

TITLE: [PR-PC] Development Application DA13/0654 for a Two Lot Subdivision, Remove Existing Dwelling and Construct Two Single Dwellings - Staged Development at Lot 7011 DP 1065741 Marine Parade, Fingal Head and Lot 367 DP 755740 No. 40 Queen Street, Fingal Head

SUBMITTED BY: Development Assessment

FILE REFERENCE: DA13/0654 Pt2



Civic Leadership

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

1	Civic Leadership
1.1	Ensure actions taken and decisions reached are based on the principles of sustainability
1.1.1	Establish sustainability as a basis of shire planning and Council's own business operations

SUMMARY OF REPORT:

This development application is being reported to Council due to the Department of Planning's Circular PS08-014 issued on 14 November 2008 requiring all State Environmental Planning Policy No. 1 (SEPP No. 1) variations greater than 10% to be determined by full Council. In accordance with this advice by the Department of Planning and given that it is not possible to calculate 10% of the shadow development standard, officers have resolved to report this application to full Council.

The SEPP No. 1 variation relates to Clause 32(b)(4)(b) of the NCREP which does not permit overshadowing of adjacent open space before 7pm midsummer (daylight saving time). Council has an instrument of assumed concurrence and it was therefore not necessary to refer the application to the Department of Planning and Infrastructure (DP&I) for concurrence purposes.

This development application was lodged 12 November 2013 which precedes gazettal date of the Tweed Local Environmental Plan 2014 (TLEP 2014). As such, and in accordance with Clause 1.8A of the TLEP 2014, this application is to be determined *as if this plan had been exhibited but had not commenced*.

The applicant seeks consent for a staged two lot subdivision with demolition of an existing dwelling (which encroaches into the Crown reserve) and construction of two single dwellings which require removal of vegetation.

Unsuccessful attempts to subdivide and develop the site date back to 2006. Council has consistently advised that subdivision of the land is not feasible given site constraints. As such, the proposed development is unsuitable for the site and would be more appropriately located on a site less constrained with regard to bush fire safety, proximity to sensitive vegetation and well established informal character.

Key issues with regard to the unsuitability of the proposal for the site include:

- Overdevelopment of a highly constrained site;
- Inability to achieve an Asset Protection Zone associated with the proposal without compromising sensitive vegetation;

- Unacceptable impact on an Endangered Ecological Community located on the site;
- Overshadowing of Crown land managed by Council for coastal environmental protection purposes;
- Inconsistency of dwelling designs with DCP A1 controls for residential development.

The proposal was required to be placed on public exhibition. 10 objections were received during the exhibition period. Matters raised within the submissions have been considered in the assessment of the proposal. The majority of objections have not been resolved.

Having regard to relevant statutory controls, the proposed two lot subdivision, removal of existing dwelling and construction of two single dwellings is not considered suitable for the location and therefore the proposed development is recommended for refusal.

RECOMMENDATION:

That:

A. Development Application DA13/0654 for a two lot subdivision, remove existing dwelling and construct two single dwellings - staged development at Lot 7011 DP 1065741 Marine Parade, Fingal Head and Lot 367 DP 755740 No. 40 Queen Street, Fingal Head be refused for the following reasons:

- 1. Pursuant to Section 5 Objects of the Environmental Planning & Assessment Act 1979 (as amended), the proposed development cannot be determined to satisfy sub section (a)(ii), the orderly and economic use and development of the land.**

It is Council's view that the proposal has the ability to impact negatively upon the subject site and adjacent land; accordingly the proposal is not identified as satisfying the Objects of the Environmental Planning & Assessment Act 1979.

- 2. Pursuant to Section 5 Objects of the Environmental Planning & Assessment Act 1979 (as amended), the proposed development cannot be determined to satisfy sub section (a)(vi), the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats.**

It is Council's view that the proposal has the ability to impact upon the protection and conservation of native animals and plants; accordingly the proposal is not identified as satisfying the Objects of the Environmental Planning & Assessment Act 1979.

- 3. In accordance with Section 79C(1)(a)(i) of the Environmental Planning & Assessment Act 1979 (as amended) the proposed development is not considered to be compliant with Environmental Planning Instruments.**

It is Council's view that the proposed development is inconsistent with the aims of:

State Environmental Planning Policies:

- **SEPP 26: Littoral Rainforests**
- **SEPP 71: Coastal Protection**
- **NCREP: Clauses 32B and 43**

It is Council's view that the proposed development does not satisfy the provisions contained within:

The Tweed LEP 2000:

- **Clause 4: Aims of this plan**
- **Clause 5: Ecologically sustainable development**
- **Clause 8(1): Consent Considerations**
- **Clause 11: The Zones**
- **Clause 39A: Bushfire Protection**

The Draft Tweed LEP 2012:

- **Clause 1.2: Aims of Plan**
- **Clause 2.3: Zone Objective and Land Use Table**
- **Clause 5.5: Development within the Coastal Zone**

Development Control Plan 2008:

- **Section A1 Part A: Dwelling Houses, Dual Occupancy, Secondary Dwellings, Alterations and Additions and Ancillary Development**
- **Section A5: Subdivision Manual**

Tweed Shire Coastline Management Plan 2005:

NSW Coastal Policy 1997: A Sustainable Future for the New South Wales Coast.

4. **Pursuant to Section 79C (1) (c) of the Environmental Planning & Assessment Act 1979 (as amended) the proposed site is not considered suitable for the proposed development.**

It is Council's view that in order to facilitate development and comply with bushfire and planning regulations, the development is likely to result in a significant and unacceptable impact on a candidate Endangered Ecological Community, threatened species and their habitat.

5. **In accordance with Section 79C (1) (e) of the Environmental Planning & Assessment Act 1979 (as amended) the proposed development is not considered to be in the public interest.**

It is Council's view that it is in the broader general public interest to enforce the standards contained within the Tweed LEP 2000 specifically as it relates to the aims of the plan, unacceptable cumulative impact and ecologically sustainable development.

B. The following action be taken:

1. Report an additional *Archidendron hendersonii* record to the Office of Environment and Heritage to be recorded on the Bionet - Atlas of NSW Wildlife database.

REPORT:**Applicant:** Mr R Nankivell**Owner:** Mr Robert L Nankivell**Location:** Lot 7011 DP 1065741 Marine Parade, Fingal Head and Lot 367 DP 755740 No. 40 Queen Street, Fingal Head**Zoning:** 2(a) Low Density Residential, 6(a) Open Space and 6(b) Recreation**Cost:** \$1,080,000**Background:**The Subject Site

The subject land is described as Lot 367 DP 755740, 40 Queen Street, Fingal Head and has a total area of 1011.78m². The site is a regular, rectangular shaped allotment with a frontage of 25.145m to Queen Street. It has a depth of 40.235m. There is an approximate 5m downward slope towards the street from the south east corner (rear) to the north-west corner (frontage). A long driveway to the rear of the site is accessed from the middle of the frontage. The site is bushfire prone and recognised as part of a Regional Fauna Corridor.



Figure 1: view to Queen Street from north eastern portion of site

An existing dwelling house is located to the rear of the site that encroaches onto Council administered Crown land (Reserve 1001008 - Lot 7011 DP 1065741) which is managed for coastal environmental protection purposes. The original dwelling was constructed prior to 1950. Council's Reserves Trust has allowed the aforementioned encroachment to remain until such time as there are building alterations or redevelopment of the site.



Figure 2: existing dwelling house to rear of site

Sensitive remnant vegetation is located on the northern side of the driveway. The assemblage of species onsite has been recognised by both Council and the Office of Environment and Heritage (OEH) as an Endangered Ecological Community (EEC) – 'Littoral rainforest in the NSW North Coast, Sydney Basin and South East Corner bioregions' as listed under the *Threatened Species Conservation Act 1995* and likely to be representative of a Critically Endangered Community being 'Littoral Rainforest and Coastal Vine Thickets of Eastern Australia' based on federal *Environment Protection and Biodiversity Conservation Act 1999* listing advice. Vegetation removal has taken place on site within the last two years.



Figure 3: north east portion of site following removal of vegetation (8 January 2014)



Figure 4: north east portion of site (19 June 2013)



Figure 5: subject site 2012

The Proposed Development

The proposal is a staged development involving subdivision of the subject site to create two rectangular shaped lots of equal size (505.85m²) with frontages to Queen Street.

Demolition of the existing dwelling encroaching into the adjoining reserve is included in the proposal along with construction of two-storey, single dwelling houses on each of the created lots. Vegetation removal is required to enable the proposal.

The subdivision component of the application is the same as that previously refused by way of DA06/0155 (refer Development History).

Three stages are indicated within the development proposal:

1. Subdivision, dwelling demolition, vegetation removal, compensatory planting, water/sewer connections.
2. Construction of single dwelling on proposed Lot 2.
3. Construction of single dwelling on proposed Lot 1.

Each dwelling has three bedrooms, three bathrooms, open plan living/kitchen/dining, double carport and swimming pool. The single dwelling house on Lot 2 also has a spa.

Amended plans received on 21 March 2014 indicate a reduction in height of the 'sub-floor' component of both dwellings, removing three storey components from the proposal. This has had little impact with regard to overall bulk and scale of the development on the site. Refer to an assessment of the proposal against DCP A1 Part A controls elsewhere in this report for further detail.

Development History

Council records indicate that the existing dwelling house located to the rear of the site was originally constructed prior to 1950, surrounded by littoral rainforest vegetation and within close proximity to the dunes.

Building application **237/50** was lodged on 2 August 1950 and approved 4 August 1950. The floor plan submitted indicates that the original structure comprised a 31.13m² (8.53m by 3.65m) rectangular building envelope containing a bedroom and kitchen/dining room, separated by a bathroom. The proposal added a second bedroom (2.44m x 4.57m) to the front elevation of the dwelling house creating an irregular shaped building envelope. The site plan submitted with 237/50 locates the dwelling house entirely within Lot 367:

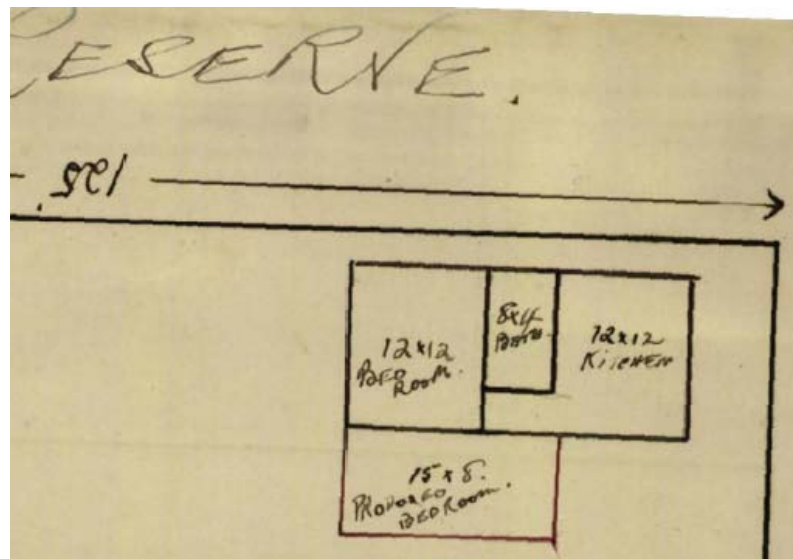


Figure 6: partial site plan with floor plan – 237/50

The angle of the structure depicted in 1962 aerial photography (below), suggests that this may not have been the case.

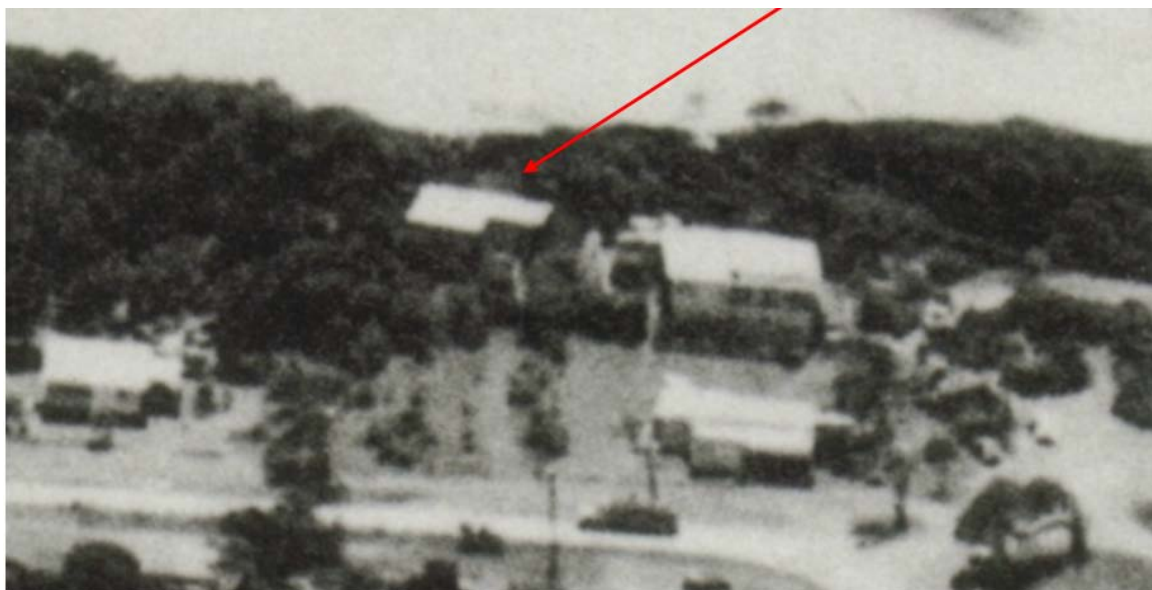


Figure 7: aerial imagery January 1962

The property was administered as part of a deceased estate until 20 February 2006 upon which ownership was transferred for a brief period to the estate executors.

Correspondence dated 14 August 2000 from Council's Reserve Trust to representatives of the previous owner's deceased estate who provided a survey plan (below), advised that Council would allow the encroachment of the existing dwelling house (and deck) into Reserve 1001008 to the rear of the site to remain until such time as there were any proposed building alterations or redevelopment of the site.

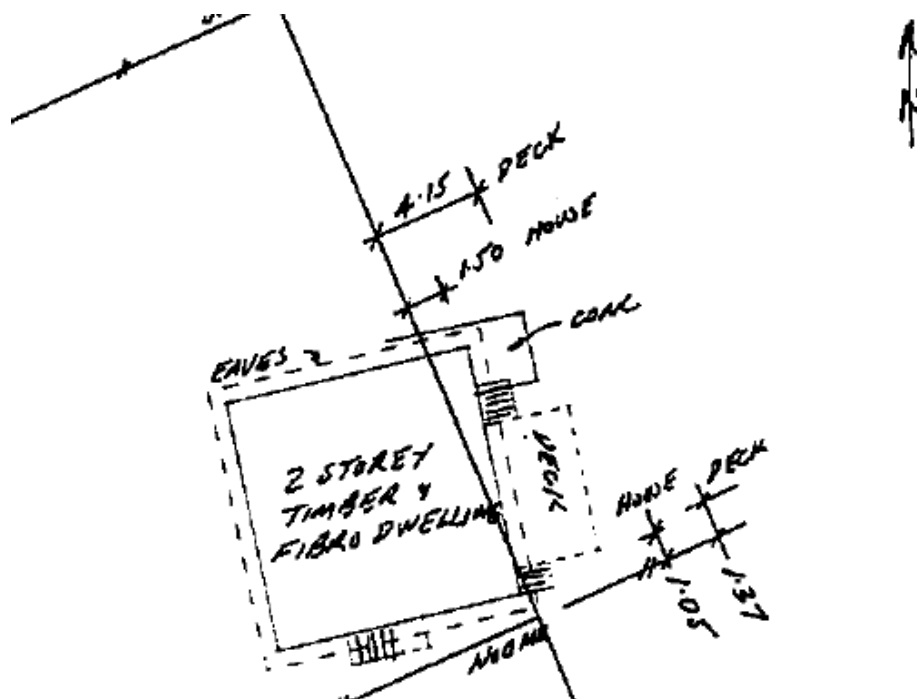


Figure 8: extract from survey plan February 2000

Subdivision proposal **DA06/0155** was lodged on 20 February 2006 to create two rectangular shaped lots of equal size (505.9m^2) with frontages to Queen Street. This application was refused on 8 May 2006.



Figure 9: subdivision layout DA06/0155

The survey plan submitted with the application and dated 15 February 2006 indicates an increase in floor area (SW corner) and change in shape of the dwelling house with one timber deck addition to the rear further encroaching into the public reserve, consistent with the 2000 survey plan.

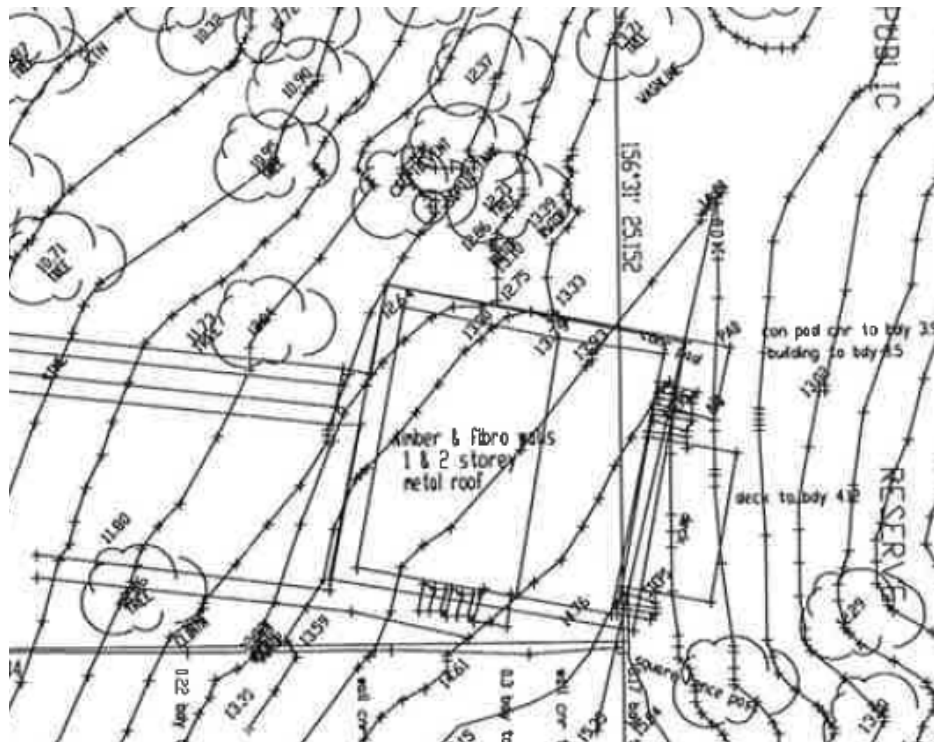


Figure 10: extract from survey plan 15/2/2006



Figure 11: deck addition at rear encroaching into public reserve

The subdivision plan nominated building envelopes on each lot for future two-storey residential development with a 6m front setback from Queen Street and a 10m rear setback from the public reserve. Significant removal of vegetation/habitat was required in order to create the building envelopes.

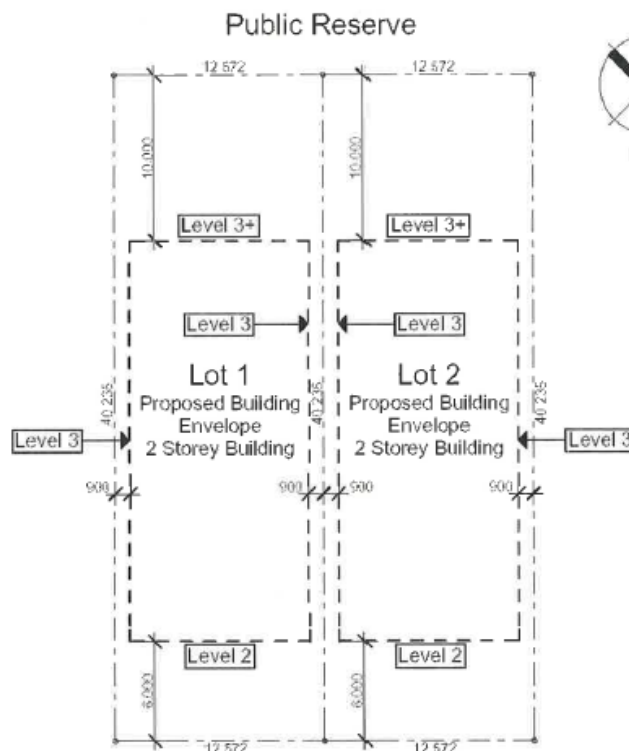


Figure 12: extract from building envelope plan (Appendix C of SEE)

Demolition of the existing dwelling house encroaching into the reserve was to be lodged separately as per the extract from the SEE below:

"The existing dwelling house is to be demolished to facilitate the subdivision of the land and to correct the current encroachment into the adjoining coastal reserve. A further development application for demolition will be prepared and submitted to Council for determination upon approval of this application."

Section 4.9 of the Bushfire Threat Assessment Report prepared by Planit Consulting and dated February 2006 states the following:

"...the proposed subdivision will not comply with the Planning for Bushfire Protection Guidelines in terms of setbacks. However variation is sought with the applicants fully aware of their responsibilities in terms of designing future dwellings which will in part be located within the Flame Zone."

Following integrated referral, the NSW Rural Fire Service (RFS) was not prepared to grant a Bush Fire Safety Authority. The proposed Asset Protection Zones (APZ's) were inconsistent with Planning for Bushfire Protection guidelines. Without full compliance with APZ's, the proposed development would be located in the 'Flame Zone'.

In the referral response dated 18 April 2006, the RFS stated that they were *'prepared to support an application for a single residential dwelling on this lot if it is suitably located and separated from the hazard'*.

Ownership of the land transferred to the current owner in June 2006. A review of aerial imagery up to May 2012 indicates that no significant vegetation removal or disturbance of the EEC had taken place on the site during this time.



Figure 13: May 2012 aerial imagery

On 23 March 2012, a Tree Preservation Order application to remove/lop trees on the site was refused. The application was lodged by the current owner on 6 March 2012 with reasons for removal/lopping based on proximity of the vegetation to the existing dwelling house and driveway.

2000 and 2006 survey plans. It was considered that the encroaching wooden decks were adding to an already significant fire hazard and that they should be removed for bushfire safety reasons.

Council's Reserve Trust subsequently resolved that the encroachment of the existing dwelling house on the reserve be removed as a condition for the proposed subdivision of the lot should the development application be approved.

NSW RFS issued a Bush Fire Safety Authority dated 21 August 2012 taking the existing dwelling into account. The authority was based on stringent conditions requiring both proposed lots to be managed as inner protection areas with an APZ of 11m to the north-east, east and south-east of the existing dwelling house.

As such, Council's reasons for refusal were based on the following:

- Reliance upon continuing encroachment of the existing dwelling house onto the reserve in order to gain a development 'benefit'.
- Loss of protected EEC remnant vegetation (on-site and on the reserve) in order to rectify the building encroachment at the rear of the site, create a compliant building envelope at the front of the site and to achieve the required APZ's in accordance with the Bush Fire Safety Authority.
- Non-compliance with DCP A1 and DCP A2 controls with regard to solar access, useable open space and on-site parking resulting in increased pressure to remove/lop the EEC surrounding the existing dwelling house, and
- Non-compliance of the highly irregular building envelope with an area of 120m² at the front of the site with DCP A1, DCP A2 and DCP A5 controls with regard to external living, private/useable open space, on-site parking and building envelope size/configuration.

Certification of Vegetation Removal

On 4 April 2013, an application from the current owner under section 91 of the Threatened Species Conservation Act 1995 (TSC Act) for licence to harm threatened species, populations, ecological communities or to damage their habitats was received by the Office of Environment and Heritage (OEH). The application was lodged on the basis that the existing dwelling house to the rear of the site would be retained.

A description of the proposed action included:

- A. Remove two trees due to safety concerns, and
- B. Trim the branches of six trees to provide a buffer between the trees and the house, driveway and clothes line.

It was deemed by OEH that a license was not required and Certificate No. 1132165 was issued under section 95(2) of the TSC Act for the proposed action (subject to prescribed conditions) with an expiry date of 31 July 2013. The species of the two trees to be removed was not stipulated in the certificate. However, Condition 3 reads as follows:

- "3. *The property contains significant vegetation which consists of old growth trees and threatened species which are listed either Endangered or Vulnerable under the Threatened Species Conservation Act 1995. The trees nominated as part of this application may include the White Lace Flower (Archidendron hendersonii) and the Stinking Cryptocarya (Cryptocarya foetida). Any work associated with threatened species or old growth trees is to be undertaken with extreme caution to ensure the tree does not deteriorate in health.*"

It was evident during a site inspection undertaken by Council's NRM Unit on 8 January 2014 as part of the assessment of DA13/0654 that significant pruning had occurred to one

Archidendron hendersonii and *Cryptocarya foetida* to a degree that would not be considered to comply with the conditions. These trees were not within an area of the site posing a risk.

Similarly, a Section 95(2) Certificate was issued on 11 June 2013 by OEH (to expire on 31 December 2013) to remove one *Sterculia quadrifida* (Peanut Tree). Cuttings were taken by Council's NRM Unit on 19 June 2013 prior to the tree being removed.

Section 95(2) Certificate No. 1132357 was issued by OEH on 10 September 2013 with an expiry date of 30 November 2013 to remove four Tuckeroo trees (*Cupaniopsis anacardioides*). Council's NRM Unit noted that during their site inspection on 8 January 2014 that one *Macadamia tetraphylla* had been removed contrary to the conditions of the certificate, specifically Condition 2:

"2. Prior to the commencement of works the arborist must be advised that individuals of the threatened flora species *Macadamia tetraphylla*, *Cryptocarya foetida* and *Archidendron hendersonii* are located in native vegetation within 5-10m of the four Tuckeroo trees to be removed and that these threatened species flora species must not be harmed."

Section 95(2) certificates contain standard information and warnings regarding contravention or failure to comply with conditions/restrictions attached to the certificates being an offence against section 133(4) of the National Parks and Wildlife Act 1974.

OEH advised on 8 April 2014 that no additional or current Section 95(2) certificates had been issued over the property to regulate vegetation works.

Vegetation Works/Compliance Matters (19 March 2014)

A site inspection was conducted at the subject site by Council officers on Wednesday 19 March 2014 in response to resident concerns regarding the removal/damage of littoral rainforest vegetation taking place on site. The Endangered Ecological Community (EEC) is considered a key factor in evaluating the merits of the current proposal which is the subject of this report.

Upon arriving at the site, maintenance contractors were in the process of packing up equipment. However, the following works undertaken by the contractors were observed:

- Brush-cutting of the understorey beneath the canopy of existing trees comprising the EEC. Brush-cutting was primarily undertaken within the western section of the community;
- Brush-cutting involved the removal of all understorey vegetation to approximately 10 -20mm of the ground surface within this area of the site with the exception of a number of small shrubs (eg. one *Diospyros fasciculosa*);
- Brush-cutting of regrowth of a *Cryptocarya foetida* was clearly evident whilst cut foliage from a suite of native saplings that would usually comprise part of an EEC (eg. *Diospyros fasciculosa* and *Cupaniopsis anacardioides*) was observed on the ground;
- Leaf litter and cut foliage were raked into small piles.

Council officers approached the contractors and the following was clarified:

- The contractors had been engaged and directed to perform works by the applicant of the yet to be determined development application who was responsible for preparing the current ecological assessment for the site. The ecological assessment identifies listed species on site and acknowledges that the assemblage of vegetation is consistent with EEC classification;
- The contractors were met by a representative of the consultancy acting as applicant for the development application on 18 March 2014 to discuss the extent

of works on the following day. The contractors were not made aware of listed threatened species such as *Archidendron hendersonii* and *Cryptocarya foetida* (the latter being previously extensively pruned and vulnerable to damage) nor the significance of the community which includes understorey-species and juvenile native seedlings/saplings;

- The contractors were employed to brush-cut, mow and apply herbicide in and around trees located on the northern side of the driveway in front of the house;
- The contractors indicated that herbicide (eg. glyphosate) had been intended to be applied. However, it was not applied only after being advised by concerned residents that the community was representative of an EEC and that threatened species occurred within the area that was to be chemically treated;
- The contractors ceased works upon discussion with concerned residents;
- The contractors indicated that they phoned the consultancy to confirm the scope of works and significance of the vegetation following confrontation by concerned residents.

It was observed that trees had been numbered from 1 – 10 with paint:



Figure 16: numbering of trees with paint 19 March 2014

It is noted that it is an offence for '*harming or picking threatened species, endangered populations or endangered ecological communities*' under section 118A of the National Parks and Wildlife Act 1974 and that the landowner has previously been required to apply for a Section 95(2) Certificate administered by OEHL to conduct such works as pruning.

Of particular concern is that directions provided to contractors engaged to complete the works were given by consultants involved in the preparation of material (ecological assessments) submitted to support previous and current development applications lodged over the site with knowledge of the vegetation community status and the occurrence of listed species within the area affected by the works.

Furthermore, it is believed that the consultants were made aware of conditions of certificates issued by OEHL under section 95(2) for previous works within the EEC. A recent search of the Public Register of section 91 applications failed to return results indicating that such works were legitimate and authorised by OEHL.

Correspondence was forwarded to the consultants on 20 March 2014 clarifying the status of vegetation on site and alerting them to conditions of approvals issued by OEHL under section

95(2) certificates for previous works within the EEC. The letter requests an explanation for the works and advises that no further works are to be carried out on the site (or adjoining site) without the necessary approvals in place. A response has not been received from the consultant.

Correspondence was forwarded on 27 March 2014 notifying OEH of vegetation works taking place on site on 19 March 2014 and requesting that return advice as to whether any current licences/certificates remain valid over the site authorising such works. OEH confirmed on 8 April 2014 that there are no current Section 95(2) certificates issued over the property to regulate vegetation works.

Correspondence was also forwarded to the Department of the Environment on 27 March 2014 requesting investigation of the removal/damage of vegetation forming part of an EEC comprising listed species potentially regulated by provisions of the Environment Protection and Biodiversity Conservation Act 1999. A response is yet to be received.

SITE DIAGRAM:



Locality Plan

Lot 367 DP 755740 No. 40 Queen Street, Fingal Head and
 Lot 7011 DP 1065741 Marine Parade, Fingal Head

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 Horizontal datum: Geoid 98; Datum of Australia 1994
 Grid: Map Grid of Australia, Zone 55
 GDA

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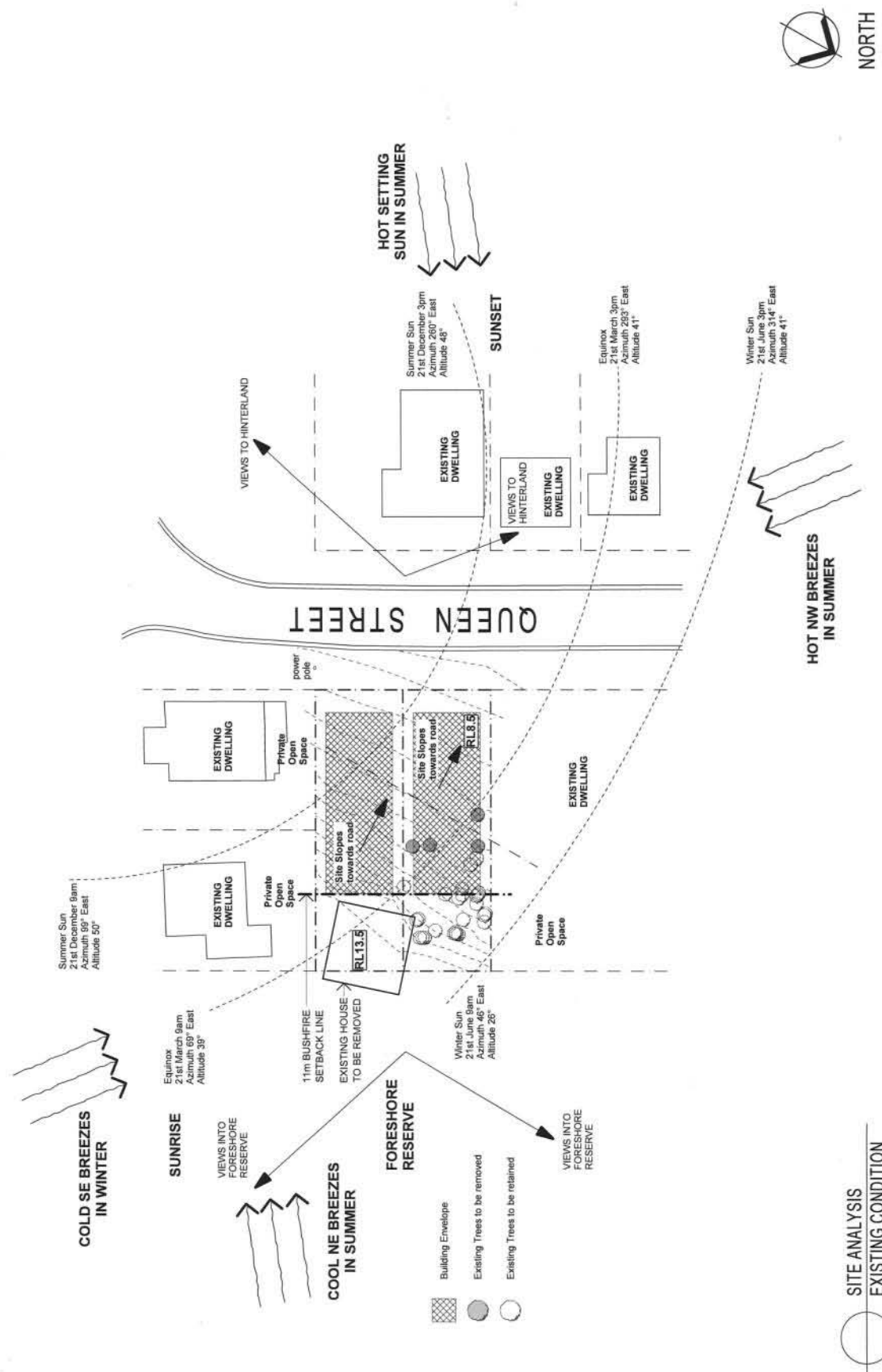
DEVELOPMENT/ELEVATION PLANS:



PLANIT
 CONSULTANTS
 11 The Old Rectory, Mount Pleasant, SA 5008
 Phone: 08 8333 1111
 Email: info@planit.com.au
 www.planit.com.au

DATE	1/08/24	DESCRIPTION	ISSUED FOR
BY	JM	REVISION	AS SHOWN

PREPARED BY: JAMES MURPHY
 DRAWN BY: JAMES MURPHY
 CHECKED BY: JAMES MURPHY
 APPROVED BY: JAMES MURPHY
 PROJECT NO: 24/001
 DRAWING NO: 1/08/24



SITE ANALYSIS
 EXISTING CONDITION

PAULUHLMAN ARCHITECTS

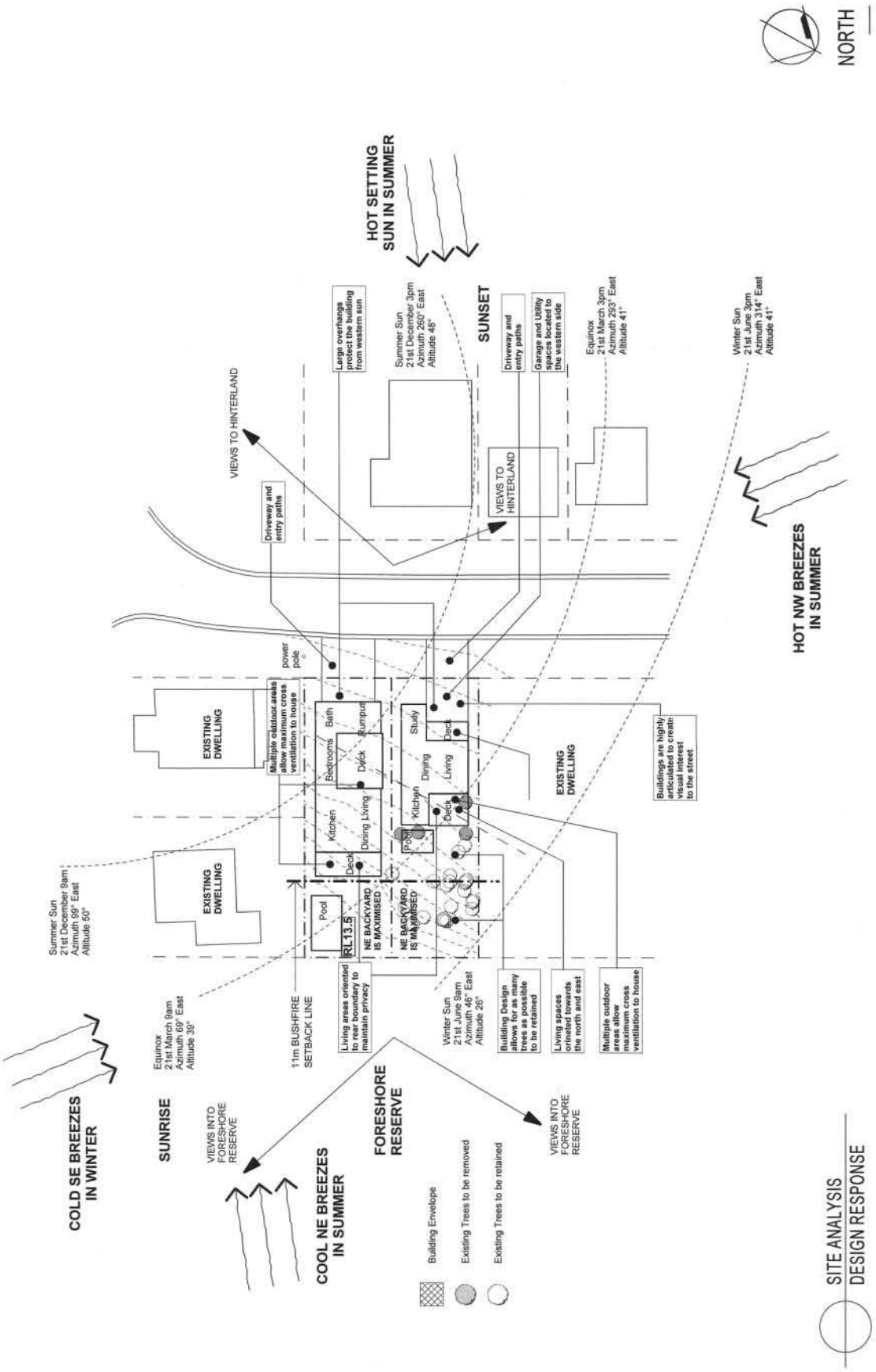
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DATE 26.10.13 DA:1844
 REV A
 DATE 27.06.13
 DRAWN DC

PROJECT NO. 13 111
 DATE 27.06.13
 DRAWN DC

SITE ANALYSIS
 EXISTING CONDITION
 DRAWING NO. WD 0.01
 SCALE 1:500 @ A3

NANKIVELL RESIDENCES
 40 QUEEN ST FINGAL HEAD



NANKIVELL RESIDENCES
40 QUEEN ST FINICAL HEAD

SITE ANALYSIS
DESIGN RESPONSE
DRAWING NO. WD 0 02
SCALE 1:300 @ A3

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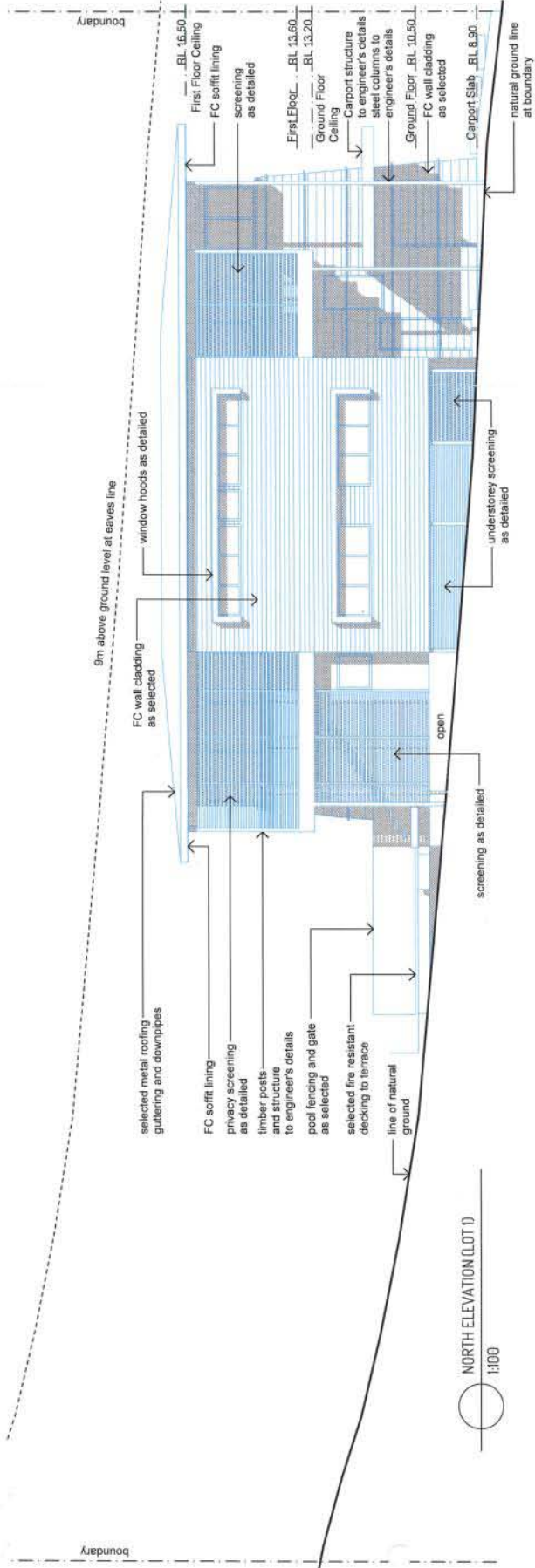
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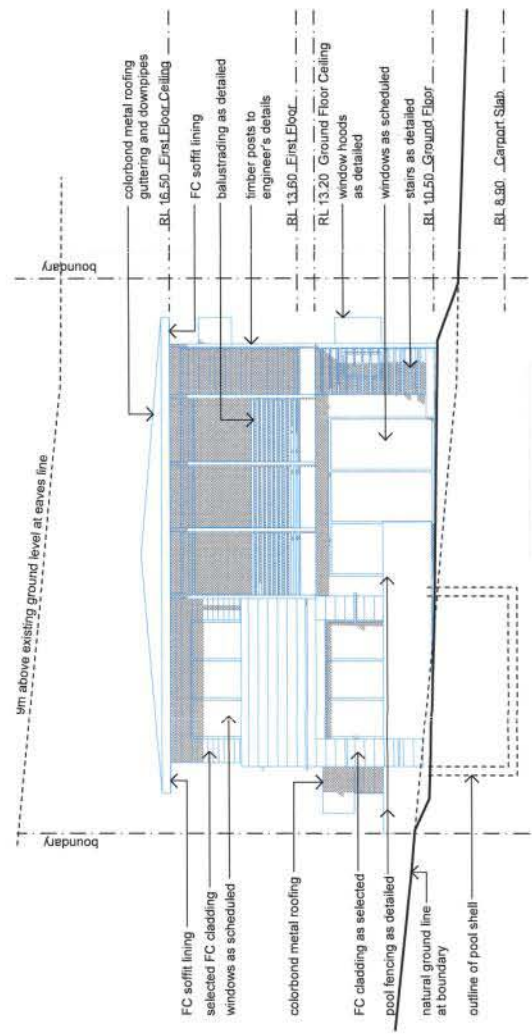
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SITE ANALYSIS
DESIGN RESPONSE





NORTH ELEVATION (LOT 1)
1:100



EAST ELEVATION (LOT 1)
1:100

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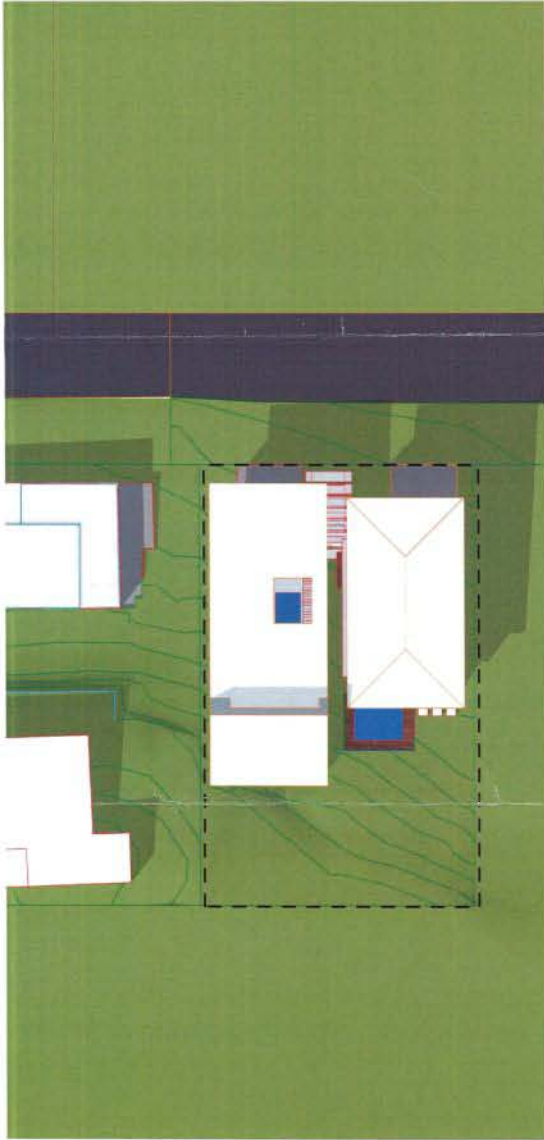
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28.10.13	B	08.10.13	B
11.03.14	C	08.10.13	C

Client Issue
DA Issue
DA Amendments

PROJECT NO. 13 112
DATE 08.10.13
DRAWN DC

DRAWING NO. M12/11
SCALE 1:100 @ A3

NORTH AND EAST
ELEVATION (LOT 1)
J & L NANKIVELL RESIDENCE
J. & L. NANKIVELL
40 QUEENSTOWN ROAD



9am December 22



12pm December 22



NORTH

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DATE 22.12.13 DA Issue
 11.02.14 DA Amendments

REV A
 B

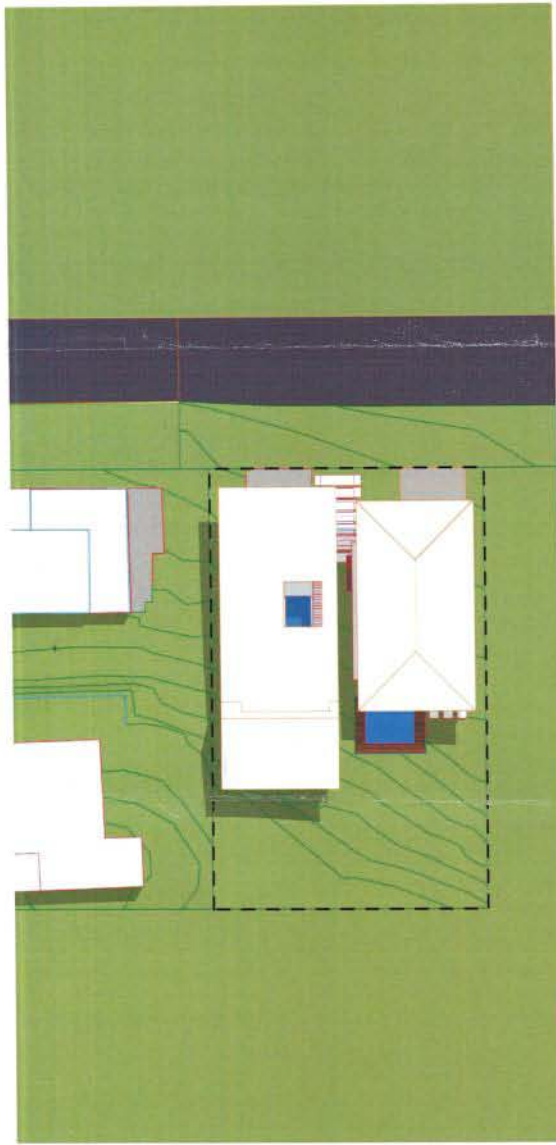
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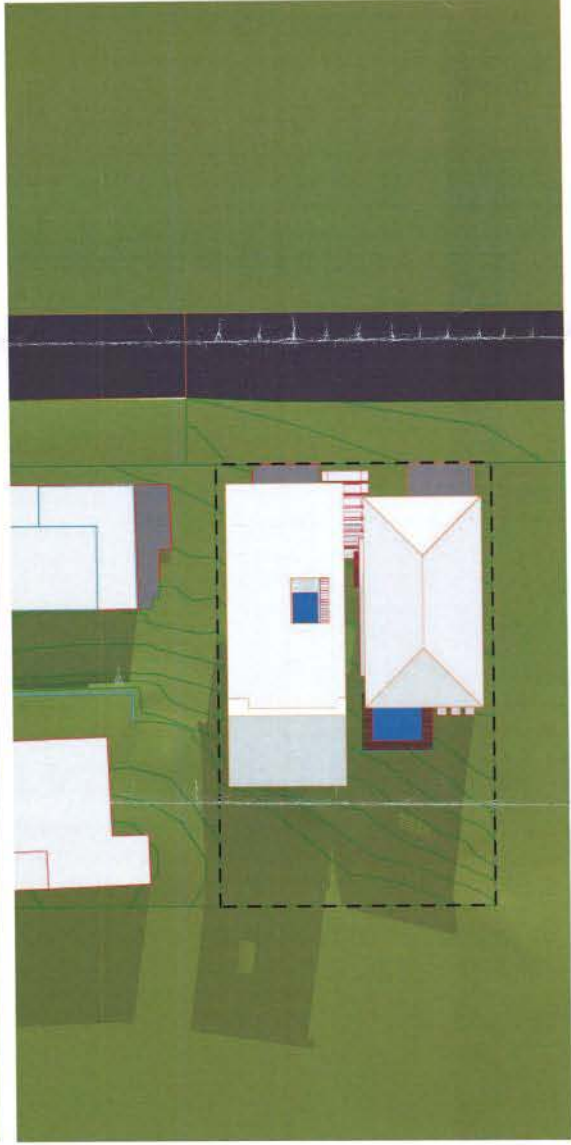
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3pm December 22



7:00pm December 22



NANKIVELL RESIDENCES
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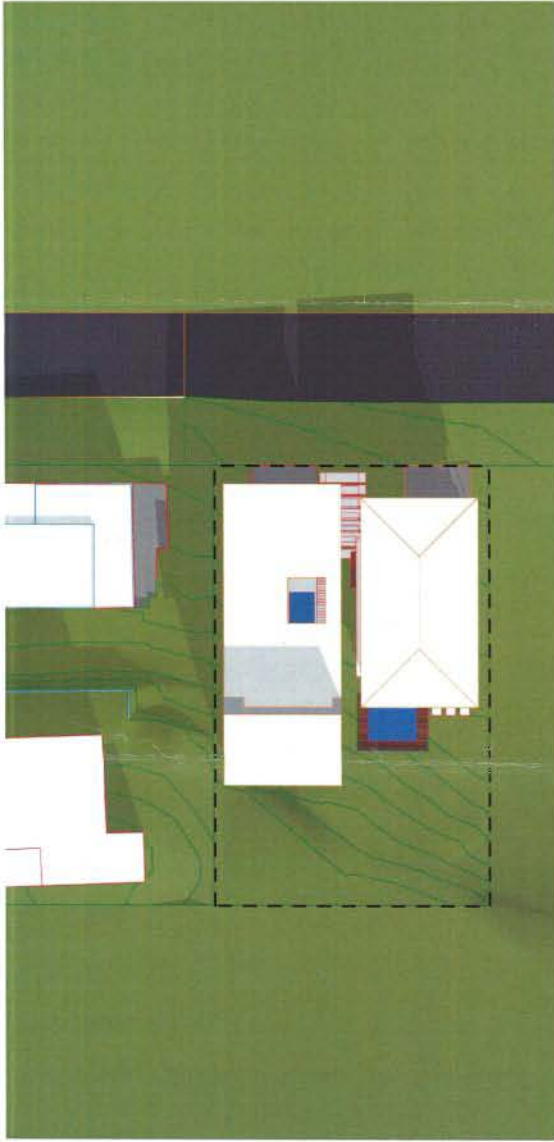
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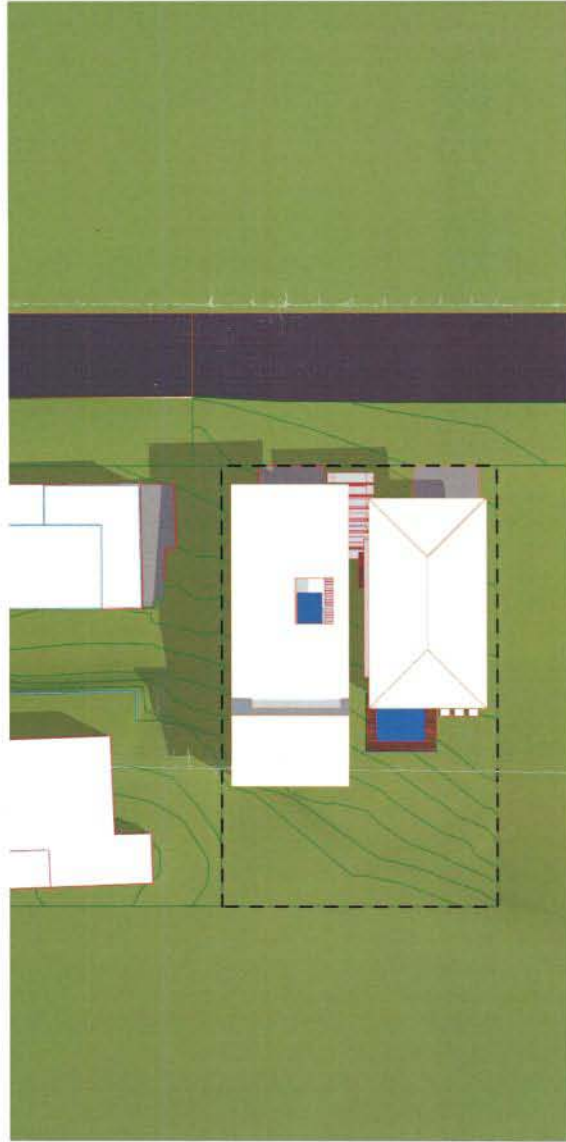
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9am June 21



12pm June 21

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DATE
 21.06.13 DA Issued
 11.03.14 DA Amendment

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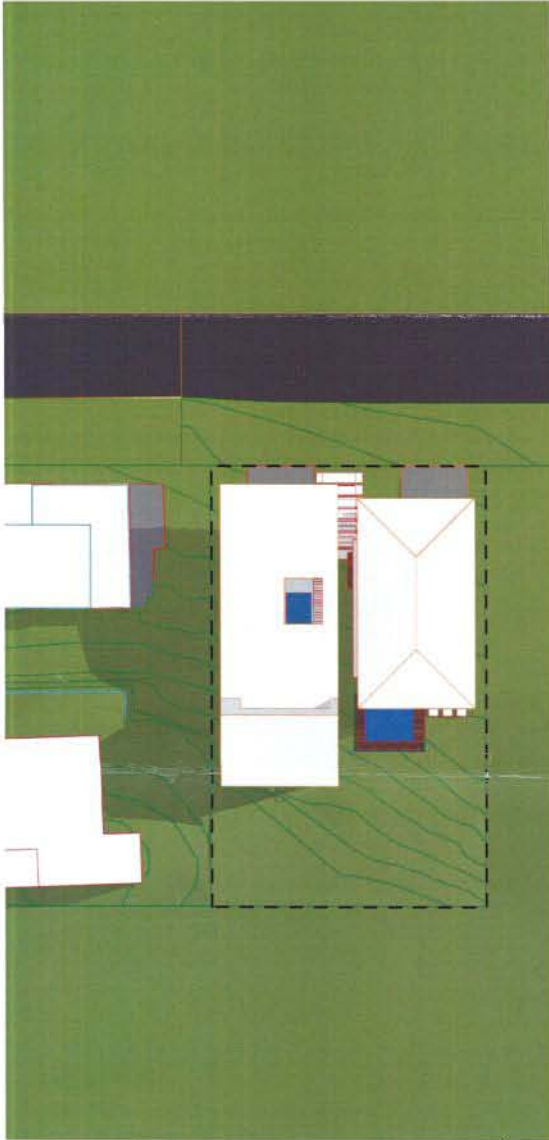
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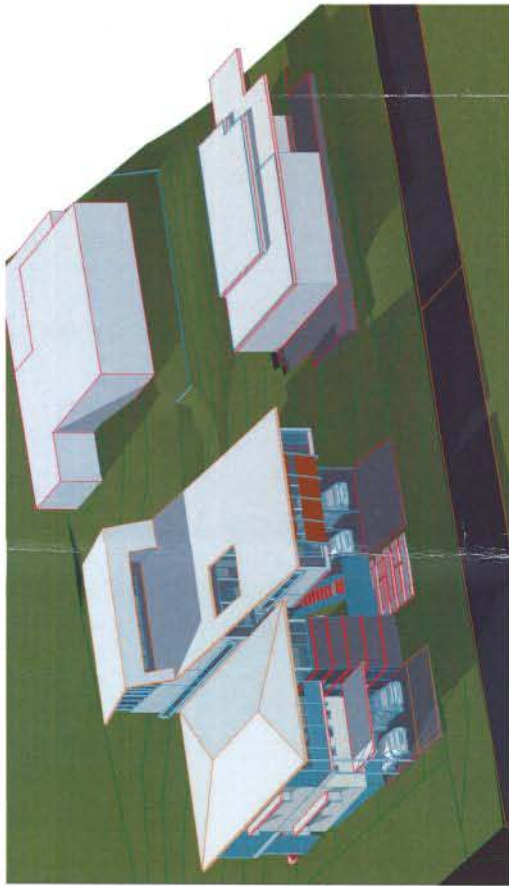
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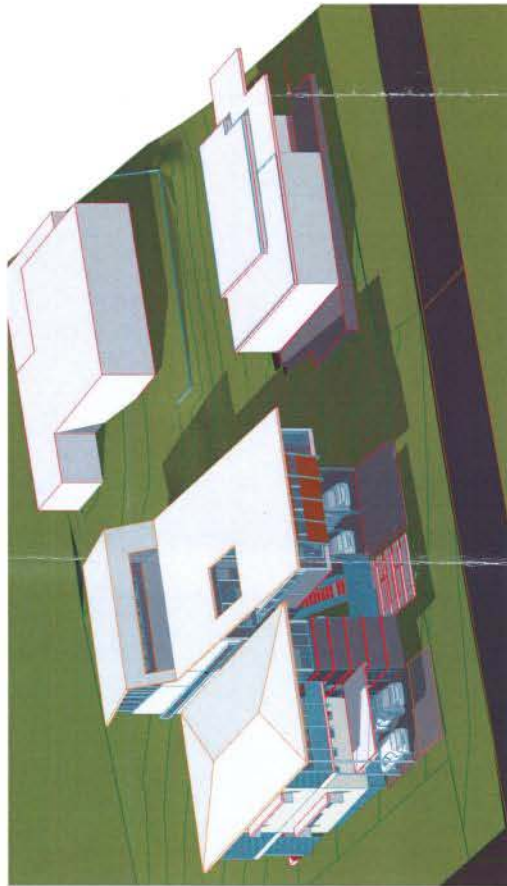
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NANKIVELL RESIDENCES
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9am June 21 3D



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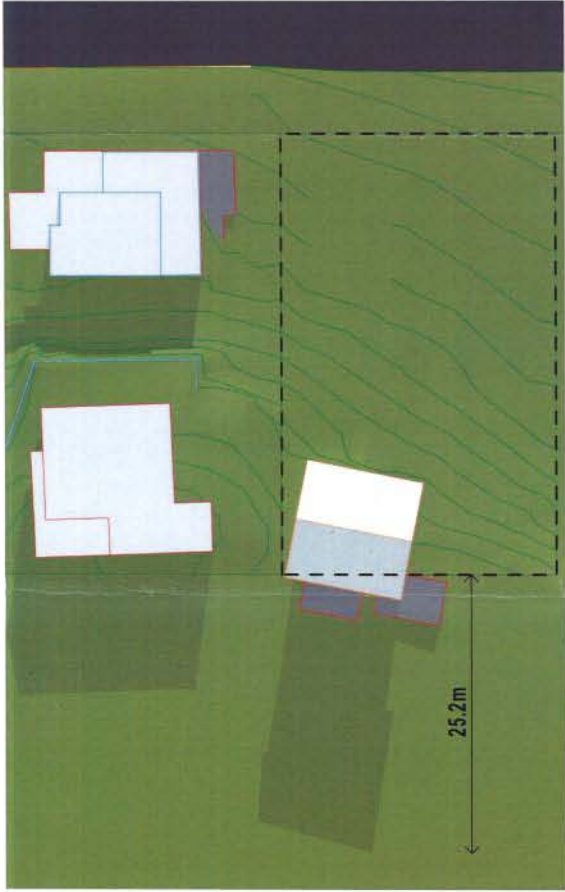
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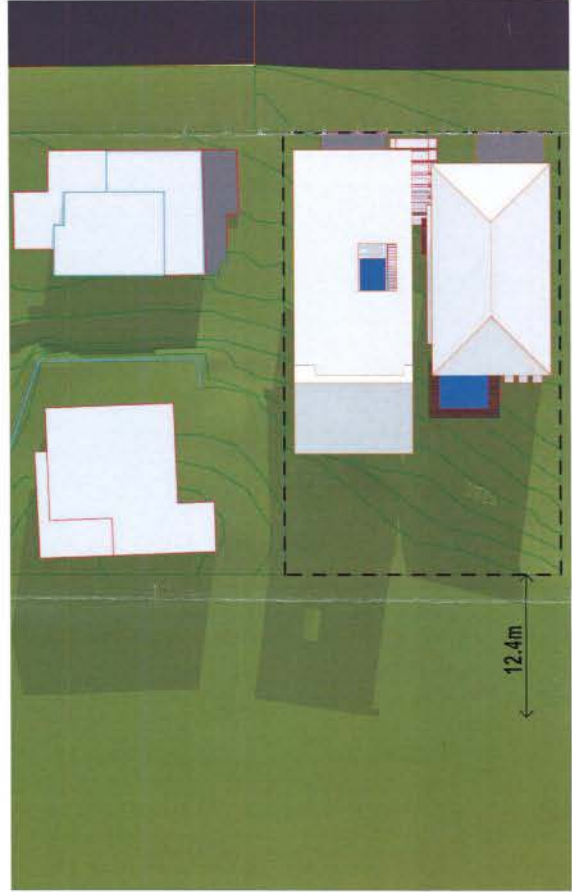
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R NANKIVELL RESIDENCE
 ROB NANKIVELL
 40 QUEEN ST FINGAL HEAD



7:00pm December 22
(EXISTING RESIDENCE)



7:00pm December 22
(PROPOSED RESIDENCES)

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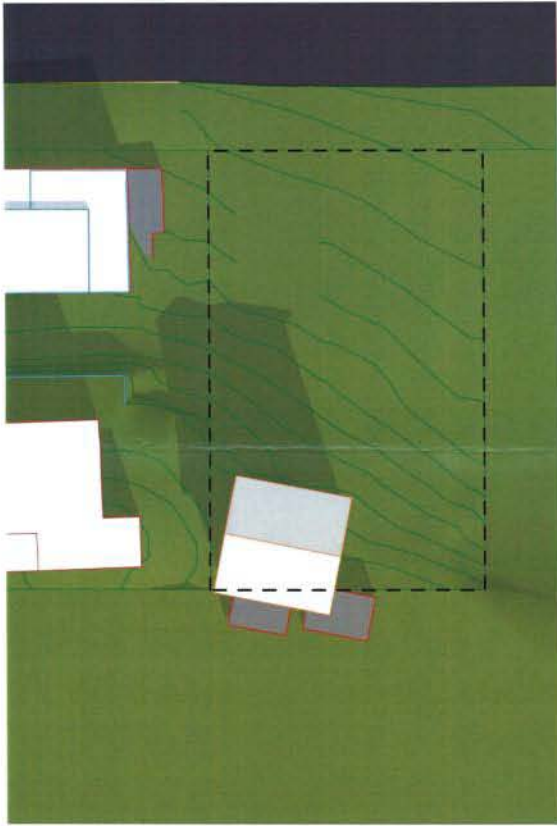
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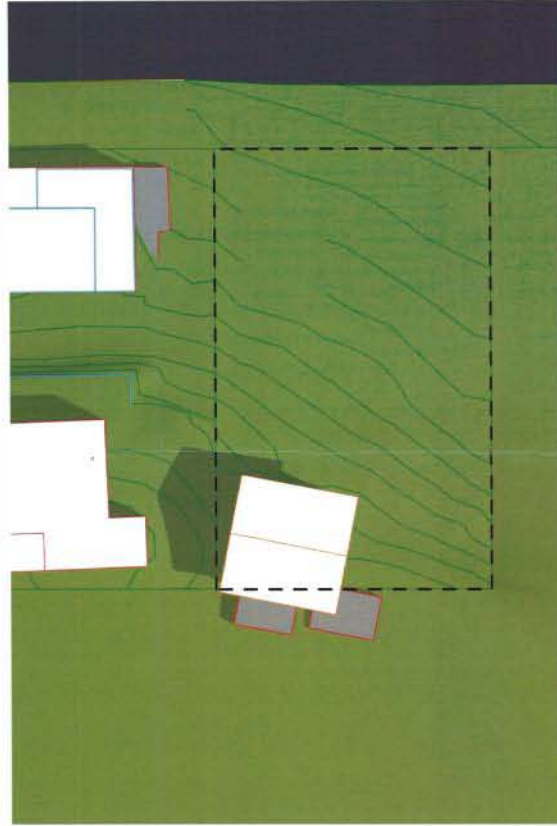
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R NANKIVELL RESIDENCE
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40 QUEEN ST FRINGAL HEAD



9am June 21
(EXISTING RESIDENCE)



12pm June 21
(EXISTING RESIDENCE)

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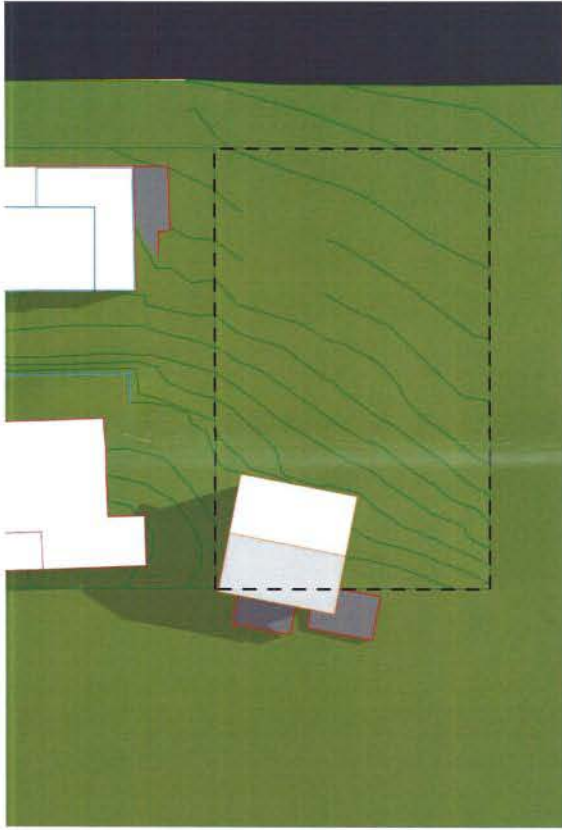
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R NANKIVELL RESIDENCE
ROB NANKIVELL
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3pm, June 21
(EXISTING RESIDENCE)

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DATE: 13.03.14 DA: Amendments A
 REV: A DATE: 27.08.13
 PROJECT NO.: 13 111 DATE: 27.08.13
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R NANKIVELL RESIDENCE
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WESTERN PERSPECTIVE

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Considerations under Section 79c of the Environmental Planning and Assessment Act 1979:

(a) (i) The provisions of any environmental planning instrument

Tweed Local Environmental Plan 2000

Clause 4 - Aims of the Plan

Clause 4 illustrates that the aims of the TLEP 2000 are to give effect to the desired outcomes, strategic principles, policies and actions of the Tweed Shire 2000+ Strategic Plan. The vision of the plan is “the management of growth so that the unique natural and developed character of the Tweed Shire is retained, and its economic vitality, ecological integrity and cultural fabric is enhanced”. Clause 4 further aims to provide a legal basis for the making of a DCP to provide guidance for future development and land management, to give effect to the Tweed Heads 2000+ Strategy and Pottsville Village Strategy and to encourage sustainable economic development of the area which is compatible with the Shire’s environmental and residential amenity qualities.

The subject site comprises and is adjacent to Littoral Rainforest, a Critically Endangered Community (EEC) listed under the Environment Protection and Biodiversity Conservation Act (EPBC) 1999. This EEC is of national environmental significance.

The development proposes the subdivision of the lot to create two equal size allotments with frontage to Queen Street. Bushfire regulations require the creation of an Asset Protection Zone which will have an unacceptable impact upon the ecological features of the site.

Council considers that the unique natural and developed character of Fingal Head would not be retained and that the ecological integrity of the locality would not be enhanced. Redevelopment of the site as proposed would necessitate the loss of EEC. It is therefore considered that the proposal would not be consistent with Clause 4 of the TLEP 2000 and would set a harmful precedent for similar development in the locality.

Clause 5 - Ecologically Sustainable Development

The four principles of Ecologically sustainable development are the precautionary principle, inter-generational equity, conservation of biological diversity and ecological integrity and improved valuation, and pricing and incentive mechanisms.

The proposed development, in order to comply with bushfire and planning regulations, would be likely to result in a significant impact on threatened species (Littoral Rainforest that is an Endangered Ecological Community). Therefore the proposal does not accord with these principles.

Clause 8 - Consent Considerations

Clause 8 states that the consent authority may grant consent to development only if:

- (a) it is satisfied that the development is consistent with the primary objective of the zone within which it is located, and
- (b) it has considered those other aims and objectives of this plan that are relevant to the development, and
- (c) it is satisfied that the development would not have an unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of Tweed as a whole.

The proposed subdivision would result in:

- Overdevelopment of the site necessitating the removal of significant vegetation (EEC Littoral Rainforest).
- Loss of informal residential character due to the bulk and scale of the proposed dwellings.
- Overshadowing of adjacent residential and community land.

For the reasons outlined further within this report, it is considered that the subject site is not capable of providing a low density residential environment with detached housing character and amenity, without the loss of EEC and negative impact upon the surrounding locality.

The development would therefore be inconsistent with subsection (a), (b) and (c) of Clause 8.

Clause 11 - Zone Objectives

The subject site is located within the 2(a) Low Density Residential Zone. The objectives of the zone are as follows:

Primary objectives:

To provide for and maintain a low density residential environment with a predominantly detached housing character and amenity.

Secondary objectives:

To allow some diversity of housing types provided it achieves good urban design outcomes and the density, scale and height is compatible with the primary objective.

To allow for non-residential development that is domestically based, or services the local needs of the community, and does not detract from the primary objective of the zone.

As detailed above, the proposed subdivision would result in:

- Overdevelopment of the site necessitating the removal of significant vegetation (EEC Littoral Rainforest).
- Loss of informal residential character due to the bulk and scale of the proposed dwellings;
- Overshadowing of adjacent residential and community land.

The development would therefore be inconsistent with the primary objective of the zone.

Clause 15 - Essential Services

The primary objective is to ensure that development does not occur without adequate measures to protect the environment and the community's health.

The subject site has existing access to essential services.

The existing dwelling appears to be connected to an on-site sewage management facility.

Connection to Council's reticulated sewer is expected for new residential allotments with access to such services. Existing on-site facilities would need to be suitably decommissioned.

Clause 16 - Height of Building

The subject site is located within an area that has been mapped as having a height of 2 storeys with a building height restriction of 9m.

The application as originally submitted represented a three storey height with a maximum building height of 9m. An amended proposal submitted 21 March 2014 has lowered sub-floor areas from 200mm to 700mm to remove the three storey component. Maximum proposed building height is approximately 8.5m.

Clause 17 - Social Impact Assessment

This clause requires Council to consider whether a proposed development is likely to have a significant social or economic impact. Given the minor scale and nature of the development it is considered that the proposal does not require a social impact assessment.

Clause 35 - Acid Sulfate Soils

The subject site is mapped as being Class 5 acid sulfate soil (ASS). Given the minor works proposed at the site, interception of ASS is unlikely. A minor works plan has been submitted. Although minor cut and fill is proposed, all fill is to be retained on the site. No further concerns are raised in relation to ASS.

Other Specific Clauses

Clause 19: Subdivision (General)

The objective of the clause is to provide a comprehensive system of planning controls for the subdivision of land in the Tweed local government area.

The development application proposes the subdivision of the existing lot to form two lots and therefore this clause applies. The proponent is seeking consent from Council to carry out the subdivision and is therefore consistent with this clause.

Clause 36 – Coastal erosion outside Zone 7(f)

The objective of the clause is:

- *To protect land that may be subject to coastal erosion (but not within Zone 7(f)) from inappropriate development.*

The subject site is in close proximity to a coastal Reserve however is located approximately 180m from the sea. Given the presence of the coastal reserve, cliff and fore dunes, as well as the steeply sloping nature of the land, it is considered unlikely that the subject site would be affected by the behaviour of the sea and would be unlikely to impact on the beach or dune system.

The subject site is not located within the Coastal Erosion Hazard line. However, subsection (2)(a)(iii) states that the consent authority should consider *the likelihood of the proposed development adversely affecting the landscape or scenic quality of the locality.*

Whilst the proposal would be unlikely to impact on the scenic quality of the locality, the development would be likely to result in the loss of significant EEC which would set an undesirable precedent for the locality.

Clause 39: Remediation of Contaminated Land

The objective of the clause is to ensure that contaminated land is adequately remediated prior to the development occurring.

The application has been referred to Council's Environmental Health Unit who have advised that the submission indicates that there is no known historic contamination of the subject allotment. A search of historic aerial photography

has shown that a dwelling was present circa 1962 with no sand mining and that there does not appear to be any trigger for further consideration of potential contamination of the site.

Clause 39A: Bushfire Protection

The subject site is bushfire prone and on this basis this clause applies. The objective of the clause is *to minimise bushfire risk to built assets and people and to reduce bushfire threat to ecological assets and environmental assets.*

The proposal is identified as Integrated Development. Accordingly the proposal was referred to the NSW Rural Fire Service for general terms of approval in accordance with Section 91 of the EP&A Act 1979.

A bush fire safety authority response was received on 31 January 2014 as required under section 100B of the 'Rural Fires Act 1997' and was issued subject to a number of conditions relating to asset protection zones, water and utilities and design/construction.

General terms of approval relate to the subdivision of the land and the building work.

Condition 2 nominates the entire property to be managed as an inner protection area (IPA):

2. *At the issue of eight: the subdivision certificate, or an occupation certificate, and then in perpetuity the entire property shall be managed as an inner protection area (IPA) as outlined within section 4.1.3 and Appendix 5 of 'Planning for Bush Fire Protection 2006' and the NSW Rural Fire Service's document 'Standards for asset protection zones'.*

General advice for the consent authority to note advises of the necessity for vegetation clearing in association with the proposal in order to achieve compliance with Condition 2:

The required asset protection zones, for proposed Lots 1 and 2 (managed as Inner Protection Areas), to achieve satisfactory building separation from vegetation located on the adjoining lot to the east will require the clearing of vegetation.

Council is further advised that the necessary approvals for vegetation clearing would need to be in place prior to the establishment of the proposed asset protection zones:

This bush fire safety authority does not authorise the clearing of any vegetation, nor does it include an assessment of potential flora and fauna impacts of clearing vegetation for the purpose of establishing the proposed asset protection zones. Approvals necessary for the clearing of vegetation should be obtained prior to the establishment of the proposed asset protection zones.

Establishment of the proposed asset protection zones results in additional vegetation clearance and an unacceptable impact upon the EEC located upon the site (EEC).

A detailed discussion of the impacts of the proposal upon Flora and Fauna is presented elsewhere in this report.

Clause 54: Tree Preservation Order

The subject site is covered by the Tree Preservation Order (TPO) 2011 (Koala Habitat) and therefore this clause applies. The objective of the clause is to enable the protection of vegetation for reasons of amenity or ecology.

As previously detailed, a TPO application was lodged with Council in March 2012. Within this application it was advised that there were no koala food trees on the subject site but that any removal of protected Littoral Rainforest species would require a specific approval from the OEH, not Council.

As such, there is no further consideration of this clause required.

State Environmental Planning Policies

SEPP (North Coast Regional Environmental Plan) 1988

Clause 32B: Coastal Lands

The subject land is designated coastal land and therefore this clause applies. The clause requires the consideration of the NSW Coastal Policy 1997 which seeks to: protect, rehabilitate and improve the natural environment; protect and enhance aesthetic qualities and cultural heritage; and to provide for ecologically sustainable human development in the coastal zone.

It is acknowledged that the proposal will not restrict public access to the coastal foreshore or impact directly on coastal processes.

A SEPP 1 objection has been lodged with regard to Clause 32B(4)(b) with regard to overshadowing of the proposal onto adjacent coastal land. Refer below for a full discussion of the SEPP 1 objection to the development standard.

Clause 43: Residential development

Clause 43 states that Council shall not grant consent to development for residential purposes unless:

- (a) it is satisfied that the density of the dwellings have been maximised without adversely affecting the environmental features of the land,
- (b) it is satisfied that the proposed road widths are not excessive for the function of the road,
- (c) it is satisfied that, where development involves the long term residential use of caravan parks, the normal criteria for the location of dwellings such as access to services and physical suitability of land have been met,
- (d) it is satisfied that the road network has been designed so as to encourage the use of public transport and minimise the use of private motor vehicles, and
- (e) it is satisfied that site erosion will be minimised in accordance with sedimentation and erosion management plans.

As detailed within this report, it is considered that the subject site is not capable of further subdivision, given the presence of EEC on the site. It is therefore considered that the proposal is not consistent with section (a) of Clause 43.

SEPP No. 1 - Development Standards

A SEPP 1 objection to Clause 32(b)(4)(b) of the NCREP is required to accompany the development application. The clause reads as follows:

The Council must not consent to the carrying out of development:

- (b) *elsewhere in the region, if carrying out the development would result in beaches or waterfront open space being overshadowed before 3pm midwinter (standard time) or 7pm midsummer (daylight saving time).*

Proposed dwellings on both Lots 1 and 2 overshadow the adjoining Crown reserve (waterfront open space) to the rear of the site prior to 7pm midsummer:



Figure 17: extract from WD 100.02 (Shadow Diagrams 2 Rev B) – 7:00pm December 22

The degree of overshadowing is likely to impact upon regeneration of remnant vegetation located on the adjoining site once the encroaching dwelling house is removed. As such, it is considered that the proposal is inconsistent with the aims of the clause.

The applicant states that the degree of overshadowing is minor, that it does not impact upon any active recreation areas within the reserve and that the area affected is currently unmanaged bushland not actively used by members of the public.

These statements have been disputed in objections received with regard to the development. The area is managed by a local conservation group and often frequented by members of the public. This will occur with greater intensity once the encroachment into the Crown reserve by the existing dwelling is rectified as the land is returned to the community.

Overshadowing into the Crown reserve by the proposed dwellings reduces the ability for threatened species to regenerate once the existing dwelling house is removed from the rear of the site. This contributes to loss of ecological integrity on land managed for the purposes of coastal protection.

It is not considered unreasonable or unjustified to request adherence to this standard given the importance of the vegetation concerned and the opportunity to enhance a significant ecological community.

A suitable building envelope for the site may be created that does not impact upon threatened species both on the site and on the adjacent Crown reserve.

The SEPP 1 objection is not supported.

SEPP No 71 – Coastal Protection

- (a) The aims of this Policy set out in Clause 2:
- (b) Existing public access to and along the coastal foreshore for pedestrians or persons with a disability should be retained and, where possible, public access to and along the coastal foreshore for pedestrians or persons with a disability should be improved.

The proposal would not impact on existing public access to and along the coastal foreshore.

- (c) Opportunities to provide new public access to and along the coastal foreshore for pedestrians or persons with a disability.

The development does not provide any new public access to or along the foreshore.

- (d) The suitability of the development given its type, location and design and its relationship with the surrounding area.

The subject site, by reason of its size and the presence of protected Littoral Rainforest, is considered to be incapable of being subdivided. Council is of the opinion that the subdivision of the site would constitute overdevelopment of a highly constrained site. Further, the creation of asset protection zones in association with the proposed building envelopes requires clearance of sensitive vegetation. The proposal is therefore not considered to be suitable in this location.

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

The proposal does overshadow the adjacent coastal land before 7pm in midsummer. The significance of this overshadowing is discussed elsewhere in this report.

- (f) The scenic qualities of the New South Wales coast, and means to protect and improve these qualities

The proposal, if approved, would establish a harmful precedent for the subdivision of lots that are constrained by the presence of protected EEC. Council is of the opinion that the proposal for two lots on the site constitutes overdevelopment. Whilst not specifically prevalent from any public vantage points as such, it is considered that the proposal would neither protect nor improve the scenic qualities of the NSW coast.

- (g) Measures to conserve animals (within the meaning of the *Threatened Species Conservation Act 1995*) and plants (within the meaning of that Act), and their habitats

As detailed within this report, the EEC is impacted by the proposal with regard to the need for removal of vegetation to create the building envelopes and vegetation clearance required in order to establish asset protection zones in accordance with the bush fire safety authority issued by the NSW Rural Fire Service. Council's Ecologist has advised that this would result in an unacceptable impact upon the remnant vegetation located on the site. On this basis it is considered that the proposal would not conserve the EEC listed under the Threatened Species Conservation Act 1995.

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

The application would be unlikely to impact on fish or marine vegetation.

- (i) Existing wildlife corridors and the impact of development on these corridors.

As detailed within this report, the locality constitutes a Regional Fauna Corridor. The proposed subdivision would undoubtedly result in the removal of threatened Littoral Rainforest species and connectivity of associated habitat with the Crown reserve to the rear of the site.

- (j) The likely impact of coastal process and coastal hazards on development and any likely impacts of development on coastal processes and coastal hazards.

The development would be unlikely to impact on coastal processes or hazards.

- (k) Measures to reduce the potential for conflict between land-based and water-based coastal activities.

It is considered unlikely that the proposal would cause conflict between land and water based coastal activities.

- (l) Measures to protect the cultural places, values, customs, beliefs and traditional knowledge of Aboriginals.

The SEE does not provide any specific information on the impact of the proposal on matters of cultural heritage.

- (m) Likely impacts of development on the water quality of coastal waterbodies.

It is considered unlikely that the proposal would impact on the water quality of coastal waterbodies.

- (n) The conservation and preservation of items of heritage, archaeological or historic significance.

Please refer to point (l) above.

- (o) Only in cases in which a council prepares a draft local environmental plan that applies to land to which this Policy applies, the means to encourage compact towns and cities.

Not of specific relevance to the development application.

- (p) Only in cases in which a development application in relation to proposed development is determined:

- (i) the cumulative impacts of the proposed development on the environment.

In order to satisfy bush fire requirements, the proposal requires removal of significant vegetation. On this basis it is considered that the proposal would have a negative cumulative impact on the environment.

- (ii) measures to ensure that water and energy usage by the proposed development is efficient.

It is considered that the proposal would be likely to satisfy efficient water and energy use criteria (as outlined by submitted BASIX certificates).

(a) (ii) The Provisions of any Draft Environmental Planning Instruments

It is noted that the draft Tweed Local Environmental Plan 2012 was gazetted (as amended) on 4 April 2014 as the Tweed Local Environmental Plan 2014. The subject application is assessed against the provisions of the Tweed Local Environmental Plan 2014 below:

Part 1 Preliminary

1.2 Aims of Plan

The aims of this plan as set out under Section 1.2 of this plan are as follows:

- (1) This Plan aims to make local environmental planning provisions for land in Tweed in accordance with the relevant standard environmental planning instrument under section 33A of the Act.
- (2) The particular aims of this Plan are as follows:

- (a) to give effect to the desired outcomes, strategic principles, policies and actions contained in the Council's adopted strategic planning documents, including, but not limited to, consistency with local indigenous cultural values, and the national and international significance of the Tweed Caldera,
- (b) to encourage a sustainable, local economy, small business, employment, agriculture, affordable housing, recreational, arts, social, cultural, tourism and sustainable industry opportunities appropriate to Tweed Shire,
- (c) to promote the responsible sustainable management and conservation of Tweed's natural and environmentally sensitive areas and waterways, visual amenity and scenic routes, the built environment, and cultural heritage,
- (d) to promote development that is consistent with the principles of ecologically sustainable development and to implement appropriate action on climate change,
- (e) to promote building design which considers food security, water conservation, energy efficiency and waste reduction,
- (f) to promote the sustainable use of natural resources and facilitate the transition from fossil fuels to renewable energy,
- (g) to conserve or enhance the biological diversity, scenic quality, geological and ecological integrity of the Tweed,
- (h) to promote the management and appropriate use of land that is contiguous to or interdependent on land declared a World Heritage site under the Convention Concerning the Protection of World Cultural and Natural Heritage, and to protect or enhance the environmental significance of that land,
- (i) to conserve or enhance areas of defined high ecological value,
- (j) to provide special protection and suitable habitat for the recovery of the Tweed coastal Koala.

The proposed development is considered to be inconsistent with the aims of this plan, specifically (c), (d) and (i).

1.4 Definitions

Under this Plan, the proposed development as 'subdivision' is not defined. Proposed land use following subdivision is 'dwelling house' which is defined as follows:

Dwelling house means a building containing only one dwelling.

This land use is permitted with consent in the R2 Low Density Residential zone.

1.8A Savings provision relating to development applications

This clause states that if a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

With respect to this it is noted that the subject application was lodged with Council on 12 November 2013, before the Tweed Local Environmental Plan 2014 was gazetted on 4 April 2014 and as such this clause is applicable to this development application. Notwithstanding this, the subject application must have

regard to the provisions of this document as a proposed instrument pursuant to s79C (1) (a) (ii) of the Environmental Planning and Assessment Act.

Part 2 Permitted or prohibited development

2.1 Land use zones

The proposed development area is zoned as R2 Low Density Residential under the provisions of this plan. The proposed lots each have an area of 505.85m² which exceeds the minimum lot size of 450m² over the subject site.

The Crown reserve to the rear of the site upon which demolition of the existing dwelling house is proposed, is still zoned 6(a) Open Space under the TLEP 2000 as it is land affected by a 'deferred matter'. As such, TLEP 2014 does not apply to this land.

2.3 Zone objectives and Land Use Table

This document zones the development area as R2 Low Density Residential. The objectives of this zone are:

- *To provide for the housing needs of the community within a low density residential environment, and*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

It is acknowledged that proposed lot areas accord with the established minimum lot size for the locality. However, as detailed within this report, Council does not support subdivision given site constraints. On this basis it is considered that the proposal does not accord with the objectives of the R2 zone.

The Crown reserve to the rear of the site upon which demolition of the existing dwelling house is proposed, is still zoned 6(a) Open Space under the TLEP 2000 as it is land affected by a 'deferred matter'. As such, TLEP 2014 does not apply to this land.

2.6 Subdivision – consent requirements.

Subdivision of land requires development consent. The development application includes subdivision for consent consideration.

2.7 Demolition requires development consent

This clause states that the demolition of a building or work may be carried out only with development consent, unless another EPI allows it without consent. The applicant has confirmed (correspondence dated 3 March 2014) that the proposal includes demolition of the existing dwelling house. As this application has been submitted in order to obtain development consent, the proposal is considered to be in accordance with this clause.

The application has been reviewed by Councils Building Unit who have considered recommended conditions of consent with respect to the demolition to be undertaken on the site should the application be considered favourably.

Part 4 Principal development standards

4.1 Minimum subdivision lot size

The size of the proposed lots (505.85m²) is not less than the minimum size shown on the Lot Size Map in relation to the land (450m²).

4.3 Height of buildings

Maximum building height under this clause is 9m. The proposed dwelling houses have a maximum building height of approximately 8.5m.

4.4 Floor Space Ratio

Maximum floor space ratio for the subject site is 0.8:1. The proposal has a floor space ratio of 0.39:1 (Lot 1) and 0.54:1 (Lot 2) which does not exceed the development standard.

Part 5 Miscellaneous provisions

5.5 Development within the coastal zone

This clause states that development consent must not be granted to development on land that is wholly or partly within the coastal zone unless the consent authority has considered the following:

- (a) *existing public access to and along the coastal foreshore for pedestrians (including persons with a disability) with a view to:*
 - (i) *maintaining existing public access and, where possible, improving that access, and*
 - (ii) *identifying opportunities for new public access*

The subject application does not propose any amendments to existing public access to or along the coastal foreshore.

- (b) *the suitability of the proposed development, its relationship with the surrounding area and its impact on the natural scenic quality, taking into account:*
 - (i) *the type of the proposed development and any associated land uses or activities (including compatibility of any land-based and water-based coastal activities), and*
 - (ii) *the location, and*
 - (iii) *the bulk, scale, size and overall built form design of any building or work involved*

The proposed development is permissible on the subject site. However, the bulk and scale of the built form design is considered inconsistent with the low-key and informal character of the beachside locality as outlined throughout this report. As such the proposal is considered to be unsuitable at this location.

- (c) *the impact of the proposed development on the amenity of the coastal foreshore including:*
 - (i) *any significant overshadowing of the coastal foreshore, and*
 - (ii) *any loss of views from a public place to the coastal foreshore,*

The proposed development results in some overshadowing of land identified as 'coastal foreshore'. Proposed building height to the rear of the site contributes to overshadowing. This may impact upon regeneration of sensitive vegetation once the existing dwelling is removed.

- (d) *how the visual amenity and scenic qualities of the coast, including coastal headlands, can be protected, and*

The proposed development requires the removal of sensitive vegetation and impacts upon an EEC that contributes to visual amenity and scenic qualities of the coast. As such, the proposal does not result in coastal protection.

- (e) *how biodiversity and ecosystems, including:*
 - (i) *native coastal vegetation and existing wildlife corridors, and*

- (ii) *rock platforms, and*
- (iii) *water quality of coastal waterbodies, and*
- (iv) *native fauna and native flora, and their habitats, can be conserved, and*

As previously discussed, the proposal impacts upon native coastal vegetation, existing wildlife corridors and native fauna, flora and their habitats via vegetation clearance within an EEC. As such, it is considered that the proposal will have an unacceptable impact on local biodiversity/ecosystems in this regard.

- (f) *the cumulative impacts of the proposed development and other development on the coastal catchment.*

The proposed development is considered to result in an unacceptable cumulative impact on the coastal catchment given the site's residential zoning and the permissibility of similar development at this location which could set a precedent for the future.

This clause goes on to further state:

- (3) *Development consent must not be granted to development on land that is wholly or partly within the coastal zone unless the consent authority is satisfied that:*
 - (a) *the proposed development will not impede or diminish, where practicable, the physical, land-based right of access of the public to or along the coastal foreshore, and*

As outlined elsewhere in this report, the proposal will not impede or diminish the right of access of the public either to or along the public foreshore.

- (b) *if effluent from the development is disposed of by a non-reticulated system, it will not have a negative effect on the water quality of the sea, or any beach, estuary, coastal lake, coastal creek or other similar body of water, or a rock platform, and*

The proposal requires connection to Council's reticulation sewer system.

- (c) *the proposed development will not discharge untreated stormwater into the sea, or any beach, estuary, coastal lake, coastal creek or other similar body of water, or a rock platform, and*

Roof water from future dwellings is proposed to be directed to 3000 litre rainwater tanks with overflow to the street network.

This document further states that full details of Water Quality Management Measures will be provided with any future Construction Certificate Application in accordance with the provisions of "Tweed Urban Stormwater Quality Management Plan, April 2000".

Having regard to the above, it is considered that the subject application would be in accordance with the above controls, with no untreated stormwater being discharged to the sea, beach or the like.

- (d) *the proposed development will not:*
 - (i) *be significantly affected by coastal hazards, or*
 - (ii) *have a significant impact on coastal hazards, or*
 - (iii) *increase the risk of coastal hazards in relation to any other land.*

The subject site is not located in an area affected by coastal hazards.

Part 7 Additional Local Provisions

7.1 Acid sulfate soils

As previously outlined in this report, works undertaken on Class 5 ASS are intended to be managed by a minor works plan.

7.6 Stormwater management

Roof water from future dwellings is proposed to be directed to 3000 litre rainwater tanks with overflow to the street network.

7.10 Essential Services

All essential services are available to the site.

(a) (iii) Development Control Plan (DCP)

Tweed Development Control Plan

A1-Residential and Tourist Development Code

An assessment of the proposal against Part A of Section A1 of the DCP has been carried out as it relates to a dwelling house – i.e. only one dwelling per allotment.

1.4. Objectives of this Section

Objectives 2 and 3 in 1.4 read as follows:

2. *Ensure that development is compatible with the local natural and built character, scale and amenity;*
3. *Ensure quality residential and tourist development which responds to the features of the site and the Tweed's subtropical climate; and*

Following assessment of the proposal, it is clear that the development is not compatible with the local natural and built character, scale and amenity. It also does not respond well to the ecological features of the site.

3.1 Streetscape

The context of the development is informal and low-rise. The locality is historically a beachside holiday area. Formal urban design of such bulk and scale is inconsistent with the existing streetscape character. The proposed development does not '*recognise and respect the existing qualities and unique characteristics of the place*'.

The development does not respond well to the streetscape. The bulk and scale is imposing, particularly to the front and side boundaries. The dwelling to the south of the development is impacted by the bulky frontage which results in overshadowing in the winter months.

The design includes prominent garaging, a reduced front setback and proximity of roof forms to the boundaries. There has been little consideration of the new dwelling houses' size, shape, elevations, setbacks, height and roof form within the streetscape and from adjoining properties. There is no landscaping to the street.

The proposal does not meet objective 01:

01. *To ensure new development is compatible with, and complements the positive characteristics of the existing built, landscape and topographic elements of the streetscape.*

Entrance to each dwelling is via a central stairway to elevated side entrances. The building entry areas/front doors are not clearly identifiable from the street and

are accessible only behind a screened/gated arrangement. This is typical of the formal urban design.

The design is not compatible with other buildings and sites along the street, *particularly those that are older and more established*. The location and height of level changes over the allotment are unnecessary. A site-responsive and low-impact design that steps down the site from rear boundary to front boundary should be possible without the need for imposing bulk and scale. The design attempts to fit in large floor areas and double carports as well as substantial external living areas on a constrained site.

As such, the proposal does not comply with the following controls:

- C1. All dwellings should address and offer passive surveillance over the street by ensuring important elements such as front doors, building entry areas and windows are prominent in the building façade (including secondary dwellings) with the entrance clearly identifiable from the street.*
- C2. Site design, building setbacks and the location and height of level changes are to consider and be compatible with other buildings and sites along the street, particularly those that are older and more established.*

3.2 View and Vistas

The dwellings are long and narrow. Building height has been maximised. Roof lines are minimal between dwellings and encroach into the front setback (within 1.7m of front boundary). This serves to reduce the view corridor down the residential street (Queen Street) which is typically vegetated (within front setbacks of existing dwellings) within the vicinity of the subject site. The height and width of the buildings at the front boundary and lack of separation between dwellings (1.8m between roof lines) also serves to reduce the ability of dwellings across the street being able to retain any existing views of the natural bushland to the rear and upslope of the subject site.

The proposal does not meet the following objectives:

- 01. To ensure existing public views and vistas particularly those of important natural features such as ridgelines, water or bushland, are retained in so far as it is practical to do so.*
- 02. To ensure public view corridors, particularly those down streets and between buildings, are not unnecessarily reduced or obliterated.*

As such, the proposal does not comply with the following controls:

- C1. Building siting and height is, as far as it is practical, to be designed to minimise the impact on views from surrounding properties, and follow the Planning Principles (refer note) of view sharing between properties.*
- C2. The location and height of new development is not to significantly diminish the public views to heritage items, dominant landmarks, public buildings from public places or unreasonably obscure public district views of major natural features such as the water, ridgelines or bushland.**

2.2 Landscaping, deep soil zones and external living areas

Landscaping requirements for the site include the following:

At least 450m ² but less than 600m ²	30% of the site including at least two deep soil zones measuring a minimum of 3m in any direction
All urban lot sizes	At least 50% of the landscaped area is

	to be behind the building line of the primary road frontage.
--	--

30% of the 505.85m² lots is 151.75m².

A hatched landscaped area of 268.47m² is nominated on Drawing No. WD11.04 for Lot 1 and a hatched landscaped area of 153.6m² is nominated on Drawing No. WD21.05 for Lot 2 - essentially all of the area of the lots that are not covered with structures. Two Deep Soil Zones of 3m x 3m are located in the NE corner of each lot adjacent to each other. However, a landscape plan has not been supplied for the development and there is no supporting information regarding proposed plantings to substantiate the nominated landscaped areas.

The existing indigenous vegetation on the site has been unsuccessfully integrated with the design and the remaining local native vegetation on the site will be compromised by the development.

As such, the proposal represents a variation to the following controls:

C4. Existing landscape elements on sites such as natural rock outcrops, watercourses, dune vegetation, indigenous vegetation and mature trees should be retained and integrated with the design of the buildings.

C5. On lots adjoining indigenous/native vegetation, protect and retain indigenous native vegetation and use native indigenous plant species for a distance of 10m from any lot boundaries adjoining bushland.

3.1 Setbacks

As stated previously in this report, the front setback for both dwellings as an average of dwellings within proximity of the subject site is not supported.

The applicant has neglected to take into account all existing/approved front setbacks within a 40m vicinity of the subject site and arrives at an average of 3.8m. A front setback between 5.275m – 7.275m is required based on a calculated average of 6.275m. Given the building height of the front elevations, adherence to a minimum front setback of 5.275m is expected.

As such, the proposal represents a variation to the following control:

C2. In established areas and on infill sites dwelling houses are to be consistent with the front setback distance of neighbouring buildings and are to be the average of the setbacks of neighbouring dwellings within 40 metres or a variation justified under a streetscape analysis. This setback may be varied up to 1 metre where justified through a streetscape analysis.

The proximity of the considerable bulk and scale of the dwellings to the front boundary is contrary to the following objective:

01. To establish the desired spatial framing of the street, define the street edge and enable a transition between public and private space.

The upper level overhang associated with the dwelling on Lot 2 does not comply with requirements in Control C3 that allow an articulation zone into the front façade as it exceeds 25% of the frontage width.

4.3 Solar Access and Natural Ventilation

The proposed development will result in some overshadowing to both southern adjoining dwellings as their associated private open space areas are oriented to the north. The most significant overshadowing occurs over the private open space and deep soil zone areas of 42 Queen Street which are oriented to the northern boundary on this constrained lot.

Dwelling plans were granted for 42 Queen Street on 24 December 2013 that include demolition of the existing dwelling (evident in May 2012 aerial imagery below) and construction of a single storey/part two storey dwelling with a larger building footprint (DA13/0584).

The existing north-facing verandah will be replaced by a building elevation with living room windows and an inset "winter" verandah with a setback of 5.505m. The area between the northern elevation and the boundary will function as a ground level external living area. It is nominated as a deep soil zone with and will be required to be landscaped as such.



Figure 19: May 2012 aerial imagery – adjoining sites to the south

Amended plans submitted by the applicant plot the adjoining dwelling at 42 Queen Street to scale in relation to the common boundary with proposed Lot 2.

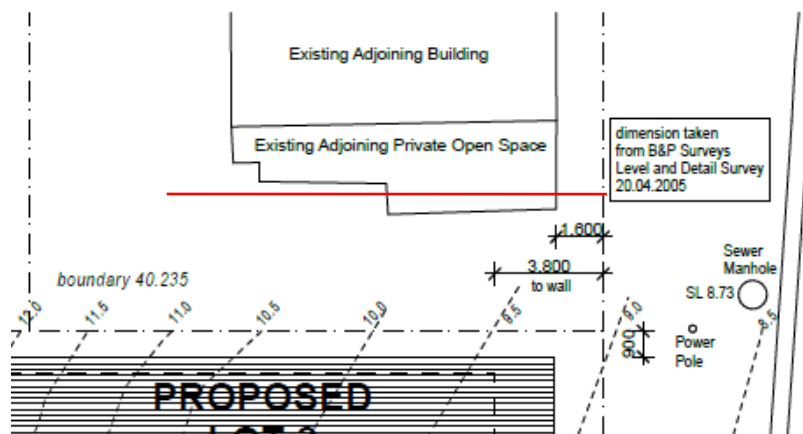


Figure 20: excerpt from Site Plan WD 0.03 Rev C – adjoining existing development at 42 Queen Street

The edge of the existing verandah is setback 4m at its closest point and 5.8m at its farthest point. The horizontal line across the verandah (above) represents an approximate setback of 5.5m. This will be the new building line as approved by DA13/0584.

Shadow diagrams submitted by the applicant confirm the scale of midwinter overshadowing to the properties to the south (42 Queen Street and 1 Lighthouse Parade) at 9am, 12 noon and 3pm on June 21.



Figure 21: excerpt from Shadow Diagrams 3 Rev B – 9am June 21



Figure 22: excerpt from Shadow Diagrams 3 Rev B – 12 noon June 21



Figure 23: excerpt from Shadow Diagrams 4 Rev B – 3pm June 21

Most of the northern setback of 42 Queen Street (existing dwelling) is overshadowed between 9am and 12 noon and 70% of the rear yard is overshadowed at 3pm. As such, sunlight to at least 50% of the principle area of private open space is easily reduced to less than 2 hours between 9am and 3pm on June 21. The overshadowing is considered unacceptable and does not comply with Control 4.

Overshadowing is intensified with regard to the approved plans for 42 Queen Street in that windows to the living areas are unlikely to receive at least three hours of sunlight between 9am and 3pm on June 21 which is also inconsistent with Control C4:

C4. For neighbouring properties ensure:

- i. Sunlight to at least 50% of the principle areas of private open space of adjacent properties is not reduced to less than 2 hours between 9am and 3pm on June 21, and*
- ii. Windows to living areas must receive at least 3 hours of sunlight between 9am and 3pm on June 21, and*
- iii. Where existing overshadowing by buildings is greater than this, sunlight is not to be further reduced by more than 20%.*

4.4 Building Form

As stated previously in this assessment, the overall bulk and scale of both dwellings impacts upon the streetscape with regard to building height in proximity to the front boundary, views from adjoining properties and overshadowing to adjoining properties.

The proposal is not consistent with the following objective:

- 01. To minimise the visual impact and bulk of development when viewed from adjoining properties, the street, waterways, and areas for public recreation purposes.*

The proposed dwelling on Lot 1 addresses the street by way of an 8m wall plate height adjacent to the carport area. This expanse is unbroken and devoid of articulation and presents as a 'tower'. This is contrary to the objective requiring the minimisation of visual impact and bulk when viewed from the street and represents a variation to the following control:

- C2. Walls in excess of 15m in length and/or 4m in height must be articulated, landscaped, or otherwise treated in order to provide visual relief. Planning and design principle 4 above identifies various articulation techniques.*

There is little visual relief with regard to the dwelling proposed on Lot 1. The southern elevation extends to 17m in width with an average height of 6.75m. It is noted that this elevation will be adjacent to the northern elevation of the dwelling proposed on Lot 2. However, it will be visible from the streetscape (and from the adjacent dwelling) and is inconsistent with the character of the area. There is little articulation and few elements of architectural interest evident.

The roof line of the dwelling on Lot 2 extends unbroken for a length of 20m with no varying pitches to reduce the overall visual bulk. It slopes towards the street as a cantilevered building section over the carport area but has no articulation for the entire length.

Similarly, the single roof form of the dwelling on Lot 1 extends unbroken for a length of 19m.

The design is an unacceptable outcome for the site. As such, the proposal is considered to represent a variation to the following control:

- C1. Building siting, height, scale, and roof form must to relate to the **surrounding development**, topography and the existing site conditions.*

The bulk and mass of both dwellings does not respond to the constraints of the site. The designs do not comply with frontage setbacks to reduce proximity to the street and mitigate impacts upon adjoining dwellings.

Summary

Both dwelling designs are inconsistent with the informal, low-density, low-rise, casual holiday character of the locality. The designs are typical of residences in

urban areas such as Tweed Heads and Banora Point or in Greenfield subdivisions along the Tweed Coast.

The designs are imposing and formal. Front elevations are dominated by car parking areas with reduced setbacks and little or no area for landscaping.

The designs incorporate architectural elements of a commercial nature which do not integrate well with the established residential streetscape.

Whilst ensuring privacy, the designs create sterile façades – at odds with the existing character of the locality which promotes an open and friendly atmosphere at a human scale.

A2-Site Access and Parking Code

Double carports are located to the front of the dwellings under upper level roofs that accommodate two car spaces for each dwelling. This is consistent with DCP A2 requirements.

A5-Subdivision Manual

A5.4.5 – Environmental Constraints

Section A5 of the DCP states that housing and other forms of urban development are designed to integrate with natural features, not dominate or remove them.

Section A5.4.5 relates to significant vegetation and advises that *'Development sites must be assessed to determine if there are areas of significant vegetation'*. Table A5-2 relates to the vegetation condition codes as follows:

TABLE A5-2: VEGETATION CONDITION CODES		
Condition Code	Condition Category	General Site Criteria
1.	Old-Growth /Undisturbed /Excellent Condition	<ul style="list-style-type: none"> • Vegetation with negligible unnatural disturbance • A significant proportion of plants with age-related features (such as tree hollows) and a species composition characteristic of the ecologically mature forest ecosystem • May include non-woody communities (eg. heathland, sedgeland, etc.) of native vegetation in excellent condition • Abundant habitat for wildlife • Mature upper stratum • A well developed understorey will usually be present
2.	Relatively Natural/Good Condition	<ul style="list-style-type: none"> • Vegetation that is relatively homogenous and intact • Minimal canopy disturbance • Understorey usually present • Advanced regrowth may be present • May have a history of logging or burning but has retained a significant component of its original vegetation diversity. May contain a low to moderate proportion of weed species in the understorey
3.	Heavily Modified /Disturbed /Poor Condition	<ul style="list-style-type: none"> • Vegetation that has been substantially modified by clearing for agriculture, logging, mining or other disturbance • Canopy removal typically between 70% & 30% • Includes recent regeneration • Understorey usually disturbed or absent • May have extensive weed invasion in the understorey • May include medium to advanced regrowth

Figure 24: Vegetation Condition Codes

Council's Ecologist has advised that the site is of high ecological status, due to the presence of Littoral Rainforest on and adjacent the lot. It is considered that the vegetation may be classified as Condition 2 with components of Littoral Rainforest that is relatively homogenous and intact, with minimal canopy disturbance, understorey and advanced regrowth present.

Section A5 advises that proposals for sites that contain significant vegetation must:

- *Demonstrate that the development proposal does not detract from the ecological, scenic landscape or local identity values of the significant vegetation;*
- *Include significant vegetation where possible into the open space/drainage network or within road reserves;*
- *Provide a street and lot layout; and/or lot sizes and shapes that will enable the proposed development to take place whilst also providing sufficient space (outside building platforms) on lots to enable significant individual trees or small stands of vegetation to be retained.*

Whilst some significant vegetation is proposed to be retained it is considered that to comply with bushfire requirements, the proposal necessitates vegetation clearance.

It is therefore considered that the proposed subdivision results in the loss of significant vegetation and detracts from the ecological values on the site, contrary to the requirements set out within Section A5 of the DCP.

A11-Public Notification of Development Proposals

The development application was notified to adjoining properties for a period of 14 days as integrated development under s100B of the Rural Fires Act 1997.

(a) (iv) Any Matters Prescribed by the Regulations

Clause 92(a) Government Coastal Policy

The subject site is nominated as Coastal Land and therefore this clause applies. As previously detailed the proposed development will not impact on coastal lands in terms of restriction of public access.

Clause 92(a) requires Council to provide an assessment of the proposal against the *NSW Coastal Policy 1997: A Sustainable Future for the New South Wales Coast*. This document acknowledges that whilst there is a focus on conservation initiatives in coastal areas, there is a need for local housing strategies in order to utilise land in existing urban centres.

As detailed within this report, Council does not support removal of vegetation within the protected EEC. With this regard the Policy states that *SEPP 26 Littoral Rainforests will be rigorously enforced and extended where appropriate in recognition that what remains of these valuable ecosystems needs to be fully protected from inappropriate development*.

Whilst the subject site is not specifically covered by the SEPP 26 Policy, Council's Ecologist, and the applicant's Flora and Fauna Assessment has acknowledged the presence of such vegetation on the site. It is therefore considered that the site is not capable of subdivision without the removal or damage to such protected species. Therefore the proposal is not consistent with the clause.

Clause 92(b) Applications for demolition

The application has been reviewed by Council's Building Unit who have considered recommended conditions of consent with respect to the demolition to be undertaken on the site should the application be considered favourably.

(a) (v) Any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),

Tweed Shire Coastline Management Plan 2005

The primary objectives of the Coastal Management Plan are to protect development; to secure persons and property; and to provide, maintain and replace infrastructure. The subject site is not located within the Coastal Erosion Hazard Zone. The proposal seeks to remove vegetation which is not supported for the reasons outlined within this report.

One of the key objectives of the Plan is to protect, rehabilitate and improve the natural environment and to promote ecologically sustainable development. It is considered that the subdivision of the lot would result in the removal or damage to a protected EEC (Littoral Rainforest). On this basis it is considered that subdivision of the site is not consistent with the Plan.

Tweed Coast Estuaries Management Plan 2004

Not applicable to the development proposal as the subject site is not located within the vicinity of an estuary ecosystem and is unlikely to impact on waterways or biodiversity of waterways.

Coastal Zone Management Plan for Cobaki and Terranora Broadwater (adopted by Council at the 15 February 2011 meeting)

Not applicable to the proposed development as the subject site is not located in the vicinity of the Cobaki or Terranora Broadwater.

(b) The likely impacts of the development and the environmental impacts on both the natural and built environments and social and economic impacts in the locality

Flora and Fauna

Ecological Values

With reference to the Tweed Vegetation Management Strategy 2004 (TVMS) mapping (updated 2009), vegetation occurring immediately to the east of the site extending across the Crown reserve is identified as *TVMS Code 310 - Banksia Dry Sclerophyll Open Forest to Shrub-land*.

However, from site inspection, this community is more closely described as Littoral Rainforest which corresponds with TVMS classification code 101. An approximate area of 340m² of Littoral Rainforest extends across the subject site that forms 10% of a broader linear remnant unit covering an area of approximately 3400m² - approximately 10% of the remnant.



Figure 25: Remnant Littoral Rainforest Unit of approximately 3400m²

The mapped TVMS Code 310 - *Banksia Dry Sclerophyll Open Forest to Shrubland* community is assigned 'Moderate Ecological Status' as shown on Map 4 of 7 titled *Ecological Values* in the TVMS 2004, dated August 2004.

However where evaluated as TVMS Code 101 *Littoral Rainforest* (in accordance with Table 3.5 Criteria for Mapped Categories of Ecological Status) the community is assessed as having 'Very High Ecological Status' due to High Biodiversity (Rainforest) Status, Significant Species and Threatened Communities criterion.

As previously discussed in this report and with reference to DCP A5 Subdivision Manual - Section A5.4.5, the community meets the definition of 'Significant Vegetation' as classified as Type 1 Regionally Significant Natural Area.

With reference to the listing advice for 'Critically Endangered' - *Littoral Rainforest and Coastal Vine Thickets of Eastern Australia* under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the remnant unit of 3400m² would be considered to satisfy the eligibility threshold criteria necessary for classification such as:

- greater than 1000m²;
- less than 70% cover of transformer weeds; and
- 25% native plant diversity of characteristic species or 30% canopy cover of one rainforest species (i.e. *Cupaniopsis anacardioides*).

In addition to being considered eligible for listing under the EPBC Act as a 'Critically Endangered Community' the remnant unit is recognised as a candidate 'Endangered Ecological Community' - *Littoral Rainforest in the South East Corner, Sydney Basin and NSW North Coast bioregions* under the *Threatened Species Conservation Act 1995* (TSCA Act).

With reference to the Far North Coast Regional Conservation Plan 2010 (FNCRCP), an estimated 90% of Littoral Rainforest has been cleared since European settlement within the Far North Coast (Ballina, Byron, Richmond

Valley, Tweed). TVMS (Table 2.4) estimates an area of approximately 102 hectares of this community remaining within the shire.

Table 2.4 Areas and Proportions of Mapped Vegetation Types in Tweed Shire

Code	Vegetation Type	Area (ha)	% of Mapped Bushland	% of Shire
Rainforest and Riparian Communities				
101	Littoral Rainforest	102	0.15	0.08
102	Sub-tropical / Warm Temperate Rainforest on Bedrock Substrates	8919	12.99	6.77
103	Dry Rainforest	157	0.23	0.12
104	Lowland Rainforest on Floodplain	283	0.41	0.21
105	Myrtaceous Riparian Low Closed Forest to Woodland	472	0.69	0.36
106	River Sheoak Open Forest	635	0.92	0.48
107	Cool Temperate Rainforest	1	0.002	0.001

Figure 26: extract from Table 2.4 of FNCRCP

Patches are generally linear in shape and remain as small fragmented units. Estimates of occupancy of the ecological community in NSW (derived to inform the Scientific Determination for EPBC listing) indicates that the majority of individual patches (92%) are less than 10 hectares in size.

The Site

Several listed species are known to occur onsite including:

- *Cryptocarya foetida* (Stinking Cryptocarya) - Vulnerable Threatened Species Conservation Act (TSC Act) and EPBC Act. The one individual has been significantly damaged through past landscape maintenance practices.



Figure 27: *cryptocarya foetida* 2012 (left) and 2014 (right)

- *Archidendron hendersonii* (White Lace Flower) - Vulnerable TSC Act. Two individuals occur onsite. One of the stems has not been identified on the site plan nor specifically recognised in the Ecological Assessment (EA) provided with application documentation. The stem identified on the site plan shows evidence of recent damage that may have occurred during pruning activity on adjacent trees. The other stem (not identified on the plan) has been significantly damaged and the architecture of the tree altered.



Figure 28: damaged *Archidendron hendersonii* not identified on site plan

- *Macadamia tetraphylla* (Queensland Nut) - Vulnerable TSC Act and EPBC Act. A single stem was previously recorded but has not been identified in the current EA. During site inspection, the severed stem of the previously identified tree was identified by low growing remaining foliage. No record of permit granted by OEH was returned from OEH Public Register search.



Figure 29: *Macadamia tetraphylla* 2012 (left) and severed stem 2014 (right)

- Other listed flora and fauna species considered to have a moderate to high likelihood of occurring/utilising habitat on and immediately adjacent to the site include:

Species	Common Name	Status	No. Records Fingal	Notes
Fauna				
<i>Ptilinopus regina</i>	Rose-crowned Fruit-Dove	Vulnerable	-	Ukerebagh NR
<i>Pteropus poliocephalus</i>	Grey headed Flying Fox	Vulnerable*	-	Soorley St Banora Pt

Species	Common Name	Status	No. Records Fingal	Notes
<i>Syconycteris australis</i>	Common Blossum Bat	Vulnerable	2/2 - SEPP Wetland	Often roosts within Littoral R/f
<i>Mormopterus beccarii</i>	Beccari's Freetail-bat	Vulnerable	1/3 - SEPP Wetland	Other records Banora, Ukerebagh NR
<i>Miniopterus australis</i>	Little Bentwing-bat	Vulnerable	-	Soorley St Banora Pt
<i>Burhinus grallarius</i>	Bush Stone-curlew	Endangered (E1)	-	Coolangatta/TH Gold Course
Flora				
<i>Archidendron hendersonii</i>	White Lace Flower	Vulnerable	4/12	Possible duplication. Only one record for the subject site.
<i>Cryptocarya foetida</i>	Stinking Cryptocarya	Vulnerable	19/27	Possible duplication
<i>Syzygium moorei</i>	Durobby	Vulnerable	3/7	Assumed to occur (100m record precision) as part of same remnant Littoral Rainforest unit to the north

Table 1: Bionet - Atlas of NSW Wildlife Search (2.5km buffer, listed species > 1980)

Council Assessment - Review of Existing Vegetation (EA) 40 Queen Street, Fingal dated October 2013 and prepared by Planit Consulting.

The EA did not consider the potential impact on the Littoral Rainforest vegetation community arising from the establishment and maintenance of Asset Protection Zones, nor the long term effects of shading from the proposed two storey dwellings.

The EA concluded that the community was representative of an EEC - *Littoral Rainforest in the South East Corner, Sydney Basin and NSW North Coast bioregions.*

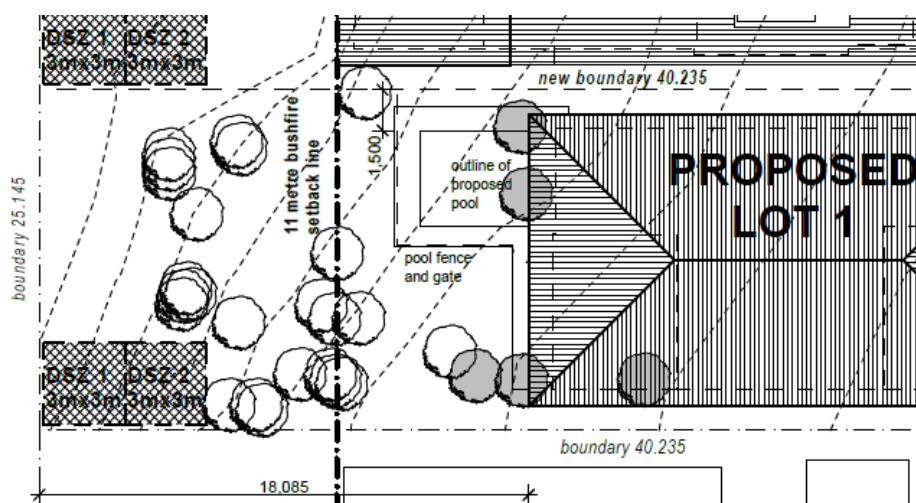


Figure 30: extract from Site Plan WD 0.03 Rev B – Tree Removal

Page 11 of the EA concludes that four trees comprising part of the EEC would be required to be removed to facilitate the development. However, page 17 of the EA indicates that five trees have been identified for removal which is consistent

with the accompanying *Tree Report*, prepared by Northern Tree Care and dated 28 October 2013 (revised 30 October 2013).

The loss of four to five trees necessary to establish the proposed dwellings has been estimated at 80m² of Littoral Rainforest. This would appear to be inaccurate as the report clearly does not consider modification of the community for bushfire hazard mitigation purposes.

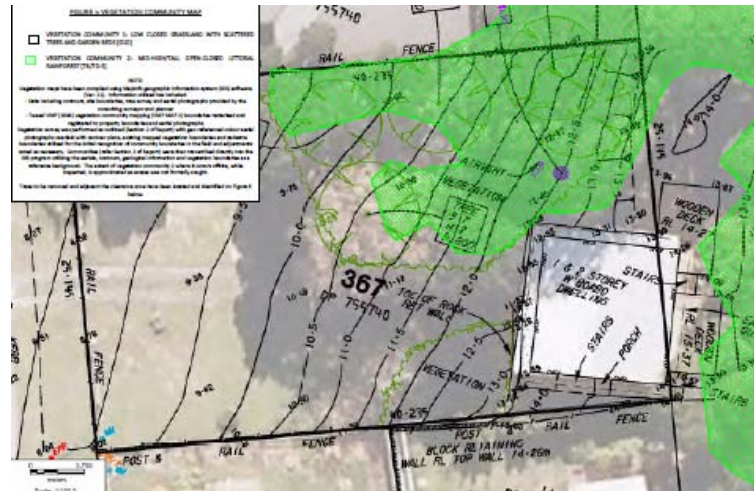


Figure 31: Vegetation Community Map (Page 13 of EA – Figure 7)

Furthermore, the extent of *Vegetation Community 2: Mid High/Tall Open-Closed Littoral Rainforest* depicted above in Figure 7 of the EA (Vegetation Community Map) is considered to be imprecise following site inspection, as it does not account for the complete extent of the Littoral Rainforest canopy. Even in the case where disturbance for bushfire management purposes is not required the area of 80m² disturbance is an underestimate.

The EA rejects classification of vegetation on the site as a *Critically Endangered Community* under the EPBC Act on the basis that patch size is less than 1000m² which did not meet diagnostic criteria as stated in Commonwealth listing advice. This is contrary to Council's determination.

As previously discussed, two stems of two listed species were not identified on submitted plans or within the EA. Page 10 of the EA suggests that 'several individuals of White Lace Flower (*Archidendron hendersonii*)' were recorded yet only one was shown on the plan.

The *Macadamia tetraphylla* was previously described in *Review of Existing Vegetation Lot 367 DP755740 dated February 2012 and prepared by Planit Consulting* (submitted as part of the application documentation for refused two lot subdivision DA12/0257) and recorded during a 2014 site inspection as significantly damaged.

When the location of the second White Lace Flower (*Archidendron hendersonii*) is translated onto the development layout the tree appears to occur within the location of the proposed swimming pool associated with Lot 1 and therefore would require removal. As such, the statement below made on page 17 of the EA indicating that 'individuals of threatened fauna shall be retained' is misleading.

The development design is considered to have adequately addressed the importance of the residual stand of trees in the northeast of the site via the following:

- The individuals of threatened flora shall be retained;
- The majority of the endangered ecological community shall be retained (5 trees removed)

Figure 32: extract from page 17 of EA

The lower strata (shrub and ground layer) is reported as being absent on page 9 of the EA. This was consistent with observations made by Council officers during a 2014 inspection. However it is contrary to what was reported in the previous EA associated with DA12/0257 where *'the shrub layer varies from being dense on the southern fringes to sparse elsewhere, throughout and includes smaller specimens from the small tree layer....'* Evidence of more structural diverse mid-lower stratum can also be seen in earlier site photographs.

There is no record of permit or certificate issue from OEH to remove understorey vegetation on the site.

It is noted that littoral rainforest communities, due to exposure and proximity to the ocean, may lack species diversity within the understorey or may exhibit a merged height/structural continuum. However, the reduced understorey vegetation observed onsite would not be expected to occur under natural conditions.

The EA included an Assessment of Significance (Seven Part Test) performed on the EEC *Littoral Rainforest in the South East Corner, Sydney Basin and NSW North Coast bioregions* to qualitatively and quantitatively identify and analyse potential direct and indirect impacts on the EEC arising from the proposed development.

Based on the Seven Part Test it, the EA concluded that a Species Impact Statement was not required and that impacts would be considered to be of a minor nature that could be mitigated through providing compensatory planting either on or off site.

However, the potential impact on threatened communities, species and their habitats is considered significant by Council, contrary to the EA conclusions particularly given that the Seven Part Test did not contemplate all direct and indirect ecological impacts as a result of the proposed development such as vegetation removal for bushfire management purposes.

Council Assessment - Tree Report 40 Queen Street, Fingal Head dated 30 October 2013 (Ver. 2) prepared by Northern Tree Care.

The Tree Report also did not consider the potential impact on the Littoral Rainforest vegetation community arising from the establishment and maintenance of Asset Protection Zones with the exception of recommending removal of Tree No. 25 being a Tuckeroo (*Cupaniopsis anacardioides*).

The Tree Report estimated the age of some trees to be up to 70 years old and noted previous damage/pruning of trees forming part of the EEC.

The Tree Report identified four trees requiring removal to facilitate building envelopes with removal of an additional tree posing future impending risk to a proposed dwelling and for bushfire management purposes.

The following table contains Council's review of information presented in the Tree Report with regard to trees proposed to be removed.

Tree No.	Species	Common Name	Ht (m)	Dbh (mm)	Crown (m)	TPZ (m)	Comments
23	<i>Archidendron hendersonii</i>	White Lace Flower	9	250	5	3.0	The report indicates encroachment within the trees Tree Protection Zone (TPZ) of 0.5m. The report hasn't contemplated the roofline of proposed

Tree No.	Species	Common Name	Ht (m)	Dbh (mm)	Crown (m)	TPZ (m)	Comments
							<p>dwelling on Lot 2 that would likely restrict growth of the canopy nor potential impacts associated with construction of Lot 2 dwelling footings. The extent of excavation for the pool associated with Lot 1 has been calculated to the outer shell of the pool, over excavation has not been contemplated and given the slumping nature of underlying sands, excavation would likely extend within the structural root zone of the trees that may have an adverse impact on the health and long term viability of the listed trees without adequate arboricultural supervision. This tree is a listed species and should be provided adequate area for canopy growth whilst all form of excavation should be restricted from the TPZ to be confident of tree survival.</p>
25	Cupaniopsis anacardioides	Tuckeroo	10	230 + 180	8	4.92	<p>This tree has been estimated to be aged 50-70 years old and forms a substantial proportion of the western edge canopy. With reference to the proposal plans Dwelling 1 would significantly encroach within the trees TPZ when calculated in accordance with AS4970. The tree's health may be compromised in the long term due to encroachment and also require substantial pruning affecting the architecture of the tree. The tree has been recommended to be removed due to avoid future risk of property damage on the proposed dwelling and</p>

Tree No.	Species	Common Name	Ht (m)	Dbh (mm)	Crown (m)	TPZ (m)	Comments
							for bushfire management purposes. It is considered that the tree poses low risk due to form (lean predominantly to the west) under current site conditions.
26	Notelaea longifolia	(Mock Olive)	4	140	3		This tree falls within the footprint of Lot 1 dwelling and as such would require removal.
27	Arytera divaricata	Coogera	4	170	3		This tree falls within the footprint of Lot 1 dwelling (pool) and as such would require removal
28	Syzygium oleosum	Lilli Pilli	5	160+90	3		This tree falls within the footprint of Lot 1 dwelling (pool) and as such would require removal
29	Diospyros fasciculosa	Grey Ebony	5		4-5		This tree is in good condition with good single leader form. Comprises part of the outermost western edge, occurs within the footprint of Lot 1 dwelling and as such would require removal.
30	Cryptocarya foetida	Stinking Cryptocarya	100 mm	30	-		The individual has been severely damaged by frequent pruning. The report recommends transplanting to ensure the tree is not further damaged/disturbed during construction. This suggests that the risk to vegetation within the EEC is at risk during the construction phase. Previous experience with transplanting semi-mature species in the Lauraceae family has proved difficult with limited success.

Table 2: Required Tree Removal/Impact

In addition to the five trees identified in the report that have been recommended for removal, an additional two semi-mature stems not shown on the plans but forming part of the EEC would likely be impacted. These trees were identified during a site inspection and are described as:

- *Denhamia celastroides* (Denhamia) - approximately 170mm dbh with 3 - 4m canopy spread situated immediately to the south of Tree No. 25 on the edge of the development footprint of dwelling No. 1;
- *Archidendron hendersonii* (White Lace Flower) - estimated dbh difficult to ascertain due to severe pruning but with high density regrowth. Likely a semi-mature tree, situated within the footprint of the proposed pool for dwelling 1.

Other vegetation within the EEC not adequately considered as part of the Tree Report comprises a number of semi-mature/mature canopy trees situated immediately adjacent, and to the east of the existing dwelling. The impact on those trees during any demolition and construction of the proposed pool for Lot 2 is considered critical in evaluating all impacts associated with the development proposal.

Bushfire Threat Assessment Report and RFS Referral

Application documentation included a report addressing bushfire threat (*Bushfire Threat Assessment Report 100B dated 8 November 2013 and prepared by BCA Check Pty Ltd*). The report recommends the entire property (Lots 1 and 2) to be maintained as an Inner Protection Area in accordance with the NSW Rural Fire Service document *Standards for Asset Protection Zones* with landscaping to future dwellings to be maintained in accordance with Appendix 5 of *'Planning for Bush Fire Protection 2006'*.

NSW Rural Fire Service returned General Terms of Approval (GTA) for the development application that included the following which is generally consistent with the recommendations of the bushfire threat report:

- *The entire property shall be managed as an inner protection area (IPA) as outlined within section 4.1.3 and Appendix 5 of 'Planning for Bush Fire Protection 2006' and the NSW Rural Fire Service's document 'Standards for asset protection zones.*

General advice was also provided to the consent authority clarifying the extent of vegetation removal required in order to comply with the aforementioned GTA:

- *The required asset protection zones, for proposed Lots 1 and 2 (managed as Inner Protection Areas), to achieve satisfactory building separation from vegetation located on the adjoining lot to the east, will require the clearing of vegetation.*

In accordance with *Planning for Bushfire Protection 2006* tree canopy cover of less than 15% shall be established and maintained within an IPA with provision for a minimum two metre separation distance between vegetation and any part of roofline associated with a dwelling.

Trees shall have lower limbs removed up to a height of two metres above the ground and groundcover managed.

The document *Standards for Asset Protection Zones* elaborates further on APZ requirements indicating that a two to five metre separation distance should be maintained between vegetation and structures and that tree crowns shall be separated by two to five metres. Where trees are retained they are to be restricted to islands/clumps having an areal extent (surface space) of no greater than 20% of the APZ.

As the existing canopy cover of the Littoral Rainforest is currently estimated at over 70% projection, significant removal of vegetation would be required to meet

APZ requirements as suggested in the RFS conditions and recommended by the bushfire threat report.

Rehabilitation and Restoration

The applicant has proposed two options to offset the loss of vegetation as outlined at Section 2.1.3 of the Statement of Environmental Effects (SEE):

- Compensatory planting onsite - to be undertaken within the 11 metre setback on Lot 2 at a ratio of 10:1; or,
- Compensatory planting offsite - 50 plantings within a Tweed Coastal Reserve.

Proposed onsite compensatory planting is not considered acceptable given the value of the remnant, lack of available area onsite and previous demonstrated land management practices. Bushfire restrictions limit opportunity on the site. In addition, the 11 metre setback area is already nominated as part of a required deep soil zone.

The proposed alternative option for offsite compensation is not considered acceptable given the shortage of available public receiving sites and limited evidence proving that compensatory planting of this community type is a successful option.

In reinforcing the importance of the EEC and requirement for close scrutiny when considering offsetting the *Far North Coast Regional Conservation Plan* indicates that 'as a general rule, areas of EEC's not in low condition should be retained wherever possible as their loss cannot be offset by positive actions elsewhere'.

Furthermore, page 22 of the EA recommends weed control within the patch of remnant vegetation. It is noted that no ecological remediation work has been proposed following demolition of the existing dwelling particularly in the area of encroachment within Crown Reserve.

Legislative Provisions

Legislation	Section(s)	Comment
<i>Environmental Protection & Biodiversity Protection Act (1999)</i>	Schedules	The site supports a part of a remnant unit classified as Littoral Rainforest and Coastal Vine Thicket of Eastern Australia listed as Critically Endangered community listed under the <i>EPBC Act</i> . The community comprises two listed flora species that occur onsite being <i>Macadamia tetraphylla</i> (Queensland Nut - Vulnerable) and <i>Cryptocarya foetida</i> (Stinking Cryptocarya - Vulnerable). The proposal involves removal of vegetation that comprises part of the Littoral Rainforest Community and as such referral should be made by the applicant to determine whether the proposal would be considered a controlled action.
<i>Environmental Planning & Assessment Act (1979)</i>	Section 5A (significant effect on threatened species, populations or ecological communities, or their habitats)	The remnant Littoral Rainforest community described above is also classified under the <i>Threatened Species Conservation Act</i> as it is considered to be representative of an Endangered Ecological Community being Littoral Rainforest in the South East Corner, Sydney Basin and NSW North Coast bioregions. The onsite portion of the remnant unit comprises both federally and State listed flora species being <i>Macadamia tetraphylla</i> (Queensland

Legislation	Section(s)	Comment
		<p>Nut - Vulnerable) and <i>Cryptocarya foetida</i> (Stinking Cryptocarya - Vulnerable), whilst <i>Archidendron hendersonii</i> (White Lace Flower) is listed as Vulnerable under the TSC Act.</p> <p>Several listed species such as Grey headed Flying Fox and Common Blossom Bat were evaluated as having a high likelihood of utilising the broader tract of remnant vegetation based on verified records and habitat values.</p> <p>The applicant has neglected to consider the full suite of potential ecological impacts and as such threatened species provisions have not been adequately met to be confident that the development could proceed without adverse impact on local populations.</p>
<i>Native Vegetation Act 2003</i>		N/A – not rural land.
<i>Threatened Species Conservation Act 1995</i>	Section (94) & Schedules 1, 1A, 2 and 3	See above on Section 5A re: potential for impact to EEC.
<i>SEPP 14 Coastal Wetlands</i>		Not applicable to the site, however a gazetted SEPP 14 Coastal Wetland occurs within 200m and to the west of the site associated with the Tweed River.
<i>SEPP 26 Littoral Rainforest</i>		Not applicable to the site, however a gazetted SEPP 26 Littoral Rainforest occurs within 250m and to the south of the site within the Crown Reserve Lot 713 in DP728231.
<i>SEPP 71</i>		<p>The site is within the coastal zone and Clause 8 matters require satisfaction. A sensitive Coastal location exists to the east within 80m of the site.</p> <p>Table 1 Clause 8 (g) pertaining to conserving animals (within the meaning of the <i>Threatened Species Conservation Act, 1995</i>) and plants (within the meaning of that Act) and their habitats has not be adequately addressed. The site's significant ecological values as captured under the TSC Act have the potential to be adversely impacted to the degree of affecting long term local viability of the EEC community and listed species that may not be avoided/mitigated through conditions of approval.</p>

Table 3: Legislative Provisions

Environmental Impact Assessment and Planning Provisions

Vegetation and Habitat Modification

The remaining area of remnant vegetation identified onsite (when considered as part of a broader contiguous patch/remnant unit extending over the adjacent Crown Reserve) is representative of a *Critically Endangered* community under the EPBC Act. This vegetation association is further recognised as an *Endangered Ecological Community* under the TSC Act providing potential habitat for a suite of listed fauna species evaluated as having a moderate to high

likelihood of occurrence (based on local validated records) by providing foraging resource for disperser species such as the Grey-headed Flying Fox and Rose-crowned Fruit-Dove and roosting opportunities for the Common Blossom Bat.

The onsite component of the broader remnant unit covers an areal extent of approximately 340m² with an estimated canopy projection of greater than 70%, comprising several stems of listed threatened flora species, two of which have dual listing under both federal and state legislation described above.

It has been determined that to enable construction of the proposed dwellings seven rainforest trees comprising part of the EEC, including one listed species being *Archidendron hendersonii*, would require removal, whilst there is a high to very high likelihood that an additional *Archidendron hendersonii* stem would be negatively affected during the construction and operational phase.

Furthermore it is understood that significant modification to the remaining stand of vegetation on the existing site would be necessary for bushfire hazard reduction purposes that would involve selective canopy and mid-stratum vegetation removal, the clearing of the understory and lower stratum (to two metres) and pruning of any retained trees (if applicable) to maintain adequate separation distance from dwellings (two to five metres). This existing vegetated area would then be maintained in the long term as an APZ preventing natural restoration.

The selective removal of vegetation and structural modification to the patch of Littoral Rainforest occurring onsite would not only be expected to have a direct adverse impact on the ecological value of the patch (onsite) yet also have an unacceptable impact on the integrity, function and dynamics of the broader unit extending over the Crown Reserve by increasing edge to area ratios (narrowing of the remnant) altering the microclimate, allowing for greater light penetration, subsequently increasing susceptibility to weed invasion and reducing resilience (loss of seed sources and potential dispersers) particularly given the exposed nature of the site and influence of salt laden winds.

The loss of listed species is also of concern given the limited and fragmented distribution of plants such as *Archidendron hendersonii* particularly where forming part of a poorly represented community where the local population may potentially be placed at risk of extinction in the long term due to depressed genetic diversity which as an example would limit the ability of the species to locally recover following a random natural event. It is considered that the removal/damage, long term decline of any listed species either directly or indirectly as a result of the development in this instance is unacceptable.

As the existing dwelling straddles the Lot boundary and extends into Crown Reserve concerns have been raised as to the likely impact on existing vegetation occurring within the Crown Reserve (that is part of the EEC) during demolition of the existing dwelling particularly in the absence of strict vegetation management controls, none of which have been recommended by the applicant.

Furthermore shading from the proposed dwellings may also have an adverse long term indirect impact on the integrity of the community by arresting successional processes particularly following a storm event and the creation of a canopy gap by artificially shading the gap and therefore limiting light penetration and delaying/suppressing the natural recruitment of pioneer species to enable rapid canopy cover.

Conclusion

Council is of the opinion that the development would have a significant, unacceptable impact on the integrity, function and long term viability of the EEC and local population of those listed species comprising the community.

Given the onsite values, it is expected that the vegetation community remain undisturbed by any proposed development and if development were to progress in another form, rehabilitated to improve the value and integrity of the community.

Context and Setting

The proposed bulk and scale of the building design with lack of open space between dwellings and need for vegetation removal is not in keeping with surrounding residential development that has retained a low-rise, low-key character that integrates and promotes retention of existing vegetation.

Cumulative Impact

The approval of the application in its current form would set a harmful precedent for damage/removal of an Endangered Ecological Community to support increased density on a constrained site.

Asbestos/Lead

Asbestos and lead are likely to be present within the existing dwelling. Demolition of the existing dwelling would need to be conditioned to take this into account.

(c) Suitability of the site for the development

The site is considered unsuitable for the proposed development. Apart from the stated planning reasons for refusal with regard to dwelling design and impact upon the locality, it is considered that insufficient ecological survey and assessment has been provided to support the conclusion that there will not be a significant impact upon threatened species, populations or ecological communities. Given the federal and State significance of the vegetation on site, it is considered that the development represents an unwarranted risk and results in an unacceptable outcome for the Shire as a whole.

(d) Any submissions made in accordance with the Act or Regulations

Referral to NSW Rural Fire Service

Refer to a previous discussion in this report of bush fire requirements at Clause 39A: Bushfire Protection (TLEP 2000).

Public Submissions

10 submissions were made during the exhibition period objecting to the proposed development. A summary of objector concerns is as follows:

- Overshadowing impact (adjoining residential) – reduction in midwinter solar access and reduced access to northerly breezes/natural cross ventilation.
- Overshadowing impact (Crown reserve) – this land is managed bushland actively used by members of the public – habitat will be impacted.
- Non-compliant front setback.
- Bulk and scale of proposed dwellings.
- Spa/pool pumps located on boundary.
- Asbestos audit required for demolition of existing dwelling house.
- Inadequate side setbacks.
- Design inconsistent with coastal village character.

- Proposal represents lack of respect for the natural beauty of the local environment and values of the local community.
- Similar applications already refused.
- Negative impact on natural vista and streetscape.
- Relatively dense development with two, large overbearing houses close to the front boundary.
- The removal and pruning of trees comprising part of an EEC – Littoral Rainforest to facilitate the development and the potential loss/decline of one listed tree (*Archidendron hendersonii*).
- The loss of biodiversity, decline in available seed sources and further restriction of connected corridor north-south and east-west.
- Cumulative impact on the integrity and value of the community as a result of direct vegetation removal particularly given that the community has previously been affected as a result of selective clearing activity undertaken under OEH approval.
- Impact on Bush Stone Curlew habitat given previous incidental reports of animals utilising the remnant.
- Modification to understorey since the last development application was lodged.
- Concern in relation to the long term success and lack of offset areas within Fingal Head suitable to accommodate any planting necessary to compensate for the loss of littoral rainforest trees.
- Further disturbance to the EEC likely to occur in order to upgrade services (sewer).
- The proposed development would cast a shadow on the EEC Littoral Rainforest community.

Objections addressed by applicant in amended application documentation submitted 21 March 2014 include:

- Removal of three storey height component.
- Reduction in width of carport associated with Lot 2.
- Presentation of fully labelled ground survey lines on plans.
- Inclusion of adjacent building envelopes in shadow diagrams.
- Recalculation of front setback requirement.
- Side setback intrusions deleted.
- Repositioning of swimming pool associated with Lot 1.
- Intention to lodge additional ecological assessment.
- Request for asbestos removal to be conditioned.

The applicant supplied three letters of support and four pro forma documents from five adjoining properties generally affirming that the proposal was consistent with the character of Fingal Head. These adjoining residents were notified of the development by Council and were given an opportunity to lodge formal submissions within the prescribed exhibition period (Monday 23 December 2013 to Thursday 9 January 2014) with regard to the development application.

Amendments made to the proposal do not alter Council's assessment of the application, nor do they resolve the bulk of objector concerns.

Council Review - Relocation of Swimming pool (Lot 1)

Realignment of the swimming pool associated with Lot 1 is not considered sufficient to ensure retention of the listed *Archidendron hendersonii* identified as Tree No. 23 in the submitted Tree Report.

As previously discussed in this assessment, the report has not considered the roofline of the proposed dwelling on Lot 2 that is likely to restrict growth of the tree canopy, nor has it considered potential impacts associated with construction of footings for the Lot 2 dwelling.

The extent of excavation for the pool associated with Lot 1 has been calculated to the outer shell of the pool. Over excavation has not been taken into account and given the slumping nature of underlying sands, excavation would likely extend within the structural root zone of the tree.

The building footprint of the Lot 2 dwelling appears to remain unchanged adjacent to the tree and as such, potential impacts associated with footings and conflict with the roofline have not been addressed.

The retraction of the pool on Lot 1 by one metre still results in encroachment within the trees TPZ. Again, over excavation has not been taken into account. Council still holds concerns for the long term viability of the tree should the proposal proceed.

As detailed previously in this assessment, an additional *Archidendron hendersonii* is located within close proximity of the swimming pool associated with Lot 1. As neither the EA or Tree Report identified the tree, it is difficult to ascertain the accurate position of the tree in relation to the proposed dwelling and swimming pool on Lot 1. However, it is highly likely that the tree occurs within the footprint of the pool and as such realigning the pool by one metre would still involve removal of the tree and/or significant disturbance.

Council Review - Retention of additional tree (Lot 1)

Tree no. 25 *Cupaniopsis anacardioides* (as described in the Tree Report) is shown on the revised set of plans as 'to be retained'. This change to the plans from indicating removal of the tree has not occurred on the basis that the design of the dwelling has been modified, nor is it justified/supported by an arboricultural professional.

The previous Tree Report indicates that '*because of the size, shape and lean of the tree it is not possible to construct a building within approximately 5m of the tree without causing significant damage to the tree and to comply with the bushfire requirements*'. As such, the report recommended the tree be removed.

Given that bushfire requirements remain unchanged and the design of the dwelling is largely unaltered (roof line remains unchanged) there is no clear supporting information to suggest that impacts can be mitigated and the long term viability of the tree maintained during or following construction.

It is Council's opinion that the tree would be negatively impacted as a result of dwelling construction due to reasons indicated in the arborist's report (substantial pruning) and likely disturbance to the tree's root plate.

(e) Public interest

Approval of the proposal would set a harmful precedent for the loss of informal character within the locality and continued encroachment of residential development upon vegetation of State and federal significance.

It is therefore considered that the development will negatively impact on matters relating to the public interest and environmentally sustainable future development of the Shire.

OPTIONS:

That Council:

1. Refuses the application for the reasons supplied; or
2. Grants in-principle support for the application and a report to be brought back to a future Council meeting with recommended conditions of consent for Council to determine.

The Council officers recommend Option 1.

CONCLUSION:

The issues considered in the assessment of the proposal are considered valid and contribute to the reasons for refusal. Approval of the proposed development could potentially set an unwarranted precedent for the location of residential development adjacent to fragile ecosystems, resulting in fragmentation and destruction of significant environmental assets.

Further, the proposed dwelling designs are not consistent with residential design controls as contained within Section A1 of the DCP 2008.

Therefore the application is recommended for refusal.

COUNCIL IMPLICATIONS:

a. Policy:

Corporate Policy Not Applicable.

b. Budget/Long Term Financial Plan:

Not Applicable.

c. Legal:

The applicant may seek to lodge an appeal against a Council determination in the NSW Land and Environment Court.

d. Communication/Engagement:

Not Applicable.

UNDER SEPARATE COVER/FURTHER INFORMATION:

Nil.

