State Environmental Planning Policy (Biodiversity and Conservation)* 2021 and *State Environmental Planning Policy (Resilience and Hazards)* 2021.

The site is mapped as being located within a coastal use area and a coastal environment area for the purpose of *State Environmental Planning Policy (Resilience and Hazards)* 2021 and is mapped as containing areas of native vegetation under *Eurobodalla Local Environmental Plan 2012*.

Clause 2.10, 2.11 and 2.12 of the Resilience and Hazards SEPP specifies that a development consent within coastal environment areas, coastal use areas including coastal protection works should not be issued unless the consent authority is satisfied that the proposed development has considered the coastal environment and is not likely to cause increased risk of coastal hazards on that land or other land. Section 27 of the *Coastal Management Act 2016* identifies matters that must be satisfied before a consent authority issues a development consent for coastal protection works.

The principal planning controls relevant to the proposal include the *Eurobodalla Local Environmental Plan 2012* and the *Residential Zones Development Control Plan* ('DCP').

There were no concurrence requirements from agencies for the proposal and the application is not integrated development pursuant to Section 4.46 of the *Environmental Planning and Assessment Act 1979* ('EP&A Act').

A referral to Essential Energy pursuant to *State Environmental Planning Policy (Transport and Infrastructure)* 2021 ('Transport and Infrastructure SEPP') pursuant to Clause 6.1 of the LEP

2012 were sent and raised no objections. A referral undertaken to Department of Primary Industries (Fisheries) Marine Parks under s.56 of the *Marine Estate Management Act 2014* in relation to potential environmental impacts within marine parks, marine biological diversity and marine habitats and DPI Fisheries has identified additional information is required to allow for assessment of potential impacts. These matters remain outstanding and the application in its current form is not supported and is recommended for refusal.

Jurisdictional prerequisites to the granting of consent subject to the following controls have not been satisfied, and therefore this application is recommended for refusal, for the following reasons:

- Section 27 of the *Coastal Management Act 2016*, requires that works as proposed will not:
 - unreasonably limit or be likely to unreasonably limit public access to or the use of the adjoining beach, or
 - pose or be likely to pose a threat to public safety; and satisfactory arrangements can be made (by conditions imposed on the consent) for the maintenance of the works.
- Section 56 of the *Marine Estate Management Act 2014* requires that development considers the potential environmental impacts within marine parks, marine biological diversity and marine habitats.
- Section 7.3 of the *Biodiversity Conservation Act 2016* requires consideration of whether a proposed development or activity is likely to significantly affect threatened species or ecological communities, or their habitats.
- Clause 2.6 of the *State Environmental Planning Policy (Biodiversity and Conservation) 2021* requires consent for clearing of vegetation on non-rural land in R2 zones;
- Clauses 2.10, 2.11, 2.12 of *State Environmental Planning Policy (Resilience and Hazards) 2021* as the application is inconsistent with the requirements for coastal management areas;
- Clause 4.6 of the *State Environmental Planning Policy (Resilience and Hazards) 2021* for consideration of whether the land is contaminated;
- Clause 4.6 of *Eurobodalla Local Environmental Plan 2012* relating to development that proposes a building height variation and Clause 4.3 Height of Buildings.
- Noncompliance with aims and objectives and relevant clauses of *Eurobodalla Local Environmental Plan 2012*
- Noncompliance with intent and performance criteria of *Residential Zones Development Control Plan*.

The unauthorised works which consist of cliff soil and stability works and retaining walls which include (in part) coastal protection works are a fundamental issue as the works have been undertaken on the site without consent, and as the consent authority must consider future works, does not allow the application to be supported. As consent is not sought for 'use of as-built work' or the like, including provision of adequate information to allow for detailed assessment of the proposal (either as-built or as proposed) the application is recommended for refusal.

Process of Application

The application was placed on public exhibition from 25/9/23 – 12/10/23, with three (3) submissions being received. The proposal was re-exhibited from 21/6/24 – 9/7/24 with three (3) submissions being received (one being an Addendum to a submission), for a total of 5 unique submissions over 2 notification periods.

These submissions which raised issues relating to overshadowing, inadequacies in the Statement of Environmental Effects (SEE), lack of supporting assessment for the proposed cl4.6 departure (HOB), impact on trees, view loss, environmental impact from construction on cliff, stability of cliff for supporting the proposed development, unauthorised vegetation removal, lack of replacement planting, visual impact of walls constructed on foreshore, unauthorised coastal protection works, insufficient information to demonstrate adequate engineering solutions, non compliance with DCP controls, setbacks, location of carports, onsite vehicle manoeuvring, character and scale of development, overshadowing, use of the storage shed, lack of a hydrological study and potential hydrological impacts on adjoining properties, and compliance within clause 27 of the CMA, stormwater management impacts. These issues are considered further in this report.

The application is referred to the Southern Regional Planning Panel ('the Panel') as the development is '*regionally significant development*', pursuant to Section 2.19(1) and Clause 8A of Schedule 6 of *State Environmental Planning Policy (Planning Systems) 2021* as the proposal is development for *Certain coastal protection works*.

A briefing was held with the Panel on 7 August 2024 where key issues were discussed. The key issues raised included:

- Status and approval pathway for the construction of the retaining wall on the foreshore and batters (defined by applicant as emergency environmental protection works), noting no assessment of these works has been undertaken.
- Consideration of which works constitute coastal protection works under the SEPP (Planning Systems) 2021
- Nature of any unauthorised works (if any).
- Cliff instability.
- Requirement for any proposed bank and batter over existing works to withstand loadings from the dual occupancy build.
- Status of any enforcement proceedings or related BIC for the existing works.
- Clarification of vegetation clearing, and relationship to the emergency works carried out on site.
- Exclusion of the site from the Coastal Management Program, as the program does not include cliff stability.
- Characterisation of the proposed dual occupancy, development suitability and scale.
- Provision of private open space.
- Proposed use of beach storage shed.
- Proposed departure from a development standard under cl4.6 (Height of buildings).
- Visual impact, overshadowing, setbacks.
- Exhibition status (noting the DA has been exhibited twice). 3 Objections received with issues raised regarding overshadowing, inadequacies in SEE, lack of supporting assessment for the proposed cl4.6 departure (HOB), impact on trees, view loss, environmental impact from construction on cliff, stability of cliff for supporting the proposed development, unauthorised vegetation removal, lack of replacement planting, visual impact of walls constructed on foreshore, unauthorised coastal protection works, insufficient information to demonstrate adequate engineering solutions, impact of cl4.6 departure (HOB), non compliance with DCP controls, setbacks, location of carports, onsite vehicle manoeuvring, character and scale of development, overshadowing, use of the storage shed, lack of a hydrological study and potential hydrological impacts on adjoining properties, and compliance within clause 27 of the CMA, stormwater management impacts.
- Status of further information requests and matters requiring further assessment.
- Referrals (Essential Energy, DPI (Marine Parks), Council development engineers, DPHI – CAA not required)

The regional planning panel at the panel briefing (7 August 2024) requested additional information be provided that includes:

- Clarification as to the extent of works on adjoining properties completed as emergency environmental protection works and how the proposal interrelates with these works.
- Further details to confirm the integrity of the sea wall given it is proposed to support the beach storage shed and ultimately the dual structure.
- A full site history including documentation and chronology to provide a clear geotechnical picture of what is under the site.
- To ensure the Panel can consider the structural adequacy of the retaining wall on which the proposed dual occupancy will rely, confirmation that the constructed retaining wall and associated works carried out as emergency environmental protection works are authorised.
- The Panel raised concerns that the size and scale of the proposed structures for which approval is sought has ultimately dictated the size of the coastal protection works.

The applicant submitted a response and a number of documents in response to the request (refer Attachments to this report). The revised documentation does not adequately address the matters raised.

The unauthorised works which consist of cliff soil and stability works and retaining walls which include (in part) coastal protection works are a fundamental issue as the works have been undertaken on the site, and as the consent authority must consider future works, does not allow the application to be supported.

The issues of urban design and bulk and scale in relation to the dual occupancy development have not been resolved and are also critical issues, but not fatal, as it is possible that design amendments may have resolved these issues in the absence of the coastal protection works and unauthorised works issue. The remaining issues are of a technical nature and are not considered capable of being resolved through amendments and/or additional information as they consist of as-built works that include coastal protection works /retaining walls of a scale and in a location that has not considered the coastal environment.

These technical issues, along with the other critical issues, are still considered in this report in terms of the acceptability of the proposal as currently presented and accordingly contribute to the reasons for refusal.

Following consideration of the matters for consideration under Section 4.15(1) of the EP&A Act, the provisions of the relevant State Environmental Planning Policies, including submission of inconsistent and insufficient information, unauthorised works, numerous non-compliances with applicable controls or adequate consideration of potential environmental impacts on the built and natural environments including the coastal environment, the proposal cannot be supported.

Following a detailed assessment of the proposal, pursuant to Section 4.16(1)(b) of the *EP&A Act*, DA 0095/24 is recommended for refusal subject to the reasons contained at **Attachment A** of this report.

1. THE SITE AND LOCALITY

1.1 The Site

The site is located within a developed residential area of Denhams Beach that adjoins residential properties to the north and south, Beach Road to the west and the Batemans Bay coastline to the east (cliff area). The site has a width of approximately 18.835 metres and a depth of between 53.64 metres and 59.91 metres and a site area of 1,069m².

The site contains a relatively level area fronting Beach Road and a cliff /escarpment area in the eastern part of the site that is mapped as native vegetation, comprising sandy beach areas at the cliff base to the east.

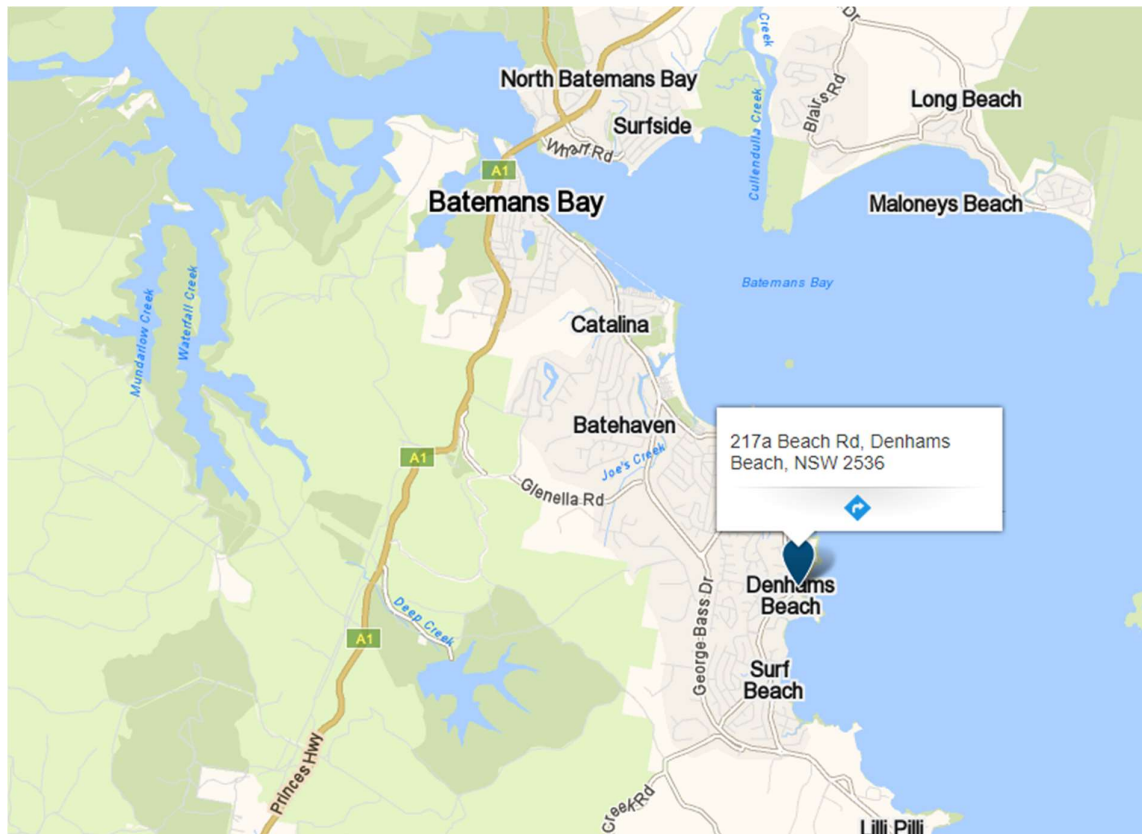


Figure 1: Site location – Map (Where-is)



Figure 2: Site location – Nearmaps 2023

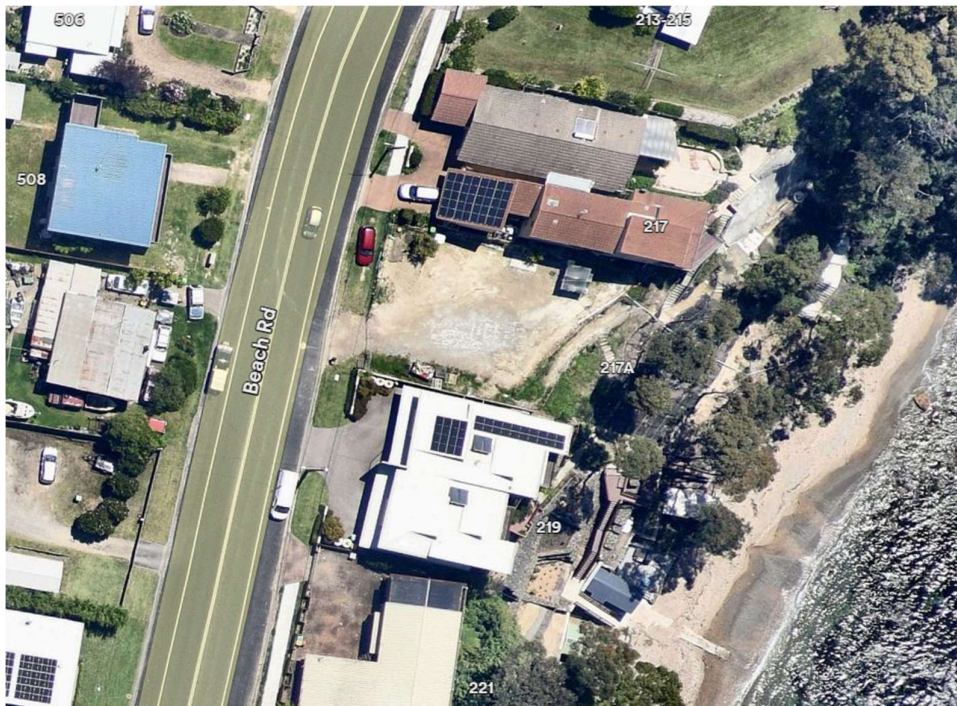


Figure 3: Site location – Nearmaps RECENT Nearmaps photo –January 22, 2024

Current site status:

The site has been cleared of any habitable structures. The land has been subject to cliff instability. Emergency environmental protection works were undertaken. The applicant has constructed retaining walls and structures on the foreshore. There has been no approval granted for these works. Therefore this application is recommended for refusal.

1.2 The Locality

The site is located within a coastal area of Batemans Bay within an established low density residential area of Denhams Beach that contains a mix of established residential properties and developing dwellings and dual occupancy developments along this section of Beach Road, which is located approximately 4 kilometres south-east of the Batemans Bay town centre. This area comprises predominantly single (1) and two (2) to three (3) storey buildings with the three storey components typically not visible from the street, stepping down the slope to the rear.

Beach Road is a main road that provides a link between Batemans Bay to the north and coastal communities to the south towards Moruya.



Figure 4: Site locality – Council GIS with aerial photo and contours

2. THE PROPOSAL AND BACKGROUND

2.1 The Proposal

The proposed development was originally lodged seeking consent to construct an attached two and three storey dual occupancy. The proposal was subsequently amended to seek to construct a detached “beach storage shed”. The development also includes the construction of 2 double carports and relocate the sewer main in a new alignment.

The land has been subject to cliff instability. The applicant has advised that emergency environmental protection works were undertaken. No assessment of these works has been undertaken as the work have been undertaken throughout the assessment process and the application as lodged seeks consent for development of ‘an attached dual occupancy dwelling and a beach storage shed’ (SEE dated June 2024). The applicant has undertaken significant

earthworks and constructed retaining walls on the foreshore without development consent following DA lodgement.

The subject DA was lodged on 25 November 2023 and was subsequently amended to include ancillary works. A detailed description of the works for which development consent is sought is provided below:

- Demolition
- Tree removal
- Construction of a dual occupancy (attached) development:
 - Dwelling 1 – 3 Levels – northern side
 - Level 0 – bathroom / laundry, playroom with kitchenette, bedroom and deck
 - Level 1 – double carport, powder room, laundry, kitchen, dining and sitting room and deck
 - Level 2 – 2 bedrooms, ensuite, bathroom, multi purpose room, front and rear terrace
 - Solar panels
 - Dwelling 2 – 3 levels – southern side
 - Level 0 – bathroom / laundry, playroom with kitchenette, bedroom and deck
 - Level 1 – double carport, powder room, laundry, kitchen, dining and sitting room and deck
 - Level 2 – 2 bedrooms, ensuite, bathroom, multi purpose room, front and rear terrace
- Beach storage shed, including deck and retaining walls, pedestrian access track, including stairs and viewing platform
- Construction of a retaining wall/seawall adjacent to the rear boundary of the property at the base of the cliff
- Landscaping and associated works
- Connection to infrastructure including relay the sewer main in a new alignment.

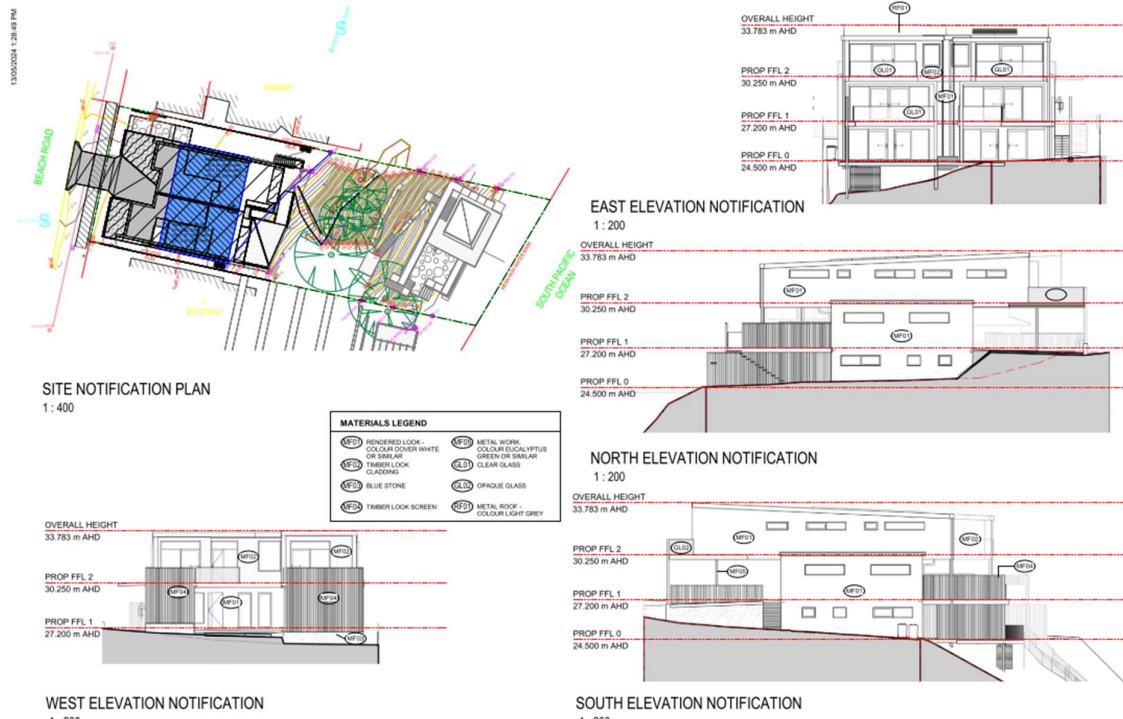


Figure 7: Site Plan and elevations

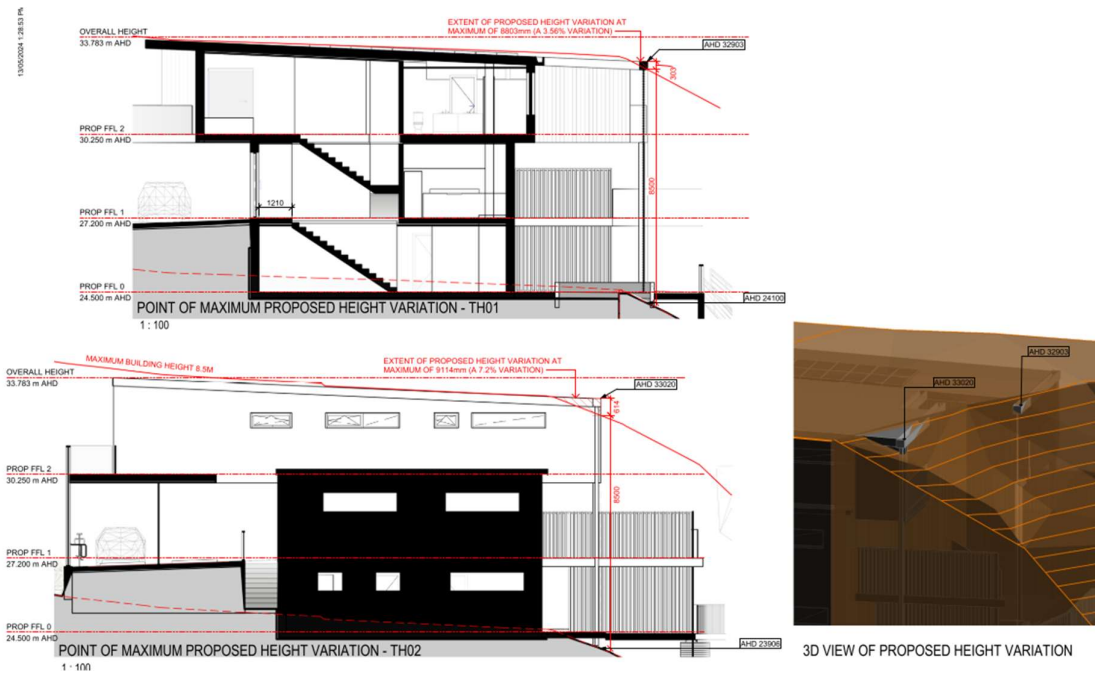


Figure 8: Extract from plans (Clause 4.6 height variation)



Figure 9: Extract from plans (perspective views)

Unauthorised works:

Since lodgement of the application, works have been undertaken and structures constructed on site consisting of tree removal, cliff works and associated structures including construction of retaining walls that act as a seawall, ramps and structures. The as-built works would be subject to a separate Building Information Certificate as a development application can only consider prospective works (refer to the “yellow” coloured retaining wall/seawall and structures as identified in Figure 1 below).

The site works have been referred to Council’s compliance section for action. This application is recommended for refusal as the development as lodged is seeking consent for ‘future’ works. The proposal has not sought consent for use of as-built works, has not provided sufficient evidence in support of any as-built proposal.

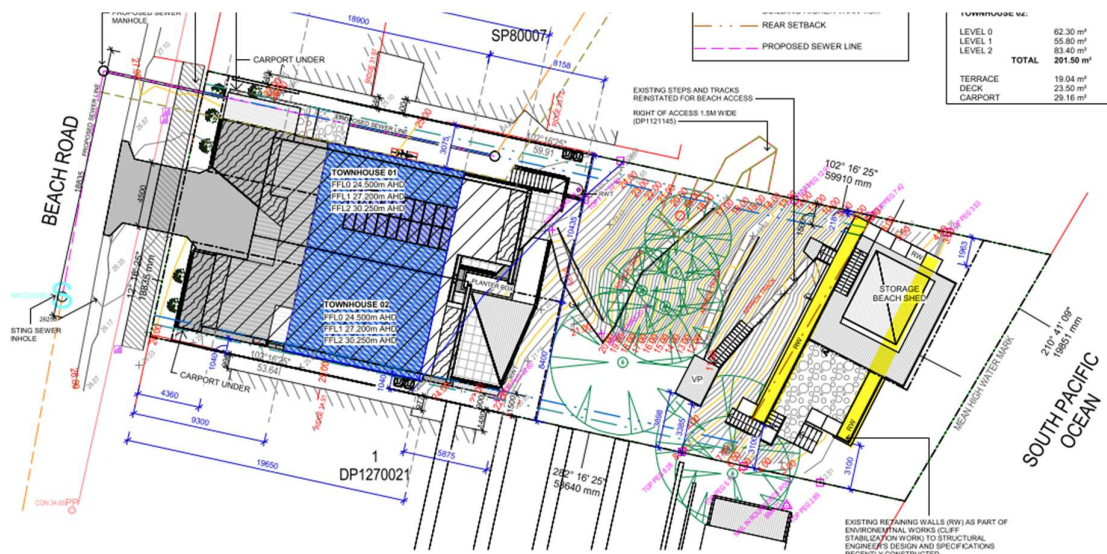


Figure 10: Retaining wall location on plans

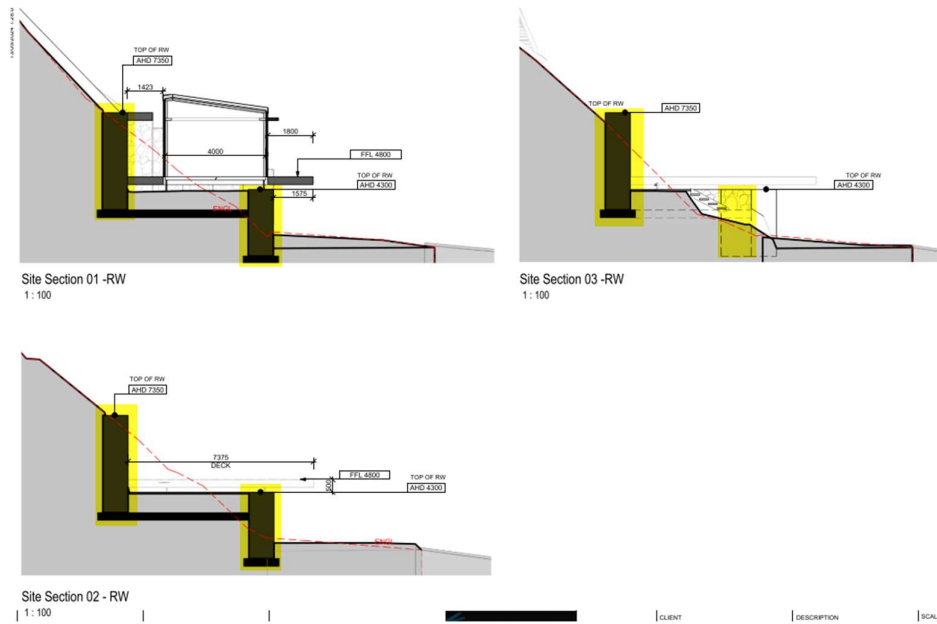


Figure 11: Walls in section



Figure 12: A photo from 20/2/24 showing base of cliff i.e. tidal ocean wave area (looking south)

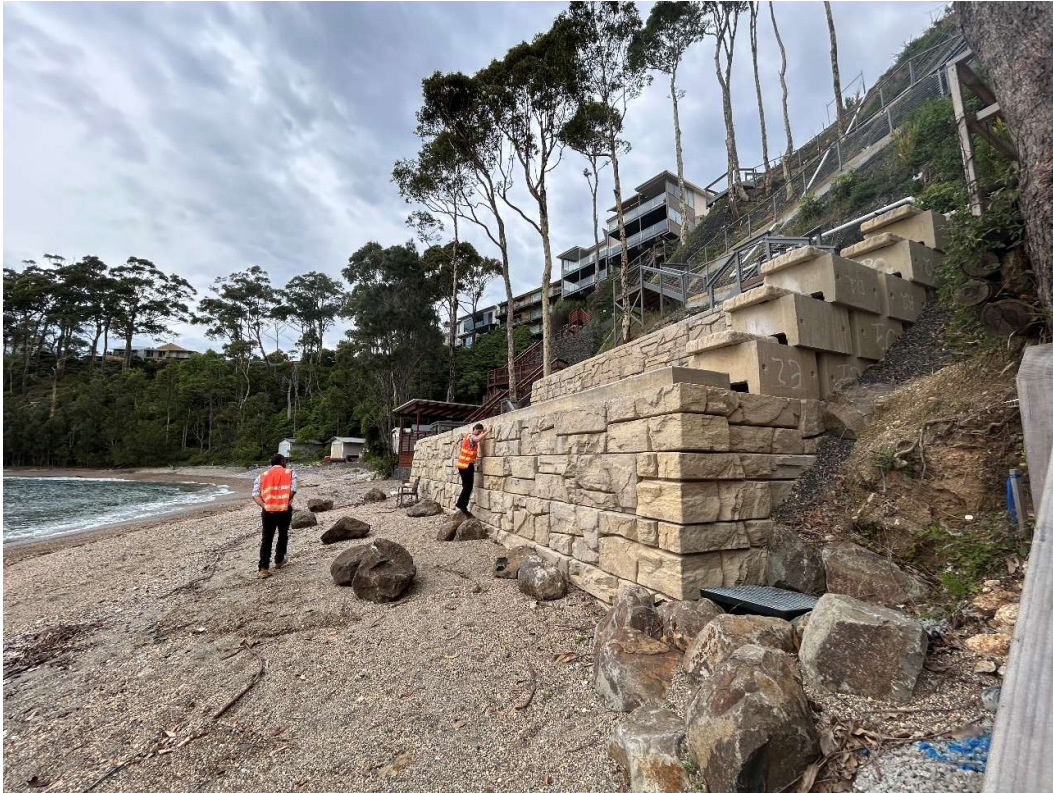


Figure 13: A site photo from 3/12/24 showing as-built works

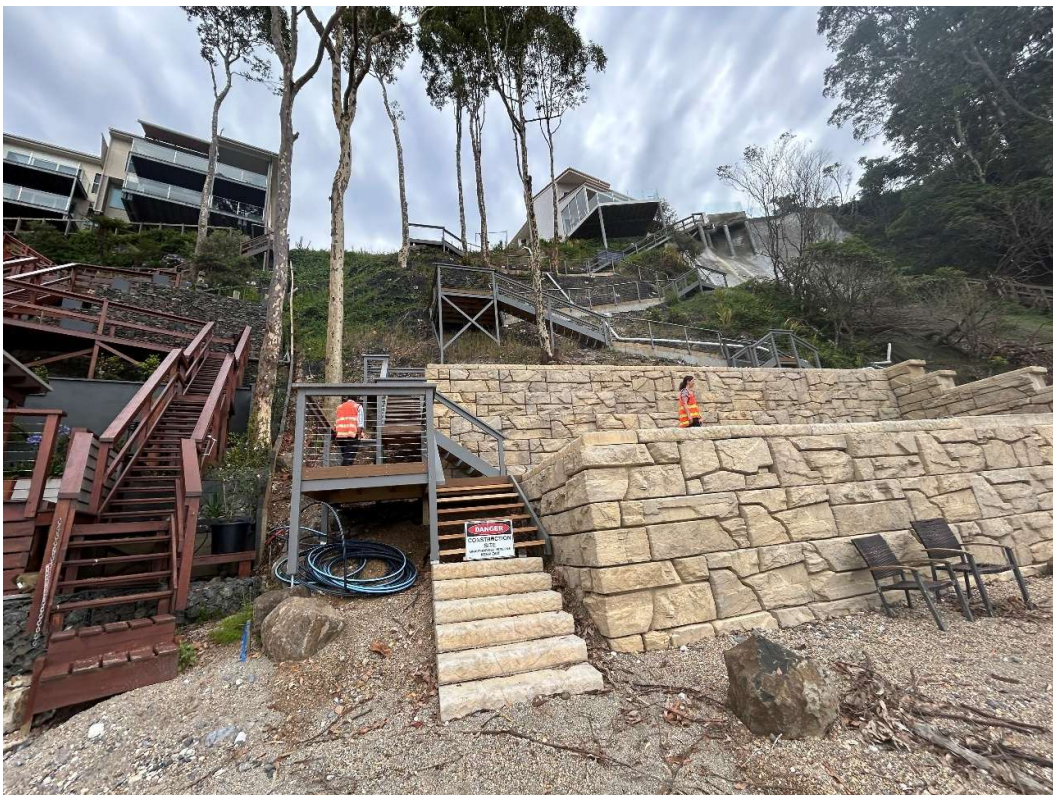


Figure 14: A site photo from 3/12/24 showing as-built works



Figure 15: A site photo from 3/12/24 showing neighbouring development to the south

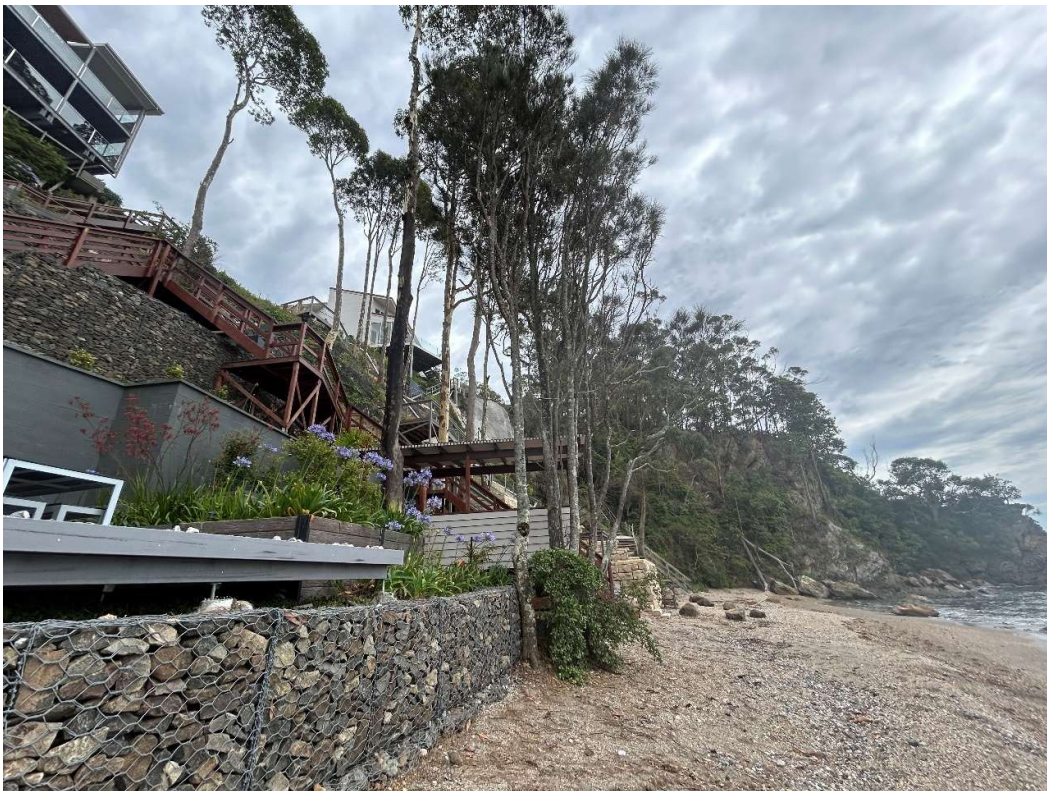
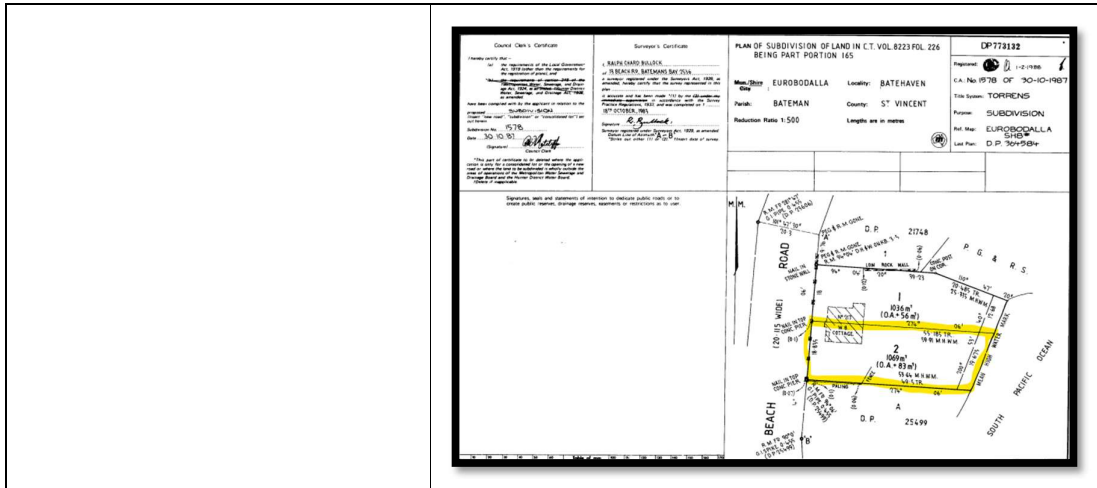


Figure 16: A site photo from 3/12/24 showing neighbouring development to the north

Table 1: Development Data

| Control | Proposal |
|---|---|
| Site area | 1,069m ² |
| GFA/FSR | N/A |
| Clause 4.6 Requests | Yes – Clause 4.3 Height of Buildings |
| No of apartments | 2 (dual occupancy) |
| Max Height | 8.5m |
| Landscaped area | Insufficient information |
| Car Parking spaces | 2 for each dwelling (4 spaces) |
| Setbacks | Non-compliant building setbacks and setbacks to ancillary development including retaining walls. |
| Access to services | Yes. |
| <i>Environmental constraints</i> | |
| BV map | No |
| Aboriginal Cultural Heritage | No |
| Bush Fire | No |
| Coastal Vulnerability | No (outside CMP area) |
| Potentially Contaminated Land | Yes (previous uses/demolition/ unauthorised works) |
| Flood | No |
| within 40m of a watercourse? | No |
| Batemans Bay Marine Park | Yes (buffer 100m) |
| SEPP (incl. Coastal) | Yes <ul style="list-style-type: none"> • Coastal Environment area • Coastal Use Area |
| <i>Eurobodalla LEP 2014</i> | |
| Acid Sulfate Soils | No |
| Biodiversity/Vegetation | No – BV mapping Yes - Council vegetation mapping |
| Heritage | No |
| <i>Deposited Plan and 88B Instrument</i> | No identified restrictions. The site is benefited by a pedestrian access from the north over an adjoining site. |



2.2 Background

No pre-lodgement meeting was held prior to the lodgement of the application.

The development application was lodged on 25 September 2023. The application was lodged for construction of a 'dual occupancy'. No works associated with the cliff were included in the DA lodgement documentation.

Following a query from the applicant, the following advice was provided to the applicant (via email dated 9/10/23) from Councils Development Helpdesk:

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| <p>3 October 2023 Email to applicant</p> | <p>Following an email request from the applicant (dated 3/10/23), Council advised the applicant that the following works consisted of 'environmental protection works' as defined and did not require development consent:</p> <p>The works proposed would take place in the following sequence:</p> <ol style="list-style-type: none"> <i>The first task is to expose the ground surface by managing the vegetation:</i> <ol style="list-style-type: none"> <i>All Weed species will be completely removed</i> <i>All native species (except large trees) will be cut back as much as needed to allow for stabilisation strategy (TerraMat allows for vegetation re-growth)</i> <i>All Native Trees will be retained</i> <i>Demolition of the remaining beach access stair.</i> <i>Once the above has been completed, test will be done in various locations to identify real depth of rock face on the cliff face.</i> <i>Assuming no surprises with the above, cliff stabilisation will proceed with:</i> <ol style="list-style-type: none"> <i>Application of TerraMat (as advised by Geotech), which is held in place by ground anchors as per structural engineer's advice, which includes baseplates and eye loops for vertical and horizontal stainless steel cable to hold TerraMat in place.</i> <p>The Council advised the applicant the following works (Nos. 5 – 6) would require a development application to be lodged:</p> <ol style="list-style-type: none"> <i>Platforms and Stairs</i> |
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| | <p><i>a. Platform locations to be surveyed accurately</i></p> <p><i>b. Ground Anchors where platforms are intended are to be installed into the rock face as per structural engineer's advice.</i></p> <p><i>c. Platform Supports will be pre-fabricated from galvanised steel + powder coated then craned into place.</i></p> <p><i>d. Platform floor joists and flooring to be constructed using hardwood timber</i></p> <p><i>e. Stairs and balustrades to be constructed on site using hardwood timber.</i></p> <p>6. Retaining Walls + Level Platforms + Beach shed</p> <p><i>a. Retaining wall sketch and support as per structural engineer's advice</i></p> <p><i>b. These works would take place immediately after the stabilisation works to the upper part of the cliff.</i></p> |
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The applicant subsequently was requested to clarify the description of the development to which consent was being sought on 19 October 2023.

A chronology of the development application since lodgement is outlined below including the Panel's involvement (briefings, deferrals etc) with the application:

Table 2: Chronology of the DA

| Date | Event |
|---------------------------------|--|
| 25 September 2023 | DA lodged |
| 25/09/2023 to 12/10/2023 | Exhibition of the application |
| 25 September 2023 | DA referred to external agencies |
| 17 October 2023 | Site visit by Council officers (DA Assessment) |
| 19 October 2023 | <p>Request for information (No. 1) sent to applicant following initial site visit:</p> <ul style="list-style-type: none"> - Planning (description of development) - Consent authority - Planning matters (initial matters): - Trees - Impact on neighbouring trees - Vehicle manoeuvring - Building height - Overshadowing - Contamination - Referrals – Engineering – Council do not support building over sewer line; Footpath required to front of development. Other engineering matters to be addressed in detailed referral comments. - Submissions |

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| 7 November 2023 | Email response to applicant (response to queries) <ul style="list-style-type: none"> - Inclinator – advised requirements if applicant wishes to include an inclinator in their application. - Building height – calculated by Council at 8.913m height. - Overshadowing – applicant will provide hourly shadow diagrams - Contamination – advised applicant a contamination report is required. It cannot be a condition of consent. |
| 7 November 2023 | Email response to applicant (response to queries) <ul style="list-style-type: none"> - Description of use – Council can only comment on permissibility of proposed works once documentation has been lodged on the NSW Planning Portal - Consent authority – The applicant is to advise Council of their proposed works, and then Council can consider whether they consist of ‘coastal protection works’ and would require determination by the Regional Planning Panel - Applicant to submit additional information to the matters raised in correspondence by Council. |
| 15 February 2024 | Applicant lodged additional information. – included works within the cliff area |
| 21 February 2024 | Request for information (No. 2) sent to applicant: <ul style="list-style-type: none"> - Planning (description of development) - Unauthorised works - Revised cost of works - Documentation – initial review <ul style="list-style-type: none"> o Contamination report o Landscape plan/arborist report - Referrals and detailed assessment |
| 20 June 2024 | Applicant lodged additional information. |
| 24 June 2024 | DA re-referred to external agencies |
| 21/06/2024 to 9/7/2024 | Re-Exhibition of the application |
| 7 August 2024 | Panel briefing |
| 3 December 2024 | Site visit by Council |

2.3 Site History

Background:

A review of Council records indicates a subdivision plan of site dated 1987 i.e. existing dwelling / cottage. There is no records for demolition of these structures with Council.

Unauthorised works:

Site visits undertaken during the assessment process indicates that works have been undertaken without development consent. Refer further comment in the Proposal section of this report. This has been referred to Councils compliance section for action.

2.4 Site and surrounds (coastal environment/cliff area) –:

To provide context for the subject development, the assessment report for an application DA0024/22 for a dwelling alterations and additions at 221 Beach Road Denhams Beach, approved by Council on 17/5/22, provided that at one point circa 1985 council proposed to acquire the land (including the cliff area of the subject site at No. 217A Beach Road).

For context, No. 221 Beach Road is located two properties to the south of the subject site (both properties highlighted in 'red'):



Figure 17: Site location (background) No. 221 Beach Road – coastal works

However following a valuation and an proposal for acquisition of land, in 1987 Council resolved:

Extract from assessment report:

On 23 November, 1987 Council resolved:

- Council not proceed with the acquisition of the total area of Lot B DP 25499 Beach Road, Batemans Bay and that the owner be invited to submit a building application for a dwelling house specifically designed to suit this cliff top site together with a structural engineer's certificate certifying stability of the structure, accompanied by a Geotech survey certifying the stability and suitability of the site for the erection of a dwelling house;
- The owner of Lot B together with the owners of the two properties north of the subject land and the four properties south of the subject land be informed that it is Council's intention to acquire the rear of these properties, being that below the 115m contour level representing the bottom area of the cliff and the immediate foreshore beach area, so as to ensure continuity of foreshore access in this locality.

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The 'two properties to the north' referred to in this report include the subject site (No. 217A Beach Rd).

In relation to works in the vicinity of the cliff and boat sheds:

On 11 July 2002, Council received a DA for the construction of a boat shed on the lower side of the cliff. On 15 April 2003, Council considered a report for the boat shed. The recommendations of the report included:

- Council not require the dedication nor to pursue the acquisition of any foreshore reserve from No. 217 to 219 (inclusive) Beach Road Denhams Beach where the titles run to Mean High Water Mark, unless such development are in accordance with the Section 94 Plan.
- That a variation be granted to the 12m Foreshore setback stipulated in the residential DCPs to enable approval of the DA55/03 for the following reasons:
 - a) Compliance to the setback would involve excessive cut into the cliff face.
 - b) The site is such that the decreased setback has no detrimental impact on sunlight of neighbours views.
- That DA55/03 be approved subject to conditions.



For reference, the image on the left nominates the extent of land that was originally proposed to be resumed. The area defined by the heavy black line is the rear portion associated with the cliff. As can be seen, at one time, Council was seeking to acquire the entire Lot B. This was then modified to be a setback in line with the adjoining properties to the north and south.

Based on the above, the resumption of the cliff is no longer on the agenda of Council. As such, there is no limitation on the extent of the development unless otherwise contained in Council's DCP.

In relation to this proposal DA0095/24, development within the cliff area is subject to applicable controls and not subject to acquisition.

Neighbouring development – No. 219A Beach Road Denhams Beach

An application was approved (DA0638/21) for 'detached deck and existing unapproved stairs' which formalised the use of the as-built stair structures within the vicinity of the beach.

Neighbouring development – No. 217 Beach Road Denhams Beach

This site has not received consent for cliff stability works.

3. STATUTORY CONSIDERATIONS

When determining a development application, the consent authority must take into consideration the matters outlined in Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* ('EP&A Act'). These matters as are of relevance to the development application include the following:

- (a) *the provisions of any environmental planning instrument, proposed instrument, development control plan, planning agreement and the regulations*
 - (i) *any environmental planning instrument, and*
 - (ii) *any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*
 - (iii) *any development control plan, and*
 - (iiia) *any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and*
 - (iv) *the regulations (to the extent that they prescribe matters for the purposes of this paragraph), that apply to the land to which the development application relates,*
- (b) *the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (c) *the suitability of the site for the development,*
- (d) *any submissions made in accordance with this Act or the regulations,*
- (e) *the public interest.*

These matters are further considered below.

It is noted that the proposal is not considered to be (which are considered further in this report):

- Integrated Development (s4.46)
- Designated Development (s4.10)
- Requiring concurrence/referral (s4.13)
- Crown DA (s4.33) - written agreement from the Crown to the proposed conditions of consent must be provided

3.1 Environmental Planning Instruments, proposed instrument, development control plan, planning agreement and the regulations

The relevant environmental planning instruments, proposed instruments, development control plans, planning agreements and the matters for consideration under the Regulation are considered below.

(a) Section 4.15(1)(a)(i) - Provisions of Environmental Planning Instruments

The following Environmental Planning Instruments are relevant to this application:

- *State Environmental Planning Policy (Biodiversity and Conservation) 2021*

- *State Environmental Planning Policy Sustainable Buildings) 2022*
- *State Environmental Planning Policy (Planning Systems) 2021*
- *State Environmental Planning Policy (Resilience and Hazards) 2021*
- *State Environmental Planning Policy (Resources and Energy) 2021*
- *Eurobodalla Local Environmental Plan 2012*

A summary of the key matters for consideration arising from these State Environmental Planning Policies are outlined in **Table 3** and considered in more detail below.

Table 3: Summary of Applicable Environmental Planning Instruments

| EPI | Matters for Consideration | Comply (Y/N) |
|---|---|---------------------|
| State Environmental Planning Policy (Biodiversity & Conservation) 2021 | Chapter 2: Vegetation in non-rural areas Chapter 3: Koala Habitat Protection 2020 Chapter 4: Koala Habitat Protection 2021 | No |
| BASIX SEPP | No compliance issues identified subject to imposition of conditions on any consent granted. | No |
| State Environmental Planning Policy (Planning Systems) 2021 | Chapter 2: State and Regional Development <ul style="list-style-type: none"> • Section 2.19(1) declares the proposal regionally significant development pursuant to Clause 8A of Schedule 6 as it comprises Coastal Protection Works | This policy applies |
| SEPP (Resilience & Hazards) | Chapter 2: Coastal Management <ul style="list-style-type: none"> • Section 2.10(1) & (2) - Development on land within the coastal environment area • Section 2.11(1) - Development on land within the coastal use area • Section 2.12 - Development in coastal zone generally — development not to increase risk of coastal hazards. • Section 2.13 - Development in coastal zone generally - coastal management programs to be considered. Chapter 4: Remediation of Land <ul style="list-style-type: none"> • Section 4.6 - Contamination and remediation has been considered in the Contamination Report – not satisfactory (works have commenced on site). | No |
| State Environmental Planning Policy (Transport and Infrastructure) 2021 | Chapter 2: Infrastructure <ul style="list-style-type: none"> • Section 2.48(2) (Determination of development applications—other development) – electricity transmission - the proposal would be considered satisfactory subject to conditions were this application not recommended for refusal. | Y |
| State Environmental Planning Policy (Industry & Employment) 2021 | Chapter 2 – Western Sydney employment area The proposed development is not located within the land application map. Chapter 3 – Advertising and Signage | N/A |

| | | |
|---|---|-----|
| | 3. The proposed development does not involve any advertising or signage structures. | |
| State Environmental Planning Policy (Housing) 2021 | <p>The application does not propose affordable rental housing, housing for seniors, a caravan park, manufactured home estate or residential flat building. As such, the SEPP does not apply.</p> <p>The proposed development seeks to construct an attached dual occupancy development. Part 12 relates to dual occupancies in R2 zones. These provisions came into effect on 1 July 2024. As such, the provisions do not apply to the proposed development. This is because the application was made on 25 September 2023.</p> | N/A |
| State Environmental Planning Policy (Primary Production) 2021 | Residential zoned land. No rural uses proposed. | N/A |
| State Environmental Planning Policy (Resources and Energy) 2021 | <p>Chapter 2 – Mining, Petroleum Production and Extractive Industries</p> <p>The proposed development does not result in any detrimental impact to Mining, petroleum production or extractive industries.</p> | N/A |
| Proposed Instruments | No relevant proposed instruments identified. | N/A |
| LEP | <ul style="list-style-type: none"> • Clause 2.3 – Permissibility and zone objectives • Clause 4.3 – Height of buildings • Clause 4.6 – Exceptions to development standards • Clause 6.4 - Earthworks • Clause 6.9 - Stormwater management | No |
| DCP | Eurobodalla Residential Zones Development Control Plan | No |

State Environmental Planning Policy (Biodiversity and Conservation) 2021

Chapter 2: Vegetation in non-rural areas

This clause applies to R2 Low Density Residential zoned land.

The site contains mapped areas of vegetation under Council mapping. The vegetation is part of a vegetated cliff area identified as consisting of mapped native vegetation *Dry Sclerophyll Forests (Shrubby subformation)* which extends south along the cliff slope from a public reserve area to the north (north of No. 217 Beach Road).

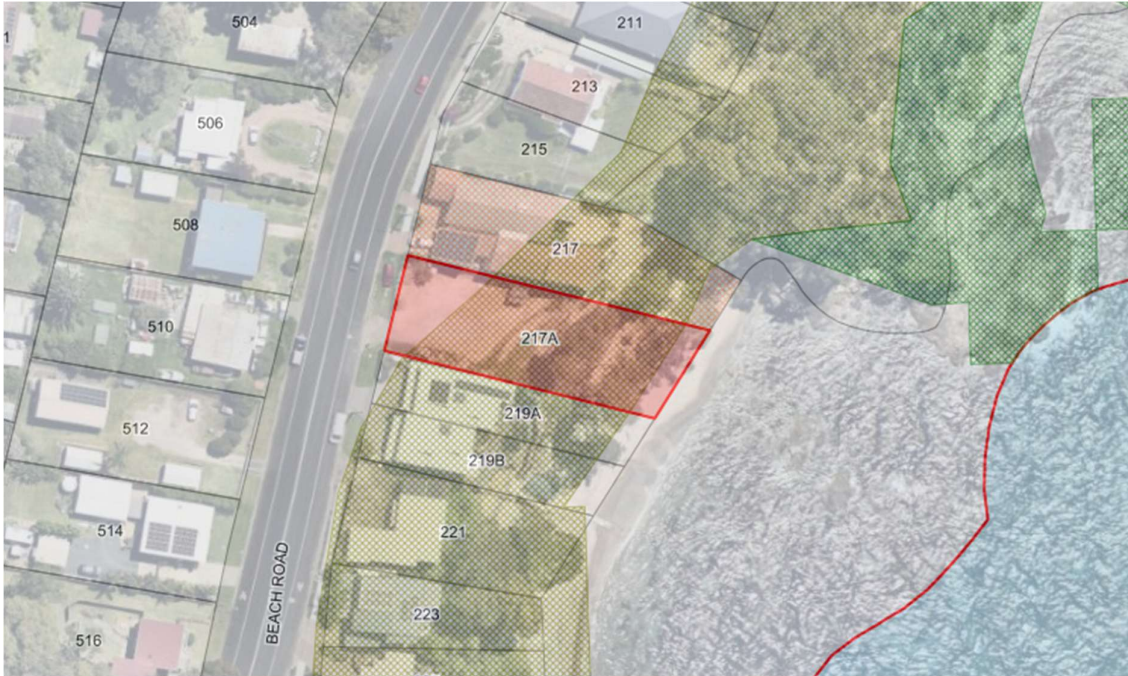


Figure 18: Council vegetation mapping / aerial photograph

The submitted survey plan illustrates that at the time of survey (5/9/22) the site contained 7 x trees (Tree Nos.1 – 7 on the survey plan – surveyed date 5/9/22 **Refer Figure 19**) and 1 x tree in the immediate vicinity of the site (Tree No. 8).

The applicant submitted an Arborist Statement (Arbor Express dated 7 December 2023) to assess the removal of 2 x Iron Bark trees. The Statement provides the following discussion and conclusion (extracts from Arborist Statement):

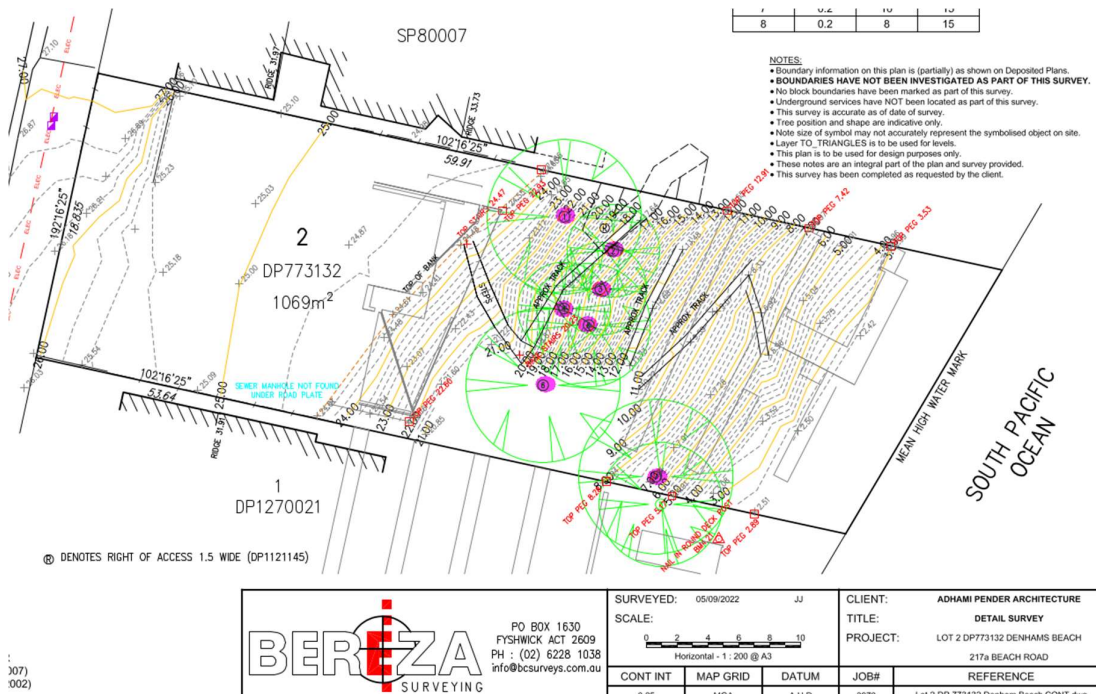


Figure 19: extract from submitted survey plan – as amended.

Discussion

I have been asked to examine the removal of 2 Iron Bark trees. I have 2 stumps located on the cliff face. Both stumps show clear evidence of major termite infestations. Given the size of the stumps with photos provided, they were mature trees. Tree 1 in the photos shows evidence of limb failure with epicormic growth. The tree closest to the top Tree 2, is in very poor condition with the top part mostly dead. There has been a major landslide around the trees basal roots as indicated by the photos. Again, this area is being strategically drilled with large bolts into the cliff face with terra mating to secure the area.

Conclusion

Given the situation the builder has been presented with, the removal of the trees appears to be necessary.

Annexure A – Photographs

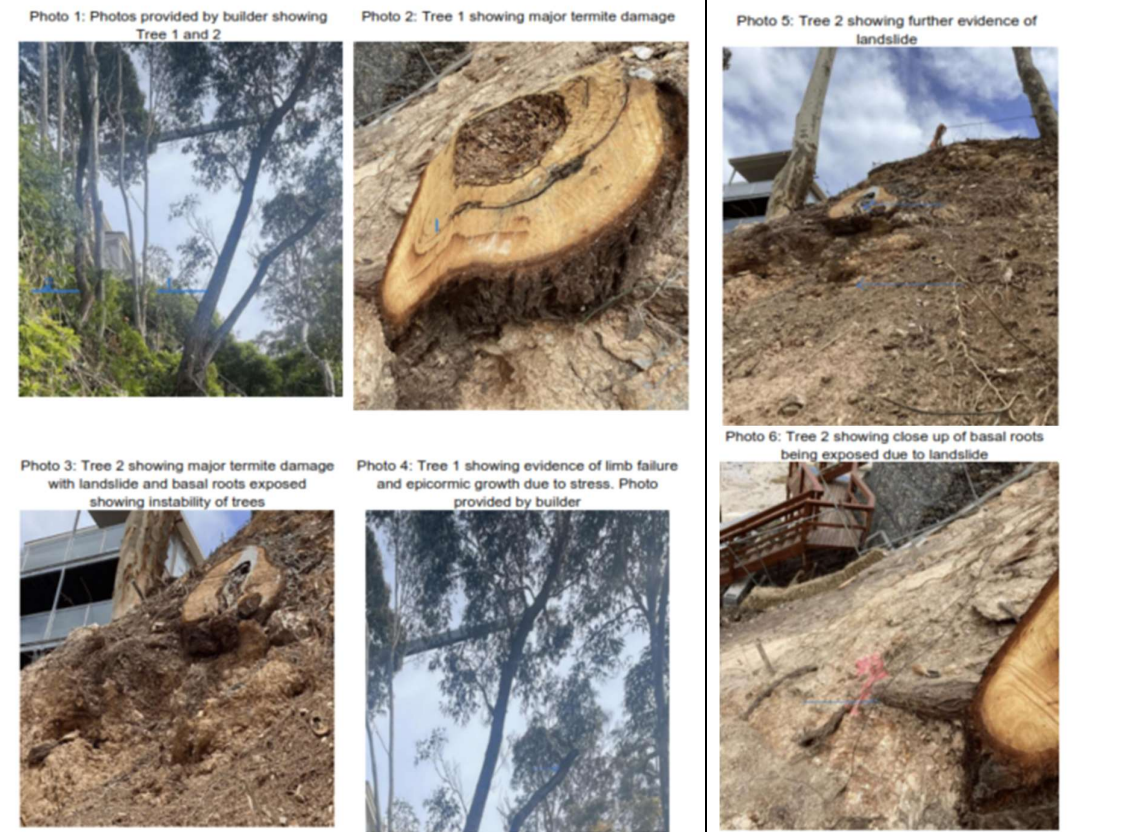


Figure 20: extract from Arborist report

There is no site plan provided with the Arborist Statement and it is unclear from the information provided where the trees (Tree 1 and Tree 2) referenced in the report were located on the site. The applicant has failed to adequately address the potential environmental impacts associated with the proposal on the subject site, with the submitted Statement of Environmental Effects incorrectly referencing a general industrial development and subdivision.

A site visit undertaken on 3/12/24 identifies 6 x trees remain on the site – refer **Figure 21**. Tree removal has been undertaken without development consent based on the information submitted.

The submitted information does not provide an assessment of the vegetation on the site as required by legislation under the Biodiversity Conservation Act or represent a Test of Significance as required under section 7.3 of the *Biodiversity Conservation Act 2016* which requires consideration of whether a proposed development or activity is likely to significantly affect threatened species or ecological communities, or their habitats which provides an assessment of the potential impacts of vegetation removal on the environment.



Figure 21: A site photo from 3/12/24 showing as-built works

Councils Manager of Development Services approved limited tree removal on 14/12/23 as exempt development (2 x trees approved for removal in accordance with recommendations of an Arborist Report), however this did not extend to removal of additional trees (a site visit identifies 6 x trees remaining) or any understorey vegetation.

A landscape plan and vegetation management plan (re-vegetation plan) is required to be submitted which considers the link of the site vegetation to surrounding vegetation corridors and considers any potential impacts on slope stability. Insufficient information has been lodged with the application to allow for detailed assessment.

Chapter 3: Koala Habitat Protection 2020

This Chapter does not apply to the proposed development. The land is not zoned RU1, RU2 or RU3. The site does not have a site area of >1ha. Assessment under SEPP not required.

Chapter 4: Koala Habitat Protection 2021

The land is zoned R2. The land is not contained within any approved koala plan of management. The land area is less than 1Ha. Additional information is required in relation to removal of trees including any feed trees listed in schedule 3 however know known feed trees are located within this area of Eurobodalla Shire.

State Environmental Planning Policy (Sustainable Buildings) 2022

State Environmental Planning Policy (Sustainable Buildings) 2022 ('BASIX SEPP') applies to the proposal. The objectives of this Policy are to ensure that the performance of the development satisfies the requirements to achieve water and thermal comfort standards that will promote a more sustainable development.

The application is accompanied by BASIX Certificate No.1397909M prepared by House Energy Certified dated 18 August 2023 committing to environmentally sustainable measures. The Certificate demonstrates the proposed development satisfies the relevant water, thermal and energy commitments as required by the BASIX SEPP.

The submitted plans identify the lower ground floor is capable of separate occupation (dwelling provision). This matter is required to be resolved prior to determining whether the proposed dual occupancy is consistent with the BASIX SEPP (i.e. whether 2 or 4 dwellings are proposed), and therefore this application is not supported and is recommended for refusal.

State Environmental Planning Policy (Planning Systems) 2021 ('Planning Systems SEPP')

Chapter 2: State and Regional Development

The proposal is *regionally significant development* pursuant to Section 2.19(1) as it satisfies the criteria in Clause 8A of Schedule 6 of the Planning Systems SEPP as the proposal is development for Coastal Protection Works. Accordingly, the Southern Regional Panel is the consent authority for the application.

State Environmental Planning Policy (Resilience and Hazards) 2021

Chapter 2 Coastal management

Section 2.12 of State Environmental Planning Policy (resilience and Hazards) 2021 specifies that development consent must not be granted to development on land within the coastal zone unless the consent authority is satisfied the proposed development '*is not likely to cause increased risk of coastal hazards on that land or other land*'. The subject land is mapped as "coastal environment area" and "coastal use area" under the SEPP.

s2.10 Development on land within the coastal environment area

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

- (a) *the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,*
- (b) *coastal environmental values and natural coastal processes,*

- (c) the water quality of the marine estate (within the meaning of the *Marine Estate Management Act 2014*), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,
- (d) marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,
- (e) existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,
- (f) Aboriginal cultural heritage, practices and places,
- (g) the use of the surf zone.

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

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

Council considers that the proposed development including cliff works (excavation, cliff bank and cliff beach retaining wall works) is incompatible with the coastal area and has failed to demonstrate the proposal will not have an adverse impact on integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment.

The submitted geotechnical report identified a number of structural, design, management and mitigation measures should be implemented into the design and construction of the development such as adequate drainage, upslope subsoil drainage, slope stabilisation for erosion, limiting future scour at the toe of the slope due to wave action and monitoring inspections to provide slope stabilisation. However as works consisting of retaining walls and slope works including in vicinity of the beach within the coastal area have been undertaken without consent, it is considered the proposed development has failed to demonstrate it would not result in unacceptable environmental impacts coastal environmental values and natural coastal processes including destabilisation or erosion effects on the beach or adjoining properties.

The application was referred to DPI Fisheries in consideration of the *Marine Estate Management Act 2014* (s.56(2)) and potential effects on the plants or animals of a marine park and their habitat. DPI Fisheries has reviewed the application and advised sufficient information has not been provided to allow for assessment of the potential impacts on the marine park environment, requiring additional information be provided in relation to bank stabilisation works, coastal protection works and environmental protection works including a detailed scope of works. As the application has failed to demonstrate the proposal will not have an unacceptable impact on the Marine Park including marine biological diversity and marine habitats the application is recommended for refusal.

There are no identified impacts on Aboriginal cultural heritage, practices and places.

Council is not satisfied the proposed development would have not have a significant adverse impact on the use of the surf zone.

The application has failed to demonstrate it will not have an adverse impact on the integrity and resilience of the biophysical, hydrological and ecological environment and has not demonstrated it will not cause increased risk of coastal hazards on adjoining land, specifically with regard to cliff and beach erosion effects, coastal cliff or slope instability or scouring or wave action.

Relevant definition (SEPP adopts definitions in the *Coastal Management Act 2016*)

coastal hazard means the following—

- (a) beach erosion,*
- (b) shoreline recession,*
- (c) coastal lake or watercourse entrance instability,*
- (d) coastal inundation,*
- (e) coastal cliff or slope instability,*
- (f) tidal inundation,*
- (g) erosion and inundation of foreshores caused by tidal waters and the action of waves, including the interaction of those waters with catchment floodwaters.*

These issues cannot be resolved through conditions of consent.

s2.11 Development on land within the coastal use area

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

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

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

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

(b) is satisfied that—

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

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

The proposal will not restrict access to the public. The property is a private land parcel zoned residential and no public access is available through the site or along the cliff top in the vicinity of the site.

The proposal has not demonstrated it will not create impacts of overshadowing and wind funnelling or result in loss of views from public places to foreshores.

The embankment and its vegetation are proposed to be stabilised under the application, however as works have been undertaken without consent including retaining walls, bank and cliff works including vegetation removal and therefore the environmental impacts cannot be determined.

These issues cannot be resolved through conditions of consent.

The site is within a residential area that has been developed for 1-2 storey development along the cliff top stepping back to 3 storeys along the cliff, limiting views from the west at Beach

Road to the east (ocean views). There is no pedestrian access at the cliff top or cliff top reserve area with the property extending down the cliff to the beach. As vegetation has been removed without consent and the submitted survey plan/development plans are inconsistent in relation to trees to be retained and removed and the works undertaken on site, the development is considered to have impacted on the scenic quality of the area. Insufficient information has been provided to allow for assessment of the suitability of revegetation in relation to the mapped vegetation areas that exist within the vicinity of the site.

The proposal involves a 3 storey dual occupancy development that protrudes beyond the cliff edge. The application has failed to demonstrate this is consistent with the surrounding coastal and built environment or that the built form (which proposed a height of buildings variation above 8.5m) is of a suitable bulk, scale and size in relation to coastal development in the area.

A basic search indicates no records of Aboriginal sites or places exist in the vicinity of the site (within 200m). The site is not listed in the vicinity of any heritage items or areas.

The proposal has failed to demonstrate it will not cause an adverse impact on the coastal use area and is therefore recommended for refusal.

These issues cannot be resolved through conditions of consent.

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

The site has been subject to works for cliff stabilisation however the extent of these works is unclear. A site visit identified significant works have been undertaken within the cliff area, cliff toe area and beach area which have impacted on site topography and land form. The extent and scale of works including cliff stabilisation works, coastal protection works and the development footprint which is inconsistent with surrounding coastal development is considered incompatible with the coastal zone.

The application has failed to demonstrate it will not have an adverse impact or cause increased risk of coastal hazards on that land or other land and is therefore recommended for refusal.

2.13 Development in coastal zone generally—coastal management programs to be considered

The site is within an area subject to Eurobodalla Open Coastal Management Program (CMP), adopted by Council on 13 December 2022 and certified by the NSW Minister for Local Government on 2 March 2023. The site is located within the study area of the CMP. The site is not mapped as being located within a coastal vulnerability area.

Section 4 of the CMP nominates that coastal cliff or slope instability is a hazard that is not subject to the code.

The CMP references Eurobodalla Coastal Hazard Code which requires submission of a Coastal Risk Management Report for Coastal Protection Works, including consideration that works do not have an adverse impact on any surrounding properties or coastal processes.

The proposal has failed to demonstrate it has adequately considered the development impacts within the coastal area and is therefore recommended for refusal.

These issues cannot be resolved through conditions of consent.

State Environmental Planning Policy (Resilience and Hazards) 2021

The provisions of Chapter 4 of *State Environmental Planning Policy (Resilience and Hazards) 2021* ('the Resilience and Hazards SEPP') have been considered in the assessment of the development application. Section 4.6 of Resilience and Hazards SEPP requires consent authorities to consider whether the land is contaminated, and if the land is contaminated, it is 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 to be carried out.

The applicant was requested to submit a preliminary site investigation report as a review of available records indicated that the site had previously contained structures/dwelling (nominated on the deposited plan) which at the time of the initial site inspection on 17/10/23 had been demolished. As the site contained evidence of construction materials and works being undertaken at the time of the Council site inspection, and there is no record of any demolition approvals, a preliminary site investigation report was requested.

Site photographs: 17/10/23



View from Beach Road – works being undertaken on site



Cliff area at top of site - vegetated



View on site looking north – works being undertaken on site



View from Beach Road – works being undertaken on site



The applicant submitted a Preliminary Environmental Assessment Report (ACT Geotechnical Engineers P/L dated 22 Dec. 2023) which identified:

Due to the presence of anthropogenic asbestos identified during sampling, and detection of organic fibres during laboratory testing, it is recommended to strip the entire surface material of the site after the current construction activities are completed.

While it is unlikely, after stripping the surface material, that contamination may be encountered during future construction works, it is recommended that an unexpected finds protocol (UFP), with management procedures for asbestos, is implemented prior to construction works commencing. The UFP will assist the construction contractor with identifying and managing any unexpected occurrences of contaminated material.

This investigation has not been completed with the intention of removing soil from the site. Should the removal of soil be necessary, then a soil classification report must be submitted to the Environmental Protection Authority (EPA) in accordance with the requirements of Information Sheet 4 'Requirements for the Reuse and Disposal of Contaminated Soil'.

The applicant was requested to provide additional information during the assessment process in relation to the presence of asbestos identified in the report and the recommendation to 'strip the entire surface material of the site' to allow for consideration of potential environmental impacts, particularly in relation to stripping of the entire surface material of the 'site' reference in the report, noting the site contains a relatively level area near Beach Road and a cliff area within the eastern part of the site, and potential impacts on vegetation.

The applicant submitted a revised Preliminary Environmental Assessment Report (ACT Geotechnical Engineers P/L dated 16 April 2024) which identified the presence of fill material including construction debris and fibrous sheeting (potentially asbestos) during sampling. The report provided the following statement:

Based on the results of this investigation, the site is considered suitable for all the permissible land uses under the R2: Low Density Residential zone use, including the proposed development from a contamination perspective.

While it is unlikely that contamination may be encountered during future construction works, it is recommended that an unexpected finds protocol (UFP), with management procedures for asbestos, is implemented prior to construction works commencing. The UFP will assist the

construction contractor with identifying and managing any unexpected occurrences of contaminated material.

This investigation has not been completed with the intention of removing soil from the site. Should the removal of soil be necessary, then a soil classification report must be submitted to the Environmental Protection Authority (EPA) in accordance with the requirements of Information Sheet 4 'Requirements for the Reuse and Disposal of Contaminated Soil'.

Comment:

Works commenced on site prior to development consent being granted and appear to be ongoing. The management and mitigation recommendations of the report which were required to be implemented prior to construction works commencing have not been complied with, due to works commencing prior to any consent being granted. A recent site visit undertaken on 3/12/24 identified significant earthworks have been undertaken within the cliff and beach areas which include filling of land. There are no records that importation of fill material has been undertaken in accordance with any development consent or consists of virgin excavated materials (VENM), and therefore due to the reasons outlined Council is not satisfied the land is suitable for the proposed residential development, the proposal is inconsistent with Chapter 4 Remediation of Land of *State Environmental Planning Policy (Resilience and Hazards) 2021* and the application is recommended for refusal.

State Environmental Planning Policy (Transport and Infrastructure) 2021

Clause 2.18(1)(b)(iii) is applicable and the application was referred to the electricity supply authority (Endeavour Energy) as required for comment. Comments were received and have been considered in the 'Referrals' section of this report).

Eurobodalla Local Environmental Plan 2012

The relevant local environmental plan applying to the site is the *Eurobodalla Local Environmental Plan 2012* ('the LEP'). The aims of the LEP include:

1) This Plan aims to make local environmental planning provisions for land in Eurobodalla in accordance with the relevant standard environmental planning instrument under section 3.20 of the Act.

(2) The particular aims of this Plan are as follows—

(aa) to protect and promote the use and development of land for arts and cultural activity, including music and other performance arts,

(a) to preserve the urban growth boundaries of Eurobodalla as identified in the Eurobodalla Settlement Strategy,

(b) to ensure development embraces the principles of ecologically sustainable development and quality urban design, and encourages walking, cycling and public transport use,

(c) to provide employment opportunities and strengthen the local economic base by encouraging a range of enterprises, including tourism, which respond to lifestyle choices, emerging markets and changes in technology,

(d) to identify and protect the established residential neighbourhoods and ensure a sufficient supply of suitable land to meet the future residential needs of Eurobodalla,

- (f) *to restrict development of land that is subject to flooding, coastline hazard, bush fires and land slip,*
- (e) *to ensure that resource lands, including agriculture, mineral resources and extractive materials are not rendered sterile from incompatible land use,*
- (g) *to provide measures to protect and manage the biodiversity and environmental values of the land and waterways,*
- (f) *to ensure that development takes into account the environmental constraints of the land and minimises any off site and on site impacts on biodiversity, water resources and natural landforms,*
- (h) *to identify and protect the cultural and architectural heritage of Eurobodalla, including Aboriginal relics and places, and assist in its promotion as a tourism asset.*

The proposal fails to satisfy *Clause 1.2 Aims of the Plan* of Eurobodalla Local Environmental Plan 2012 including the particular aims of the Plan:

- (g) *to ensure development embraces the principles of ecologically sustainable development and quality urban design, and encourages walking, cycling and public transport use,*
- (h) *to identify and protect the established residential neighbourhoods and ensure a sufficient supply of suitable land to meet the future residential needs of Eurobodalla,*
- (i) *to restrict development of land that is subject to flooding, coastline hazard, bush fires and land slip,*
- (j) *to provide measures to protect and manage the biodiversity and environmental values of the land and waterways,*
- (i) *to ensure that development takes into account the environmental constraints of the land and minimises any off site and on site impacts on biodiversity, water resources and natural landforms,*

The application fails to demonstrate the proposal is consistent with the provisions of Clause 1.2 Aims of the Plan as the proposal fails to meet the overall aims of the plan to provide residential development in a manner that has considered the principles of ecologically sustainable development the biodiversity and environmental values of the land, considers site constraints such as vegetation, landslip and coastal processes and ensures the design of the development has considered off site and on site impacts on the environment.

Zoning and Permissibility (Part 2)

The site is located within the R2 Low Density Residential Zone.

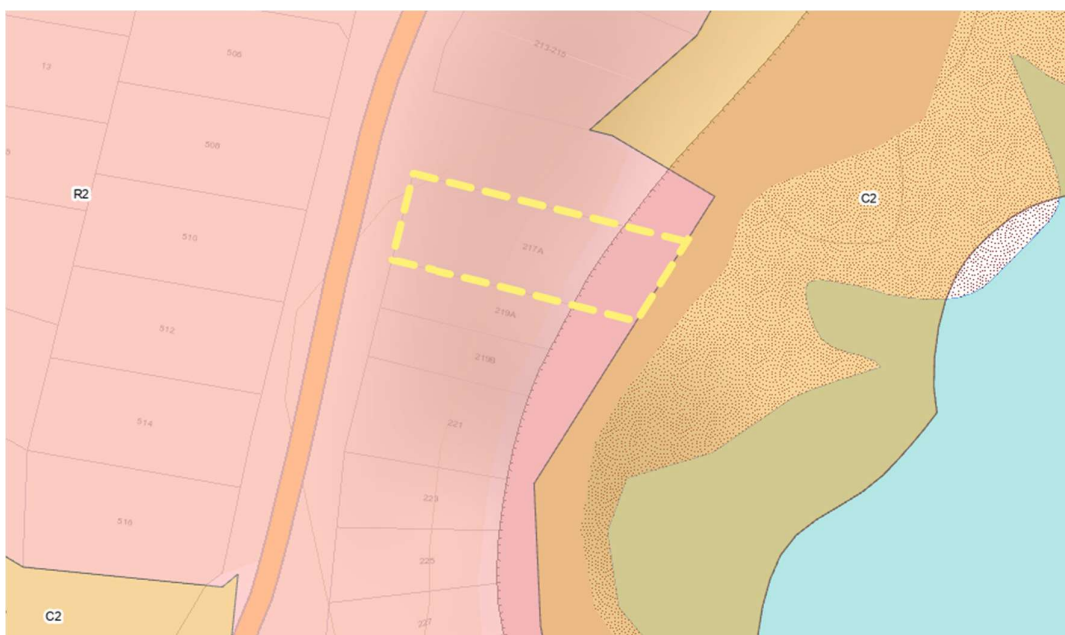


Figure 22: Zoning Map (NSW Planning Portal)

According to the definitions in Clause 4 (contained in the Dictionary), the proposal is best categorised as including a *dual occupancy* and ancillary works, *coastal protection works* and *environmental protection works*. A *dual occupancy* and *coastal protection works* are a permissible use with consent in the Land Use Table in Clause 2.3. Environmental protection works are permitted without consent.

Relevant definitions:

coastal protection works has the same meaning as in the [Coastal Management Act 2016](#).

[Coastal Management Act 2016](#):

coastal protection works means—

- (a) beach nourishment activities or works, and
- (b) activities or works to reduce the impact of coastal hazards on land adjacent to tidal waters, including (but not limited to) seawalls, revetments and groynes.

dual occupancy (attached) means 2 dwellings on one lot of land that are attached to each other, but does not include a secondary dwelling. **Note—**

Dual occupancies (attached) are a type of **dual occupancy**—see the definition of that term in this Dictionary.

environmental protection works means works associated with the rehabilitation of land towards its natural state or any work to protect land from environmental degradation, and includes bush regeneration works, wetland protection works, erosion protection works, dune restoration works and the like, but does not include coastal protection works.

The proposal includes a dual occupancy development proposed to be constructed at the western part of the site adjacent to Beach Road and steps, ramps, retaining walls and associated structures at the base of the cliff, noting recommendations in the submitted plans illustrate retaining walls and geotechnical report (ACT Geotechnical Engineers dated 30 June 2023) recommends a form of wave dissipator be installed along the toe of the cliff consisting of large boulders (preferably strong, durable, volcanic rock), or some form of retaining wall.

The proposal is best defined as consisting of a mix of residential construction (dual occupancy), associated engineering works including geotechnical engineering cliff

stabilisation works (anchor bolts etc.), associated ancillary works associated with the dual occupancy development (stairs and ramps to the beach, and a beach shed which include ancillary earthworks, associated landscape and infrastructure works, environmental protection works (geotech fabric covered soil areas i.e. protecting existing embankment) and coastal protection works (located at the toe of the cliff consisting of retaining walls at the beach/ wave interface area).

Characterisation of Development:

The applicant in their Amended Statement of Environmental Effects dated June 2024 has defined the proposal as consisting of a dual occupancy only. No reference is made to the coastal protection works or cliff works. In addition, the submitted plans illustrate the lower ground floor of the proposal appears capable of separate occupation (dwelling) with a living area, bedroom, bathroom, laundry and kitchenette. The applicant is to confirm the proposed use is consistent with a single dual occupancy use as defined, in order to correctly characterise the proposed development.

The amended plans and documents lodged in October 2024 (in response to the second panel briefing) included a new set of plans titled 'Emergency Environmental Protection Works'. The plans were accompanied by a written response document which stated the works were undertaken for bank stabilisation and to act as retaining walls for the development due to slope stability and landslide risks. The written response did not address planning definitions or permissibility.

The definition for '*emergency environmental protection works*' referenced by the applicant is not permitted to be undertaken by persons other than public authorities. Applicable legislation (SEPP Resilience and Hazards) 2021 cl. 2.16 applies to works undertaken by a public authority and is limited to a period of 90 days:

cl.2.16(4) (4) *In this section, **emergency coastal protection works** means works comprising the placement of sand, or the placing of sandbags for a period of not more than 90 days, on a beach, or a sand dune adjacent to a beach, to mitigate the effects of coastal hazards on land.*

Cl.2.16(1) of the SEPP specifically requires coastal protection works by person other than public authority to obtain development consent: *Development for the purpose of coastal protection works may be carried out on land to which this Chapter applies by a person other than a public authority only with development consent.*

The term 'temporary coastal protection works' was previously defined under the repealed *Coastal Protection Act 1979*. Temporary works consisted primarily of material placed on a beach or a sand dune adjacent to a beach to mitigate coastal erosion impacts such as sand, or fabric bags filled with sand or other materials (other than rocks, concrete, construction waste or other debris) which allowed temporary works for a maximum of 12 months to be undertaken until a longer term approach to managing erosion risk to the property could be developed.

This is not considered applicable to the extent, scale or scope of unauthorised works undertaken on this site, which are not considered 'temporary'.

The applicant did not make an application to the consent authority to change the DA under Clause 37 of the EP&A Regulation 2021 to amend the description of the development. The applicant did submit additional information at the request of Council and the Panel in relation to the description of development and the nature of works proposed. The applicant was requested to clearly describe and illustrate the full scope of works for which consent was being sought i.e. dual occupancy, associated ancillary earthworks, stairs, ramps and beach shed, describe which works were considered by the applicant to be 'environmental protection works' and which works were considered to be 'coastal protection works'. This has not occurred.

Council certainly did not authorise any works that required consent to be undertaken without consent. It is considered that the change made to the development application was undertaken due to the extent of works undertaken in the eastern half of the property being integral to the works to be undertaken in the western half. i.e. a dual occupancy structure would not be approved on a site with slope instability.

The zone objectives include the following (pursuant to the Land Use Table in Clause 2.3):

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To encourage residential development that is consistent with the character of the neighbourhood.*

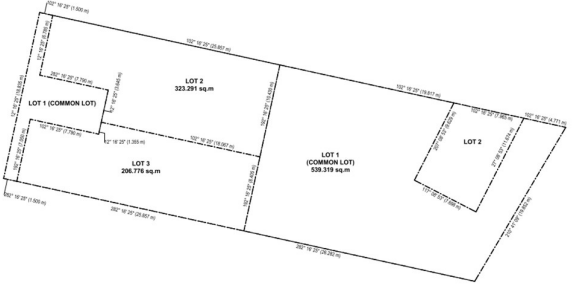
The application fails to demonstrate the suitability of the site for the development in terms of providing for development in a manner that has considered the aims of the zone including provision of residential housing that adequately considers the potential environmental impacts.

General Controls and Development Standards (Part 2, 4, 5 and 6)

The LEP also contains controls relating to development standards, miscellaneous provisions and local provisions. The controls relevant to the proposal are considered in detail in **Appendix B** and summarised below.

The proposal does not comply with the development standard/s in Part 4 of the LEP, including Clause 4.3 Height of Buildings and a Clause 4.6 request has been provided with the application for the exceedance of the maximum building height development standard.

Table 4: Consideration of the LEP Controls

| Clause | Comment | Compliance |
|---------------------------------------|---|------------|
| Minimum subdivision Lot size (Cl 4.1) | <p>Min. lot size: 550m² Strata subdivision proposed. Comment: the minimum lot size does not apply to strata subdivision. The application would be subject to consent conditions were this application be recommended for approval in relation to access/use of allotments.</p>  | No |
| Height of buildings (Cl 4.3(2)) | <p>Does not comply. Required: 8.5m Proposed height (applicants SEE): 9.114m</p> | No |

| | | |
|--|--|-----|
| | Variation of 7.2%. The height of building variation is not supported. Refer discussion in this report. | |
| FSR (CI 4.4(2)) | Not adopted by ESC. | N/A |
| Clause 4.6 | Does not comply. The proposed development requests a variation to the clause 4.3 height of buildings development standard. The proposed development seeks a variation to the building height proposed on the eastern elevation of the building. | No |
| Heritage (CI 5.10) | Not within a Heritage Conservation Area An item of environmental heritage is not situated on the land. | N/A |
| Flood planning (CI 5.21) | The site is not within a flood planning area. | N/A |
| Acid sulphate soils (CI 6.3) | The land is not identified as Class 1 or 2 Acid Sulfate Soils. | N/A |
| Earthworks (CI 6.4) | Does not comply. Earthworks have been undertaken without consent and the application fails to demonstrate the earthworks which development consent is required will not have a detrimental impact on existing drainage patterns and soil stability in the locality, the amenity of adjoining properties , not have adverse impacts on the water catchment or environmentally sensitive area or that appropriate measures have or can be implemented to avoid, minimise or mitigate the impacts of the development. The applicant has failed to demonstrate the proposal will not have an unacceptable impact on the environment including excavation extent and works associated with the cliff/seawall. The application fails to demonstrate the proposal meets the objectives of clause 6.4(1) ;and the requirements of clause 6.4(3 and therefore is recommended for refusal. | No |
| Clause 6.7 and 6.8 Riparian and Wetlands | The land is not mapped on the riparian map. The proposed development involves works adjacent to the Batemans Bay Marina. This is subject to separate requirements. Please refer above to Marine Estate Management Act 2014 discussion. | N/A |

| | | |
|--------------------------------|---|----|
| Stormwater Management (CI 6.9) | <p>Does not comply.</p> <p>Works have been undertaken without consent. The applicant has failed to demonstrate the proposal will not have an unacceptable impact on the environment including stormwater management and disposal. The application fails to demonstrate the proposal meets the objectives of clause 6.9(1) and fails to demonstrate the proposal will not negatively impact on downstream properties (clause 6.9(3)) and therefore is recommended for refusal.</p> | No |
|--------------------------------|---|----|

The proposal is considered to be generally inconsistent with the LEP.

Clause 4.6 Request

The proposed development requests a variation to the clause 4.3 height of buildings development standard. *Note: - application lodged 25/9/23 (a written request under Clause 4.6 ELEP 2012 was required).*

Building height limit: 8.5m

Proposed height: 9.114m

Variation of 7.2%

Preconditions to be satisfied

Clause 4.6(4) of the LEP establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard. Clause 4.6(2) provides this permissive power to grant development consent for a development that contravenes the development standard is subject to conditions.

The two preconditions include:

1. Tests to be satisfied pursuant to CI 4.6(4)(a) – this includes matters under CI 4.6(3)(a) and (b) in relation to whether the proposal is unreasonable and unnecessary in the circumstances of the case and whether there are sufficient environmental planning grounds to justify contravening the development standard and whether the proposal is in the public interest (CI 4.6(a)(ii)); and
2. Tests to be satisfied pursuant to CI 4.6(b) – concurrence of the Planning Secretary.

These matters are considered below for the proposed development having regard to the applicant's Clause 4.6 request

Discussion:

(1) The proposed development is inconsistent with the objectives of this clause which are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The proposed development seeks to construct a new dual occupancy development within the western area of the site adjacent to Beach Road consisting of 3 storeys excavated in to the site at the rear.

(2) Clause 4.3 is not expressly excluded from the application of this clause.

This clause permits consent being granted for contravention to the development standard. Section 1.4 of the *Environmental Planning and Assessment Act 1979* identifies the items that a considered to be development standards. Height of building is a development standard.

(3) The proposed development is supported by a written request from the applicant.

The applicant provides the following description of the proposed variation and provides the following justification (in part) (SEE):

The height limit is exceeded for the proposed development by 614mm or a variance of 7.2% the development standard. This height exceedance is as a result of the topography of the site and the design has endeavoured to take the site conditions into account.

The height variation in this location is for a very small portion of the southern unit where the roof line over the terrace exceeds the height plane as a result of the rapid fall of the site in this location due to the ‘cliff face’ at the rear of the building site. This area of exceedance is illustrated in the figure 9.

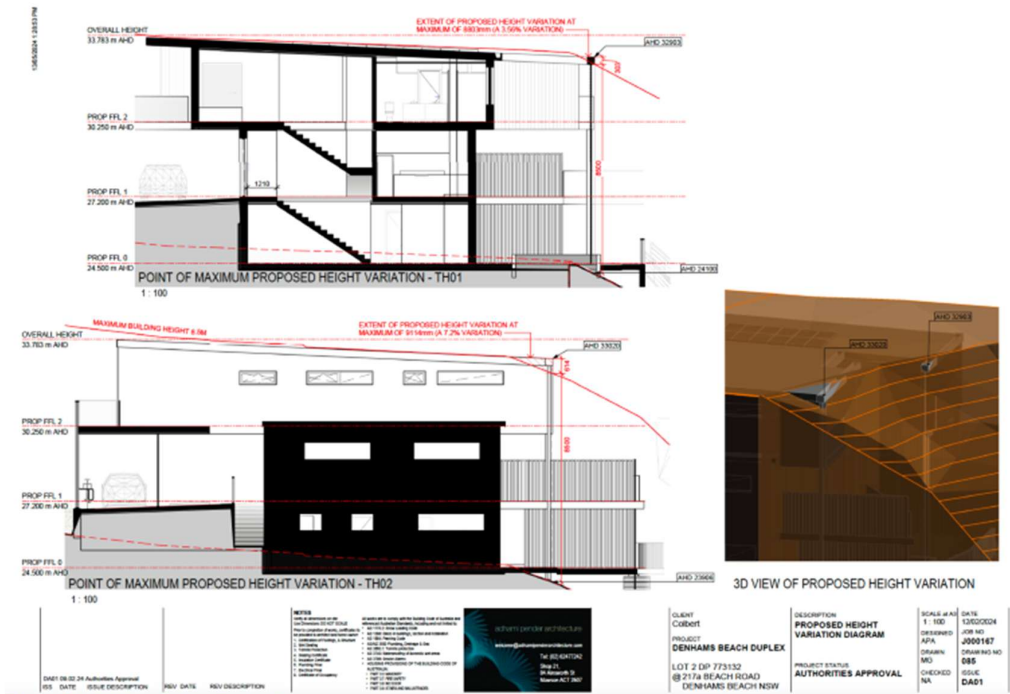


Figure 9 height variation illustrations

Figure 23: Extract from applicants Clause 4.6 variation request (referenced Figure 9)

(4) The applicant has provided a written justification to the variation of the development standard. The proposed development seeks consent for a new dual occupancy development which exceeds the 8.5m height of buildings development standard applying to the land.

(Wehbe test):

Objectives of Clause 4.3

4.3(1)(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality.

4.3(1)(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.

Comment:

The proposed development seeks to construct a new dual occupancy on a vacant land parcel. The proposal involves a built form with a height above the maximum building height with building setbacks that do not meet DCP requirements in relation to site design, built form, visual impact, views, privacy or solar access (Refer Appendix A for detailed assessment against *Eurobodalla Residential Zones Development Control Plan*).

The non-compliances result in a development that is of a bulk and scale that provides for unacceptable visual impact, disruption of views, loss of privacy and loss of solar access to neighbouring properties (particularly to the south). The east-west orientation of the land and the non-compliant setbacks and height result in overshadowing to the existing development to the south and a development that fails to meet the objectives of Clause 4.3.

Objectives of R2 Low Density Residential Zone

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To encourage residential development that is consistent with the character of the neighbourhood.*

Comment:

The proposed development provides for residential accommodation in the zone however the proposed development has not demonstrated it is consistent with the character of the adjoining developments. The area contains a mix of established residential dwellings and newer developing dwellings and dual occupancy developments. The built form in this area of Beach Road contains predominantly two storey structures fronting Beach Road stepping down to three storey elevations at the cliff /ocean eastern boundary.

The written request addresses the Wehbe test. The applicant has provided objectives of the standard i.e. Clause 4.3 (however addressed clauses (a) – (f)). It is unclear to which objectives of the standard these refer to however they appear to reference Hurstville LEP provisions which are outside the Eurobodalla local government area as Eurobodalla LEP 2012 Clause 4.3 provides only two (2) objectives:

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

- (a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.*

The applicant has referred to objectives from a different EPI and failed to address this provision.

There is no evidence the development standard has been virtually abandoned or destroyed by the Council's actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable. The site is located within a low density zoned residential area of Denhams Beach on the coast.

Council has not abandoned the development standard. The majority of dwellings in the Eurobodalla Local Government Area are compliant with the height of buildings standard. Councils' Clause 4.6 register identifies that the applications approved with height of buildings variations since 2019 are primarily related to larger scale development in higher density, mixed use or business zoned areas.

A single height of buildings variation has been approved in Denhams Beach (221 Beach Road Denhams Beach) (DA0024/22) for a building with a proposed a height variation for a roof ridge for alterations and additions to a dwelling of 0.3m (or 8.8m (3.5%)). This involved a 300mm variation to a minor part of the pitched roof form to this dwelling. This application cannot rely on this as merit for an abandoned development standard.

The written request has failed to justify that the proposed development is consistent with the objectives of clauses 4.3 and 4.6 of the LEP and the R2 Low Density Residential Zone Land Use Table objectives.

The applicant has provided site specific environmental planning grounds, stating:

The Proposal seeks a slight and modest increase in height from the standards contained in Council's LEP. The design presents a contemporary and attractive design to Beach Road which will benefit the adjoining and adjacent dwellings in the area.

The above statement by the Applicant has failed to demonstrate there are sufficient environmental planning grounds to justify the building height variation. The applicant has not addressed Objects of the Act, demonstrated that the proposal involves good design and amenity outcomes, provides for orderly and economic development of the land, promotes ecologically sustainable development or has adequately considered environmental impacts. The works on the site have commenced without development consent and it is considered that the written request has not met the Wehbe test and cannot be supported.

The applicant has failed to demonstrate the proposal is in the public interest including demonstrating the variation to building height is consistent with the relevant objectives of Clause 4.3 Height of Buildings. The development works including construction of substantial structures have commenced on site without development consent resulting in a proposal that has not demonstrated acceptable environmental impacts including on the coastal environment and the Marine Estate and is therefore recommended for refusal.

- **Coastal Management Act (2016)**

27 Granting of development consent relating to coastal protection works

The application has failed to demonstrate the proposed development will not present an unacceptable risk to public safety or will not result in increased erosion of the beach or adjacent land. **The application is recommended for refusal.**

- **Marine Estate Management Act 2014**

The application has failed to demonstrate the proposed development will not present an unacceptable impact on the Marine Estate. Referral comments are provided from DPE Fisheries which identify the proposal is not suitable and does not meet legislative requirements. Refer referrals section of this report. **The application is recommended for refusal.**

- ***Biodiversity Conservation Act 2016***

Section 7.3 of the *Biodiversity Conservation Act 2016* requires consideration of whether a proposed development or activity is likely to significantly affect threatened species or ecological communities, or their habitats. The site is mapped as containing native vegetation areas and vegetation and tree clearing and clearing has been undertaken without consent and inadequate information has been lodged with the application to demonstrate the application is suitable as proposed **the application is recommended for refusal.**

(b) Section 4.15 (1)(a)(ii) - Provisions of any Proposed Instruments

There are no relevant proposed instruments which have been the subject of public consultation under the EP&A Act.

(c) Section 4.15(1)(a)(iii) - Provisions of any Development Control Plan

The following Development Control Plan is relevant to this application:

- ***Eurobodalla Residential Zones Development Control Plan***

The proposed development is not consistent with the relevant aims of the *Residential Zones Development Control Plan*. Refer detailed assessment in Appendix C.

The Aims of the DCP are:

- *conserve the character and environmental quality of the local area enjoyed by residents of, and visitors to, the Eurobodalla*
- *ensure any development takes into account environmental constraints*
- *provide opportunity for innovative, well-designed, quality development in the Eurobodalla Shire*
- *ensure that the design of development will improve the quality of the built environment and is of a scale that complements the local character*
- *to protect the visual amenity by encouraging the retention of trees and preserving prominent ridgelines and other scenic areas in their natural state*

The proposal does not provide for development that meets the aims of the Residential Zones DCP to ensure development takes into account environmental constraints or conserves the character and environmental quality of the local area.

The proposed development **is not consistent** with the relevant Performance Criteria of ***Residential Zones Development Control Plan*** including:

- 2.1 Siting
- 2.2 Setbacks
- 2.3 Garages, Carports & Sheds
- 2.5 Landscaping
- 2.6 Parking and Access
- 2.8 Views

- 4.1 Bulk and Scale
- 4.2 Street Frontage and Façade Treatment
- 4.3 Style and Visual Amenity
- 5.1 Visual Privacy
- 5.2 Solar Access
- 6.2 Tree Preservation
- 6.3 Biodiversity
- 7.2 Earthworks
- 7.3 Stormwater Management
- 7.5 Waste

While s 4.15(3A)(b) of the EPA & Act requires the consent authority to “be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development” **the number of proposed variations result in a development that is not supported, and therefore is recommended for refusal.**

- ***Contribution Plans***

The following contributions plans are relevant pursuant to Section 7.18 of the EP&A Act and have been considered in the recommended conditions (notwithstanding Contributions plans are not DCPs they are required to be considered):

- ***Eurobodalla Local Infrastructure Contributions Plan 2022 (s7.11)***

Contributions are payable for the additional dwelling proposed under the dual occupancy. Insufficient information has been provided to allow for contributions plan calculations i.e. the submitted cost of works does not appear to include the cliff stabilisation and coastal protection works that have been undertaken as unauthorised works.

- ***Water & Sewer headworks***

The proposal is subject to contributions under Section 64 Local Government Act.

(d) Section 4.15(1)(a)(iia) – Planning agreements under Section 7.4 of the EP&A Act

There have been no planning agreements entered into and there are no draft planning agreements being proposed for the site.

(e) Section 4.15(1)(a)(iv) - Provisions of Regulations

Section 61 of the 2021 EP&A Regulation contains matters that must be taken into consideration by a consent authority in determining a development application, with the following matters being relevant to the proposal.

Section 62 (consideration of fire safety) and Section 64 (consent authority may require upgrade of buildings) of the 2021 EP&A Regulation are not relevant to the proposal.

These provisions of the 2021 EP&A Regulation have been considered and are addressed in the report.

3.2 Section 4.15(1)(b) - Likely Impacts of Development

The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality must be considered. In this regard, potential impacts related to the proposal have been considered in response to SEPPs, LEP and DCP controls outlined above and the Key Issues section below.

- **Coastal environment and coastal processes**
Unacceptable - The proposed development may have a significant adverse impact on the natural environment. The application has not satisfactorily demonstrated that the proposed coastal protection works will not have an adverse impact on adjoining properties and or the coastal environment. The proposed works may have an adverse impact on local hydrology and natural coastal processes.
- **Built environment**
Unacceptable - The proposed development fails to demonstrate it will not have a significant adverse impact on the built environment. The proposal involves a height of building above the building height limit, proposes a building that projects beyond the cliff top of bank, adverse overshadowing impacts, bulk and scale that is not consistent with the existing and developing character of this area of Denhams Beach.

The as-built works undertaken without consent including cliff slope stability works, works at the base of the cliff consisting of retaining walls, filled pad areas, excavated walkways and stairs are not consistent with the surrounding development in relation to context or character, bulk or scale and are therefore recommended for refusal.

- **Context and setting –**
Unacceptable - The proposal is considered to be inconsistent with the context of the site, in that the proposed dual occupancy and associated structures are not consistent with the regional and local context or scenic qualities. Character and amenity of the locality and streetscape, scale, mass, form, character etc of surrounding development, potential impacts on adjoining properties (discussed in key issues if significant), previous and existing land uses.
- **Access and traffic –**
Unacceptable - The proposed dual occupancy provides 2 x off street car parking for each proposed dwelling. The applicant is required to confirm the characterisation of development prior to parking generation being calculated i.e. the lower ground floor illustrates separate occupation (a separate dwelling) may be proposed. Council's engineers provides no objection in relation to driveway access from Beach Road.
- **Public Domain** – the proposal includes residential development that does not obstruct public access. A new footpath would be required to be installed at Beach Road were this application approved.
- **Utilities –**
Unacceptable - utilities are available at the site. Essential Energy provided no objection subject to recommendations. Council's engineers are not in support of the application due to the unauthorised works which have the potential to impact on infrastructure provision.
- **Heritage** – the site does not contain any heritage listed items or areas. A basic search indicates no records of Aboriginal sites or places exist in the vicinity of the site (within 200m).

- **Water/air/soils impacts –**
Unacceptable - the application fails to adequately address this the site works have commenced without development consent and therefore the application fails to demonstrate it meets requirements in relation to water and soil management including contamination mitigation and management (including importation of soil materials).
 - **Flora and fauna impacts –**
Unacceptable - The site contains mapped areas of native vegetation and the application fails to demonstrate the proposal will not have unacceptable impacts on biodiversity. Works including vegetation and tree removal have been undertaken without consent that have not been managed to minimise the impact on the environment.
 - **Natural environment –**
Unacceptable - the proposal fails to demonstrate that it is acceptable in relation to impacts on the natural environment. Significant unauthorised works that have undertaken within the coastal environment including significant changes to the natural contours of the site including within the cliff and beach area that have the ability to impact on the coastal environment and Marine Estate.
 - **Noise and vibration** –construction and operational impacts during construction for future works could potentially be mitigated with conditions.
 - **Natural hazards –**
Unacceptable - site affected by natural hazards that include coastal processes. The applicant has failed to adequately address the potential impacts including via submission of consultant reports, and works have been undertaken without development consent in immediate proximity to the coast, having the ability to have cumulative impacts on surrounding properties.
- Safety, security and crime prevention** – CPTED Principles can be implemented in to the design of the development subject to conditions in relation to future building works. The application has failed to demonstrate it will not pose a potential risk to public safety, particular in relation to works undertaken without consent in vicinity of the beach and adjoining properties.
- **Social impact –**
Unacceptable – the application fails to adequately address the health and safety of the community including considering the impacts of unauthorised works.
 - **Economic impact** – construction works have the ability to provide employment during construction.
 - **Site design and internal design** –the proposal fails to provide a built form and associated works that provide a suitable response to the character of the residential environment and the coastal location. The proposal involves a variation to building height and non compliance with Council controls in relation to built form, site design, amenity impacts and environmental management.
 - **Construction** –the potential impacts from construction have not been adequately mitigated. Works undertaken without development consent cannot be mitigated through consent conditions.

- **Cumulative impacts** –the proposal fails to demonstrate it will not result in significant adverse cumulative impacts. The proposal involves non-compliances with numerous planning controls and the works that have been undertaken without consent including within the coastal cliff and beach area have the ability to result in adverse cumulative impact.

Accordingly, it is considered that the proposal will result in any significant adverse impacts in the locality as outlined above.

3.3 Section 4.15(1)(c) - Suitability of the site

The site is not considered suitable for the proposed development. The application is recommended for refusal for the reasons provided in **Attachment A**. The proposal fails to demonstrate it has considered the objects of the *Environmental Planning Act 1979* to facilitate ecologically sustainable development, promote the orderly and economic use of the land or promote good design and amenity of the built environment.

The application has failed to demonstrate the proposal meets the requirements of the *Coastal Management Act 2016* (cl. 27) which provides that development consent must not be granted to development for the purpose of *coastal protection works*, unless the consent authority is satisfied that works will not be likely to unreasonably limit public access to or use of a beach or headland, or pose or be likely to pose a threat to public safety, and that satisfactory arrangements have been made (via conditions of consent) for the following for the life of the works for beach restoration any increased erosion of the beach or adjacent land and the maintenance of the works.

The application fails to adequately demonstrate the proposal meets the requirements of the applicable legislation including the *Marine Estate Management Act 2014* (s.56(2)); the *Biodiversity Conservation Act 2016* (section 7.3) or applicable State Environmental Planning Policies, including *State Environmental Planning Policy (Resilience and Hazards) 2021*, *State Environmental Planning Policy (Biodiversity and Conservation) 2021*.

The proposal fails to satisfy the relevant aims and provisions of the *Eurobodalla Local Environmental Plan 2012* including numerous clauses and including Clause 4.6 Exceptions to development standards for a building height variation.

The proposal fails to satisfy the intent or performance criteria for development within the *Residential Zones Development Control Plan* for numerous sections.

The proposal has failed to demonstrate it will not have an adverse impact on the adjoining properties and the adjoining coastal environment including the built and natural environment and natural coastal processes.

3.4 Section 4.15(1)(d) - Public Submissions

The submissions are considered in Section 4.3 of this report.

3.5 Section 4.15(1)(e) - Public interest

The proposal is not in the public interest. The application fails to demonstrate the proposal is suitable for the site and the low density residential environment. The application fails to demonstrate the potential impacts can be managed and mitigated during construction as significant cliff and coastal works have been undertaken without development consent and specialist reports have not been provided to allow for assessment of a number of matters

including impacts on vegetation or the coastal environment and coastal processes, including cumulative impacts.

The scale of works significantly alters the topography of the site and proposal is not consistent with the aims and objectives of numerous environmental planning instruments and development controls. The proposal has failed to demonstrate it will not pose a potential risk to public safety, particularly in relation to works undertaken without consent in vicinity of the beach, cliff and coastline and adjoining properties.

The application fails to demonstrate it meets the principles of ecologically sustainable development including the precautionary principle, inter-generational equity and conservation of biological diversity and ecological integrity. The principle of integration that includes the mutual respect and reciprocity between economic and environmental considerations has not been considered and the proposal is contrary to the public interest.

4. REFERRALS AND SUBMISSIONS

4.1 Agency Referrals and Concurrence

The development application has been referred to various agencies for comment/concurrence/referral as required by the EP&A Act and outlined below in Table 5.

The outstanding issues raised by Agencies are considered in the Key Issues section of this report.

Table 5: Concurrence and Referrals to agencies

| Agency | Concurrence/ referral trigger | Comments (Issue, resolution, conditions) | Resolved |
|---|---|--|----------|
| Concurrence Requirements (s4.13 of EP&A Act) | | | |
| Environment Agency Head (Environment, Energy & Science Group within DPIE) | S7.12(2) - <i>Biodiversity Conservation Act 2016</i> | The applicant has failed to address the potential impacts on native vegetation. The site contains mapped native vegetation areas on Council mapping. The applicant has not lodged a Test of Significance or Biodiversity Assessment with the application. Clearing of vegetation has been undertaken without consent. Concurrence has not been granted. | N |
| Rail authority for the rail corridor | Section 2.98(3) - <i>State Environmental Planning Policy (Transport and Infrastructure) 2021</i> | N/A | N/A |
| Referral/Consultation Agencies | | | |

| | | | |
|-------------------------------------|--|---|-----|
| RFS | S4.14 – EP&A Act Development on bushfire prone land | N/A | N/A |
| Electricity supply authority | Section 2.48 – <i>State Environmental Planning Policy (Transport and Infrastructure) 2021</i> Development near electrical infrastructure | Referral response. Suitable subject to conditions. | Y |
| | | <p>Details of referral: Essential Energy makes the following general comments:</p> <ul style="list-style-type: none"> • If the proposed development changes, there may be potential safety risks and it is recommended that Essential Energy is consulted for further comment; • Any existing encumbrances in favour of Essential Energy (or its predecessors) noted on the title of the above property should be complied with; • Any activities in proximity to electrical infrastructure must be undertaken in accordance with the latest industry guideline currently known as ISSC 20 Guideline for the Management of Activities within Electricity Easements and Close to Infrastructure; • Prior to carrying out any works, a “Dial Before You Dig” enquiry should be undertaken in accordance with the requirements of Part 5E (Protection of Underground Electricity Power Lines) of the Electricity Supply Act 1995 (NSW); and • It is the responsibility of the person/s completing any works around powerlines to understand their safety responsibilities. SafeWork NSW (www.safework.nsw.gov.au) has publications that provide guidance when working close to electricity infrastructure. These include the Code of Practice – Work near Overhead Power Lines and Code of Practice – Work near Underground Assets. | |
| Rail authority | Section 2.97 – <i>State Environmental</i> | N/A | N/A |

| | | | |
|----------------------|--|--|-----|
| | <i>Planning Policy (Transport and Infrastructure) 2021</i> Development land that is in or adjacent to a rail corridor. | | |
| Transport for NSW | Section 2.121 – <i>State Environmental Planning Policy (Transport and Infrastructure) 2021</i> Development that is deemed to be traffic generating development in Schedule 3. | N/A | N/A |
| DPI Fisheries | s.56 Marine Estate Management Act 2014 | Referral response received. Not in support. | No |
| | | <p>Details of referral: Response to 19 Oct. 2023 documents (in part): <i>Section s.56 (2) of the Marine Estate Management Act 2014 requires that if the consent authority is of the opinion a development is likely to have an effect on the plants or animals of a marine park and their habitat, the consent authority consults with of the relevant Minister before finally determining the application. DPI Fisheries has assessed the application and reviewed the Ad Info request uploaded to the Planning Portal by Eurobodalla Shire Council on 19 October 2023. Batemans Marine Park likewise requires the following additional information requested by Eurobodalla Shire Council:</i></p> <ul style="list-style-type: none"> • <i>details of bank stabilisation works and referral to appropriate consent authority if such works are coastal protection works for the purpose of the Coastal Management Act 2016</i> • <i>confirmation of the scope of works to be assessed in this application with relation to “cliff stabilisation” and environmental works.</i> <p><i>In addition to the request from Eurobodalla Shire Council, Batemans Marine Park requires the following:</i></p> | |

| | | | |
|---------------------|-----------------------|--|-----|
| | | <ul style="list-style-type: none"> • Confirmation if scope of works to be assessed in this application includes the boat shed. • If the boatshed is included, detailed plans of the proposal, inclusive of any environmental protection or coastal protection works required to support the development. | |
| | | <p>Referral dated 23/09/24 (in part): DPIRD Fisheries has assessed the application and reviewed the response by the applicant to the Ad Info request uploaded to the Planning Portal by Eurobodalla Shire Council. Batemans Marine Park acknowledges the applicant has provided the following information:</p> <ul style="list-style-type: none"> • Confirmation the scope of works to be assessed in this application includes the boat shed/storage shed. • Diagrams indicating the design and location of the boatshed/storage shed. • Applicants case for determining the purpose of the wall as a retaining wall and not a coastal protection work. <p>Batemans Marine Park has considered the matter of resolving the purpose of the wall and can provide the following advice:</p> <ul style="list-style-type: none"> • The matter cannot be determined without an assessment of coastal hazards of the site. • Council should consider coastal hazards in making a decision. <p>Section s.56(2) of the Marine Estate Management Act 2014 requires that if the consent authority is of the opinion a development is likely to have an effect on the plants or animals of a marine park and their habitat, the consent authority consults with the relevant Minister before finally determining the application. Batemans Bay Marine Park will consider any advice from Council prior to finalisation of the application.</p> | |
| Design Review Panel | CI 28(2)(a) – SEPP 65 | N/A | N/A |

| | | | |
|--|--|---------------|-----|
| | Advice of the Design Review Panel ('DRP') | | |
| Integrated Development (S 4.46 of the EP&A Act) | | | |
| RFS | S100B - <i>Rural Fires Act 1997</i> bush fire safety of subdivision of land that could lawfully be used for residential or rural residential purposes or development of land for special fire protection purposes | N/A | N/A |
| Natural Resources Access Regulator | S89-91 – <i>Water Management Act 2000</i> water use approval, water management work approval or activity approval under Part 3 of Chapter 3 | Not required. | N/A |

4.2 Council Officer Referrals

The development application has been referred to various Council officers for technical review as outlined **Table 6**.

Table 6: Consideration of Council Referrals

| Officer | Comments | Resolved |
|-------------|--|----------|
| Engineering | <p>Council's Engineering Officer reviewed the submitted proposal and initially provided the application was suitable subject to conditions. Following a site visit undertaken on 3/12/24 where the extent of as-built works in relation to cliff and beach works including structural works was evident, Council engineers revised the engineering referral comments (which relied on prior to construction works commencing, during works conditions etc. to ensure works were undertaken in accordance with applicable controls and standards) provided the following referral comment:</p> <p><i>The previous engineering referral (V2) was for a DA seeking approval of future works, hence the provisioning of conditions.</i></p> <p><i>As evidenced today, there has been extensive slope stability works to the entire cliff face in the form of numerous soil nails</i></p> | N |

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| | <p><i>and 2 significant retaining walls (> 3m high) constructed on site. It is my understanding that these works have not been approved, and no assessment/justification for the bulk and scale of the retaining walls. It is quite plausible to conclude that it would be highly unlikely an engineer would provide certification of these structures post construction due to the inherent risks associated with the stability of the site and potential impacts on adjoining land.</i></p> <p><i>The application in its current form, due to the unapproved site works, is not supported and refusal of the DA is recommended until these works are addressed.</i></p> | |
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The outstanding issues raised by Council officers are considered in the Key Issues section of this report.

4.3 Community Consultation

The proposal was notified in accordance with the Council's Community Participation Plan from First notification period: 25/9/23 – 12/10/23 and Second notification period: 21/6/24 – 9/7/24 . The notification included the following:

- A sign placed on the site;
- Notification letters sent to adjoining and adjacent properties
- Notification on the Council's website.

The Council received a total of three (3) unique submissions for the first submission period and two (2) unique submissions for the second submission (one being an Addendum to a submission) for a total of five (5) submissions, comprising 5 objections to the proposal. The issues raised in these submissions are considered in **Table 7**.

Table 7: Community Submissions

| Issue | Council Comments |
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| Inadequacies in Statement of Environmental Effects | <p>The submitted Statement of Environmental Effects fails to adequately address the legislative requirements for lodgement of development applications (as required by EP&A Act 1979, which refers to Application requirements listed on the NSW DPE website – current document dated March 2022). This requires the applicant to:</p> <ul style="list-style-type: none"> <i>a. the environmental impacts of the development</i> <i>b. how the environmental impacts of the development have been identified</i> <i>c. the steps to be taken to protect the environment or to lessen the expected harm to the environment</i> <i>d. any matters required to be indicated by any guidelines issued by the Planning Secretary</i> <i>e. drawings of the proposed development in the context of surrounding development, including the streetscape</i> |

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| | <p><i>f. development compliance with building heights, building height planes, setbacks and building envelope controls (if applicable) marked on plans, sections and elevations</i></p> <p><i>g. drawings of the proposed landscape area, including species selected and materials to be used, presented in the context of the proposed building or buildings, and the surrounding development and its context</i></p> <p><i>h. if the proposed development is within an area in which the built form is changing, statements of the existing and likely future contexts</i></p> <p><i>i. photomontages of the proposed development in the context of surrounding development</i></p> <p><i>j. a sample board of the proposed materials and colours of the facade</i></p> <p><i>k. detailed sections of proposed facades</i></p> <p><i>l. if appropriate, a model that includes the context.</i></p> <p>The application fails to provide sufficient information to allow for assessment of the proposal, including a full description of the proposed works. The Statement of Environmental Effects includes numerous errors and inconsistencies. As identified unauthorised works have been undertaken on the site. The proposed scale and character of development has not been adequately addressed including in relation to potential environmental impacts, and the application cannot be supported.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| Unauthorised vegetation removal, lack of replacement planting, impact on trees | <p>The application fails to provide sufficient information to justify the extent of tree or vegetation removal that has been undertaken or justify the proposed landscaping in the context of mapped native vegetation areas, providing a landscape plan that does not adequately address the cliff or coastal landscape, or the existing site topography or site conditions.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| View loss | <p>The application has failed to adequately address potential view loss. The submitted survey plan, development plans and documents do not adequately address potential view loss including provision of existing deck/window/dwelling locations in relation to site boundaries and the proposed dual occupancy development.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| Unauthorised coastal protection works | <p>As unauthorised works have been undertaken including significant works to the site topography, the application is recommended for refusal. The applicant has failed to provide sufficient documentation to warrant the extent or scale of works, including an adequate engineering response, and the</p> |

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| | <p>application is therefore recommended for refusal. As the consent authority can only consider 'future' works for any application and the applicant has not lodged documentation in support of any as-built works i.e. 'use of as-built works' and given the scale and nature of works constructed, the application cannot be supported based on the current information submitted and the application is recommended for refusal.</p> <p>Councils compliance section is investigating the unauthorised works on the site, which is subject to separate action.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| Visual impact of walls constructed on foreshore | <p>As outlined above, as-built works have been undertaken on site. As evidenced in site photographs taken at a site visit on 3/12/24, the proposal is inconsistent in scale and character with the existing development within this coastal area of Denhams Beach and is not supported.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| Insufficient information to demonstrate adequate engineering solutions, Environmental impact from construction on cliff | <p>The application has failed to adequately address the cliff and coastal works including consideration of geotechnical and hydrological impacts on the coastal area. As unauthorised works have been undertaken including significant works to the site topography, the application is recommended for refusal. The applicant has failed to provide sufficient documentation to warrant the extent or scale of works, including an adequate engineering response, and the application is therefore recommended for refusal.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| Impact of cl4.6 departure (HOB), lack of supporting documents for cl. 4.6 | <p>The applicant has failed to adequately address the proposed departure from the building height including provision of a Clause 4.6 variation request that fails to meet requirements including justification that the variation to the standard is unreasonable or unnecessary in this instance. The proposal cannot be supported based on the information submitted.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| Non compliance with DCP controls including setbacks | <p>As outlined in this report the proposal involves numerous non-compliances with DCP controls and is not supported.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| Location of carports | <p>The proposal involves construction of carports within the front setback area (1.5m from beach road). This includes 1-2 storey</p> |

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| | <p>vertical screens/walls that contribute to a built form that is not supported.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| Onsite vehicle manoeuvring | <p>The proposal involves construction of carports within the front setback area. As the proposal involves a built form including building setbacks that are not supported and construction works on the site have been undertaken on site without development consent, the proposal is not supported by Council engineers.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| Character and scale of development | <p>The proposal involves a 2-3 storey development that is located within a developing area of Denhams Beach. The built form, including building height, setbacks and design which includes minimal setbacks to Beach Road is not supported in its current form, providing a dominant building that is not consistent with the character and scale of development in the locality.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| Overshading | <p>The applicants plans illustrate the property to the south is overshadowed throughout the day. The proposal includes a height of building variation above 8.5m and non-compliant building setbacks which increase overshadowing impacts. Additional information including potential re-design would be required to address these impacts.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| Use of the storage shed | <p>The applicant (in the SEE) identifies the use of the storage shed as 'a beach storage shed'. No further details are provided. As outlined in this report, works including in the location of the proposed beach storage shed have been undertaken without consent, with the proposal considered inconsistent with the character of this area of Denhams Beach which contains a number of smaller shed-type beach sheds. The current proposal is not supported and is recommended for refusal.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| Lack of a hydrological study and potential hydrological impacts on adjoining properties, Stability of | <p>The application has failed to adequately address the cliff and coastal works including consideration of geotechnical and hydrological impacts on the coastal area. As unauthorised works have been undertaken including significant works to the site topography, the application is recommended for refusal.</p> |

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| cliff for supporting the proposed development | Outcome: These issues cannot be resolved through conditions of consent. |
| Compliance within clause 27 of the CMA | <p>Section 27 Granting of development consent relating to coastal protection works of the Coastal Management Act 2016 states that development consent must not be granted under the EP&A Act 1979 for the purpose of coastal protection works unless the consent authority is satisfied that:</p> <p><i>(a) the works will not, over the life of the works—</i></p> <p><i>(i) unreasonably limit or be likely to unreasonably limit public access to or the use of a beach or headland, or</i></p> <p><i>(ii) pose or be likely to pose a threat to public safety, and</i></p> <p><i>(b) satisfactory arrangements have been made (by conditions imposed on the consent) for the following for the life of the works—</i></p> <p><i>(i) the restoration of a beach, or land adjacent to the beach, if any increased erosion of the beach or adjacent land is caused by the presence of the works,</i></p> <p><i>(ii) the maintenance of the works.</i></p> <p>As outlined in this report the applicant has failed to provide sufficient information to demonstrate the proposal meets the requirements for development involving coastal protection works and will not result in unreasonable impacts including in relation to public safety.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |
| Stormwater management impacts | <p>The application proposes a stormwater management system which will capture and control discharge of stormwater to the beach to the east.</p> <p>Council's Development Engineer has reviewed the proposal and as works have been undertaken without consent, does not support the proposal. A site visit undertaken identifies potential links to the adjoining property to the north (No. 217) in relation to stormwater, which does not form part of this application and therefore cannot be supported.</p> <p>Outcome: These issues cannot be resolved through conditions of consent.</p> |

5. KEY ISSUES

The key issues are summarised in to two main categories:

- **Coastal Protection Works and Environmental Protection Works (Unauthorised works)**
- **Built form / Coastal environment**

They consist of the following matters:

- Coastal protection works already undertaken without approval. This includes retaining walls and stabilisation works to cliff.
- Vegetation removal occurred without approval.
- Coastal zone impact.

- Contamination.
- Carport proposed over sewer main. Fails to comply with Build in the Vicinity of Sewer Mains Code of Practice.
- Variation to height of buildings development standard.
- Several non-compliances with acceptable solutions contained in the Residential Zones Development Control Plan.
- Building Setbacks
- Bulk and Scale
- View loss
- Visual impact
- Overshadowing
- Characterisation of the proposed development. Plans indicate that the Level 0 could be used separated of the remainder of the dwelling. (Two laundries)
- Suitability of the development

5.1 Coastal Protection Works and Environmental Protection Works (Unauthorised works)

The applicant has justified unauthorised works on the site that consist of retaining walls, batters, soil stabilisation anchor bolts, tree removal, geotextile fabric, walkways and ramps, earthworks that include filling of land and excavation works as being warranted as 'emergency environmental protection works'.

Relevant definitions (Eurobodalla LEP 2012):

coastal protection works has the same meaning as in the [Coastal Management Act 2016](#).

[Coastal Management Act 2016](#):

coastal protection works means—

- (a) beach nourishment activities or works, and
- (b) activities or works to reduce the impact of coastal hazards on land adjacent to tidal waters, including (but not limited to) seawalls, revetments and groynes.

environmental protection works means works associated with the rehabilitation of land towards its natural state or any work to protect land from environmental degradation, and includes bush regeneration works, wetland protection works, erosion protection works, dune restoration works and the like, but does not include coastal protection works.

As outlined in this report (section 2.2 Background) Council provided an email to the applicant (outside of the development assessment process) that advised the applicant the following works were considered 'environmental protection works' as defined and described by the applicant and did not require consent (Nos. 1-4):

1. *The first task is to expose the ground surface by managing the vegetation:*
 - a. *All Weed species will be completely removed*
 - b. *All native species (except large trees) will be cut back as much as needed to allow for stabilisation strategy (TerraMat allows for vegetation re-growth)*
 - c. *All Native Trees will be retained*
2. *Demolition of the remaining beach access stair.*
3. *Once the above has been completed, test will be done in various locations to identify real depth of rock face on the cliff face.*
4. *Assuming no surprises with the above, cliff stabilisation will proceed with:*
 - a. *Application of TerraMat (as advised by Geotech), which is held in place by ground anchors as per structural engineer's advice, which includes baseplates*

and eyeloops for vertical and horizontal stainless steel cable to hold TerraMat in place.

The Council advised the applicant the following works (Nos. 5 – 6) would require **a development application to be lodged:**

5. *Platforms and Stairs*
 - a. *Platform locations to be surveyed accurately*
 - b. *Ground Anchors where platforms are intended are to be installed into the rock face as per structural engineer's advice.*
 - c. *Platform Supports will be pre-fabricated from galvanised steel + powdercoated then craned into place.*
 - d. *Platform floor joists and flooring to be constructed using hardwood timber*
 - e. *Stairs and balustrades to be constructed on site using hardwood timber.*
6. *Retaining Walls + Level Platforms + Beach shed*
 - a. *Retaining wall sketch and support as per structural engineer's advice*
 - b. *These works would take place immediately after the stabilisation works to the upper part of the cliff.*

Comment:

The works undertaken on site involve significant changes to the existing site topography and are not considered to meet the definition of 'environmental protection works' which are considered to be limited to identifying an existing land topography and securing the land surface to prevent erosion. The application fails to address the aspects of the development that consist of 'environmental protection works' and 'coastal protection works' or provide sufficient information to demonstrate the proposal is suitable for the coastal and cliff location.

Council have considered the extent of the works and identify that insufficient information has been provided to allow for assessment of the environmental protection works and coastal protection works as works have continued on the site throughout the period of development assessment period without consent, including substantial earthworks (cut and fill), construction of retaining walls, stairs and ramps and 'coastal protection works' at the interface of the cliff and the beach area.

The as-built works are subject to compliance action by Council, and are not supported. Notwithstanding, the scale of the proposed works within the cliff and beach area is inconsistent with the existing character of the coastal area and coastal environment, and not supported by specialist reports that justify the extent and scope of works are warranted in relation to coastal erosion or coastal processes. The proposal would not have been supported by Council notwithstanding the nature of the as-built works.

Resolution: The issue has not been resolved and accordingly, warrants refusal of the application.

5.2 Built form / Coastal environment

The proposed building form presents an unsympathetic response to the streetscape and is of an excessive bulk and scale that does not positively contribute to the desired future character of the area. The building proposes non compliant building height and non compliant building setbacks for a 2-3 storey dual occupancy is setback 1.5m from the street and projects beyond the top of bank of the cliff. The work as-built consist of significant earthworks and retaining wall structures of a bulk and scale that is incompatible with the existing coastal environment and beach character.

A design which is more compatible with the low density residential environment is recommended, with increased setbacks to the front boundary and side boundaries and a building height that complies with the height of buildings control, and considers the solar impacts and overshadowing on the property to the south should be considered. The large vertical screens and balconies to the car parking area which are between 1-2 storeys in height should be reconsidered to provide for a development that addresses the streetscape with adequate setbacks.

The unauthorised works associated with substantial retaining walls, filled earthen platform areas and associated steps, walkways and structures are not supported. They are not consistent with the setbacks associated with neighbouring developments along this section of coastline and have not been justified by specialist reports in relation to impacts from coastal process or geotechnical requirements in relation to coastal hazards to support the bulk and scale of proposed works.

It is considered that this aspect of the as-built works requires demolition (a process outside of this development application). Notwithstanding the illustrated design for the retaining walls is not supported based on their development footprint, bulk and scale, design and materials and finishes, the context and character of the area of beach front and the potential impacts on the coastal environment including cumulative impacts. The proposal requires reconsideration and redesign including submission of specialist reports to address the structural requirements and coastal environmental works within the cliff and coastal beach areas of the property. The application relies on a site survey dated 2022, and given the extent of unauthorised works having been undertaken, further information is required to be provided in relation to existing site conditions to allow for assessment of any future development works in relation to the existing site.

The applicant has not addressed this issue satisfactorily with amended plans or reports and accordingly, this issue remains outstanding. The lack of an appropriate environmental outcome (both built and natural environment) warrants refusal of the application.

Resolution: The issue has not been resolved and accordingly, warrants refusal of the application

6. CONCLUSION

This development application has been considered in accordance with the requirements of the EP&A Act and the Regulations as outlined in this report. Following a thorough assessment of the relevant planning controls, issues raised in submissions and the key issues identified in this report, it is considered that the application cannot be supported and is recommended for refusal.

The proposal involves construction of a dual occupancy development that includes ancillary works and coastal protection works within a coastal environment. The applicant has failed to demonstrate the proposal meets the requirements of key legislation including the *Environmental Planning and Assessment Act 1979* and requirements under the *Coastal Management Act 2016*, *Marine Estate Management Act 2014* and *Biodiversity Conservation Act 2016* and relevant environmental planning instruments. The site visits identified unauthorised works have occurred on site and as the consent authority may only provide development consent for future works, the application cannot be supported.

It is considered that the key issues as outlined in Section 5 have not been resolved satisfactorily through amendments to the proposal. These issues cannot be resolved through conditions of consent.

7. RECOMMENDATION

That the Development Application DA No. 0095/24 for *Attached dual occupancy, relocation of sewer main including coastal and environmental cliff works, beach storage shed and retaining walls* at 217A Beach Road, Denhams Beach (Lot 2 DP 773132) be REFUSED pursuant to Section 4.16(1)(b) of the *Environmental Planning and Assessment Act 1979* subject to the reasons for refusal attached to this report at **Attachment A**.

The following attachments are provided:

- Attachment A: Reasons for refusal
- Attachment B: Tables of Compliance – DCP
- Attachment C: Plans - Architectural
- Attachment D: Plans - Civil Engineering
- Attachment E: Plans – Environmental Protection
- Attachment F: Survey plan
- Attachment G: Clause 4.6 Request
- Attachment H: Statement of Environmental Effects
- Attachment I: Low Rise Density Design Verification Statement
- Attachment J: Low Rise Density Assessment
- Attachment K: DCP Variation Requests
- Attachment L: BASIX and Nathers
- Attachment M: Geotechnical Report
- Attachment N: Preliminary Environmental Assessment (22/12/23)
- Attachment O: Preliminary Environmental Assessment (16/5/24)
- Attachment P Structural Design Statement
- Attachment Q: Arborist statement
- Attachment R: Construction Management Plan
- Attachment S: AHIMS Search
- Attachment T: Deposited Plan/s
- Attachment U: Cost of Works
- Attachment V: Correspondence from applicant (submission of addit. Info cover letter)