

COUNCIL ASSESSMENT REPORT

SOUTHERN REGIONAL PLANNING PANEL

PANEL REFERENCE & DA NUMBER	PPSSTH-516 REV0011/25 (review of DA0095-24)
PROPOSAL	Review of Determination of Application DA0095-24 (PPSSTH-414) for <i>an attached dual occupancy, relocation of sewer main including coastal and environmental cliff works, beach storage shed and retaining walls</i>
ADDRESS	Lot 2 DP 773132, 217A Beach Road, Denhams Beach
APPLICANT	Adhami Pender Architecture
OWNER	Canplay Pty Ltd
DA LODGEMENT DATE	18 June 2025
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) original DA \$1,486,092 (Review)
CLAUSE 4.6 REQUESTS	Nil (s8.2 review)
KEY SEPP/LEP	• 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 KEY ISSUES IN SUBMISSIONS	Notification – 23/6/25 – 16/7/25 (issues raised including but not limited to): • Use of as built works • Lodgment of BICs • Whether development is substantially the same • Significant environmental impacts • Environmental impact from constructing on the cliff • Stability of cliff for supporting the proposed development

	• Unauthorized native vegetation clearing • Visual impact of walls constructed on foreshore. • Coastal engineering and engineering • Built form impacts • Not suitable character or context • Non-compliance with DCP controls, setbacks • Vehicle maneuvering • Overshadowing • Impacts on coastal environment • Stormwater management
DOCUMENTS SUBMITTED FOR CONSIDERATION	Refer attachments to this report: • Previous DA0095/24 plans and documents • Revised documents (s8.2 review) ○ Cover letter (15 June 25) ○ Survey plan ○ Architectural Plans ○ Civil Engineering Plans ○ Structural Design Statements ○ Letter – UNSW Water Research Lab (Wave forces) ○ Letter – UNSW Water Research Lab (advice regarding coastal engineering works) ○ Arborist report ○ Arborist memorandum ○ Flora and Fauna Assessment ○ Revegetation strategy (letter) ○ Photographs/photomontages ○ Table - embodied emissions materials form • 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	28 July 2025
PLAN VERSION	-
PREPARED BY	D. Meagher. Acting Div. Manager Development & Compliance Eurobodalla Shire Council
DATE OF REPORT	17 July 2025

EXECUTIVE SUMMARY

This report provides an assessment of a Review of Determination for an attached dual occupancy, relocation of sewer main including coastal and environmental cliff works, beach

storage shed and retaining walls on a site known as 217A Beach Road, Denhams Beach ('the site').

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 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 development application (DA 0095/24) was lodged on 25/9/23 seeking consent for a dual occupancy development. The application was 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*.

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.

On 13 February 2025 the Southern Regional Planning Panel (SRPP) refused the development application (DA0095-24) under Section 4.16 of the *Environmental Planning and Assessment Act 1979* for the construction of an attached dual occupancy, relocation of sewer main including coastal and environmental cliff works, beach storage shed and retaining walls on the site.

On 18 June 2025, a Section 8.2 Review of Determination application was lodged with amended documents. The main changes to the proposed development are summarised as follows:

- Use of as-built works including removal of the term 'coastal protection works' from the description of development for which consent is being sought
- Submission of additional specialist reports - engineering; wave action and coastal engineering works; flora and fauna assessment and arborist reports;
- Revised plans (minor built form amendments)
- Tree removal (2 x tree removal)

The subject site is zoned R2 - Low Density Residential under *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). Development for the purposes of a dual occupancy is permitted with consent in the zone. While the construction of a dual occupancy for residential use is permissible with consent in the R2 zone, the applicant failed to adequately address the coastal protection works and ancillary works associated with the cliff and beach areas of the site

Pursuant to Section 8.2 of the Act, the applicant seeks a review of all aspects of the refusal of (DA 0095/24). Clauses 8.3 and 8.10 of the Act requires that the request for the review must be made and determined within 6 months after the date of determination. The application was determined on 13 February 2025 and the Notice of Determination was issued on 13 February 2025. The request for review was lodged on 18 June 2025, which is within the statutory timeframe.

The assessment of the amended application has concluded that despite the submission of additional information in relation to engineering of as-built works including a wave action

analysis and revised plans, the amendments do not overcome the Panel's concerns in relation to the constructed seawall/retaining wall and the appropriateness in relation to the coastal location, impact on coastal processes and adjoining properties.

The application was referred to internal departments and external authorities for comment. In the responses received, issues were raised regarding the assessment of coastal hazards such as coastal erosion and recession, the grounds and evidence to support the wall/s not being assessed as coastal protection work, engineering related matters and the extent of native vegetation clearing and revegetation requirements. Council engineers, Councils' Environmental Planner and NSW DPE Fisheries (Marine Parks) do not support the proposal.

Accordingly, it is recommended that the SRPP, as the determining authority, having considered the application for review of determination, resolve to maintain its refusal of DA 0095/24 for the reasons detailed within the "Recommendation" section of this report.

1. PROPOSAL IN DETAIL

DA 0095/24 - **Background:** The subject (DA 0095/24) was lodged on 25 November 2023 and was subsequently amended to include ancillary works. A detailed description of the works for which development consent was sought is provided below:

- Demolition
- Tree removal
- Construction of a dual occupancy (attached) development:
 - o 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
 - o 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.

DA 0095/24 - Unauthorised works:

Since lodgement of DA0095/24, 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.

Section 8.2 (Rev0011/25) Review documents –

The proposed development, as revised, comprises the following, as stipulated within the revised Cover Letter, prepared by Adhami Pender Architecture.

Consent is sought for:

- *Construction and use of a dual occupancy;*
- *Relocation of sewer mains;*
- *Landscaping works and use of environmental protection works (comprising terra matting and rock bolts) and use of the reconstructed beach access stairs and pathway;*
and
- *Use of the retaining wall at the base of the cliff.*

It is noted that the applicant does not seek consent for use of as-built 'coastal protection works' however their covering letter states ('emphasis added'):

*Canplay Pty Ltd now understand that while the retaining wall is clearly for the purpose of cliff stability, due to its location adjacent to tidal waters, **it would most appropriately be characterised as “coastal protection works”** and ought to have been constructed*

with the prior consent of the Panel, or via lodgement of an earlier BIC adjacent to the DA. A separate BIC has now been sought from Council for the retaining walls constructed at the base of the cliff and in this DA, Canplay Pty Ltd seeks approval for the use of the retaining walls.

Additional information has been provided in relation to coastal and coastal engineering risks associated with the proposed development. The amendments to the proposal include:

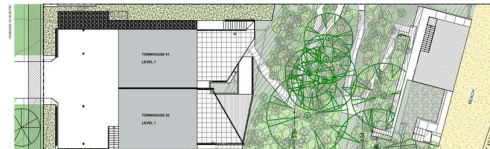
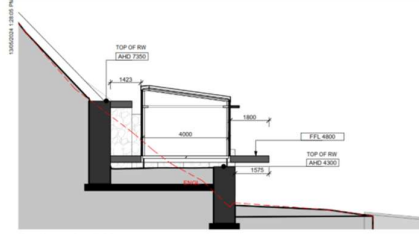
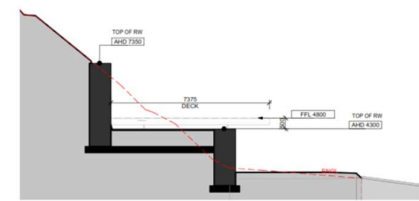
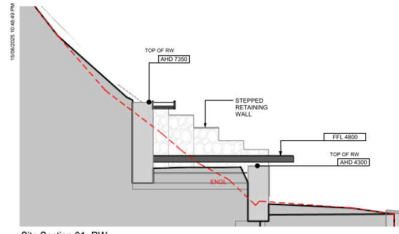
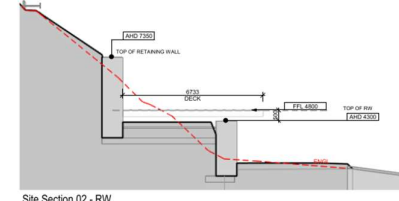
1. *Beach Storage Shed* - Consent is no longer sought for construction and use of a beach storage shed.
2. *Building Height* (dual occupancy) - Roof encroachment into building height limit has been removed, and the proposed dual occupancy is entirely within the 8.5m maximum height limit.
3. *Stormwater* – Storm water management has been relocated to the north boundary.
4. *Amenity* – The Kitchenette has been removed from L0 plan to remove any ambiguity that the lower ground floor may be capable of separate occupation (or future dwelling provision)

The applicant addressed the reasons for refusal in their covering letter, identifying that concurrent Building Information Certificates (BIC)s have been lodged with the review of determination.

A comparison of the original and amended proposals is outlined in the Table below:

Table 1: Original proposal and s8.2 Review comparison table

	Original proposal	Amended proposal
Dual occupancy		
Built form		
	Front setback: 1.5m (does not comply) Side setback (north): 3m Side setback (south): 1.05m <i>Did not comply – 2m setback required >7.5m</i> Cliff works – unauthorised works.	Front setback: 1.5m (Does not comply) Side setback (north): 3m Side setback (south): 1.04m and 1.5m Cliff works – use of as-built works.
		 STREET FRONTAGE 3D RENDER
		 REAR OF BUILDING 3D RENDER
Building height	Does not comply. Required: 8.5m Proposed height: 9.114m Variation of 7.2%. The height of building variation is not supported. Refer discussion in this report.	Yes. Complies. Overall building height Amended to comply. Required: 8.5m Proposed height: 8.48m (RL33.049m AHD above RL24.568m AHD)

	Original proposal	Amended proposal																																																																				
FSR	N/A	N/A																																																																				
Site coverage	No change <table><tr><td colspan="2">TOWNHOUSE 01</td></tr><tr><td>LEVEL 0</td><td>62.30 m²</td></tr><tr><td>LEVEL 1</td><td>55.50 m²</td></tr><tr><td>LEVEL 2</td><td>87.00 m²</td></tr><tr><td>TOTAL</td><td>204.8m²</td></tr><tr><td colspan="2">TERRACE</td></tr><tr><td>DECK</td><td>35.3 m²</td></tr><tr><td>CARPORT</td><td>29.16 m²</td></tr><tr><td>STORAGE SHED</td><td>20.00m²</td></tr><tr><td colspan="2">TOWNHOUSE 02:</td></tr><tr><td>LEVEL 0</td><td>62.30 m²</td></tr><tr><td>LEVEL 1</td><td>55.80 m²</td></tr><tr><td>LEVEL 2</td><td>83.40 m²</td></tr><tr><td>TOTAL</td><td>201.50 m²</td></tr><tr><td colspan="2">TERRACE</td></tr><tr><td>DECK</td><td>23.50 m²</td></tr><tr><td>CARPORT</td><td>29.16 m²</td></tr></table>	TOWNHOUSE 01		LEVEL 0	62.30 m ²	LEVEL 1	55.50 m ²	LEVEL 2	87.00 m ²	TOTAL	204.8m ²	TERRACE		DECK	35.3 m ²	CARPORT	29.16 m ²	STORAGE SHED	20.00m ²	TOWNHOUSE 02:		LEVEL 0	62.30 m ²	LEVEL 1	55.80 m ²	LEVEL 2	83.40 m ²	TOTAL	201.50 m ²	TERRACE		DECK	23.50 m ²	CARPORT	29.16 m ²	No change <table><tr><td colspan="2">TOWNHOUSE 01</td></tr><tr><td>LEVEL 0</td><td>62.30 m²</td></tr><tr><td>LEVEL 1</td><td>55.50 m²</td></tr><tr><td>LEVEL 2</td><td>87.00 m²</td></tr><tr><td>TOTAL</td><td>204.8m²</td></tr><tr><td colspan="2">TERRACE</td></tr><tr><td>DECK</td><td>35.3 m²</td></tr><tr><td>CARPORT</td><td>29.16 m²</td></tr><tr><td>STORAGE SHED</td><td>20.00m²</td></tr><tr><td colspan="2">TOWNHOUSE 02:</td></tr><tr><td>LEVEL 0</td><td>62.30 m²</td></tr><tr><td>LEVEL 1</td><td>55.80 m²</td></tr><tr><td>LEVEL 2</td><td>83.40 m²</td></tr><tr><td>TOTAL</td><td>201.50 m²</td></tr><tr><td colspan="2">TERRACE</td></tr><tr><td>DECK</td><td>23.50 m²</td></tr><tr><td>CARPORT</td><td>29.16 m²</td></tr></table>	TOWNHOUSE 01		LEVEL 0	62.30 m ²	LEVEL 1	55.50 m ²	LEVEL 2	87.00 m ²	TOTAL	204.8m ²	TERRACE		DECK	35.3 m ²	CARPORT	29.16 m ²	STORAGE SHED	20.00m ²	TOWNHOUSE 02:		LEVEL 0	62.30 m ²	LEVEL 1	55.80 m ²	LEVEL 2	83.40 m ²	TOTAL	201.50 m ²	TERRACE		DECK	23.50 m ²	CARPORT	29.16 m ²
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Landscape	50.66% 	50.5% 																																																																				
Car parking	2 x car parking																																																																					
Tree removal	7 x trees <i>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 and 1 x tree in the immediate vicinity of the site (Tree No. 8).</i>	Additional tree removal – 2 x trees (Submitted arborist report) Due to landslide instability																																																																				
Retaining walls																																																																						
Heights TOW and BOW	Architectural plans: AHD 7350m AHD 4300m	Architectural plans: AHD 7350m AHD 4300m Extended platform RL4800m Note Inconsistent documentation revised survey plan: as-built walls AHD 7.45m AHD 4.45m																																																																				
	 Site Section 01 - RW 1 : 100  Site Section 02 - RW 1 : 100	 Site Section 01 - RW 1 : 100  Site Section 02 - RW 1 : 100																																																																				

The amended proposal is accompanied by:

- Architectural Plans (s8.2 review)
- Architectural Plans - Environmental Protection) (DA)
- Civil Engineering Plans (s8.2 review)
- Survey plan (s8.2 review)
- Statement of Environmental Effects (DA)
- Low Rise Density Design Verification Statement (DA)
- Low Rise Density Assessment (DA)
- DCP Variation Requests (DA)
- BASIX and Natthers (DA)
- Geotechnical Report (DA)
- Preliminary Environmental Assessment (22/12/23)(DA)
- Preliminary Environmental Assessment (16/5/24)(DA)
- Cover letter (15 June 25) (s8.2)
- Structural Design Statements (DA)(s8.2)
- Letter – UNSW Water Research Lab (Wave forces) (s8.2)
- Letter – UNSW Water Research Lab (advice regarding coastal engineering works) (s8.2)
- Construction Management Plan (DA)
- Arborist report (s8.2)
- Arborist memorandum (s8.2)
- Flora and Fauna Assessment (s8.2)
- Revegetation strategy (letter) (s8.2)
- Photographs/photomontages (s8.2)
- Table - embodied emissions materials form (s8.2)
- AHIMS Search (DA)
- Cost of Works (s8.2)
- Deposited plan (DA)

Table 2: Section 8.2 (Rev0011/25) Specialist reports (planner comments) – key documents

Report	Author/date	Details/findings
Arboricultural Memorandum	Arbor Express Dated 7 December 2023	Works completed: - Assessment of existing tree stumps (x2) that were mature trees - 'show clear evidence of major termite infestations'
Arboricultural Assessment and Report	Arbor Express Dated 7 December 2023	Works required: - Inspection of tree 1 (Spotty Gum) and Tree 2 (Spotty Gum) - Recommendation: removal due to 'compromised due to landslide', structural weakness. - Unstable cliff face presents potential risks to safety.
Flora and fauna report	Waratah Ecology Project: WE20250319 Dated: 12/6/2025	- Proposed clearing of 300m²/0.03ha of native vegetation (this includes the vegetation previously cleared from the site) - Less than 0.25ha threshold for BAM and offsets scheme. - Native vegetation and exotic species evident on site - Cleared areas of site have occurred. However 'some ecologically significant pieces of native vegetation remain, including several Spotted Gums'. - Further disturbance to retained ecological resources are to be minimised - Mitigation measures recommended.

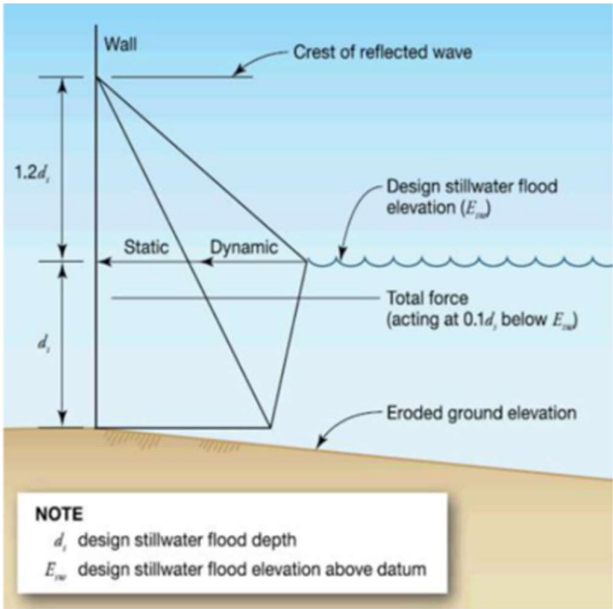
Report	Author/date	Details/findings
		Note: refer Council Environmental Planner comments in referral section of report. Additional information required.
Revegetation summary	Garden Thumb Dated 21 May 2025	- Note: prepared by a structural landscape license no. - No author. - Unclear qualifications of author. - Recommends removal of invasive weeds and recommends native plant species be planted on site. - Recommends an additional retaining wall. - <i>'this project should be considered long term revegetation over the mesh will take a number of years to re-establish fully.'</i>
Letter report- (wave forces on the cliff stabilisation works) Supplements Letter report- advice (cliff stabilisation works) dated 28 April 2025	UNSW Water Research Laboratory (WRL) Ref: WRL Ref: WRL2025012 LR20250501 JTC Dated 1 May 2025	- Extract from Drawing C0011 Issue DA-C dated 11.10.24/Dwg. C0010: - o Elevation of crest of seaward wall: 4.3 m AHD - o Elevation of crest of landward wall: 7.35 m AHD - o Distance between the rear face of seaward wall and front face of landward wall: 4.8 m - o Assumed eroded (bedrock) toe elevation: 1.27 m AHD Planner Note <i>Inconsistent documentation revised survey plan: as-built walls AHD 7.45m AHD 4.45m</i> - Wave forces/pressures have been calculated using Equation 8.6 from the US Federal Emergency Management Agency Coastal Construction Manual (FEMA, 2011).  NOTE d_s design stillwater flood depth E_{sw} design stillwater flood elevation above datum

Figure 2-2 FEMA (2011) wave force configuration

Report	Author/date	Details/findings																									
		Table 2-1 Wave pressure at elevation <table><tr><th>Planning period (year), ARI and variable</th><th>2025 100 year ARI</th><th>2025 500 year ARI</th><th>2075 100 year ARI</th><th>2075 500 year ARI</th></tr><tr><td>Runup level (crest of reflected wave) (level of zero pressure, m AHD)</td><td>3.89</td><td>4.22</td><td>4.64</td><td>5.01</td></tr><tr><td>Still water level (SWL, m AHD)</td><td>2.46</td><td>2.61</td><td>2.80</td><td>2.97</td></tr><tr><td>Pressure at SWL (kPa)</td><td>39.0</td><td>55.6</td><td>82.8</td><td>113.6</td></tr><tr><td>Pressure at bed (1.27 m AHD) (kPa)</td><td>26.3</td><td>29.6</td><td>33.8</td><td>37.6</td></tr></table> - Summary: Thank you for the opportunity to provide this advice.	Planning period (year), ARI and variable	2025 100 year ARI	2025 500 year ARI	2075 100 year ARI	2075 500 year ARI	Runup level (crest of reflected wave) (level of zero pressure, m AHD)	3.89	4.22	4.64	5.01	Still water level (SWL, m AHD)	2.46	2.61	2.80	2.97	Pressure at SWL (kPa)	39.0	55.6	82.8	113.6	Pressure at bed (1.27 m AHD) (kPa)	26.3	29.6	33.8	37.6
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Letter report-advice (cliff stabilisation works)	UNSW Water Research Laboratory (WRL) Ref: WRL2025012 LR20250428ab JTC Dated 28 April 2025	- The works are more than 5 m landward of the seaward private property boundary. - There is no public access to the beach via land, with access only through eight private properties or via water through the small keyhole gap in the surrounding rocky reefs. - The works will not unreasonably limit or be likely to unreasonably limit public access to or the use of the beach or headland. - The works are unlikely to cause any increased erosion of the beach or adjacent land. - Conditions for maintenance of the works are detailed in the body of this report, and consist primarily of annual or post-storm event inspections by a qualified engineer, and the development of an emergency action plan should the works be damaged or fail. - Wave runup is under extreme storms is estimated to be above the crest of the outer wall, but below the crest of the inner wall. - Based on on WRL’s interpretation of AS 4997-2005, the subject structure should be designed for a 50 year life and a 500 year ARI design event. Consideration of wave runup and overtopping is usually undertaken for 100 year ARI conditions for consistency with flood policies and the CMP. Planner comment: additional comments provided in the Council Engineers referral section of this report. It should be noted that the report scope of work is limited to an assessment of the as-built structures and does not address the design amendments/design requirements for coastal protection works in relation to achieving an outcome consistent with the existing development along this section of coastline that considers the context of the coastal environment. i.e. - can the as-built wall heights or wall footprint be reduced and still meet engineering requirements for both cliff stability (upslope) and wave action?																									

Report	Author/date	Details/findings
Engineering letter – Gerin Hingee	Dated 12/6/2025	Planner comment: engineering letters/sketches were providing during the assessment period for DA0095-24 during as-built unauthorised works. These sketches identified retaining walls are required for upslope slope stabilisation. An additional letter is provided for the s8.2 review dated 12/6/25 i.e. following construction of the walls, that states: <i>The original requirement was to provide slope stability to the 25 m high escarpment overlooking Denhams Beach. Included in the clients design requirements were 2 platforms at the base of the escarpment created by 2 retaining walls. I decided to modify the lower retaining wall to provide some resistance to storm surge, thus turning it into a sea wall as well. The client decided to use a Vertiblock wall system – a stone filled, precast concrete hollow block (see attached details). I decided to concrete reinforce it, and stabilise it by linking the top to the footing of the adjacent wall. See original structural drawings attached. The slope stability and retaining walls have been built to my design.</i> <i>The Council now require it to formally certified as a Sea Wall to design loads determined by UNSW Water Research Laboratory. See attached document.</i> <i>The UNSW guide lists a range to design horizontal pressures depending on the wave action and sea level increases due to climate change, for the current year, 2025, and for year 2075, and for 100 and 500 year ARI (annual recurrent incident). The max design horizontal pressure for 2025 / 500 ARI is 55.6 Kpa, and 113.6 Kpa for 2075 / 500 ARI.</i> <i>The upper and lower walls are capable of withstanding 60 KPa based solely on the resistance provided by passive earth pressure of loose sand. This would satisfy the 2025 / 500 ARI. The lower seawall / retaining wall may experience local damage at the 2075 100 year and 500 year ARI events, but the wall as a whole should remain intact. Failure of this wall does not pose a safety risk or risk to other nearby structures.</i> <i>The lower sea wall could be strengthened by casting a 200 mm slab on top of the platform above the lower sea wall and anchored into the existing concrete reinforce parts of the lower wall and into the footing of the upper wall. This would confine the soil behind the wall and result in resisting pressures in excess of 150 KPa. It would also eliminate the loss of soil from behind the wall. This would then satisfy the 2075 / 500 ARI requirement.</i> <i>Both walls should be inspected after major storm events to check for and rectify any damage.</i> Planner comment: further works recommended for structural stabilisation.

2. SITE DESCRIPTION

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.

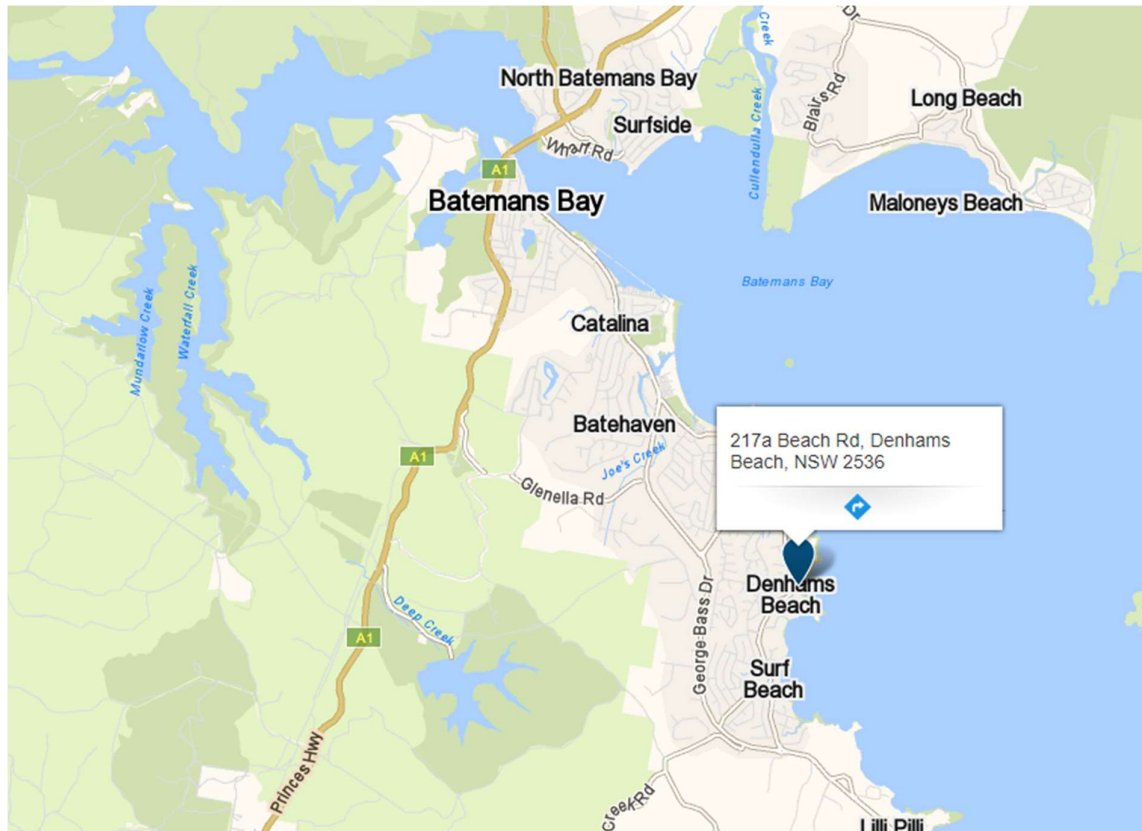


Figure 1: Site location – Map (Where-is)

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 2: Site location – Nearmaps 2023

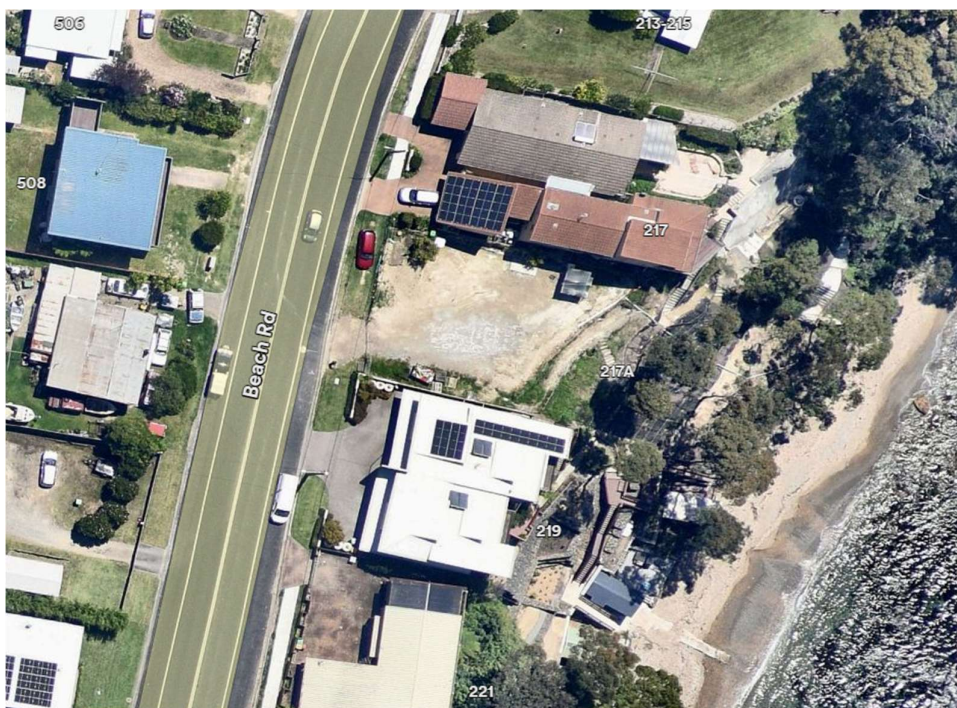


Figure 3: Site location – Nearmaps RECENT Nearmaps photo –January 22, 2024

Current site status:

The site has been cleared of any habitable structures. The applicant has constructed retaining walls and structures on the foreshore.



Figure 4: A photo from 20/2/24 showing base of cliff i.e. tidal ocean wave area (looking south)

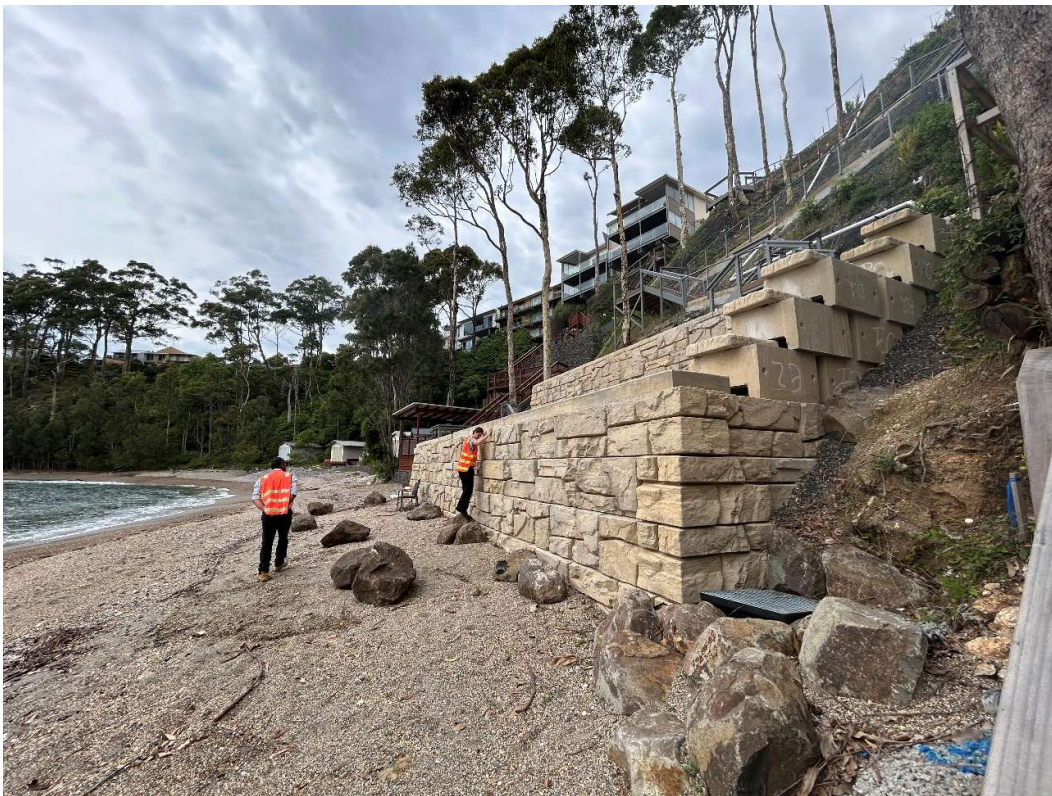


Figure 5: A site photo from 3/12/24 showing as-built works

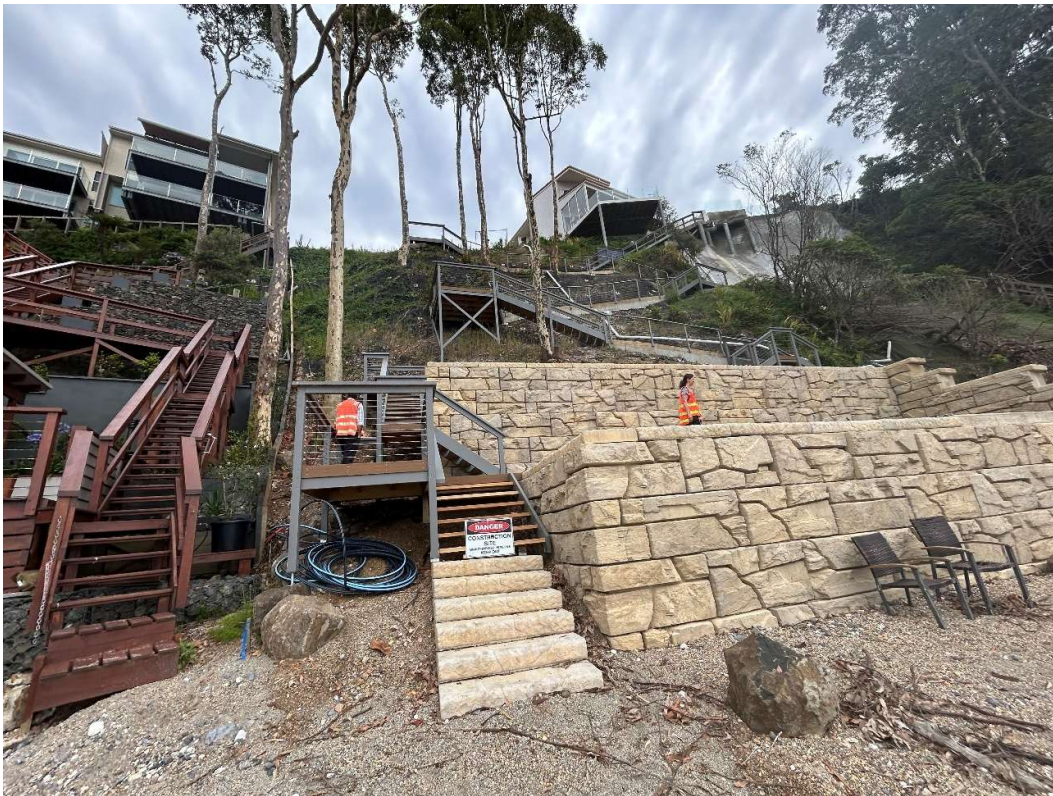


Figure 6: A site photo from 3/12/24 showing as-built works



Figure 7: A site photo from 3/12/24 showing vacant land parcel/streetscape context

2.1 Background site and surrounds (coastal environment/cliff area) (history)

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 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.

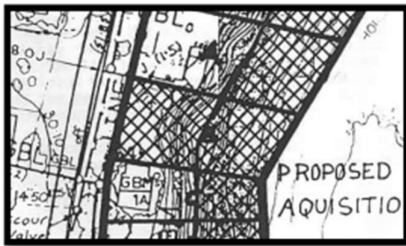
DA DA0024/22 Page 2 of 23

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.



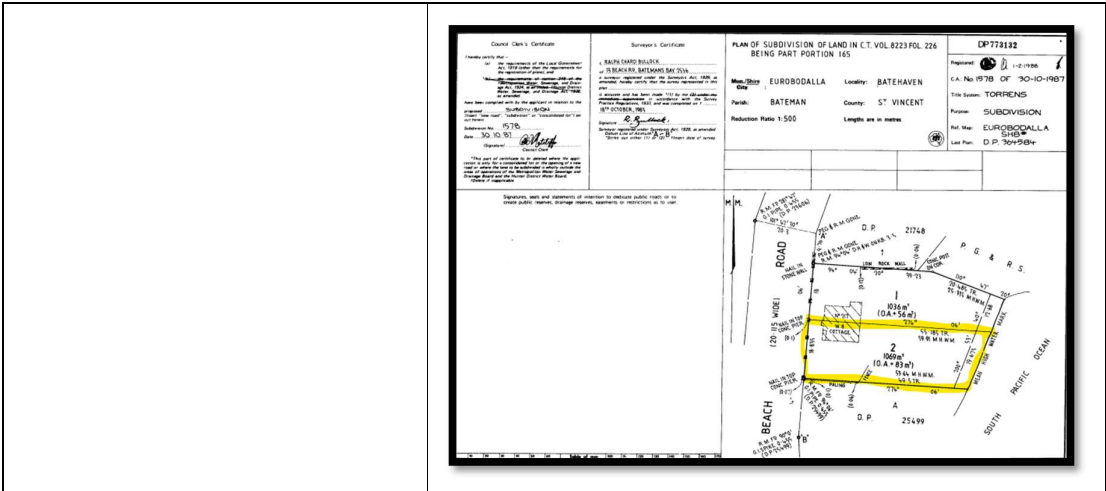
For reference, the image on the left nominates the extent of land that was originally proposed to be resumed. The area defined by the heavy black line is the rear portion associated with the cliff. As can be seen, at one time, Council was seeking to acquire the entire Lot B. This was then modified to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

Table 3: Development Data

Control	Proposal
Site area	1,069m ²
GFA/FSR	N/A
Clause 4.6 Requests	Yes - DA0095/24 – Clause 4.3 Height of Buildings No – Review Rev0011/25 (height of building modified to meet building height of 8.5m)
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 • Coastal Environment area • Coastal Use Area
<i>Eurobodalla LEP 2014</i>	
Acid Sulfate Soils	No
Biodiversity/Vegetation	No – BV mapping Yes - Council native 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.



3. RELEVANT BACKGROUND

The Development Application (DA0095/24) was lodged with Council on 23 August 2023. The application sought approval for construction an attached two and three storey dual occupancy and relocation of the sewer main in a new alignment. The proposal was subsequently amended to seek to construct a detached “beach storage shed”.

Works were subsequently undertaken on the site (significant earthworks and constructed retaining walls) without consent during the assessment process for DA0095/24.

The application was reported to SRPP with a recommendation for refusal and was determined by the SRPP on 13 February 2025 for refusal. The matter determined was described as:

PPSSTH-414-Eurobodalla Shire Council- DA0095/24 at 217A Beach Road, Denhams Beach – Attached dual occupancy, relocation of sewer main including coastal and environmental cliff works, beach storage shed and use of the seawall/retaining wall (as described in Schedule 1).

The Panel determined to refuse the application providing the following reasons for the decision:

REASONS FOR THE DECISION

Consistent with Government policy, a key role of the Panel is to facilitate ecologically sustainable development (ESD) in the coastal zone and promote sustainable land use planning in its decision-making.

This includes:

- avoiding inappropriate development in areas exposed to high levels of risk from coastal hazards or directed towards areas of lower probability of hazards and risk.
- achieving land uses where the impacts and risks can be mitigated, and the development is necessary.
- planning and design development to be safe without increasing the risks or threats elsewhere, and ensuring any residual risks are addressed.

The Panel determined to refuse the application for the following reasons:

Given the circumstances of the case, the Panel ultimately determined to refuse the application:

- For the reasons outlined in the Council’s assessment report.
- Given there is insufficient information (as required by section 27(1)(b) of the *Coastal Management Act 2016*) to enable the Panel to be satisfied that the proposal includes satisfactory arrangements for the life of the seawall/retaining wall (being either maintenance or for restoration of the beach or land adjacent).
- Given there is insufficient information (as required by section 27(1)(b) of the *Coastal Management Act 2016*) regarding the structural integrity of the seawall/retaining wall noting that the structure is inextricably linked to the integrity of the proposed beach storage shed and dual occupancy and could pose, a threat to public safety.
- Had the Panel been of a mind to approve the development application, including the use of the seawall/retaining wall, whilst Council is pursuing regulatory compliance action relating to the unauthorised works, it has the potential to create an anomalous situation where the proposed dual occupancy and beach storage shed are approved but the supporting structure (seawall) may require rectification.
- Pursuant to the provisions of section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*, it is considered approval of the development application would set an undesirable precedent for similar inappropriate development and is therefore not in the public interest.

Consideration of Community Views

In coming to its decision, the Panel considered written submissions made during public exhibition.

The Panel notes that issues of concern included:

- Visual Impacts and overshadowing
- Unauthorised vegetation removal and Impact on trees
- View loss
- Unauthorised coastal protection works
- Inadequate information to demonstrate adequate engineering solutions
- Non-compliance with DCP and LEP controls
- Vehicular movements and location of carport

The reasons in Councils Assessment report included:

1. 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.
2. 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.
3. The application has failed to demonstrate the proposal meets the requirements of the *Marine Estate Management Act 2014* (s.56(2)) including demonstrating that the proposal will not have unacceptable impacts on the plants or animals of a marine park and their habitat.
4. The proposal fails to adequately consider the characterisation of the development including addressing the unauthorised works resulting in an application which cannot be supported and pursuant to Section 4.16(1)(b) of the EP&A Act, DA 0095/24 is recommended for refusal.
5. The application has failed to demonstrate the proposal meets the requirements of the *Biodiversity Conservation Act 2016* (section 7.3) which requires consideration of whether a proposed development or activity is likely to significantly affect threatened species or ecological communities, or their habitats.
6. The applicant has failed to demonstrate the proposal meets the aims and objectives or considered the environmental impacts of the proposal as required under the provisions of applicable Acts and State Environmental Planning Policies, including *State Environmental Planning Policy (Resilience and Hazards) 2021*, undertaking works without development consent and failing to demonstrate the site is suitable for development in relation to contaminated land.

7. The applicant has failed to demonstrate the proposal meets the aims and objectives or considered the environmental impacts of the proposal as required under the provisions of applicable Acts and State Environmental Planning Policies, including *State Environmental Planning Policy (Biodiversity and Conservation) 2021*, undertaking works without development consent including vegetation and tree removal and failing to demonstrate the site is suitable for development in relation to the potential impacts on biodiversity and the natural environment.
8. The proposal fails to satisfy the relevant aims of the *Eurobodalla Local Environmental Plan 2012*.
9. The proposal fails to satisfy the zone objectives of the R2 Low Density Residential zone of *Eurobodalla Local Environmental Plan 2012*.
10. The proposal fails to demonstrate the proposed building height variation (Proposed building height: 9.114m in a Height of Buildings area of 8.5m (exceeding height limit by 614mm or 7.2%) is compatible with the objectives and provisions of *Eurobodalla Local Environmental Plan 2012* Clause 4.3 Height of Buildings and has failed to demonstrate the variation to the development standard meets the objectives, standards and requirements of Clause 4.6 Exceptions to development standards.
11. The proposal fails to demonstrate the proposal is compatible with the objectives and provisions of *Eurobodalla Local Environmental Plan 2012* including:
 - Clause 2.3 Permissibility and zone objectives
 - Clause 4.3 Height of buildings
 - Clause 4.6 Variation to a development Standard
 - Clause 6.4 Earthworks
 - Clause 6.9 Stormwater management
12. The proposal fails to satisfy the intent or performance criteria for development within the *Residential Zones Development Control Plan* for sections:
 - 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

13. The application has failed to demonstrate the proposal has adequately considered geotechnical constraints and the coastal environment including adequately addressing development on cliff edges, sloping land, slope instability or demonstrating that the proposal will not have unacceptable impacts on the coastal cliff environment.
14. The proposal has failed to demonstrate it will not have an adverse impact on the on adjoining properties and the adjoining coastal environment including the built and natural environment and natural coastal processes including but not limited to vegetation and biodiversity, earthworks and geotechnical stability, stormwater management and disposal, bulk and scale, character, parking, view loss, overshadowing and visual impacts.
15. The proposal 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, cliff and coastline and adjoining properties.
16. The proposal is not in the public interest as it is not suitable for the site, resulting in unacceptable built form, natural, social, economic environmental impacts including impacts on the coastal environment.

The Notice of Determination was issued to the applicant on 14/02/25.

On 16/06/25 the applicant lodged the current application pursuant to Section 8.2 of the Environmental Planning and Assessment Act 1979 (the Act) for the review of SRPP's determination of refusal for DA0095/24.

4. REFERRALS

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 4.

Table 4: Referrals

External Referral Body	Legislation	Comment/Response	Support Y/N
DPI Fisheries	s.56 Marine Estate Management Act 2014	Referral response received. Not in support.	NO
S8.2 REVIEW referral comments: Thank you for your referral seeking comment under s.56 of the <i>Marine Estate Management Act 2014</i> on the proposal to construct a coastal protection work ancillary to a three storey town houses at 217A Beach Road, Denhams Beach. Department of Primary Industries and Regional Development (DPIRD) understands the Regional Planning Panel determined not support the matter of the coastal protection work and the applicant has requested a review by the Panel. DPIRD (Batemans Marine Park) has reviewed new information provided by the applicant to support a review of the Panel's determination. DPIRD (Batemans Marine Park) has not changed our initial advice provided on 23 September 2024 (MEAA24/212). The new advice has not provided: • an assessment of coastal hazards such as coastal erosion and recession • evidence to support the wall not serving as a coastal protection work • grounds for the work not being assessed as a coastal protection work. Section s.56 (2) of the <i>Marine Estate Management Act 2014</i> 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 Council comment: The initial advice provided on 28 September 2024 remains relevant. The initial 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: • <i>Confirmation the scope of works to be assessed in this application includes the boat shed/storage shed.</i> • <i>Diagrams indicating the design and location of the boatshed/storage shed.</i> • <i>Applicants case for determining the purpose of the wall as a retaining wall and not a coastal protection work.</i> <i>Batemans Marine Park has considered the matter of resolving the purpose of the wall and can provide the following advice:</i> • <i>The matter cannot be determined without an assessment of coastal hazards of the site.</i> • <i>Council should consider coastal hazards in making a decision.</i> <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 the relevant Minister before finally determining the application. Batemans Bay Marine Park will consider any advice from Council prior to finalisation of the application.</i>			

Electricity supply authority – Essential Energy	Section 2.48 – <i>State Environmental Planning Policy (Transport and Infrastructure) 2021</i> Development near electrical infrastructure	Details of previous referral remain current. Suitable subject to conditions.	Y
Details of referral: Essential Energy makes the following general comments: • 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.			

Internal Referral Body	Comments	Resolved
Engineering	Council's Engineering Officer reviewed the revised proposal and provided that additional information is required to be provided, providing the following summary: <i>To enable further assessment the application needs to address the following items:</i> 1) <i>Relocation of retaining wall on northern boundary to be a minimum 1.5m from the sewer main and wholly outside of the proposed easement.</i> 2) <i>Provision of swept paths with clearances in accordance with AS/NZS2890.1:2004 demonstrate 3-point turn entry/exit for the parking spaces is achieved.</i> 3) <i>The submitted structural design for the retaining walls and slope protection do not reference the geotechnical report and appears to have been designed independent of geotechnical advice. There is no structural design certification providing certainty that the designs are compliant with the relevant Australian Standards. This lack of integration between key engineering components needs to be addressed.</i> 4) <i>It appears that the constructed retaining wall is significantly higher, approximately 1m, than that required to provide protection from wave impacts. It is to be investigated to determine what design would be required (e.g., single wall) to provide protection from wave impacts and provide bank</i>	NO

	<i>stability, such that appropriate consideration can be given to the unapproved structures.</i>	
Environmental Planner	Councils Environmental Planner reviewed the revised proposal and provided the following comments (in part): <i>It is considered that in its natural state, prior to clearing, this vegetation would have provided important connectivity between remnant patches. It is also likely that native vegetation would have also contributed to bank stability.</i> <i>Without any detailed assessment of native vegetation and biodiversity values prior to emergency works undertaken, it is difficult to comment on whether these works removed only weeds and non-significant vegetation (as stated in letter dated 11 October 2024, PM Anderson), as is reflected in the FFA submitted.</i> <i>Despite any clearing required for emergency protection works, it is considered that native vegetation and biodiversity values on site could have been improved through remediation works rather than further development of the site.</i> <i>The additional works that have been undertaken have resulted in additional impacts, that could have been avoided and a better environmental outcome achieved if the works that have been undertaken did not occur.</i> In relation to specific reports submitted under the Review (REV0011/25) Councils Environmental Planner provided the following comments: The FFA (Waratah Ecology, 12/06/2025): <i>assesses the existing native vegetation potential and biodiversity impacts from the proposed development.</i> <i>does not provide any assessment of biodiversity values or native vegetation that was on site prior to clearing that has been undertaken.</i> <i>concludes the proposal is unlikely to have a significant impact on threatened species, ecological communities or their habitats</i> <i>provides recommendations, including mitigation measures such as remediation works. If development goes ahead, these should be included as conditions of consent to ensure all recommendations are implemented.</i> <i>does not consider the native vegetation that was undertaken prior to clearing that has been undertaken. As such, retrospective approval cannot be granted. Any unlawful clearing would need to be dealt with through compliance action.</i> The Arboricultural Assessment & Report (Arbor Express, 25/02/2025) <i>Provides a visual tree assessment</i> <i>Identifies and assesses 7 trees on site</i> <i>The tree schedule identifies 6 for retention and 1 for removal</i>	NO

	- <i>It is unclear from the report whether the tree assessment includes a review of the trees in relation to the proposed development or that has already occurred. This should be clarified.</i> - <i>According to the architectural plans, there appears to be proposed building works within the TPZs of several trees. According to civil drawings there also appears to be a stormwater line within close proximity to trees.</i> - <i>It should be clarified whether the arboricultural assessment has considered all proposed works, including any that are to be carried out, in accordance with AS4970 "Protection of trees on development sites."</i> - Letter outlining notes from discussion about revegetation (Garden Thum, 21 May 2025) - <i>This letter provides an overview of advice given during discussion about what would be required to revegetate the site.</i> - <i>This should not be taken as a revegetation or rehabilitation plan.</i> - <i>A more comprehensive site rehabilitation and vegetation management plan is warranted, to be prepared by a suitably qualified environmental consultant or ecologist and/or knowledge and experience in bush protection and regeneration.</i> - <i>The FFA (Waratah Ecology, 12/06/2025) also provides recommendations. This should be considered in the preparation of a rehabilitation and vegetation management plan.</i> Planner comment: Additional information is required as nominated above in relation to the submitted information.	
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The application is not subject to a Design Review Panel and does not include integrated development as defined under the Act.

Design Review Panel	CI 28(2)(a) – SEPP 65 Advice of the Design Review Panel ('DRP')	N/A	N/A
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

5. NOTIFICATION & SUBMISSIONS RECEIVED

The proposal was notified in accordance with the Council's Community Participation Plan from 23/6/25 – 16/7/25 as extended = (23 days) i.e. an additional 7 days was added to the initial 14 day notification period in response to an applicants submission. 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 five (5) unique submissions, comprising 5 objections to the proposal.

The issues raised in the submissions objecting to the development include the following:

Table 5: Submissions

Issue	Council Comments
1.SUB0003/26	
- Legal roles of Council and SRPP in respect to the review	The application has been amended under the s8.2 review to include the 'use' of as-built works. As stated in the original SRPP Panel determination for DA0095/24 the SRPP cannot approve construction of as-built works, and therefore the review is submitted seeking consent for as-built works. Concurrent Building Information Certificate (BIC) applications have been lodged.
- The modification of the application in the review is no longer 'substantially the same development'	Council has outlined the reasoning for asserting that the proposed s8.2 review is 'substantially the same' development for the purposes of the s8.2 application as that determined. However, it is noted that this is an assessment report submitted to the SRPP who is the consent authority for this application. The original DA determination by the SRPP identified that the application revised the application during the assessment process to consider the as-built structures.
- What is the ongoing involvement of the Regional Panel and Council, given the attempt to circumvent the Regional Panel by the applicant in the decision-making process through the submission of BICs for the unauthorised works that were previously refused by the Panel.....	The review application is determined by an alternate Regional Planning Panel (differing Panel members) as required by legislation. As stated, the SRPP is the determining authority for this 'use' of as-built works application and associated dual occupancy application. The Building Information Certificates (BIC)s have been submitted concurrently however are considered separately by Council. The s8.2 review application is accompanied by additional specialist reports which

	consider the potential impacts of the as built works. The s8.2 review seeks consent for use of as-built unauthorised works and the use of the works. This application is not supported based on the information submitted. The proposal fails to demonstrate it does not result in substantial environmental impacts. Council is recommending to the SRPP that the application be refused.
2. SUB0004/26	
- Extent of cliff works undertaken along this section of Denhams Beach is not appropriate for the locality and strongly disagree with proposal	Council is recommending to the SRPP that the application be refused for the reasons stated, including significant environmental impacts.
3. SUB0011/26	
- Public availability of enforcement compliance action and transparency	The status of compliance and enforcement action is available via Councils compliance section. The application is under compliance investigation and action.
- Requirement of Panel to consider the environmental impacts associated with the lodged BICs although they can't determine the BICs themselves. BICs are objected to.	The matter of issue of the BICs is considered separately, notwithstanding the 'use' of as built structures is a matter for consideration under this application. The proposal as amended under the s8.2 review is not supported by Council including for numerous non compliances with applicable legislation. The proposal as-built is not considered a suitable response for a site located within a coastal environment.
- Numerous issues have not been addressed in the s8.2 application including: - o beach storage shed - o Building height - o Stormwater - o Visual impact, character and scale - o Vehicle manoeuvring and sewer - o Front setback - o Side setbacks - o Overshadowing - o landscaping	Council is recommending the s8.2 review application result in upholding the original determination and the application be refused which include for the reasons identified in the submission.
- Reasons for refusal remain valid (detailed reasoning provided in attached submission Table)	Council is recommending the s8.2 review application result in upholding the original determination and the application be refused.
- The s8.2 review application has not removed the insufficiency of the application and the reasons for refusal in the refused DA remain valid.	Council is recommending the s8.2 review application result in upholding the original determination and the application be refused.
- Height variation proposed incompatible with LEP	The review application proposes a built form that has been amended below the 8.5m building height limit. Notwithstanding the

	proposal overall does not meet the aims of the LEP or zone objectives, or other relevant sections of the LEP.
- Numerous non compliances with DCP including front and side setbacks	An assessment of the proposal identifies non compliant building setbacks across the site. These variations to required controls are not supported.
- It will be the only 3 storey development along the cliff	A full analysis of the cliff development has not been undertaken in relation to the extent of 3 storey development along this section of Denhams Beach, however it is considered the proposal does not provide a built form that can be supported in consideration of potential environmental impacts and non-compliance with legislation.
- does not conserve the character and environmental quality of the area enjoyed by residents of and visitors to the Eurobodalla; - does not ensure that the design will improve the quality of the built environment and is of a scale that complements the local character; - does not protect the visual amenity by reserving the prominent ridgeline; and - is not consistent with the height , bulk and scale of the existing development and streetscape.	The proposal as amended under the s8.2 review is recommended for refusal. It is not considered compatible with the streetscape, streetscape setbacks or coastal cliff environment.
- Sewer easement not compatible with proposal	Council engineers are not in support of the proposal.
- Overdevelopment of the site	The proposal does not meet legislative requirements in relation to development requirements including built form, natural and built form impacts including for development located on the cliff and coastal area. The application as amended under s8.2 is recommended for refusal.
4. SUB0012/26	
- Unauthorised and destructive works undertaken without consent have resulted in significant impacts.	The s8.2 application has failed to demonstrate the use of
- Works should be removed and the full cliff area rehabilitated.	
- Original submission against application is still valid and attached – visual impacts; unauthorised vegetation removal; engineering design and coastal impacts	
Included in submission - Drone photograph illustrating context in relation to neighbouring development:	



***Figure 1. Drone image looking west towards the subject site & foreshore
(Source: Edmiston Jones)***

5. SUB00013/26	
- Should be refused for the original reasons of the determination by the Panel.	Council is not in support of the proposal as is recommending the SRPP refuse the s8.2 review application for the reasons stated in the original determination.

6. STATUTORY CONSIDERATIONS

Section 8.2 – Review of Determination

Subclause (1) (a) of Clause 8.2 Determination and decisions subject to review of the EP&A Act states the following:

(1) The following determinations or decisions of a consent authority under Part 4 are subject to review under this Division—

- (a) the determination of an application for development consent by a council, by a local planning panel, by a Sydney district or regional planning panel or by any person acting as delegate of the Minister (other than the Independent Planning Commission or the Planning Secretary),*
- (b) the determination of an application for the modification of a development consent by a council, by a local planning panel, by a Sydney district or regional planning panel or by any person acting as delegate of the Minister (other than the Independent Planning Commission or the Planning Secretary),*
- (c) the decision of a council to reject and not determine an application for development consent.*

Comment: This application is being referred back to SRPP for determination.

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

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

- 8) *The review of a determination or decision made by the Independent Planning Commission is also to be conducted by the Commission.*
- 9) *The review of a determination or decision made by a delegate of the Minister (other than the Independent Planning Commission) is to be conducted by the Independent Planning Commission or by another delegate of the Minister who is not subordinate to the delegate who made the determination or decision.*

Pursuant to Section 8.2 of the Act, the applicant seeks a review of all aspects of the refusal of DA 0095/24.

Section 8.2 of the Environmental Planning and Assessment Act, 1979 allows an applicant to request a review of determination of a decision of a consent authority under Part 4. Section 8.3 requires that any determination or decision cannot be reviewed after the period within which any appeal may be made to the Court has expired if no appeal was made.

In this regard the review period ends on 13 August 2025 and the decision must be finalised before this date.

The review of determination made by a Sydney district or regional planning panel is also to be conducted by the panel. In this instance, as the original determination was made by the Southern Regional Planning Panel, therefore the Section 8.2 review is referred to the Southern Regional Planning Panel for consideration and determination and will be determined by the SRPP comprised of different members than the original determination SRPP.

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

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

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

In *Moto Projects [No.2] Pty Limited v North Sydney Council* (1999) NSWLEC 280, Bignold J stated that for a Section 96 (now a s4.55) to be successful the modified development must be "essentially or materially the same as the (currently) approved development". In this regard he commented that the comparative task involves "an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted)".

As permitted under Section 8.3 (3) of the Act, the applicant has amended the proposed development from the original application. The key changes include a reduction in building height (to comply with the maximum height of buildings of 8.5m), deletion of storage shed, and provision of additional specialist reports including advice regarding coastal engineering works, wave forces and flora and fauna and biodiversity.

In considering whether the application as amended is substantially the same the following points are made:

- The built form of the dual occupancy is found to be substantially the same (i.e. built form and design, building footprint, comparable numeric data (4bed/3 storey), reduced building height (reduction under 8.5m), amendments to built form. It is noted the original built form including the front building setbacks and building design was not supported by Council, and this aspect of the development appears to be substantially the same.
- The retaining walls/sea walls and development with the cliff area was considered under the determination for DA 0095/24 with the proposal described by the SRPP as *'the Applicant: Now considers the seawall/retaining wall is clearly for the purpose of cliff stability but given its location is most appropriately identified as coastal protection works within the meaning of Section 27 of the Coastal Management Act.'*
- The amended proposal subject to review, while removing the words 'coastal protection works' from the proposed description of the development, is acknowledged in the application in the submitted cover letter as consisting of 'coastal protection works' with the comment provided:

*Canplay Pty Ltd now understand that while the retaining wall is clearly for the purpose of cliff stability, due to its location adjacent to tidal waters, **it would most appropriately be characterised as "coastal protection works"** and ought to have been constructed with the prior consent of the Panel, or via lodgement of an earlier BIC adjacent to the DA. A separate BIC has now been sought from Council for the retaining walls constructed at the base of the cliff and in this DA, Canplay Pty Ltd seeks approval for the use of the retaining walls.*

A consideration of whether the development is substantially the same should focus on whether there are sufficient similarities to reasonably conclude the development is substantially the same.

A review of the original and amended documentation has found that the proposal which consists of between the original application and the amended application:

- **Original application:** *an attached dual occupancy, relocation of sewer main including coastal and environmental cliff works, beach storage shed and retaining walls*
- **s8.2 review:** *an attached dual occupancy, relocation of sewer main ~~including coastal and environmental cliff works, beach storage shed~~ and landscaping works and use of the environmental protection works and use of reconstructed stairs and pathway and use of retaining walls at the base of the cliff*

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

Note: Council do not agree that environmental protection works include the geotechnical stabilisation works such as rock bolts, rock anchors or stabilising cable.

Assessment of the Reason for Refusal by Southern Regional Planning Panel

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

The applicant has amended the proposal and has provided additional information.

Consequently, the Reasons for Refusal of DA 0095/24 that are stipulated in the Notice of Determination are examined below to determine if they remain applicable or should be overturned:

- For the reasons outlined in the Council's assessment report.

Comment:

It is considered that the reasons for refusal as listed below remain applicable.

The revised application fails to adequately address the potential environmental impacts of the proposal including adequately addressing development on cliff edges, sloping land, slope instability or demonstrating that the proposal will not have unacceptable impacts on the coastal cliff environment. The dual occupancy component of the development cannot be considered in its own right, having a clear interrelationship between the cliff stability works and any proposed structures as stated in the original determination '*The Panel is of the view there is a clear interrelationship between the stability and integrity of the seawall/retaining wall and the construction of the beach storage shed and the dual occupancy*'.

Reasons for refusal (Point 1):

<u>Reason for refusal</u>
1. The proposal fails to demonstrate it has considered the objects of the <i>Environmental Planning Act 1979</i> to facilitate ecologically sustainable development, promote the orderly and economic use of the land or promote good design and amenity of the built environment.
2. The application has failed to demonstrate the proposal meets the requirements of the <i>Coastal Management Act 2016</i> (cl. 27) which provides that development consent <u>must not be granted</u> to development for the purpose of <i>coastal protection works</i> , 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.
3. The application has failed to demonstrate the proposal meets the requirements of the <i>Marine Estate Management Act 2014</i> (s.56(2)) including demonstrating that the proposal will not have unacceptable impacts on the plants or animals of a marine park and their habitat.
4. The proposal fails to adequately consider the characterisation of the development including addressing the unauthorised works resulting in an application which cannot be supported and pursuant to Section 4.16(1)(b) of the EP&A Act, DA 0095/24 is recommended for refusal.
5. The application has failed to demonstrate the proposal meets the requirements of the <i>Biodiversity Conservation Act 2016</i> (section 7.3) which requires consideration of whether a proposed development or activity is likely to significantly affect threatened species or ecological communities, or their habitats.
6. The applicant has failed to demonstrate the proposal meets the aims and objectives or considered the environmental impacts of the proposal as required under the provisions of applicable Acts and State Environmental Planning Policies, including <i>State Environmental Planning Policy (Resilience and Hazards) 2021</i> , undertaking works without development consent and failing to demonstrate the site is suitable for development in relation to contaminated land.
7. The applicant has failed to demonstrate the proposal meets the aims and objectives or considered the environmental impacts of the proposal as required under the provisions of applicable Acts and State Environmental Planning Policies, including <i>State Environmental Planning Policy (Biodiversity and Conservation) 2021</i> , undertaking works without development consent including vegetation and tree removal and failing to demonstrate the site is suitable for development in relation to the potential impacts on biodiversity and the natural environment.
8. The proposal fails to satisfy the relevant aims of the <i>Eurobodalla Local Environmental Plan 2012</i> .
9. The proposal fails to satisfy the zone objectives of the R2 Low Density Residential zone of <i>Eurobodalla Local Environmental Plan 2012</i> .
10. The proposal fails to demonstrate the proposed building height variation (Proposed building height: 9.114m in a Height of Buildings area of 8.5m (exceeding height limit by 614mm or 7.2%) is compatible with the objectives and provisions of <i>Eurobodalla Local Environmental Plan 2012</i> Clause 4.3 Height of Buildings and has failed to demonstrate the variation to the

development standard meets the objectives, standards and requirements of Clause 4.6 Exceptions to development standards.
11. The proposal fails to demonstrate the proposal is compatible with the objectives and provisions of <i>Eurobodalla Local Environmental Plan 2012</i> including: - <i>Clause 2.3 Permissibility and zone objectives</i> - <i>Clause 4.3 Height of buildings</i> - <i>Clause 4.6 Variation to a development Standard</i> - <i>Clause 6.4 Earthworks</i> - <i>Clause 6.9 Stormwater management</i>
12. The proposal fails to satisfy the intent or performance criteria for development within the <i>Residential Zones Development Control Plan</i> for sections: - <i>2.1 Siting</i> - <i>2.2 Setbacks</i> - <i>2.3 Garages, Carports & Sheds</i> - <i>2.5 Landscaping</i> - <i>2.6 Parking and Access</i> - <i>2.8 Views</i> - <i>4.1 Bulk and Scale</i> - <i>4.2 Street Frontage and Façade Treatment</i> - <i>4.3 Style and Visual Amenity</i> - <i>5.1 Visual Privacy</i> - <i>5.2 Solar Access</i> - <i>6.2 Tree Preservation</i> - <i>6.3 Biodiversity</i> - <i>7.2 Earthworks</i> - <i>7.3 Stormwater Management</i> - <i>7.5 Waste</i>
13. The application has failed to demonstrate the proposal has adequately considered geotechnical constraints and the coastal environment including adequately addressing development on cliff edges, sloping land, slope instability or demonstrating that the proposal will not have unacceptable impacts on the coastal cliff environment.
14. The proposal has failed to demonstrate it will not have an adverse impact on the on adjoining properties and the adjoining coastal environment including the built and natural environment and natural coastal processes including but not limited to vegetation and biodiversity, earthworks and geotechnical stability, stormwater management and disposal, bulk and scale, character, parking, view loss, overshadowing and visual impacts.
15. The proposal 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, cliff and coastline and adjoining properties.
16. The proposal is not in the public interest as it is not suitable for the site, resulting in unacceptable built form, natural, social, economic environmental impacts including impacts on the coastal environment.

Public Interest

It is considered that the reasons for refusal in relation to public interest remain applicable. Five (5) submissions were received in relation to the revised proposal.

Reasons for refusal (Points 2 – 5):

- Given there is insufficient information (as required by section 27(1)(b) of the *Coastal Management Act 2016*) to enable the Panel to be satisfied that the proposal includes satisfactory arrangements for the life of the seawall/retaining wall (being either maintenance or for restoration of the beach or land adjacent).

- Given there is insufficient information (as required by section 27(1)(b) of the *Coastal Management Act 2016*) regarding the structural integrity of the seawall/retaining wall noting that the structure is inextricably linked to the integrity of the proposed beach storage shed and dual occupancy and could pose, a threat to public safety.

- Had the Panel been of a mind to approve the development application, including the use of the seawall/retaining wall, whilst Council is pursuing regulatory compliance action relating to the unauthorised works, it has the potential to create an anomalous situation where the proposed dual occupancy and beach storage shed are approved but the supporting structure (seawall) may require rectification.

- Pursuant to the provisions of section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*, it is considered approval of the development application would set an undesirable precedent for similar inappropriate development and is therefore not in the public interest.

Comment:

It is considered that the reasons for refusal in relation to all of the matters listed remain applicable. The s8.2 review application fails to demonstrate the proposal meets the requirements of the Coastal Management Act has adequately considered the construction of the retaining walls/seawall and impacts on the coastal environment, has not reduced the front setbacks or built form of the dual occupancy development, adequately considered environmental impacts and additional matters remain outstanding in relation to impacts on the marine estate, vegetation and biodiversity and contamination remain applicable.

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 6 and considered in more detail below.

Table 6: 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 Comment: 8.2 Review. <i>This matter remains unchanged under the review. Comment as per DA0095-24.</i>	No
BASIX SEPP	No compliance issues identified subject to imposition of conditions on any consent granted. Comment: 8.2 Review. <i>This matter remains unchanged under the review. Comment as per DA0095-24.</i>	No
State Environmental Planning Policy (Planning Systems) 2021	Chapter 2: State and Regional Development • Section 2.19(1) declares the proposal regionally significant development pursuant to Clause 8A of Schedule 6 as it comprises Coastal Protection Works Comment: 8.2 Review. <i>This matter remains unchanged under the review. Comment as per DA0095-24. Refer additional comments in report regarding 'substantially the same development'.</i>	This policy applies
SEPP (Resilience & Hazards)	Chapter 2: Coastal Management • Section 2.10(1) & (2) - Development on land within the coastal environment area	No

EPI	Matters for Consideration	Comply (Y/N)
	- 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. Comment: 8.2 Review. <i>This matter remains unchanged under the review. Comment as per DA0095-24.</i> Chapter 4: Remediation of Land - Section 4.6 - Contamination and remediation has been considered in the Contamination Report – not satisfactory (works have commenced on site). Comment: 8.2 Review. <i>This matter remains unchanged under the review. Comment as per DA0095-24.</i>	
State Environmental Planning Policy (Transport and Infrastructure) 2021	Chapter 2: Infrastructure 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. Comment: 8.2 Review. <i>This matter remains unchanged under the review. Comment as per DA0095-24.</i>	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 3. The proposed development does not involve any advertising or signage structures. Comment: 8.2 Review. <i>This matter remains unchanged under the review. Comment as per DA0095-24.</i>	N/A
State Environmental Planning Policy (Housing) 2021	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. 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. Comment: 8.2 Review. <i>This matter remains unchanged under the review. Comment as per DA0095-24.</i>	N/A

EPI	Matters for Consideration	Comply (Y/N)
State Environmental Planning Policy (Primary Production) 2021	Residential zoned land. No rural uses proposed. Comment: 8.2 Review. <i>This matter remains unchanged under the review. Comment as per DA0095-24.</i>	N/A
State Environmental Planning Policy (Resources and Energy) 2021	Chapter 2 – Mining, Petroleum Production and Extractive Industries The proposed development does not result in any detrimental impact to Mining, petroleum production or extractive industries. Comment: 8.2 Review. <i>This matter remains unchanged under the review. Comment as per DA0095-24.</i>	N/A
Proposed Instruments	No relevant proposed instruments identified. Comment: 8.2 Review. <i>This matter remains unchanged under the review. Comment as per DA0095-24.</i>	N/A
LEP	• 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 Comment: 8.2 Review. <i>This matter remains unchanged under the review. Comment as per DA0095-24.</i>	No
DCP	Eurobodalla Residential Zones Development Control Plan Comment: 8.2 Review. <i>This matter remains unchanged under the review. Comment as per DA0095-24.</i>	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 site contains existing vegetation mapped as 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). [Refer Figure 8 and 9.](#)

DA0095-24 – 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 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.

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

There was 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 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.

Section 8.2 (Rev0011/25) Review documents – refer to Councils Environmental Planner comments. Additional information required. The application based on submission of additional review documents is not supported.

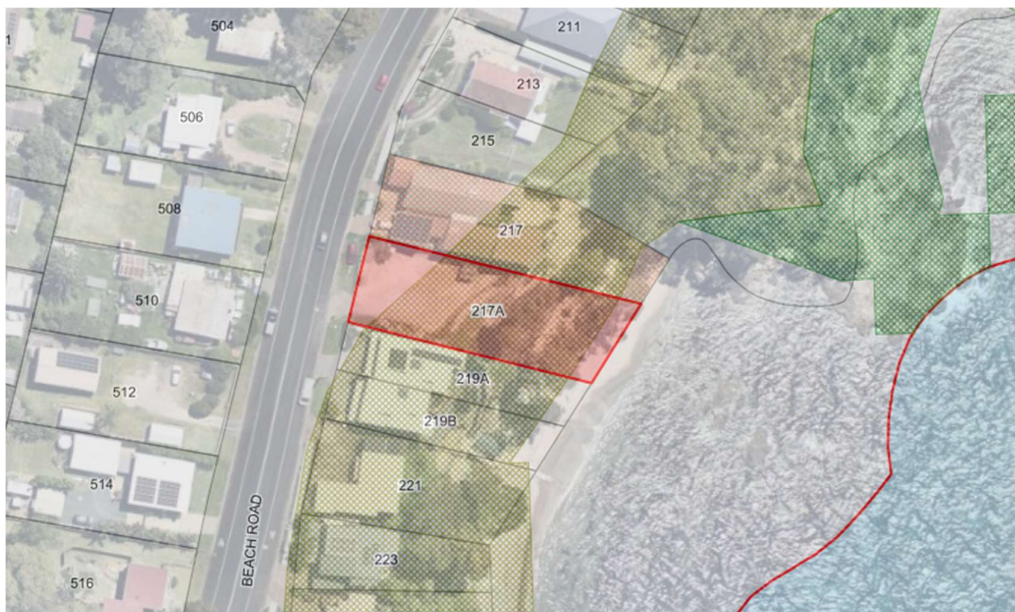


Figure 8: Council vegetation mapping / aerial photograph



Figure 9: A site photo from 3/12/24 showing as-built works

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. No 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.

Section 8.2 (Rev0011/25) Review documents - the application has been amended to remove the lower ground floor of being capable of separate occupation, allowing for a dual occupancy development consistent with the BASIX development description.

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.

Section 8.2 (Rev0011/25) Review documents – The application has removed the term ‘coastal protection works’ from the description of development, however Council is of the opinion the as-built works constructed consist of ‘coastal protection works’ as defined under the *Coastal Management Act 2016*, providing for works to reduce the impact of coastal hazards.

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.*

Section 8.2 (Rev0011/25) Review documents - 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.

The lodged section 8.2 documents for the as-built works including retaining walls/sea walls which have been constructed without consent have not provided a clear connection between the geotechnical requirements and the proposed structural design (refer Council engineer referral comments). It is considered additional information is required. 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 section 8.2 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 and that the response provided (as-built structures) provide a suitable response in the context of the coastal environment.

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 (s8.2 review documents) and advised the revised proposal has failed to provide sufficient information to demonstrate the proposal will not have an unacceptable impact on the Marine Park including marine biological diversity and marine habitats.

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.

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 which includes the use of as-built works, however additional documentation has been submitted which identifies the as-built works that have been undertaken without consent have contributed to the requirement for additional trees to be removed due to instability. It is considered that insufficient information has been provided to justify the current s8.2 proposal (which includes the use of as-built works) in relation to retaining walls (location, height, bulk, scale and footprint), bank and cliff works and vegetation removal.

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. The section 8.2 application has addressed vegetation removal and revegetation. Additional information is required in relation to impacts on the scenic quality of the area. Additional information is required 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 built form of the dual occupancy has been amended under the section 8.2 application to provide a height of building that meets the 8.5m maximum building height requirement however has not address the built form and bulk and scale in terms of the front setback and context of the streetscape and has not demonstrated it is of a suitable bulk, scale and size in relation to coastal residential development in the area. However, the dual occupancy development is intrinsically linked to the cliff stabilisation works and any geotechnical cliff stabilisation works and coastal protection works should be resolved prior to any additional cliff-top works being constructed on site.

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 for which this s8.2 review application seeks consent. 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 section 8.2 application has provided additional information to address the retaining wall works. It is considered that the works undertaken are 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.

DA0095-24 - 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 and 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

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

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:

Section 8.2 (Rev0011/25) Review documents – Works commenced on site prior to development consent being granted. 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 had 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).

No revised Contamination Report or evidence that imported materials meet VENM requirements has been provided under the s8.2 review and therefore 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.

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 under DA0095-24 and no objection was provided.

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,*

(a) *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,*

- (b) 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,*
- (c) 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,*
- (d) to restrict development of land that is subject to flooding, coastline hazard, bush fires and land slip,*
- (e) 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 section 8.2 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.

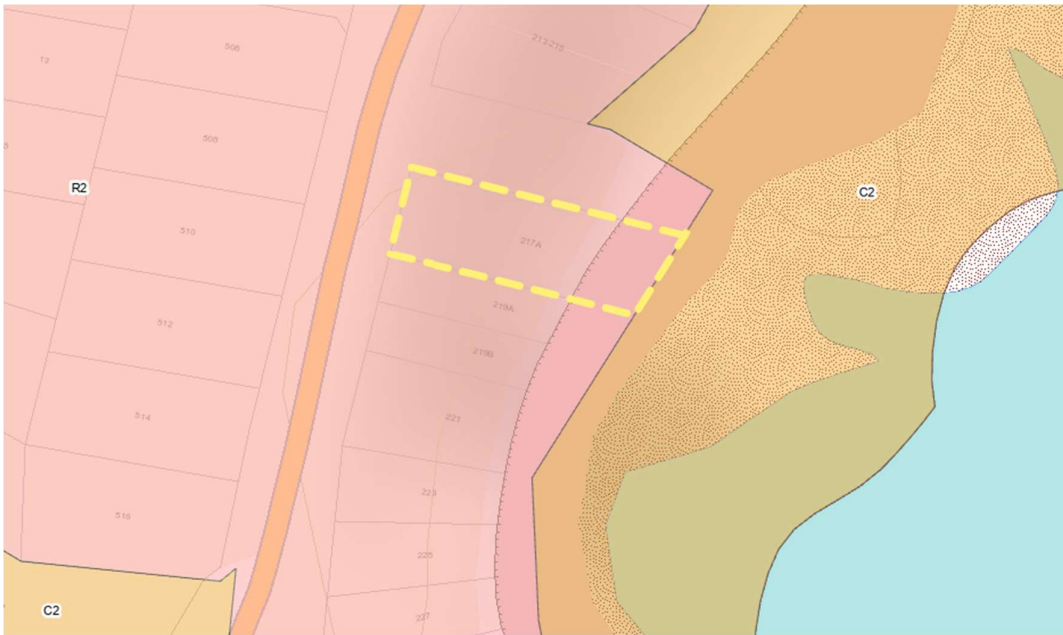


Figure 10: Zoning Map (NSW Planning Portal)

According to the definitions in Clause 4 (contained in the Dictionary), the proposal is best categorised as including a *dual occupancy* and ancillary works, *environmental protection works* and *coastal 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.

Section 8.2 (Rev0011/25) Review documents – The revised 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.

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, 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 s8.2 application has not lodged an amended Statement of Environmental Effects and relies on the 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. The revised proposal clarifies that the lower ground floor of the proposed dual occupancy is not capable of separate occupation.

DA0095-24 - 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'.

Section 8.2 (Rev0011/25) Review documents – The SRPP in making its determination provided the following statement in relation to coastal protection works:

- The Applicant:
 - Now considers the seawall/retaining wall is clearly for the purpose of cliff stability but given its location is most appropriately identified as coastal protection works within the meaning of Section 27 of the *Coastal Management Act*.
 - Is seeking consent for the use of the seawall/retaining wall noting the Panel cannot retrospectively approve the construction of the already built seawall/retaining.
 - Has agreed to prepare a report addressing the impacts (if any) of the seawall/retaining wall on coastal processes and adjoining properties.
 - Has decided to amend the application to remove the small section of the roof over the deck that exceeds the relevant height limit although the Applicant has not sought to formerly amend the development application under Section 37 of the *Environmental Planning and Assessment Regulation 2021*.

The revised s8.2 review documents has not nominated *coastal protection works* as being sought under the application. The s8.2 application has removed the term 'coastal protection works' from the description of development, however Council is of the opinion the as-built works constructed consist of 'coastal protection works' as defined under the *Coastal Management Act 2016*. The review application while not listing the proposed works as including 'coastal protection works' has acknowledged in the submitted covering letter that they *'now understand that while the retaining wall is clearly for the purpose of cliff stability, due to its location adjacent to tidal waters, it would most appropriately be characterised as "coastal protection works" and ought to have been constructed with the prior consent of the Panel'*.

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 s8.2 review documentation has not demonstrated that the proposal is consistent with the zone objectives of the R2 zone. It is considered that a dual occupancy development cannot be approved on the site due to the extent of works undertaken in the eastern half of the property (cliff area) 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.

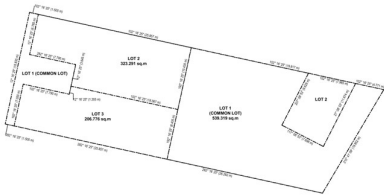
The application fails to demonstrate the suitability of the site for the development in terms of providing for development in a manner that has considered the aims of the zone including provision of residential housing that adequately considers the potential environmental impacts.

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 summarised below.

The proposal under the s8.2 review has been redesigned to comply with Clause 4.3 Height of Buildings and a Clause 4.6 is not required for the revised proposal. The s8.2 proposed development fails to meet the standard/s in Part 4 of the LEP.

Table 7: Consideration of the LEP Controls

Clause	Comment – DA0095-24	S8.2 review - Compliance
Minimum subdivision Lot size (CI 4.1)	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. 	No change. The application would be subject to consent conditions were this application be recommended for approval in relation to access/use of allotments.
Height of buildings (CI 4.3(2))	Does not comply. Required: 8.5m Proposed height: 9.114m Variation of 7.2%. The height of building variation is not supported. Refer discussion in this report.	Yes. Complies. Overall building height Amended to comply. Required: 8.5m Proposed height: 8.48m (RL33.049m AHD above RL24.568m AHD)
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.	Yes. Complies. No variation sought.
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	Does not comply.	No

(CI 6.4)	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.	s8.2 review – the application has not demonstrated it meets cl.6.4 requirements.
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)	Does not comply. 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	No s8.2 review – the application has not demonstrated it meets cl.6.4 requirements.

	negatively impact on downstream properties (clause 6.9(3)) and therefore is recommended for refusal.	
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The proposal is considered to be inconsistent with the LEP.

Clause 4.6 Request

Section 8.2 (Rev0011/25) Review documents – no clause 4.6 required. The proposed development has been modified to provide a height of building below the 8.5m height requirement.

- ***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.

- ***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 (as reviewed under the s8.2 review) which identify the proposal is not suitable and does not meet legislative requirements. Refer referrals section of this report.

- ***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. Inadequate information has been lodged with the application (as reviewed under the s8.2 review) to demonstrate the application is suitable as proposed.

(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 B.

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 (as reviewed under the s8.2 review) 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. The application (s8.2 review) has been lodged concurrently with Building Information Certificate (BIC) applications.

6.1 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 s8.2 review documents have not demonstrated the proposal will not have unacceptable environmental outcomes. 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 s8.2 review documents have not demonstrated the proposal will not have unacceptable environmental outcomes. The proposed development fails to demonstrate it will not have a significant adverse impact on the built environment. The s8.2 proposal has reduced the height of building to meet the building height limit however continues to propose a building that projects beyond the cliff top of bank, adverse overshadowing impacts, bulk and scale (minimal front building setbacks and built form) 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 of the coastal environment.

- **Context and setting –**
Unacceptable - The s8.2 review documents have not demonstrated the proposal will not have unacceptable environmental outcomes. 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 s8.2 review documents have not demonstrated the proposal will not have unacceptable environmental outcomes. The proposed dual occupancy provides 2 x off street car parking for each proposed dwelling. The s8.2 review documents do not meet legislative requirements. Carports forward of building with terracing and multi-purpose room above, plans do not provide the required front setback for carport/terrace. Entry to the eastern side parking spaces multi-point turn, when combined with exit manoeuvre will result in 5-point turn for entry/exit, which is not supported, as there is an increased likelihood that the spaces will not be utilised and vehicles will instead use on-street options. Swept paths are required to be provided that include clearances as per AS/NZS2890.1:2004.
- **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 - The s8.2 review documents have not demonstrated the proposal will not have unacceptable environmental outcomes. utilities are available at the site. Essential Energy provided no objection subject to recommendations. Council's engineers have identified additional information is required to be provided to demonstrate the proposal will not unacceptably impact on infrastructure.
- **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 s8.2 review documents have not demonstrated the proposal will not have unacceptable environmental outcomes. 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). A revised contamination report has not been submitted in support of the s8.2 review application and it is evident that imported soil materials have been placed on site including within the as-built retaining wall structures.
- **Flora and fauna impacts –**
Unacceptable - The s8.2 review documents have not demonstrated the proposal will not have unacceptable environmental outcomes. The site contains mapped areas of native vegetation and the application fails to demonstrate the proposal will not have unacceptable impacts on biodiversity. Council's Environmental Planner has reviewed the proposal and identified additional information is required. The revised documentation identifies that the cliff works have resulted in a requirement for an additional 2 x mature trees to be removed due to instability. The lodged reports and revegetation plans are not supported in their current form.

- **Natural environment –**
Unacceptable - The s8.2 review documents have not demonstrated the proposal will not have unacceptable environmental outcomes. The proposal fails to demonstrate that it is acceptable in relation to impacts on the natural environment. The as-built unauthorised works have resulted in 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 - The s8.2 review documents have not demonstrated the proposal will not have unacceptable environmental outcomes. The site is affected by natural hazards that result from coastal processes. Additional information is required to be provided to address potential impacts on the environment.
- **Safety, security and crime prevention** – CPTED Principles can be implemented into the design of the development subject to conditions in relation to future building works. Further information is required to demonstrate the proposal 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 s8.2 review documents have not demonstrated the proposal will not have unacceptable environmental outcomes. 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 has not adequately addressed legislative requirements in relation to earthworks, coastal cliff stabilisation works/ coastal works, built form, site design, amenity impacts and environmental management.
- **Construction** –the potential impacts from as-built construction have not been adequately mitigated. Any future works could 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 impacts.

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

6.2 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 originally outlined by the Southern Regional Planning Panel. 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.

Council's Engineering Officer has reviewed the submitted documentation including specialist engineering reports and identified deficiencies in the documentation including 'The submitted structural design for the retaining walls and slope protection do not reference the geotechnical report and appears to have been designed independent of geotechnical advice. There is no structural design certification providing certainty that the designs are compliant with the relevant Australian Standards. This lack of integration between key engineering components needs to be addressed'.

The submitted documentation identifies the constructed retaining wall is significantly higher, approximately 1m, than that required to provide protection from wave impacts. Further investigation is required to determine what design would be required (e.g., single wall) to provide protection from wave impacts and provide bank stability.

In relation to planning matters and provision of a suitable built form in relation to the cliff works, it appears from the submitted documents that retaining walls are required for cliff stability (upslope stabilisation) and to protect against coastal hazards (erosion, wind and wave effects). It is clear that the proposal as-built is not a suitable response to the coastal location, is incompatible with the context and character of the coastal area, that it has been constructed higher than required and that a proposal that considers cliff stability and coastal protection works in isolation from any proposed cliff-top built form should be considered in the first instance i.e. what response to provision of coastal protection works/cliff stabilisation works would have been designed were the works not constructed to provide an elevated platform/deck for a dual occupancy? What extent of works is required to the minimum extent necessary to provide for bank stabilisation and coastal hazards?

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 provides for suitable development within a coastal environment that will not have an adverse impact on built and natural environment and natural coastal processes.

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

The submissions are considered in Section 5 of this report.

6.4 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 as-built works are suitable in the coastal environment, provide an potential impacts can be managed and mitigated during construction as significant cliff and coastal works have been undertaken without development consent and specialist reports provided require 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.

7. CONCLUSION

This Section 8.2 Review Application has been assessed having regard to the reasons for refusal and the previous assessment in relation to Section 4.15 of the *Environmental Planning and Assessment Act 1979*, *Coastal Management Act 2016*, *State Environmental Planning Policy (Resilience and Hazards) 2021*, *State Environmental Planning Policy (Biodiversity and Conservation) 2021* the *Eurobodalla Local Environmental Plan 2012* and the relevant codes and policies of Council. This assessment has taken into consideration the revised plans, cover letter, other documentation supporting the application and public submissions.

The initial application under DA0095-24 included unauthorised works associated with substantial retaining walls, filled earthen platform areas and associated steps, walkways and structures are not supported. These were not consistent with the setbacks associated with neighbouring developments along this section of coastline and were not 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.

The design for the retaining walls which included coastal protection works was not supported based on the 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. The proposal was identified as requiring 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.

As permitted under Section 8.3 (3) of the Act, the applicant has amended the proposed development from the original application.

The key changes include:

- Use of as-built works including removal of the term 'coastal protection works' from the description of development for which consent is being sought
- Submission of additional specialist reports - engineering; wave action and coastal engineering works; flora and fauna assessment and arborist reports;
- Revised plans (minor built form amendments)
- Tree removal (2 x tree removal)

The application has been amended to seek consent for a dual occupancy and the use of as-built works including retaining walls and engineering works. The application has removed the term 'coastal protection works' from the description of development, however Council is of the opinion the as-built works constructed consist of 'coastal protection works' as defined under the *Coastal Management Act 2016*. The review application while not listing the proposed works as including 'coastal protection works' has acknowledged in the submitted covering letter that they *'now understand that while the retaining wall is clearly for the purpose of cliff stability, due to its location adjacent to tidal waters, it would most appropriately be characterised as "coastal protection works" and ought to have been constructed with the prior consent of the Panel'*.

For this reason, as per Section 8.3 (3) of the Act, the revised application notwithstanding removal of the beach storage shed from the application, it is concluded the proposal as revised is substantially the same development.

It should be noted that the review application is not accompanied by a revised Statement of Environmental Effects, provides inconsistent documentation in relation to as-built works

(survey plan RLs/submitted plans and documents) and requires further information be submitted in relation to environmental impacts (biodiversity, coastal hazards and coastal impacts including coastal protection works), impacts on marine park, impacts on biodiversity and contamination.

Five (5) submissions were received in response to the notification of the current application, objecting to the development.

The site is located in the R2 - Low Density Residential zone pursuant to Clause 2.2 of the *Eurobodalla Local Environmental Plan 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 s8.2 review application has not adequately addressed the environmental impacts for a development that is considered incompatible with the coastal environment.

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* under DA0094/24 raised no objections. A referral undertaken to Department of Primary Industries (Fisheries) Marine Parks under s.56 of the *Marine Estate Management Act 2014* as per s8.2 review in relation to potential environmental impacts within marine parks, marine biological diversity and marine habitats and DPI Fisheries has identified the s8.2 review proposal has failed to address potential impacts.

Jurisdictional prerequisites to the granting of consent subject to the following controls have not been satisfied, and therefore this s8.2 review 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 6.4 of *Eurobodalla Local Environmental Plan 2012* relating to development that proposes earthworks
- 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*.

Accordingly, the revised proposal cannot be supported upon review as the proposal fails to satisfy the fundamental planning controls applying to this site and this type of development.

The amendments to the proposal and new documentation have attempted to resolve the potential impacts of the as-built works on the coastal environment and amend the dual occupancy built form to address the character and site suitability issues forming the basis of the reasons for refusal of the Development Application. Concurrent Building Information Certificates (BICs) have been lodged with the application.

However, the critical concerns relating to the cliff geotechnical stabilisation works (retaining walls/seawall 'coastal protection works') to reduce the impacts of coastal hazards of the dual occupancy and associated works and the fact that the proposal, despite the amendments, is not consistent nor compatible with the context of the site and the elements that make up the existing and desired future character of the site located within the coastal environment have not been adequately addressed.

This remains as the primary concern with regards to the proposed development on this site and its suitability and appropriateness. It is considered a more suitable proposal (reduced retaining wall height/s, location and footprint, materials and landscaping) at the cliff base and cliff toe area could be provided of a scale and context that meets requirements for coastal protection works while considering the potential coastal environmental impacts (as required under applicable Acts and SEPPs). This would require demolition works be undertaken to provide a development that was consistent with the existing and developing character of development along this section of Denhams Beach.

The site is considered neither suitable nor appropriate for the as-built works within a coastal environment. Any building works including a dual occupancy development is inextricably linked to the structural integrity of the sea wall/cliff stabilisation works and building works on

the cliff top are not considered capable of being recommended for approval until the geotechnical cliff stabilisation works 'coastal protection works' that address coastal hazards in a manner that is suitable for the coastal environment have been adequately addressed.

Accordingly, the recommendation is that SRPP maintain its original reasons for refusal in the determination of this application.

8. RECOMMENDATION - REFUSAL

That the SRPP, as the consent authority pursuant to Clause 4.16(1) (a) of the EP&A Act 1979 amended), confirm its decision to refuse to grant consent to the Review of Determination No DA0095-24 for an *attached dual occupancy, relocation of sewer main including coastal and environmental cliff works, beach storage shed and retaining walls* at Lot 2 DP 773132, No. 217A Beach Road, Denhams Beach, subject to the following reasons for refusal, which remain the same as the original refusal:

Given the circumstances of the case, the Panel ultimately determined to refuse the application:

- For the reasons outlined in the Council's assessment report.
- Given there is insufficient information (as required by section 27(1)(b) of the *Coastal Management Act 2016*) to enable the Panel to be satisfied that the proposal includes satisfactory arrangements for the life of the seawall/retaining wall (being either maintenance or for restoration of the beach or land adjacent).
- Given there is insufficient information (as required by section 27(1)(b) of the *Coastal Management Act 2016*) regarding the structural integrity of the seawall/retaining wall noting that the structure is inextricably linked to the integrity of the proposed beach storage shed and dual occupancy and could pose, a threat to public safety.
- Had the Panel been of a mind to approve the development application, including the use of the seawall/retaining wall, whilst Council is pursuing regulatory compliance action relating to the unauthorised works, it has the potential to create an anomalous situation where the proposed dual occupancy and beach storage shed are approved but the supporting structure (seawall) may require rectification.
- Pursuant to the provisions of section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*, it is considered approval of the development application would set an undesirable precedent for similar inappropriate development and is therefore not in the public interest.

Consideration of Community Views

In coming to its decision, the Panel considered written submissions made during public exhibition.

The Panel notes that issues of concern included:

- Visual Impacts and overshadowing
- Unauthorised vegetation removal and Impact on trees
- View loss
- Unauthorised coastal protection works
- Inadequate information to demonstrate adequate engineering solutions
- Non-compliance with DCP and LEP controls
- Vehicular movements and location of carport