

14.9. 1998
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Submission re undated S.96 Application on Council File 1996 / 0331
for 43 Minimbah Rd, Northbridge

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14 September 1998

The General Manager
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31 Victor St, Chatswood 2057

Fax to 9412 3107

Confirmatory Copy by hand to Level 4, 31 Victor Street, Chatswood

For the attention of
Mr Greg P. Woodhams, Environmental Services Director;
and Mr Scott Lincoln, Urban Planner and Development Assessor

Submission re Section 96 Application by Mark Bennett, Architect, of Wattle St, Ultimo, to change the Development Consent & the Building Approval for 43 Minimbah Road, Northbridge: Council File DA 1996 / 0331

1. I act for Patricia Ritchie and family of 41 Minimbah Road, and Harry Moll and family of 45 Minimbah Road, who have requested and instructed me, jointly and severally, to make a submission to Council on the above matter on their behalf.

2. Summary of Submission

2.1 We adopt for this S 96 submission, the 4 page summary of our overall submission lodged with Council on 18 August, 1998, re the S 102 application. Since then, we have further considered certain more specific details, and so herein we clarify, amplify and add to the points made to you in our August 18 letter.

2.2 We submit that the series of substitutions and/or changes, made by the Applicant to the drawings and to the actual proposal on the site, over the 16 month period following the drawings dated 6 March 1996 now purported to be the "Consent Plans" (only one sheet of which is "date stamped (by Council) 3 June 1996") as required by Council Resolution on 14 April 1997 authorising the Conditional Development Consent notified to the Applicant on 12 May 1997, are not in accord with, and are distortions of, the intent, terms and the specific legal

and common sense meaning of the conditions of that Council Resolution and Conditional Development Consent as notified.

2.3 When taken together, these substitutions and changes constitute a deceptive, significant, substantial change in the development proposal as it was originally believed to be, assessed and approved, subject to specific conditions, by the staff and Councillors of Willoughby City Council, and as advertised and represented to the public, including adjoining owners and occupiers Patricia Ritchie and Harry Moll and their families.

2.4 The now proposed development conflicts with Aims & Objectives (b), (c), (d), (e) & (g), and with Clauses 14, 16, 17, & 18 of the Willoughby Local Environment Plan 1995.

2.5 The changes & distortions of the original Conditional Consent aggravate the conflicts with the statutory instrument, the LEP; and further, contravene the July 1998 exhibited Draft Development Control Plan for the ultra-sensitive space between the Foreshore Building Line and the water. The now proposed S.96 development contravenes even this draft DCP's Controls & Performance Standards for retaining walls for elevated swimming pools, retaining walls for elevated stairs and retaining walls for highly elevated boundary screen walls purporting to be narrow "planter boxes" on top of the north-east side boundary of the Foreshore .

These contraventions of the draft exhibited DCP include contravention of:-

- the Cl 3.07 "Intent" of the Foreshore Building Line (FBL);**
- the actual location of both the current and the proposed FBL as exhibited in July 1998;**
- the Cl 4 "Views & Amenity" specification;**
- Control 3 under Cl 4 and Performance Standards 1,4,5,6,7, & 9 under that Control 3 under Cl 4;**
- Control 8 on the next page of the draft DCP, commencing "extensive earthworks...& high retaining walls are not to be carried out below the FBL...." and the following Control 9 re minimising paved surfaces;**
- Control 10 re 'Swimming Pools should be at or below ground level...etc;**
- Control 13 re "Retaining walls should generally be no more than 1 metre high above natural ground level"; eg. the now proposed retaining and screen wall for the now proposed swimming pool is approx 2 to 3 or 4 metres high above natural ground level; the retaining wall along the north boundary which retains stairs and a high view- and sun-blocking "planter box" structure, is 2 or more metres high above the natural ground level of 41 Minimbah Rd;**
- in conclusion, the objectives, controls and standards of both the LEP and the draft DCP are contravened by the now proposed structures encroaching onto**

the Foreshore, and blocking views and solar access of adjoining properties, and invading the privacy of No 41 Minimbah Rd..

2.6 The now proposed high retaining walls on the boundary of 41 Minimbah Rd between the existing Foreshore Building Line and the boundary of the reserve along the former high tide mark, which retain narrow but shadow-casting "planter boxes" and landing platforms for people to directly overlook the private garden and living room windows of 41 Minimbah Rd, and would seriously damage the amenity and value of 41 Minimbah Rd for any future development on that site, are NOT in accord with the Conditions 4c & 4d of the 1997 Consent, in the light of the Council's consideration of Clause 16 (4) (d) of the Willoughby LEP and the privacy of 41 Minimbah Rd, namely:-

"(c) The retaining wall of the swimming pool is to be setback 1.5 metre from the eastern boundary to allow landscaping for privacy and is to incorporated terraces for dense planting (*not stairs and viewing platforms overlooking the neighbours*) of shrubs, creepers and other vegetation to soften the appearance of the wall as viewed from Middle Harbour;"

"(d) A landscaping plan show ways of screening the sandstone structure of the new retaining wall from the water and the adjoining eastern property;"

2.7 The modified, distorted proposal now shows a 2 metre or more high concrete retaining wall along the eastern boundary, retaining high stairs and viewing platforms which would block afternoon sun and would facilitate people overlooking everyone and everything on the Ritchie Family land and both the outdoor and indoor living areas of the Ritchie Family home.

2.8 We request Council at least to modify the 19997 Consent, and/or to impose a Condition on the granting of any Section 96 Application to modify that Consent, so as to require that:-

"Along the north east boundary between the waterway and the Foreshore Building Line (the existing sandstone wall), the proposed retaining wall structures of the proposed stairs, landings and planter boxes be deleted and that the 1.5 metre side setback of the retaining wall of the swimming pool be used for the planting of shrubs, creepers and other vegetation to soften the appearance of the swimming pool wall, to reduce over-looking of the adjoining eastern property, and to reduce the over-shadowing of the adjoining eastern property".

2.9 Council has the power to impose such a Condition pursuant to Section 96 of the amended Act in force since 1 July 1998.. Council also has such power pursuant to Section 96A of the amended Act; the requested Condition would improve the amenity of, and reduce the construction costs of, the Applicant's overall development, as well as conforming more closely to the requirements of the LEP and the draft DCP. The Applicant's access to the foreshore reserve would be more easily accessible from the Pool Terrace level (R.L. 6.15) than from the Rumpus Room Terrace level (R.L.7.28); this is the existing location and character of the existing naturally graded access path and steps. The requested Condition would reduce the construction costs of the Applicant; it would reduce

development costs. There would be a need for a child-proof gate on the steps and path from the Pool Terrace down to the Foreshore Reserve owned by the NSW Waterways Authority via the Marine Ministerial Holding Corporation.

2.10 The impacts of the currently proposed structures, the retaining walls for stairs and high narrow planter boxes on the Ritchie Family's boundary, on the amenity of, the privacy of, solar access to, and diagonal views from, No 41 Minimbah Road, and their impacts on scenic views from Castlecrag and from the waterways of Sailor's Bay, are substantial and should be reduced.

2.11 In the particular circumstances of this case, these impacts are caused by modifications and distortions of the intent, terms and the specific conditions of the 1997 Development Consent. These modifications and distortions conflict with the relevant statutory instrument, the Willoughby Local Environment Plan 1995, including but not limited to Clauses 14, 16, 17 and 18, and the relevant exhibited Draft Development Control Plan Performance Standards and controls.

2.12 We believe that in 1997, Council may not have appreciated how close the proposed Foreshore structures would be to the sea-wall, because the Plan submitted with the Development Application, which later became the "Consent Plan" appears to show the sea-wall about half a metre further into the water than the Surveyor's Site Survey showed it, and than is now shown on the S.96 application plan.

3. Matters for consideration

3.1 S.96 (3) of the Act requires that Council, "in determining an application for modification of a consent under this section, must take into consideration such of the matters referred to in section 79C (1) as are of relevance to the development". The following matters are most particularly relevant to this development:

3.2 Clause 14, the relevant statutory "Zoning Control, the Specific Objective of the Residential Scenic Protection Zone" is:- "housing such that the scenic qualities and ecological values of environmentally sensitive natural areas, including foreshores and bushland areas, are maintained by *protecting the land from over-development or visually intrusive development, by minimising the impact of hard surfaces on the ecological characteristics of the locality, including nearby and adjoining bushland, and by ensuring that the new development does not dominate the natural scenic qualities of the locality.*"

3.3 Clause 16 specifies the Foreshore Building Line "(a) to preserve and enhance the natural features and vegetation of the area where the land meets or is in close proximity to the water; and (b) to encourage the protection and *regeneration* of land which forms an integral part of the foreshore setting by controlling new development.....the Council may, after considering the probable aesthetic appearance of the proposed structure in relation to the foreshore, consent to the erection, repair or maintenance of...(d) structures or works, such as swimming pools, *below or at the surface of the ground...between a foreshore building line and the bay...or...harbour...*" This appears to make clear that the Council had no power in 1997, and presumably has no power today, to grant consent to structures above the surface of the ground between a Foreshore Building Line and the bay or harbour. We note

the controversial proposal of the currently exhibited Amendment no 3 to the Willoughby LEP, to give Council the power to consent to buildings, structures, retaining walls, swimming pool and sheds, on the Foreshore between the waterway and the Foreshore Building Line. This amended has NOT yet been gazetted, and so the power of Council remains restricted to the current statutory restriction of Clause 16 of the current legal instrument. It does not appear to be legally possible for this absence of power, this effective prohibition, to be avoided by Council by the mere expedient of requesting an Applicant to "submit a SEPP 1 request". **The lack of a power is NOT a "Development Standard" within the meaning of SEPP 1.**

3.4 Clause 17 requires that Council shall not consent to the carrying out of any development within a Scenic Protection Area unless it has considered the appearance and impact of that development on (a) *the amenity of surrounding properties, including loss of views to and from the foreshore, bushland and any waterways; and (b) the scenic qualities of the foreshore, including whether man-made structures visually dominate the natural landscape through excessive height and bulk and whether buildings, structures and other works are aesthetically and sympathetically integrated with the form and features of the local topography; ..."*

3.5 Clause 18 prohibits, in the Residential Scenic Protection Zone, the erection of a building of more than 2 storeys. The Willoughby LEP (page 13) defines "storey" so that "Any space (between any floor and its ceiling or roof above) that exceeds 3.5 metre in height is counted as 2 storeys". **The proposed Level 3 Living & Dining area has a ceiling height of 5.6 metres and thus must count as two storeys. The building height through a vertical plane here is four (4) storeys. Councillors were not advised of this during 1997, and were thus unable to consider it. The Report on the Council's Business Paper for the Council Meeting on 3 March 1997 (see pages 91 to 100 inc), states that the proposal is only for a three storey structure.**

3.6 Refer also to the intent, controls and performance standards of the exhibited draft DCP for the Foreshore margins in the Residential Scenic Protection Zone,, as specified in detail in paragraph 2.5 of this objection, above.

4. In the light of the Specific Objective of the Residential Scenic Protection Zone (see p 21 of the Willoughby LEP), and other unique circumstances of this case, the proposal now is for a substantially different development

4.1 We further submit that the current S.96 application seeks to substantially change the 1997 Development Consent to include a new Consent for the complete demolition of an existing dwelling house. The original Application and advertising of June 1996, was for Consent to "UNDERTAKE ALTERATIONS AND ADDITIONS TO EXISTING DWELLING HOUSE". The Council Assessment dated 11 February 1997 in the Business Paper for the Meeting of 3 March 1997 was for "ADDITIONS AND ALTERATIONS TO EXISTING 3 STOREY DWELLING". **The proposal now to modify the original Consent in order to demolish and excavate fully all of the site of the existing dwelling, including underneath all existing walls of the existing dwelling house, by itself makes for a "substantially different development", in the ultra-sensitive Foreshore area and the ultra-sensitive Residential Scenic Protection Zone. Councillors did NOT vote to approve complete demolition and excavation of the existing dwelling house.**

4.2 Council did not receive a copy of the now proposed and amended Excavation Plan until on or after 14.05.1998, when on its own face, the Excavation Plan and Section was first "issued to Council": note that that date was: 23 months after the Application, 14 months after the Council Staff Assessment and Report to Council, 13 months after the Councillors' consideration and more than 1 year after the Notification of the Development Consent to the Applicant. (Note that 14.05.98 was 1 month and 6 days AFTER the issue of the Building Approval on 12.04.98.)

4.3 The neighbouring Ritchie and Moll families believed that the Development Application and the 1997 Consent was for "alterations and additions to an existing house". This was why they did not contest it as strongly as they would have done, if the Application had then been for a complete demolition of the existing dwelling house, and excavation and construction of a completely new four (4) storey dwelling house. The first the neighbours knew about complete demolition and massive earthworks and excavations was when, in July 1998, insurance engineer-assessors entered their properties to inspect and photograph their houses and gardens to enable them later to assess the results of excavation, bulldozer operations on the very steep slopes, and blasting. This alone makes the S.96 Application for a substantially different development.

4.4 The recently uncovered "modified" plans show greater excavation into the existing slopes for increase in the Gross Floor Area of both Level 1 (R.L. 7.45) and Level 2 (R.L.10.98). We have demonstrated this by stable-base tracings of the now purported "Consent Plans" and the current S. 96 drawings. A "creep" increase in Gross Floor Area would be made possible by the attempted demolition of the complete residential dwelling.

4.5 The new Excavation Plan and the new Landscaping Plan and other modifications never before notified, seen or believed possible by neighbours, all combine to make the S. 96 Application substantially prejudicial to the adjoining owners and residents, including the NSW Waterways Authority and the Marine Ministerial Holding Corporation which owns and controls and has responsibility for the foreshore reserve apparently less than 2 metres away in several places from the now substantially different swimming pool now proposed to be built on top of a new retaining wall 4 metres above the natural existing ground level of the abutting foreshore reserve.

4.6 Additionally, the 1.5 metre wide setback strip alongside the North Eastern Boundary (the Ritchie Family boundary) which the Development Consent clearly specified was to be "landscaping for privacy", is now substantially differently filled with retaining structures for new and previously undrawn and undiscussed terraces, viewing platforms, stairs, reinforced concrete planter boxes to considerable height along about a 9 or 10 metre length of the boundary. These planter boxes are to contain only 400mm width of soil, but are now newly proposed on the Landscaping Plan to contain plants stated to grow "15" metres high, 3 metres spread and along a 9 or 10 metre length of the Ritchie family boundary.

4.7 The unanticipated, not previously proposed or notified total demolition, clearance and excavation of almost all of the freehold land, so far only up to the boundary of the Foreshore Reserve, also causes "substantially different" ecological

issues of stormwater run-off and pollution of the foreshore and Sailors Bay waters during construction, and afterwards. These are of substantial concern to all property owners and residents of Sydney, and particularly to adjoining owners, including the NSW Marine Ministerial Holding Corporation, owners of the reserve between the old high tide mark and the existing seawall, and guardian of the cleanliness of the waters of Sailor's Bay.

4.8 The Development Consent Drawings (including but not limited to the North East Elevation and Section along the side boundary on Drawing DA 003 dated 6.3.96) clearly show that natural ground level along this boundary was not to be substantially, or not at all, changed. The current S.96 modification application including the new Sectional Elevation along the same boundary on S.96 Drawing A004 D1 last amended 20.7.1998, shows "substantially different" development of new high structures both above and below the Foreshore Building Line, not in accord with the original Development Consent which required a 1.5. clear setback for, among a number of reasons, "softening" " landscaping for privacy ".

4.9 Some of the now newly proposed "structures such as the swimming pool" in front of the Foreshore Building Line are now proposed to be ABOVE the surface of the ground, but the Willoughby LEP 1995 does not allow Council the power to permit such structures above the surface of the ground, between the Foreshore Building Line and the Waterway.

4.10 In the light of all of the considerations raised in this Submission, the Councillors could not reasonably resolve that, in the particular circumstances of this case, and in this ultra-sensitive Scenic Protection Zone and ultra-sensitive Foreshore margin, this S 96 application is not significantly or substantially different to the intent, terms and conditions of the original Development Consent.

5. Conclusion of this Submission on the S 96 Application

5.1 We submit, therefore, that it is not open to Council to approve this particular S.96 Application to modify the original 1997 Consent for alterations and additions, subject to performance-based Conditions.

5.2 We request that Council advise the Applicant that he should stick with the original Development Consent, or else submit a new Development Application.

5.4 Alternatively, we request Council to facilitate negotiations between the Applicant and the professional adviser to the Ritchie and Moll families, seeking the Applicant's voluntary agreement to amend his proposed plans in ways that would cause the Ritchie and Moll families to withdraw and cease their continuing actions which are delaying the Applicant's project.

6. The public interest requires Council to avoid the danger of setting a controversial precedent for spoiling all Foreshores throughout Willoughby by disregarding the seriousness of the statutory matters for consideration

6.1 It is further submitted that the Councillors should be wary of setting precedents for not enforcing the provisions of the Willoughby LEP and of the Environmental Planning and Assessment Acts throughout all Foreshore Land

throughout Willoughby, which we submit they would do if they voted to permit the current Applicant to get away with the creeping changes in this development proposal which appear to have been slowly and quietly introduced over the past several years, and particularly since the purported Consent Drawings dated 6 March 1996, required by Council Resolution authorising a Consent, to be the actual drawings actually date stamped 3 June 1996, which were last before Council on 14 April 1997, the last occasion on which the Councillors gave any consideration to the original Development Application for "Alterations and Additions to the Existing Dwelling House at 43 Minimbah Road".

6.2 We submit that Council should refuse the modification and require the Applicant Architect to stick strictly to the terms and conditions and intent of the original Development Consent based on the original drawings "date stamped 6 June 1996" the subject of the relevant Council Resolution on 14 April 1997. One of the many reasons for refusal should be "the public interest".

7 Request for advance notification of Report to Council and opportunity to address the Councillors

Please advise when we will be able to meet Councillors, to discuss these issues with them and/or to address a Council Meeting on the issues raised herein.

Yours faithfully

George Clarke,
for and on behalf of Patricia Ritchie and Family, and Harry Moll and Family

Copies by Fax and by hand to:-

Patricia Ritchie & Family

William O'Brien, Solicitor

Harry Moll & Family

Rosemary McDonald, Development Specialist

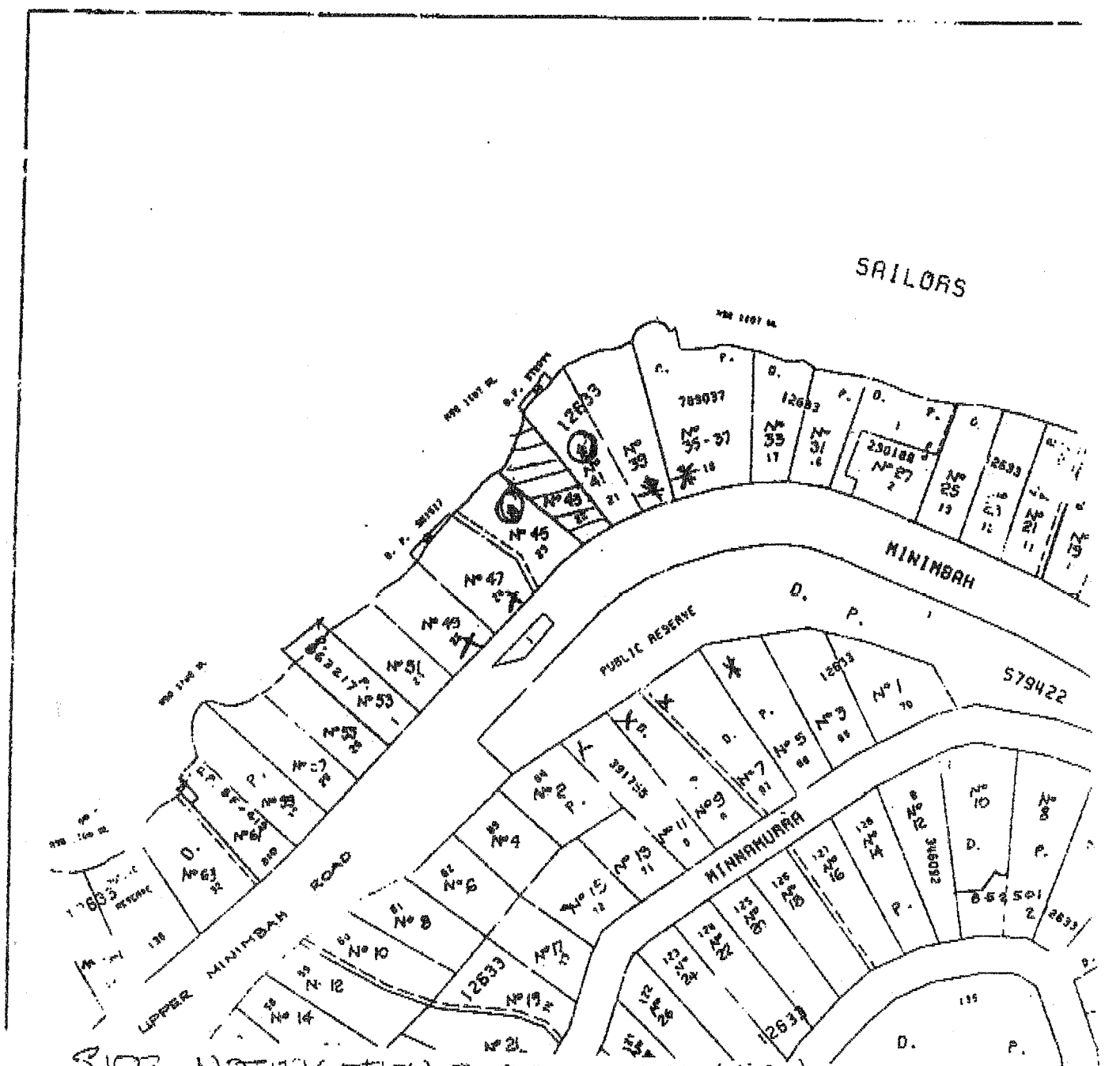
The Chief Executive Officer, The Waterways Authority of New South Wales,
attention the Property and Assets Branch; and the Environmental Branch

The Secretary, The Foreshores and Waterways Development Advisory Committee,
care the Director, NSW Department of Urban Affairs and Planning

CURRENT CADASTRIAL PLANS

HOUSE NO,S ARE INDICATIVE ONLY

LAST UPDATE: 3 . 07 . 1986:



3 SUBMISSIONS RECEIVED FROM -
4145 MIDWINTER RD.

G. C. L. K. representing 41 & 45
Munich, Pa

NOTIFICATION

PLAN

LOCALITY

* Properties Notified
⊗ Submissions Received
▨ Subject Property

SCALE : 1 : 20

Willoughby City Council
Environmental Services Division
Council Meeting - 6 October 1998
43 Minimbah Road, Northbridge

Page 148

effects and development application form submitted to Council by the applicant clearly stated that the proposal involved extensions and alterations to the existing house.

There was a Full Committee Inspection of the application prior to the determination.

Development Consent No. 1996/0331 was subsequently granted on 12th May 1997, for extensions and alterations to the existing house.

Building Application plans submitted to Council on 23 January 1998 nominated a number of the building's existing walls to be retained on Levels 1, 2 & 3 and a portion of the garage walls on levels 4 and 5.

Building Approval No. 980055 was granted on 8th April, 1998 and demolition work subsequently took place. A stop work order was issued on 17th July, 1998 that the building had been demolished beyond that for which approval was sought and approved.

PROPOSAL

The applicant now seeks approval for the removal of a number of walls previously noted to be retained and replaced by new brickwork which now means that the development is defined as the construction of a new dwelling house. These walls include:

- Levels 3 and 2 northern, eastern and southern walls adjoining the living and bedroom areas.
- Level 1 southern wall adjoining the bathroom.

These walls which were previously identified on the building application to be retained are now proposed to be demolished and constructed as new brickwork in the same location.

Following is an extract from the applicant's submission in support of the proposal: -

"A structural engineer's report from Scahill & McCloskey Pty Ltd has also been forwarded to Council confirming the structural inadequacy of the existing walls in question after the timber roof structure was removed and that they were unstable and at risk of collapse.

It should be noted that Bennett Architects issued Drawing No. A009A, an excavation plan that noted complete demolition of the existing residence to Council in March 1998, this was requested by Council in Condition Nos. 9, 10, 11 and 12 of B.A. No. 980055.

Receipt of this drawing has been acknowledged by Council but it was not stamped for construction, we request that this be done."

Willoughby City Council

Page 149

Environmental Services Division

Council Meeting - 6 October 1998

43 Minimbah Road, Northbridge

It should also be noted that our current approvals include substantial demolition and excavation in order to build this approved design."

The current proposed amendments were originally submitted to Council in the form of a modification under Section 102 of the Environmental Planning & Assessment Act, 1979. However, given that the modification was lodged after 1st July 1998, this section has now been replaced by Section 96 of the Environmental Planning & Assessment Amendment Act, 1998. The previously lodged Section 102 modification was therefore invalid and has been withdrawn by the applicant and a new application lodged under Section 96.

STATUTORY CONTROL

Residential 2(a2) under WLEP 1995
SREP No. 23 - Sydney & Middle Harbours

DCP/CODE

Local Approval Policy for Dwelling Houses

DESCRIPTION OF LOCALITY

The locality is characterised by a mixture of one and two storey dwellings.

ENVIRONMENTAL APPRAISAL/POLICY COMPLIANCE**SATISFACTORY**

1.	Statutory Controls	YES
2.	Design in relation to existing building and natural environment	YES
3.	Landscaping Provision	YES
4.	Traffic generation and car parking provision	YES
5.	Physical relation to and impact upon adjoining development	YES
6.	All relevant S.90 considerations.	YES

REFERRALS

Council's Health & Building Surveyor and Council's Technical Services Division have no objections to the modification.

NOTIFICATION

The proposal was notified in accordance with Council's Policy to all those persons previously notified with a total of three submissions being received for the S102 modification (subsequently withdrawn). Three submissions were also received following the notification of the S96 modification from the same persons representing Nos. 41 and 45 Minimbah Road

Willoughby City Council

Environmental Services Division

Council Meeting - 6 October 1998

43 Minimbah Road, Northbridge

Page 150

and Mr George Clark, a consultant Architect on behalf of both of the owners of Nos. 41 and 45. A summary of the issues raised during both notification periods follows:-

- *The Section 102 application is invalid and inadmissible given that the application was lodged after 1st July, 1998.*
Comment: The S102 modification was invalid and subsequently withdrawn and replaced by a Section 96 modification as required under the Environmental Planning & Assessment Act, 1998.
- *The description of development has changed from "alterations and additions to an existing residence" to a brand new four storey residence.*
Comment: The modification involves demolition of a number of walls and given that they are to be replaced by new walls in exactly the same location, it is considered to form substantially the same development and is open to be approved by Council on its merits under a Section 96 modification.
- The proposal is prejudicial and detrimental to the adjoining properties as follows:-
 - * we are horrified at the proposed four storey residence and associated deep excavation.
 - * the changes constitute a deceptive, significant and substantial change in the development proposal as it was originally represented to Council and the public.
Comment: The proposed residence and excavation are substantially the same as approved and are not considered to represent any substantial change.
 - * the now proposed development conflicts with the aims and objectives of WLEP 1995 and Draft DCP including controls regarding views, amenity and structures within the Foreshore Building Line (F.B.L.)
Comment: These issues were assessed as part of the original application and remain substantially unchanged by the proposed amendment. Council has previously supported the SEPP No. 1 Objection to allow the development below the F.B.L.
 - * the consent plan appears to show the sea wall 0.5m closer to the water than the site survey plan and the current plans.
Comment: The plans show the sea wall in the same location. Any difference perceived by the objector maybe attributed to a distortion of the plans when photocopied.
 - * Council did not have the power in 1997, and presumably has not power today, to grant consent to structures above the surface of the ground which are below the F.B.L., and it is not legally possible to grant a SEPP No. 1 Objection. Council was not aware that the proposal was defined as four storeys, as the Council report described the development as three storeys.
Comment: Council previously considered the proposed variation to the two storey height control and the location of the pool which were validly approved under SEPP No. 1.

Willoughby City Council

Page 151

Environmental Services Division

Council Meeting - 6 October 1998

43 Minimbah Road, Northbridge

- * *the excavation plan was not received by Council until 13 months after the Council's consideration of the application. The neighbours were not aware that the alterations and additions involved such massive earthworks and excavations.*

Comment: A detailed excavation plan is not required at development application stage and it is normal practice for an excavation plan not to be received until this stage. The excavations as approved under the development consent are required to construct the building works as approved.

- * *the modified plans involve a "creep" increase in the L1 & L2 gross floor area by demolition of the existing building.*

Comment: A comparison of the consent plans and amended plans has revealed that the proposed new walls are in the same location of the existing walls and that there is no increase in gross floor area.

- * *new pool terraces and retaining wall are substantially different and show new high structures along the north-east boundary leading to privacy and overshadowing.*

Comment: The pool location under the proposed S96 modification is the same as that approved under the Building Approval. Changes from the development consent to the pool which were approved under the Building Consent include the lowering of the pool level by 1.3m from R.L. 7.45 to R.L. 6.15 with the terrace area now incorporating centrally located stairs down to the pool and stairs located on the north-eastern boundary to access landscaped foreshore area with a planter box in accordance with Condition No. 4(c). These changes resulted in substantially the same development, were in accordance with the development consent conditions and were subsequently approved. The proposed ground level is also substantially the same as approved on all levels 1 through to 4 along the north-eastern boundary.

- * *we submit that it is not open for Council to approve this S96 and that the applicant should stick with the original consent or else submit a new application or Council should facilitate negotiation with neighbours. If the application is approved we regretfully advise that we shall be appealing to the Court.*

Comment: The proposal which involves substantially the same development is able to be recommended for approval under Section S96 and is considered acceptable.

ASSESSMENT

The proposal has been assessed in accordance with Sections 79C and 96 under the Environmental Planning and Assessment Amendment Act, 1998 and a summary of the issues raised follows:

Willoughby City Council
Environmental Services Division
Council Meeting - 6 October 1998
43 Minimbah Road, Northbridge

Page 152

Whether the proposal forms substantially the same development.

The proposal involves the demolition of a number of existing walls facing the front and sides on Levels 1, 2 and 3, previously shown to be retained, to now be replaced with new brick walls in the same location and of the same height. These modification change the description of the development from "extensions and alterations to the existing dwelling house" to "construction of a new dwelling house." Council's solicitors have advised that the description of development which involves the same building envelope as approved is open to be modified under Section 96 of the Act.

Given that these proposed changes constitute substantially the same development and as such Council is able to modify Development Consent No. 1996/0331 in accordance with Section 96.

Impact of Adjoining Premises

The proposed modifications result in the same building envelope and are not considered to adversely impact on adjoining premises.

Correspondence from the adjoining residents has raised the concerns that the proposal also involves changes to the amount of excavation, landscaping and proposed building. However, the application does not seek to modify these aspects of the proposal which are to remain as approved under Development Consent No. 1996/0331. The proposed amendments to consent have been assessed in accordance with all relevant provisions under Section 79C and is recommended for approval.

Issues raised regarding the merits of these aspects of the approval which remain unchanged from the building approved by Council were previously considered and satisfied in accordance with the relevant provisions of the Environmental Planning and Assessment Act and are not relevant to this modification.

Minor amendments between the development consent and building approval were in compliance with the conditions of the development consent and therefore subsequently approved.

CONCLUSION

The proposal has been assessed to result in substantially the same development, is unlikely to adversely impact on the adjoining premises and is recommended for approval.

Willoughby City Council
Environmental Services Division
Council Meeting - 6 October 1998
43 Minimbah Road, Northbridge

Page 153

RECOMMENDATION:

THAT the application be approved and delegated authority be granted to the General Manager to issue the consent notice subject to the attached conditions.

SCOTT LINCOLN
DEVELOPMENT PLANNER

GREG FOSTER
DEVELOPMENT PLANNING MANAGER

Willoughby City Council
Environmental Services Division
Council Meeting - 6 October 1998
43 Minimbah Road, Northbridge

Page 154

SCHEDULE

DRAFT CONDITIONS OF MODIFICATION

Development Consent No. 1996/0331 is modified in the following manner:

1. The description of the development is to be modified to read as follows:
"Construction of a new dwelling house."
2. Condition No. 1 is replaced with the following:
"1. The development to be generally in accordance with plans numbered A001D1, A002B1, A002C1, A003C1, A004D1, A005D1, A006C1, A009B1, prepared by Bennett Architects, dated 20 July 1998, except as otherwise provided by the conditions of this consent."