

**DEVELOPMENT UNIT REPORT**

**SUBJECT:** N0021/13 - 1858 Pittwater Road, Church Point (Lot 142 DP 752046) Alterations and additions for adaptive re-use of the existing building to include a cafe, restaurant, bar, shop and motel uses

**Determination Level:** Development Unit

**Date:** 3 October 2013

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**SUMMARY OF RECOMMENDATION**

**REFUSAL**

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**REPORT PREPARED BY:** Gordon Edgar

**APPLICATION SUBMITTED ON:** 5 February 2013

**APPLICATION SUBMITTED BY:** BOSTON BLYTH FLEMING  
1/9 NARABANG WAY  
BELROSE NSW 2085

**OWNER(S):** ALTIUS PTY LTD (Own)

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This application is the subject of an appeal to the Land and Environment Court based on he deemed refusal of the application.

**1.0 ISSUES**

- Abandonment of Existing Use Rights
- Development on unzoned land
- Existing Use Rights and Derogation
- Height, Bulk and Scale
- Inadequate Information
- Notification
- Adaptive Re-Use versus New Development
- Parking
- Noise
- Heritage
- Foreshore Access
- Views
- Illegal Building Works
- Intensification of Use
- Unacceptable behaviour of Applicant
- Hours of Operation

## 2.0 SITE DETAILS

The subject site is known as 1858 Pittwater Road, Church Point. It is comprised of 2 allotments including Lot 142 in DP 752046 and Lot 3 in DP 1148738. It is located on the north-eastern corner of the intersection of Pittwater Road, McCarrs Creek Road and the unformed section of Quarter Sessions Road.

Lot 142 DP752046 ("the Site") is a rectangular-shaped parcel of land that contains the subject building, known as the 'Pasadena'. This building is a part 2 storey / part 3 storey commercial building. The lower two floors of this building are constructed of rendered concrete and the smaller upper floor constructed of weatherboard with an iron roof. The existing building is currently vacant and in a dilapidated state.

The boundaries of the Site approximate the building footprint of the existing Pasadena building. The Site has an area of 634.4sqm and a frontage to Pittwater Road of 32.685m. It has an eastern boundary of 19.595m, a northern boundary of 32.64m and a western boundary of 19.27m.

The Site is zoned 3(c) Neighbourhood Business under PLEP 1993.

Lot 3 in DP 1148738 ("Lot 3") is an irregular shaped parcel of land under lease from the Crown. It has a total area of 811.9sqm and adjoins the north-eastern and south-eastern boundaries of the Site. The portion of Lot 3 to the south-east of the Site currently contains 7 long stay visitor car parking spaces. The portion of Lot 3 to the north-east of the Site currently contains a stair well and paved area that was formerly used as an outdoor cafe.

Lot 3 is unzoned land under PLEP 1993.

Under Draft Pittwater Local Environmental Plan 2013, the Site is zoned B1 Neighbourhood Centre. Within this zone, restaurants and cafes are permissible although motels, which would come under the definition for 'tourist and visitor accommodation', are prohibited. Lot 3 is zoned RE 1 Public Recreation. Under this zone, restaurants and cafes would be permissible with consent.

The immediate previous use of the Pasadena building was as a licensed restaurant with indoor and outdoor eating areas, bar and bottle shop, real estate agent office and motel accommodation on the first floor with 15 suites.

The existing Pasadena building is located in close proximity to the water's edge of Pittwater at its northern corner with public access between this building and the Pittwater waterway only being achieved at this point via an adjacent timber boardwalk.

The subject site is completely surrounded by the public domain. The subject site as a whole is generally flat and contains no canopy trees or other significant landscape items.

To the immediate west of the subject site is Thomas Stephens Reserve, which is a paved public space with outdoor seating and tables in-between the Pasadena building, the Church Point Post Office, General Store and restaurant building and the Church Point Wharf. Both the Church Point Post Office and Store, as well as the Church Point Wharf are listed heritage items under Schedule 9 of PLEP 1993. Thomas Stephens Reserve is an important and frequently used public space, particularly for off-shore residents. Thomas Stephens Reserve is zoned 6(a) Existing Recreation under PLEP 1993. Its legal description is Lot 319 in DP 824048.

To the east of the Site is land known as Church Point Reserve. This land is legally identified as Lot 321 in DP 824048 and is zoned 6(a) Existing Recreation under PLEP 1993.

To the south of the Site, between the Pasadena building and Pittwater Road, is land zoned 9(d) Local Road Reservation. This land is currently being used as a pedestrian way and perpendicular car parking adjacent to the Pasadena building. This land is indicated by this zoning as required for the widening of Pittwater Road. In Draft Pittwater Local Environmental Plan 2013, this land is zoned SP1 as part of McCarr's Creek Road / Pittwater Road. It is therefore likely that, at some point in the future, the existing perpendicular parking spaces adjacent to the Pasadena building will be lost to road widening.

The adjoining built form in the vicinity of the subject site consists of the Church Point Post Office, General Store and Cafe to the north-west adjacent to Thomas Stephens Reserve.

To the east of the Site there is an existing Council owned carparking area predominately utilised by off shore residents but open to the general public.

The closest residential properties to the Site are to the south east on the opposite side of Pittwater Rd. There is also the heritage listed Church Point Graveyard Site and an existing reserve located adjacent to the residential properties.

The site is identified as being subject to Wave Action and Tidal Inundation, within the vicinity of heritage items and located in a Coastal Zone as defined by SEPP 71.

### **3.0 PROPOSAL IN DETAIL**

The Applicant seeks consent for the adaptive re-use of the existing part 2 storey / part 3 storey building for the purposes of a café, restaurant, bar, retail, and motel uses and involving alterations and additions to this existing building including the following:

- (a) Raise the floor level of the ground floor from RL 2.15m AHD to RL 2.5m AHD.
- (b) Demolish existing external stairs at northern corner of building.
- (c) Provision of 10 car parking spaces on the south-eastern side of the existing building and outdoor dining area, including 1 disabled space and associated disabled access ramp and pathways/stairs. All of this work is within land referred to in this statement of facts and contentions as 'Lot 3'.
- (d) Reconfigure the ground floor plan of the existing building to incorporate the following: a kitchen with associated store, garbage store, staff room, office and loading dock external to the building adjacent to the southern corner; 125sqm restaurant internal dining area with associated 118sqm covered outdoor dining area adjacent to the northern elevation; reception and waiters' station; a commercial bar servery of 23.4sqm; a café with an internal dining area of 96sqm with associated outdoor dining areas of 9.4sqm and 11.5sqm adjacent to the western elevation, and additional associated outdoor dining areas adjacent to the northern elevation of 68sqm and 16.69sqm; a retail shop of 58sqm with associated storage; 2 sets of male and female toilets and a disabled toilet; new internal fire stairs and; a stair and lift entry foyer with new lift to access upper floors. All of the outdoor dining areas adjacent to the northern elevation of the building mentioned above are located on land referred to as 'Lot 3' in this statement of facts and contentions.
- (e) Extend the first floor at the southern corner of the building to enclose 7.95sqm of existing front balcony space and use it as additional internal floor area.
- (f) Reconfigure the first floor plan of the existing building to incorporate 8 motel rooms of varying sizes, all with their own ensuites and bathrooms, plus separate common male and female toilets, a store room, lift/stair foyer and circulation corridor.
- (g) Completely demolish the existing second floor including all existing internal and external walls, the floor and the roof.
- (h) Raise the floor level of the second floor from RL 8.94m AHD to RL 9.43 AHD.

- (i) Construct a new second floor over a larger footprint than the existing second floor that will include 3 motel rooms and a lift/stair foyer. Balconies are proposed on the northern side of the 3 motel rooms for each of these rooms. Planter boxes are proposed along the northern, eastern and southern external edges of the roof at this level.
- (j) Various changes to the sizes and location of windows.

#### 4.0 BACKGROUND

Prior to 1961, the building on the subject site was known as 'the Pasadena Road House'. It was used for the sale of petrol, as a dance hall and as a cafe/restaurant.

In November 1961, Warringah Council approved an application for the conversion of the building into a guesthouse or boarding house with three shops with store rooms attached and an estate agent's office, also a restaurant and kitchen and toilets on the ground floor. The first floor was approved for use as a caretaker's flat of 2 bedrooms and 13 guesthouse bedrooms, each containing a bathroom and W.C. In addition, 2 laundries and a storeroom were approved "on the roof" (i.e. second floor).

In 1961, the subject site was zoned 'Living Area' under the County of Cumberland Planning Scheme Ordinance. In the Living Area zone, all uses were permissible with or without consent other than generating works, warehouses, bulk stores, industries other than local light industries, mines, institutions and drive-in theatres.

It was confirmed in the Land and Environment Court judgement for Romeo, Guiseppe and Romeo, Anna Maria v Pittwater Council [2006] NSWLEC 645 in paragraph 3 of that judgement that there was no surviving copy of the actual 1961 development consent granted nor any plans as follows:

*"The council's records confirm that in November 1961 the Warringah Shire Council resolved to approve an application for alterations and additions to the premises then referred to as Church Point Store (Pasadena). Neither party is in a position to produce the original approval granted in 1961. Minutes of the meeting of the Health and Building Committee held on 7 November 1961 have been produced together with a report to the Town Planning Committee dated 15 November 1961. Both parties are prepared to rely upon the abovementioned records to understand the terms of the approval granted in 1961...."*

Building Approval A212/63 was subsequently issued by Warringah Shire Council in March 1963 for 3 shops, an estate agent's office, 3 storerooms, toilets, vestibule, restaurant, kitchen and storeroom and a concrete terrace area (which later formed part of the covered eating area on the northern side of the building), 13 motel rooms on the first floor and common laundry, plant room, private laundry and store on the second floor.

On 7 June 1963, the Warringah Planning Scheme Ordinance 1963 was gazetted. Under this planning instrument, the subject site was zoned Neighbourhood Business "C". In this zone, restaurants and shops were permissible with development consent however, motels, hostels and guesthouses were prohibited. Part IV of the Warringah Planning Scheme Ordinance 1963 authorised the continued use of the motel component of the development notwithstanding that it was a prohibited use. Motels continue to be prohibited development under the current PLEP 1993 in the 3(c) Neighbourhood Business zone.

On 1 September 1980, the Environmental Planning and Assessment Act, 1979 (EPA Act) came into effect. Under this act, the continued use of the Pasadena building for the purposes of a motel, hostel or guesthouse was authorised by Division 10, Part 4 of the EPA Act. However, this authorisation was subject to this prohibited use not being abandoned (i.e. the prohibited use ceases for a continuous period of more than 12 months).

In November 1990, Warringah Shire Council granted development consent No.90/393 for a covered outdoor eating area (already constructed) and an extension to the restaurant/kitchen storeroom (already constructed) on the ground floor on the north side of the building on permissive occupancy 1965/326. In granting this consent, contrary to the recommendation for refusal of the Development Unit, Warringah Shire Council advised:

***"That in doing so, (i.e. approving the development) Council wishes to inform the applicant and place on record, that such leniency as now extended, on the basis of claimed but unsubstantiated existing use, and indeed having regard to the present chaotic parking situation and the informality of the reserve parking area (as recently provided by the tolerant attitude adopted by the Department of Land) would be highly unlikely that any intensification of the existing use could be justified."***

A modification of this consent was approved by Warringah Shire Council in August 1991, permitting the enclosure of the covered outdoor eating area and an extension of the paved floor area to the west and north for landscaping purposes only. Consent No. 90/393 included a condition that sought to limit the available outdoor dining area that had been constructed illegally from 190sqm of available area down to 120sqm of available outdoor dining area by requiring a permanent landscaped area 70sqm.

A section 102 (now known as section 96) application to modify Consent No.90/393 was lodged to replace the requirement for a fixed landscaped area to moveable pots. Pittwater Council refused the application to modify the Consent. The Applicant lodged an appeal against this refusal with the Land and Environment Court (M.Romeo and Anor. v Pittwater Council, Appeal No. 10261 of 1997). This appeal was upheld by the Court, subject to a new condition that limited the seating of the restaurant (including both indoor and outdoor dining areas) to a maximum number of 138 persons, consistent with the relevant liquor license restriction on the premises that had been granted by the Liquor Licensing Board in January 1990.

**As this judgement has significant relevance to the current assessment of whether the currently proposed development is an intensification of use and also in the assessment of the likely generation of additional demand for car parking resulting from the development, relevant sections of the Land and Environment Court judgement, dated 13 August 1997 are quoted below:**

*"..The expert town planner in the Council's case, Mr H. Sanders stated that the **Council was concerned that the seating capacity of the restaurant was being increased by stealth**. It was stated that the Council was not concerned whether the seating was inside the building or in the terraced eating area but that the seating capacity should not be increased...In my opinion, the reason for the fixed landscaping is clear....to restrict the floor area of the restaurant.... **There are strong planning reasons why any intensification of the restaurant should not flow from this application**. Mr Rennard gave evidence that parking could be a problem in the area particularly on certain evenings and during summer. The Council's resolution of 13 November 1990 makes reference to **"the chaotic parking situation"** and the observations from the view showed little parking available relatively early on a Friday morning in winter. **It is therefore of some importance that the use is not intensified**, if for only this reason...*

*.. ..I am very mindful of the need to have conditions that can be monitored and enforced with minimal effort. The use of portable landscaping does not achieve this, in my view.....The On-License for the restaurant pursuant to the Liquor Act 1982... provided a maximum seating capacity for the restaurant of 138 persons. Mr Maston indicated that this was the number of seats available at the restaurant. It is noted that the license was issued on 3 January 1990.*

*I am of the view that the most appropriate means of limiting the operation is through the number of seats rather than the use of portable landscaping. I accept that the permanent landscaping originally in development consent No. 90/373 would have gone further in ensuring this, than the portable landscaping...*

*. I agree with Mr Hemmings when he stated that the planning controls and seating limits under the liquor Act 1982 are different, but it is inescapable that they both seek to limit the scale and operation of the restaurant. I cannot see any good reason why they should not work in concert, particularly as the planning controls are far less precise through the use of floor area limitations. **Using controls based on floor space, the number of patrons is only limited by the degree of comfort acceptable by patrons.....***

**CONCLUSION** *It was common ground that the s.102 modification satisfied s.102(1)(a) as being substantially the same if the patronage stayed at current levels.... **When asked about limiting the capacity of the restaurant it was considered by the Council to be best achieved using restrictions on the areas that may be used for restaurant purposes. This approach is used by Council as it was felt that there was no simple correlation between the area available for restaurant purposes and the number of patrons who may be served.** The applicant was willing to accept a condition restricting the seating capacity to that specified in the Liquor License*

***In my opinion, a condition restricting the number of seats provides the most practical and effective way to limit the patronage at the restaurant and accordingly the following condition is imposed:***

***..The seating of the restaurant is to be limited to 138 persons as contained within the On-License (Restaurant) Number 462049 pursuant to the Liquor Act 1982.***  
*(emphasis added)*

In 2002, DA N0550/02 for a 4 storey shop top housing development on the Site was refused by Council and subsequently also refused by the Land and Environment Court on 17 October 2003. The judgment of this decision confirmed that the property benefitted from existing use rights at that time. At this time, shop top housing was a prohibited development but the EPA Act permitted the conversion of a prohibited development to another prohibited development under existing use rights provisions. Thus, in lodging this DA in 2002 and subsequently lodging an appeal against its refusal in 2003, the Applicant clearly intended to abandon the motel use in this period but retain existing use rights for the site in order to carry out another prohibited use.

A further development application (DA N0051/05) was lodged on 4 February 2005 for the demolition of the existing Pasadena building and the construction of a 3 storey shop top housing development over a basement car park was refused by Council but approved by the Land and Environment Court on 12 January 2007. The ground floor included a restaurant with overall indoor/outdoor seating capacity for 138 patrons as well as 3 shops. 6 residential units were proposed on the first and second floors. Notably, the proposal also included a basement car park with 14 car spaces. The Court issued a deferred commencement approval to the development. In the judgement, Commissioner Watts made the following pertinent comments and conclusions (Romeo, Guiseppe and Anna Maria v Pittwater Council [2007] NSWLEC 15):

*"46. I accept the water view over the top of the eastern section of the 'Pasadena' is less significant in Tenacity terms than the view over the western section of roof and I would not require the removal of Apartment No.6 or refuse the development for reason of the view loss occasioned by that part of the proposal.*

47. *With Apartment 5 removed and the parapet lowered to 10.1m AHD and taking into account the setback from the main walls of Apartment No.6, I consider the view loss to be not unreasonable and the impact of bulk within reasonable limits. Whilst I acknowledge that the existing building is already bulky and uncharacteristically large, the architect has done much to disguise the bulk of the new (development) and the design is of high quality. The sloping louvred walls is an inspired solution to the constraints of the land and allow for generous access for pedestrians around the proposal. Mrs Romeo assured the Court that Mr Stutchbury would be commissioned to complete the building where it approved and I consider this important as the building is a focal point in this part of Pittwater and to be successful it should be well detailed."*

An amendment to the EPA Act in March 2008 removed the ability to lodge a development application relating to a site where existing use rights applied for conversion of that prohibited use into another prohibited use. The existing prohibited use could still be extended or an application for a permissible use could still be lodged.

A subsequent Section 96(8) application to modify the approved shop top housing development (N0051/05) was lodged on 4 August 2008 to reduce the total number of residential units from 5 to 3, delete a pool, changes to the basement carpark and add an outdoor spa to one of the units. This Section 96(8) application was approved by the Land and Environment Court on 24 October 2008. In the same Orders of the same date of this approval, the Court ordered that the deferred commencement consent conditions had been satisfied and that the Consent had been activated. **Given that Consent N0051/05 was activated on 24 October 2008, this Consent remains valid and does not lapse until 24 October 2013.**

A further Section 96(8) application to modify Consent N0051/05 was lodged on 7 July 2010. This modification included the return of the unit deleted by condition by the Court on the top floor, regularised the sloping external walls by making them more traditional vertical walls and changed the finished materials by replacing approved materials with cheaper materials to reduce construction costs. This appeal was dismissed by the Court on 5 April 2011. Commissioner Dixon, in her judgement (Guiseppe and Maria Romeo v Pittwater Council 10536 of 2010) determined that the modified building was not substantially the same as the original approved development. In addition, the following conclusions concerning the merits of the development were held:

*"36. Based on the evidence, I accept Mr Moore's opinion that the modified development will lessen the successful contribution of the approved design to the Church Point setting and the modified development will not sit positively beside the old Post office and Store, which are heritage items...Given the landmark site, and after a consideration of the objections raised by local residents at the site inspection and in the written submissions...I accept that it is not in the public interest to approve a modified development, which detracts from the amenity and sense of place.*

*37. The additional residential apartment on the western side of Level 2 will have an impact on water views from 2195 Pittwater Road opposite the site. I accept the evidence of Mr Edgar...that the proposal does not provide reasonable view sharing. The northern view corridor over the Pasadena building is the most highly valued view from 2195 Pittwater Road because water views from this dwelling are relatively limited...the owners of 2195 Pittwater Road have already suffered view loss from their balcony/living areas as a result of the granting of consent to the original approved development.....it would be unreasonable to impose a further view loss impact on this property.....*

*38. I accept the evidence of Professor Webber, Mr Moore and Mr Edgar that the addition of the residential unit on the western end of Level 2 will result in an unacceptable impact on the amenity and scenic quality of the surrounding public domain due to the additional height, bulk and scale. The site is prominent within the locality and is completely surrounded by the public domain."*

The lodgement of Development Application N0051/05 in 2005, the subsequent lodgement of an appeal against the refusal of this application in 2006, the lodgement of a S96 application in 2008 and the lodgement of a further S96 application to this consent in 2010 and its refusal by the Court in 2011 also provides indication that the owners of the Site had the continued intention in this period of 2005 to 2011 of abandoning the motel use with the construction of a new shop top housing development that did not include a motel use.

The subject application was submitted on the 5th February 2013 and notified for a period of 31 days with an advertisement in the Manly Daily. During the notification period 136 submissions were received from local property owners and resident associations. The application was referred to Council's Senior Development Engineer, Principle Natural Resources officer, Environmental Health officer, Reserves and Recreation department, Strategic Planning (Heritage), Community Services department, Department of Water and Energy, Department of Planning and Infrastructure (SEPP 71) and NSW Police.

Height poles were requested to be erected and certified on 4th April 2013 and inspected by the assessing officer from potentially affected properties on 14 May 2013. A number of outstanding issues were raised and additional information requested in a letter from the assessing officer to the applicant dated 23 May 2013. Additional information was received from the Applicant on 25 July 2013.

## **5.0 NOTIFICATIONS**

The Application was advertised and 544 property owners and local resident and community groups were notified of the receipt of the Application between 15 February 2013 and 18 March 2013. As a result of this advertising and notification process, 133 objections from residents and community groups were received and 5 submissions in support of the development.

Amended plans and additional information received in July 2013. All those originally notified plus objectors were notified of the receipt of this additional information and 14 day period was provided to receive and additional submissions between 30 July 2013 and 13 August 2013. 18 further objections were received and one submission in support were received as a result of this re-notification process.

## **6.0 STATUTORY CONSIDERATIONS**

### **6.1 Work on Unzoned Land**

The proposal involves the construction of various structures and the use of Crown land that is unzoned for purposes associated with the restaurant/cafe/bar uses on the ground floor of the building. PLEP 1993 is completely silent on the facilitation of the approval of such uses (or any uses, for that matter) on unzoned land. The Applicant has not addressed this issue but it is likely that the work proposed on the unzoned land will need to be assessed and approved under Part 5 of the Environmental Planning & Assessment Act, 1979 (EPA Act) rather than Part 4. This would be a completely different process and application that would be independent of the subject application.

Notwithstanding this, the work proposed on the unzoned land is clearly occurring in association with the work proposed to the existing Pasadena building. As a consequence, this work must be taken into consideration in the Part 4 assessment of the subject application. This assessment report has been prepared on this basis.

## **6.2 Abandonment of Existing Use Rights**

The relevant provisions relating to existing use rights are contained within Division 10 of Part 4 of the EPA Act.

The proposal involves the re-use of an existing building on 3(c) Neighbourhood Business zoned land as a motel on the first and second floors. A motel is a prohibited use in the 3(c) zone under PLEP 1993, thus, this aspect of the proposal must rely on existing use rights being established for this use.

In the Land and Environment Court Judgement dated 12 October 2006 for Guiseppe and Anna Maria Romeo v Pittwater Council [2006] NSWLEC 645, Talbot, J. confirmed that the whole of the Pasadena building and site enjoyed existing use rights encompassing a number of uses that could all generally be regarded as being associated with and directly related to the overall development of the building for accommodation purposes (i.e. use as a motel). In Paragraph 12 of this judgement, the site was identified as follows:

*"12. The subject land is comprised within Lot 142 DP 752046 and Permissive Occupancy No. 1965/326. The building effectively occupies the whole of Lot 142. The Permissive Occupancy is used as an outdoor eating area."*

Based on this decision, it is clear that the Pasadena site, including Lot 142 DP 752046 and that part of Lot 3 DP 1148738 used as an outdoor eating area (i.e. the land subject to Permissive Occupancy 1965/326), benefitted from existing use rights for uses associated with a motel use in October 2006. What is not clear is whether these existing use rights have been abandoned since this time. This issue was raised with the Applicant during the assessment process as an issue requiring additional evidence to demonstrate that the motel use has not been abandoned. In response to this request for additional information, the town planning consultant has merely stated that it was never the intention of the owner of the property to abandon such rights.

It is not known when the operation of the motel use of the Pasadena building ceased and the Applicant has not been forthcoming in providing that information other than confirming that it has not been operating for a period of more than 12 months. Due to the involvement of the assessing officer in the assessment of a previous section 96(8) application considered by the Land and Environment Court and personal observations made during inspections carried out at that time, it appeared that the motel was not operating on the premises in December 2010. No information has been offered by the Applicant to either confirm or deny this.

From more recent observations of the premises in May 2013, the Pasadena building has been gutted with the majority of windows being removed and is not in a condition for such a business to operate from it. It is also known that the current property owners purchased the property at an auction on 28 March 2013.

The relevant sections in the EPA Act governing existing use rights, their continuance and abandonment are as follows:

### **"106 Definition of "existing use"**

*In this Division, existing use means:*

- (a) *the use of a building, work or land for a lawfully commenced purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part, have the effect of prohibiting the use, and*
- (b) *the use of a building, work or land:*
  - (i) *for which development consent has been granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and*
  - (ii) *that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse.*

### **107 Continuance of and limitations on existing use**

- (1) *Except where expressly provided in this Act, noting in this Act or an environmental planning instrument prevents the continuance of an existing use.*
- (2) *Nothing in subsection (1) authorises:*
  - (a) *any alteration or extension to or rebuilding of a building or work, or*
  - (b) *any increase in the area of the use made of a building, work or land from the area actually physically and lawfully used immediately before the coming into operation of the instrument therein mentioned, or*
  - (c) *without affecting paragraph (a) or (b), any enlargement or expansion or intensification of an existing use, or*
  - (d) *the continuance of the use therein mentioned in breach of any consent in force under this Act in relation to that use or any condition imposed or applicable to that consent or in breach of any condition referred to in section 80A(1)(b), or*
  - (e) *the continuance of the use therein mentioned where that use is abandoned.*
- (3) ***Without limiting the generality of subsection (2)(e), a use is to be presumed, unless the contrary is established, to be abandoned if it ceases to be actually so used for a continuous period of 12 months.*** (emphasis added)

It is noted that an appeal has been lodged to the Land and Environment Court which effectively makes this court the consent authority for this application. Notwithstanding the very clear wording in the EPA Act, the Land and Environment Court tends to take a very liberal approach to the abandonment of existing use rights and would be likely to accept the confirmation from the Applicant of their intention to maintain their existing use rights.

On this basis, this issue is not recommended as a reason for refusal and the assessment of this Application is made on the premise that existing use rights still apply to the Site.

### 6.3 Assessment of Existing Use Rights Applications and Derogation

Section 108 of the EPA Act sets out how the Environmental Planning & Assessment Regulation ('the Regulations') can make provisions for respecting existing use rights as follows:

**"108 Regulations respecting existing use**

- (1) *The regulations may make provision for or with respect to existing use and, in particular, for or with respect to:*
  - (a) *the carrying out of alterations or extensions to or the rebuilding of a work being used for an existing use, and*
  - (b) *the change of an existing use to another use, and*
  - (c) *the enlargement or expansion or intensification of an existing use.*
  - (d) *(Repealed)*
- (2) *The provisions (in this section referred to as **the incorporated provisions**) of any regulations in force for the purposes of subsection (1) are taken to be incorporated in every environmental planning instrument.*
- (3) *An **environmental planning instrument** may, in accordance with this Act, contain provisions extending, expanding or supplementing the incorporated provisions, but any **provisions** (other than incorporated provisions) in such an instrument **that**, but for this subsection, **would derogate** or have the effect of derogating from the incorporated provisions **have no force or effect** while the incorporated provisions remain in force...." (emphasis added)*

The Land and Environment Court Planning Principle established by the judgement by Senior Commissioner Roseth in *Fodor Investments v Hornsby Shire Council [2005] NSWLEC 71* confirms that the provisions of environmental planning instruments (and DCP's) that derogate or detract from the benefit endowed on a site by existing use rights do not apply to the assessment of applications on sites where existing use rights apply. Thus, zone objectives and planning controls that limit the size of a proposal (i.e. floor space ratio, height, setbacks) have no application if existing use rights apply. This includes qualitative provisions as well as quantitative provisions.

In view of the above, a DCP compliance table is not relevant to the assessment of the Application and is, therefore, only included as a record of the nature of issues raised in objections but not as a compliance table. Likewise, the provisions of environmental planning instruments that might otherwise have applied, were it not for the application of existing use rights (such as SEPP 71 and PLEP 1993) also do not apply. Instead, this report includes a pure merits assessment based upon the matters for consideration set out under Section 79C of the EPA Act.

In addition, the Planning Principle in *Fodor Investments* provides guidance in the merits assessment of existing use rights applications in paragraph 17 of that judgement by setting out the following considerations:

- "(1) *How do the bulk and scale (as expressed by height, floor space ratio and setbacks) of the proposal relate to what is permissible on surrounding sites? ...planning controls, such as height...and setbacks have relevance to the assessment of applications on such sites....because the controls apply to surrounding sites and indicate the kind of development that can be expected if and when surrounding sites are redeveloped.*

*The relationship of new development to its existing and likely future context is a matter to be considered in all planning assessment. (refer to assessment of height, bulk and scale in **section 7.1** of this report).*

- (2) *What is the relevance of the building in which the existing use takes place? Where the change of use is proposed within an existing building, the bulk and scale of that building are likely to be deemed acceptable, even if the building is out of scale with its surroundings, because it already exists. However, where the existing building is proposed for demolition, while its bulk is clearly an important consideration, there is no automatic entitlement to another building of the same floor space ratio, height or parking provision. (refer to assessment as to whether the proposal is a demolition and rebuilding or alterations and additions in section 7.2 of this report).*
- (3) *What are the impacts on adjoining land? The impact on adjoining land should be assessed as it is assessed for all development.....the...impact....should be reasonable. (refer to the assessment of the potential impacts of the development under section 7.3 of this report).*
- (4) *What is the internal amenity?..." (this is not considered relevant to the subject proposal as no dwellings are proposed).*

Further guidance in the assessment of existing use rights proposals and the application of the planning principles in *Fodor Investments* is provided in the Land and Environment Court judgement by Pain J. in *Stromness Pty Ltd v Woollahra Municipal Council [2006] NSWLEC 587* with relevant paragraphs quoted below.

*"86.....The planning principles (in Fodor Investments) are intended as guidelines to assist resolution of issues that commonly arise in merits cases reviews.....*

*87....there is no presumption that an existing use which can continue under s.107(1) can be rebuilt...There is no entitlement to a development consent for a rebuilding, only an entitlement to make a development application. **No case to which I have been referred has said that in the assessment of a development application to rebuild or intensify an existing use it is a given that the new proposal must be assessed as against what it replaces to determine if it is satisfactory.** Principle 2 in *Fodor* states that where an existing building is proposed for demolition there is no automatic entitlement to another building of the same floor space ratio, height or parking provision. That is correct in my view....If a merit assessment under s.79C is applied to a new building which is a rebuilding for the purposes of continuing an existing use, **it is possible that the existing use holder will not be allowed to build something identical to that which already exists if a merits assessments results in the conclusion that the impacts under s.79C are unacceptable.** (emphasis added)*

*88. That is not to say that the building intended to be replaced is irrelevant...It may well be appropriate depending on the circumstances that the building intended to be replaced is considered...The merits assessment is not confined to that comparison only however, it is also necessary to consider the development application more broadly under s.79C...*

*89. Principle 1 in *Fodor* states that it is acceptable to consider the relevant planning instruments as these apply to the area surrounding the proposed development because they determine the nature of development in that area. That principle is not inconsistent with s.108(3) (i.e. does not derogate existing use rights)...Care must be exercised, however against the possibility that such an assessment leads to a de facto application of standards in environmental planning instruments to the existing use rights site.*

*Failure to comply with standards in an environmental planning instrument cannot be a consideration in the assessment of the application based on existing use rights. The same can be said in relation to Principles 3 and 4 but these can clearly otherwise apply to assist in the merit review under s.79C.*

*90. I do not agree that matters such as the context of the proposed development cannot be taken into account.....**If the assessment under s.79C is to be adequate it must consider the proposal in its surroundings**, and that is clearly a fundamental part of any analysis required under s.79C(1)(b) and (c). **In this case the primary issue is the bulk and scale of the development and consideration of the proposal in its surroundings** which would appear necessary given the requirement of s.79C(1)(b) and (c)....” (emphasis added)*

Accordingly, the merits of the subject development application are assessed in accordance with the planning principles relating to existing use rights applications established in *Fodor Investments and Stromness Pty Ltd* below.

## **7.0 MERITS ASSESSMENT**

### **7.1 Planning Principle 1 – How Does the Bulk and Scale of the Proposal Relate to what Exists on Surrounding Sites and what is Permissible on Surrounding Sites?**

Planning Principle 1 of the *Fodor* judgement makes it clear that, whilst an existing use rights development cannot be assessed against numerical controls governing bulk and scale, such controls still need to be taken into account in order to gain an informed understanding of the future context of the character of surrounding development. *Stromness* warns that care must be taken in this assessment to avoid any de facto application of these standards and that failure to comply with these standards cannot be a consideration in the assessment. To draw these points out further, the focus of the assessment is to draw a comparison between the bulk and scale of the development and the bulk and scale of what is around it and what is likely to occur in the vicinity in the future, based on the applicable building envelope controls.

#### Surrounding Development

What is unusual about the subject site is that there are not that many other properties in the vicinity of it that are able to be developed. The Site is surrounded to the west, north and east by public reserves zoned 6(a) Existing Recreation, unbuilt upon Crown land or by the Pittwater waterway. This makes the existing Pasadena building a very prominent building in the locality, particularly when viewed from the Pittwater waterway and Scotland Island. Development that would be permissible in the surrounding public reserve and Crown land would be required, under the relevant Plan of Management, to be consistent with the purpose of the reserve or any lease or license granted within the Crown land. Given this, the possibility of the construction of buildings and structures in the open space around the Pasadena site is likely to be ancillary in nature and fairly limited.

The only nearby property in the vicinity of the Site that is able to be developed with a commercial building is the General Store site at 1860 Pittwater Road on the opposite side of Thomas Stephens Reserve from the subject site. The existing building on this nearby property is a part 1 / part 2 storey building constructed of lightweight materials including weatherboard and a pitched iron roof. The first floor has a reduced floor plate compared to the ground floor and is contained within the roof form. The General Store building is heritage listed. There is also a small single storey building associated with the Church Point Ferry Wharf. The ferry wharf is also heritage listed. To the south of the Site and across the other side of Pittwater Road is another small reserve and low density residential properties that are of a sufficient distance from the Site and vertically separated from the Site and screened by vegetation such that these dwelling-houses are not considered to be a significant part of the

visual catchment of the Site for comparative purposes of bulk and scale. The general lack of other buildings in the vicinity of the Site actually places a higher focus on the relationship visual between the existing Pasadena building and the nearby heritage listed General Store and ferry wharf building.

There are two 3(b3) Waterfront Business zoned properties in the locality including 1856 Pittwater Road, Church Point and 2A McCarrs Creek Road, Church Point containing 1-2 storey marina-related buildings. These buildings would be in the general visual catchment of the setting of the Pasadena building when viewed within the Pittwater waterway from a distance. These marinas are, respectively, 350m and 800m from the Pasadena building. Both marina sites are locally less prominent sites when viewed from the Pittwater waterway compared to the Pasadena site as the Pasadena property is located at the tip of a peninsula.

### Building Height

The maximum height controls for the General Store site and the marina sites described above is 8.5m, or 8m above any applicable Estuarine, Flood and Coastline FPL. Other than public toilets and the like, no buildings or structures of any note are likely to be erected within the public reserves that immediately adjoin the Site. It is noted that the same height controls apply to the subject site. Without the benefit of scaled plans of the General Store, it is likely that the General Store building complies with the maximum 8.5m height control.

The maximum height of the existing Pasadena building is approximately 10.0m. The maximum building height of the proposed development is 11.3m above natural ground level scaled off the plans to the top of the lift over-run and 10.7m to the roof ridge.

Given the heritage listing of the General Store building and the applicable height control affecting the few other business-zoned properties adjacent to the foreshore in this locality, it is highly unlikely that there would ever be a building of a comparable height to that being proposed in the foreseeable future.

### Building Setbacks

#### Front Setback

The minimum front setback control that would be applicable to the business-zoned sites along the foreshore in this locality would be 3.5m. Both the existing Pasadena building and the General Store building have nil setbacks to Pittwater Road. The existing second floor of the Pasadena building has a front setback of between 4.5m and 5.5m. In comparison, the proposed second floor has a front setback of between 2.2m and 3.5m. There is also additional floor area proposed to the front of the first floor in the southern corner of the building. This proposed additional floor area on the first and second floors adds additional visible bulk to the development compared to the existing development when viewed from the street.

#### Side Setback

A 3m side setback control is applicable for commercially zoned land that adjoining is immediately adjoining land zoned as public open space. This would apply to both the Pasadena site and also to the General Store in relation to the setbacks of development on these sites to Thomas Stephens Reserve. The existing General Store building has a 1m setback to the ground floor to Thomas Stephens Reserve and 3.2m to the first floor of this building. This results in a low profile and human scale to this building when viewed from the popular and well-used Thomas Stephens Reserve. Such a presentation is considered to be respectful and appropriate for the relatively intimate public space to which it presents, notwithstanding the non-compliance of the ground floor with the setback control.

In comparison, the existing Pasadena building is setback 2.078m to Thomas Stephens Reserve and is a full 2 storey height. This results in this side of the existing Pasadena building having a bulky, unarticulated and overwhelming appearance when viewed from the quite confined public space within Thomas Stephens Reserve.

There is a sharp contrast between how these 2 opposing buildings currently present to this important public open space. The proposed development adds additional outdoor dining areas within the 2.078m side setback area with sandstone walling and planter boxes addressing the level change between the ground level of Thomas Stephens Reserve (RL 1.53 – RL 1.75) and the new finished floor level of the ground floor of the proposed development (RL 2.5). The proposal also includes a larger, higher second floor that has a setback to Thomas Stephens Reserve of 8.5m. Whilst this is well over the required 3m side setback it is noted, based on the height poles erected on the Site, that this new second floor will be plainly visible to a viewer standing adjacent to the General Store in Thomas Stephens Reserve. Consequently, this new second floor further exacerbates the lack of any 'human scale' to the Pasadena building that is exhibited in the General Store building opposite.

#### Foreshore Building Line (FBL)

Whilst the FBL appears to make allowances for the existing location of the marina buildings in the general vicinity of the Site it cuts across both the General Store and the Pasadena buildings such that these existing buildings encroach over the FBL. Thus, any future re-development of these two sites would involve smaller buildings set further back from the water's edge than the existing buildings are located. With the exception of the existing marina-related buildings on the foreshore, it would appear that it would be unlikely that there would be any development in the future in the vicinity of the Site involving a large building of 2 or more storeys in close proximity to the foreshore. The application of an FBL on the residential zoned land adjacent to the foreshore in Church Point, Scotland Island and the western foreshore is also likely to prevent the occurrence of any significant building in close proximity to the foreshore other than boatsheds, jetties and the like. It is therefore likely that the foreshore in this locality will remain legible and relatively uncluttered by large buildings of the scale of the existing Pasadena building.

#### Relationship of Proposal to Existing and Likely Future Context

When viewed from both Pittwater Road and also from the Pittwater waterway, the height difference and the disparity of bulk and scale between the General Store building and the existing Pasadena building is marked to the extent that there is a clearly perceivable visual incongruence between them. This incongruousness is intensified by the disparity in height, scale and built form, as well as the disparity in the materials and construction of these buildings.

The proposed development will involve a second floor that is higher and has a larger floor plate than the existing Pasadena building and this will intensify the already disharmonious relationship between the General Store building and the Pasadena building. The proposal incorporates a larger second floor that is closer to Pittwater Road than the existing second floor, making it more visually prominent and dominating when viewed from Pittwater Road and Thomas Stephens Reserve.

The unusual height of the proposed building on the Site cannot be 'hidden' by adjoining development, nor can it be softened by immediately adjoining development having a slightly lower height and providing some form of visual transitioning up to the higher proposed building. The Site is surrounded by the public domain with each of the 4 elevations of the building being highly visible from the public domain, thus, a building that is unusually high on this site will be highly prominent and create a visually jarring impact for a viewer standing in the public domain at ground level or travelling by boat along the Pittwater foreshore.

The proposed building would become even more visually dominant as a feature within this locality, contrasting with the natural topography, the coast and water, the native tree canopy and landscape, which are the primary features that make up the general character of Church Point and are highly valued by the community.

The building envelope restrictions discussed above that would apply to the few other commercial sites in the locality and the FBL restrictions to residential sites in the locality are such that it would be extremely unlikely for any future development of a similar bulk and scale as the 3 storey proposal to ever occur as close to the foreshore as is proposed under the subject application.

It is not considered acceptable for this proposal to add additional height and bulk to an already visually dominant and bulky building that does not sit sensitively within its prominent natural setting immediately adjacent to the foreshore. There is little evidence in the proposed plans of any attempt by the architect to somehow reduce the apparent visual bulk of the existing Pasadena building and improve its relationship to its surroundings. Consequently, the development is recommended for refusal due to its excessive and unacceptable height, bulk and scale.

## **7.2 Planning Principle 2: What is the relevance of the Existing Building in which the Existing Use Takes Place?**

Although the proposal is for “adaptive re-use” of the existing building, there is very little of the existing building that is actually being proposed to be retained. The proposed demolition of the existing building includes the following:

- a. demolition of a significant proportion of the internal walls at ground and first floor levels;
- b. demolition of significant portions of the external walls at both ground and first floor levels, including:
  - i. almost the entire walls facing the Thomas Stephens Reserve and the outdoor eating and drinking areas at ground floor level, and
  - ii. the entirety of the wall facing the Thomas Stephens Reserve at the first floor level;
- c. complete demolition of the existing second floor including all existing internal and external walls and the roof
- d. complete demolition of the floor of the second floor (being the entire roof of the first floor)
- e. complete demolition of the existing external stairs at the northern corner of the building, and
- f. construction of a new ground floor level.

In view of the significant extent of demolition proposed, the Proposal does not involve “adaptive re-use” of the existing building on the Site. Rather, the Proposal involves the substantial demolition of the existing building on the Site. The Applicant has not demonstrated any environmental benefits associated with the proposal to retain limited elements of the existing building. Based on the Land and Environment Court Planning Principle in *Michael Hesse v Parramatta City Council* [2003] NSWLEC 313, the Proposal does not require any different assessment from a proposal that does not involve adaptive reuse as it has not been established that the proposed adaptive re-use has any major benefit that is in the public interest.

More than half of the existing external fabric of the building is proposed to be demolished. Given this and taking into account the Land and Environment Court Planning Principle in *Edgar Allan Planning Pty Limited v Woollahra Municipal Council* [2006] NSWLEC 790, the Application should therefore be assessed as a new development.

The above points need to be considered in association with the *Fodor* Planning Principle 2 which states that, where the existing building is proposed for demolition, there is no automatic entitlement to another building of the same floor space ratio, height or parking provision. The Planning Principle in *Stromness* expands on this principle by stating that it is possible that the existing use holder will not be allowed to build something identical to that which already exists if a merits assessment results in the conclusion that the impacts under s.79C are unacceptable.

It is not known what the Applicant's true motive in deciding to retain the existing building actually is but it is evident that, by retaining this building (or at least appearing to), the possibility of providing basement car parking (which was included in the previous shop top housing development for this site) is avoided on the premise that it would be too difficult to construct whilst still retaining the existing building above. It also retains the envelope of the existing building whereas a new development may not necessarily achieve this same envelope, due to the excessive height, bulk and scale detailed under **section 7.1** of this report. It cannot be said that the existing Pasadena building is attractive and fits very successfully into its particular context. Thus, there is no real public benefit in retaining this building. A recommended reason for refusal is that the development is not 'adaptive re-use' as proposed. The proposal is for demolition and construction of a new development. This building has unacceptable impacts in its existing form and the proposal exacerbates these unacceptable impacts. With the extent of demolition proposed there are opportunities to improve the relationship this building has with its surroundings but this has not occurred.

### **7.3 Planning Principle 3: What are the Impacts on Adjoining Land?**

#### Car Parking Impact

The subject site and the locality surrounding it has a long history of parking issues. This is confirmed by the 133 objections received, many of which included details of the day to day difficulties faced by local residents in finding a car park in the locality. The history of the use of the Site is detailed in the 'Background' section of this report (**section 4**).

In particular, it is clear that when Warringah Council granted consent for the use/extension of the covered outdoor dining area to the restaurant in 1990, it was also conscious of the lack of a sufficient supply of public and on-street car parking to meet demand in the area ("*..the chaotic parking situation...*") and puts its concern on the record that any further intensification of the use of the Site could not be supported due to this existing parking problem. This was more than 20 years ago and there is no evidence currently before Council to suggest that the chaotic parking situation in this locality has improved since that time. Even with the Pasadena building lying completely vacant and unused today, there still appears to be a significant parking problem in the area.

It is in the context of this significant and long-standing chaotic parking situation that the parking impacts of the development are assessed. It is noted that in the submitted Statement of Environmental Effects and in the Traffic and Parking report submitted in support of the development, this significant and long-standing problem has neither been mentioned nor taken into account. This is in spite of the issue having been raised in a public consultation session with local residents held by the Applicant prior to submission of the Application, at 2 meetings between Council's Executive Planner and the Applicant and in a letter from Council's Executive Planner dated 23 May 2013 to the Applicant requesting additional information including a parking survey that assesses the current parking conditions and availability in the locality.

In essence, the Applicant has been made aware of the problem on numerous occasions but has deliberately completely ignored it. No parking survey has been provided. As a result, the proposed utilisation of the adjacent public car park and surrounding streets for overflow parking demand generated by the proposal has not been justified as being feasible without significant detrimental impacts. In response to the request for a parking survey the traffic engineer for the Applicant stated:

*“...the existing approval with the parking circumstances as they are prevail and there is no relevance in the results of any parking surveys.”*

According to figures provided by the Traffic Consultant for the Applicant, (these are disputed as not being correct later in this report under **section 7.5** ‘Intensification of Use’ but are adopted for the purposes of parking assessment) the Pasadena building was last used as a 138 person restaurant with an indoor dining area of 240sqm and an outdoor dining area of 200sqm, 3 shops with total area of 205sqm and 14 motel rooms. It provided 7 parking spaces exclusively for these uses on the adjoining Crown land to the east known as Lot 3.

In order to gain an understanding of the likely parking impact of the development on the locality, the parking generation rates of section B6.6 of Council’s PDCP 21 need to be referred to. This development would have generated a total demand for 36 car spaces. Thus, under these terms, the existing development has historically had a shortfall of approximately 29 car spaces.

It is presumed by the town planning consultant and traffic engineer for the Applicant that any excess demand for parking generated by the development will be absorbed by whatever parking spaces were available in the adjoining public car park and in the surrounding street network, based on the assumption that this happened in the past and was deemed acceptable. However, it is questionable as to whether the locality can successfully or adequately absorb this parking shortfall in the future and whether it is appropriate or reasonable to discount any parking shortfall from the previous use in the parking assessment of the current proposal. In failing to provide any acknowledgement or assessment of the existing parking issues in the locality at all, the submitted “Assessment of Traffic and Parking Implications” dated July 2013 can only be regarded as misleading and grossly inadequate for the purposes of assessing the true likely parking impact of the development on the locality.

As demonstrated above in **section 7.2** of this report, it is considered that the extent of the existing building that is actually being retained within this proposal is minimal to the extent that the proposal is effectively for a new development rather than additions and alterations to the existing building, as proposed. This is a relevant consideration in regard to the *Fodor* Planning Principle 2 where it states that there is not necessarily an automatic entitlement to the same parking provision as the existing development in the new development. The *Stomness Pty Ltd* Planning Principle expands on this point where it states that it is possible that the existing use holder will not be allowed to build something identical to that which already exists if a merits assessment results in a conclusion that the impacts under s.79C are unacceptable. In failing to deliver the requested parking survey and providing a clear indication of the anticipated maximum patron capacity of the restaurant/café/bar functions, as requested, the Applicant is obstructing the necessary merits assessment from being made.

Notwithstanding the failure of the Applicant to co-operate by providing the necessary information, a merits assessment of parking impact is provided below, based on the information currently before Council.

The proposed development includes a restaurant with an indoor dining area of 125sqm and an outdoor dining area of 118sqm, a café/bar with an indoor dining area of 96sqm and total outdoor dining area of 105.59sqm, a shop of 58sqm and 11 motel rooms. Under the terms of section B6.6 of PDCP 21, this development would generate a demand for 27 car spaces. It provides 10 spaces on Lot 3 resulting in a parking shortfall of 17 car spaces, if assessed strictly against Council's DCP.

Whilst the Applicant's parking and traffic report claims that there is no intensification of use and the parking demand assessment of the proposal under the DCP creates this appearance, this is not considered to be an acceptable assessment of the parking impact for two reasons. Firstly, the Applicant has not demonstrated that the locality has the capacity at this time to absorb this additional parking demand, as indicated above. Secondly, the unique circumstances of the history of the use of this site warrant a parking impact assessment based primarily on patron numbers, not on floor space.

The Pasadena building and adjoining Lot 3 has historically been used for the purposes of a restaurant with a combined indoor dining / outdoor dining / reception area / staff capacity of 138 persons. This restriction in capacity, based on maximum number of persons was imposed by the Land and Environment Court in a judgement of *M.Romeo & Anor v Pittwater Council [Proceedings No.10261 of 1997]* (see details in 'Background' section of this report (section 4) in preference to restricting capacity by setting maximum floor areas for indoor and outdoor dining, which was Council's stated preference at the time. The Court recognised the need to restrict capacity mainly because of the "*chaotic parking situation*". The judgment noted that:

*"..Using controls based on floor space, the number of patrons is only limited by the degree of comfort acceptable by patrons...."*

In making this decision, the Court over-ruled Council's desire to contain the intensity of use of the restaurant by setting maximum permitted dining areas. The containment of the intensity of the restaurant use was considered necessary by both Council and the Court in order to restrict the parking demand that it generated. Future increases in both the internal and external dining areas of the restaurant were therefore possible and have occurred as it was the maximum patron capacity that limited the intensity of the restaurant use on this site.

It is therefore questionable to allow the Applicant to claim the benefit of the existing outdoor and indoor dining areas when these areas were not limited in the relevant development consent. Instead, the maximum number of patrons was limited. For this reason, the parking assessment of the use of this Site needs to be based on the likely number of patrons if this assessment is going to involve any comparison to the previous use. The Applicant's parking and traffic report relies heavily on a comparison between the dining areas of the previous restaurant use of the Site and the current restaurant/café/bar proposal to justify the assertion that there is no change in parking demand. Given the above, this comparison of areas is irrelevant and a totally inaccurate assessment of what the true parking impact is likely to be.

The RTA's 'Guide to Traffic Generating Developments' ('GTGD') recommends a parking generation rate for restaurants of 1 car space per 3 seats. If the GTGD is used to assess parking impact, this would increase the potential parking generation of the existing restaurant from 14.67 car spaces (as assessed against PDCP 21) to 46 car spaces (as assessed against GTGD). This would increase the overall parking shortfall of the previous use of Pasadena from 29 to 60 car spaces.

A GTGD parking assessment based on patron numbers would increase the parking generation of the currently proposed restaurant/bar/café outdoor and indoor areas from 14.82 car spaces (as assessed against PDCP 21 and based on dining area) to 126.67 car spaces (based on an estimated maximum number of 380 patrons and using the GTGD criteria, maximum patron number assumption explained in this section of the report under 'Intensity of Use'). The overall parking shortfall of the proposal using patron numbers would then increase from 17 car spaces to 130 car spaces. This is considered to be a much closer reflection, in this instance, of the likely parking impact of the development than an assessment against the floor area based parking criteria of section B6.6 of PDCP 21.

It should be noted that, once the Applicant was aware that the parking assessment and intensity of use assessment of this proposal would be based on the number of patrons rather than floor areas of indoor and outdoor dining areas, the seating plans that formerly appeared in the original plans were subsequently removed from the amended plans to obscure the intended maximum number of patrons and make such an assessment more difficult. Despite requests, the Applicant has not provided any detail on the anticipated maximum number of patrons this proposal is designed to cater for. This is not considered to be a particularly transparent or co-operative approach and leaves Council with the only option of refusing the development. A reason for refusal, based on inadequate information submitted to enable a proper assessment is recommended.

In addition, given the significant existing parking problems in the Church Point locality and the likely significant increase in the demand for parking in the area that this development will create, the development is not considered to be satisfactory having regard to section 79C(1)(b) and (c) of the EPA Act as the Site is not suitable for a development of this magnitude. A reason for refusal on this basis is recommended.

#### Noise Impacts

Numerous objections received have raised concern regarding the impact of additional noise arising from the proposed use at the proposed operating hours.

The originally submitted development application was accompanied by a noise impact assessment report prepared by Atkins Acoustics. Council arranged to have this report assessed by independent acoustic experts who made a number of comments and raised some concerns regarding the content and methodology of this report. These concerns were included in the letter of issues prepared by the assessing officer and sent to the Applicant on 23 May 2013. The letter provided Council's independent acoustic consultant's comments and specifically requested that issues raised by addressed in any revised noise impact assessment report. In response to the letter of issues, the Applicant has amended the plans and provided a revised noise impact assessment report by Atkins Acoustics dated July 2013 which appears to have responded to the issues raised.

The revised noise report makes a number of recommendations regarding the noise attenuation measures that would be required to be made to the construction of the building and its internal fitout. The report indicates that the predicted cumulative noise levels with the northern and western outdoor terraces occupied prior to 10pm satisfy the relevant noise assessment criteria. However, after 10pm, with the western terraces closed and with doors to the restaurant open and amplified music internally, noise levels are predicted to exceed the assessment criteria by 1dB.

It states that, without amplified music, noise from the restaurant and northern terrace patrons is predicted to satisfy the post 10pm noise criteria for Pittwater Road and Scotland Island residential properties. The report recommends options to control the predicted exceedence include reducing the level of amplified music or closing the northern facade doors and windows to the Restaurant and Bar. However, with no access to the bar from the northern terrace, it is likely that patrons on the northern terraces would be frequently opening the northern facade doors to gain access to the bar. Thus, closing the northern facade doors and windows to the bar would be unlikely to be all that effective in restricting noise escaping from the premises. A more certain option would be to close the northern terraces at 10pm at the same time as the recommended closure of the western terraces. This could be required by a condition of consent, should the development be approved.

Notwithstanding the submission of the above acoustic report that concludes that with the appropriate management of the restaurant/café/bar uses and appropriate acoustic insulation work being carried out to the existing building, the noise impacts of the uses would be within generally acceptable limits, it is considered that the likely number of patrons and proposed operating hours are two factors that could be more easily and appropriately limited and more effectively reduce the potential for the proposed operations on the premises to create noise disturbance. The acoustic report does not consider whether or not capacity or opening hours should be limited to achieve more acceptable noise impacts.

The tolerance and expectations of residents relating to noise impacts varies between an urban town centre and a predominantly low density residential area with a small neighbourhood centre such as Church Point. Clearly, in a low density residential area, it would be reasonable for residents to expect some relief from ANY potential noise impacts at certain times, such as Sunday evenings, weekday evenings after 10pm and also early in the mornings. Thus, the acoustic report is noted but it is questioned as to whether the capacity and opening hours proposed are appropriate for a low density residential locality such as Church Point.

The inappropriate patron capacity and opening hours and the potential of these elements of the proposal to lead to potentially unreasonable noise impacts are recommended as a reason for refusal.

#### Impacts on Heritage Items in the Vicinity of the Site

The closest buildings/structures to the Pasadena building are the heritage-listed Church Point Post Office and General Store (a part 1/part 2 storey building of lightweight weatherboard construction with a colorbond roof) and the heritage-listed Church Point Ferry Wharf (also a structure that is low-scale and lightweight construction).

The Pasadena building is in the vicinity of these heritage buildings and makes up a prominent part of their visual setting, particularly when viewed from the Pittwater waterway and from Pittwater Road.

The proposed additions and alterations add highly visible bulk to the Pasadena building, exacerbating its existing overbearing scale in relation to the setting of these heritage items. The construction of the new work is predominantly heavy masonry construction rather than lightweight materials. Unsympathetic and unnecessary alterations such as widening the existing masonry supporting columns along the front elevation, extending the height of the masonry external wall on the southern corner of the building and introducing high stone walls at ground level to raised planter boxes along the water's edge further enhance the solid and bulky appearance of the Pasadena building compared to the heritage items. This detracts from the quality of the setting of these heritage items.

The unsympathetic bulk, design and construction of the proposed additions to the existing building and their impact on the heritage value of the adjacent heritage items is recommended as a reason for refusal.

#### Impacts on Saltmarsh Endangered Ecological Community

Comments by Council's Natural Resources section provided below:

*"The property contains a modified landscape located on the foreshore of Pittwater estuary. The proposed works involve alterations and additions to the existing Pasadena building to upgrade the restaurant facilities. No native trees or significant vegetation occurs in the vicinity of the works, and as a sea wall is present (which will not be altered) there is no saltmarsh vegetation in the vicinity which could be impacted. Seagrass beds occur offshore, however will not be impacted if sedimentation fencing is implemented (as conditioned). Landscaping on the site will be enhanced, and a landscape plan (Jane Britt Design Drawing No. L01A January 2013) has been submitted. The Planting schedule includes a some species deemed undesirable in Pittwater due to being invasive in natural environments. These are Tuckeroo (*Cupaniopsis anacardioides*), Indian Hawthorn (*Rhapiolepis indica* 'Cosmic White') and Treasure Flower (*Gazania* spp).*

Therefore, an amended landscape plan is required prior to the issue of the Construction Certificate which deletes these undesirable species and replaces them on the Planting Schedule with more appropriate locally native species selected from the relevant lists in the Native Plants For Your Garden guide on Councils website at [http://www.pittwater.nsw.gov.au/environment/species\\_lists](http://www.pittwater.nsw.gov.au/environment/species_lists)."

#### Impacts on the Public Domain – Prevention of Land-Based Foreshore Pedestrian Access

The development involves the removal of external stairs that currently prevent land-based pedestrian foreshore access in-between the Pasadena building and the water's edge but then replace this structure with planter boxes and raised outdoor dining areas that will continue to prevent the achievement of land-based foreshore access. These new structures would obstruct the natural pedestrian desire line that follows the line of the seawall. Accessing the boardwalk requires a deviation away from this pedestrian desire line and a change in the construction of the footpath from gravel to timber. This deviation in terms of the direction of travel and construction of the footpath is not desirable for a vision impaired person or a person in a wheelchair to navigate. There is clear potential to improve the existing foreshore access.

The provision of land-based access along the foreshore for pedestrians is considered preferable to continuing to rely on the timber boardwalk that protrudes over the water as it would be more accessible and reduce the visual clutter and obscuring of the legibility of the foreshore caused by the current boardwalk. It would also remove the future maintenance costs associated with the boardwalk. The proposed planter boxes are not essential elements to the proposal and it is considered that there is a higher value to the public in deleting these planter boxes and reducing the outdoor dining areas as necessary, in order to achieve the land-based foreshore access.

## View Impacts

Submissions received raised concerns regarding view loss as a result of the proposed development from the public domain (Church Point Graveyard and adjoining reserve) as well as from private properties, in particular, 2195 Pittwater Rd.

The view loss impact on the dwelling at 2195, Pittwater Road, Church Point is assessed below in accordance with the procedure established by the relevant Planning Principle in the judgement of *Tenacity Consulting v Warringah Council [2004] NSWLEC 140* which sets out a four step assessment procedure to determine the reasonableness of a development in terms of achieving view sharing.

*“The first step is to make an assessment of the views to be affected. Water views are more highly valued than land views. Iconic views are more highly valued than views without icons. Whole views are valued more highly than partial views, for example, a water view where the interface between land and water is visible is more valuable than one in which it is obscured.”*

With specific reference to the existing views from 2195 Pittwater Road, Church Point, this property is on the opposite side of Pittwater Road from the Site. This dwelling is a 2 storey dwelling with garaging on the ground floor and living areas are on the first floor. There is a first floor balcony on the north-eastern side (front) of the dwelling and directly off the living room/dining room.

Although the dwelling at 2195 Pittwater Road is in reasonable proximity to the Pittwater waterway, water views from this dwelling are surprisingly limited. Partial views of the Pittwater waterway, Scotland Island and the interface between this land and water are available to the north-east of the house from the front first floor balcony and internal living areas from both a standing and a seated position. These partial views are heavily filtered by trees located in-between the dwelling and the foreshore of Pittwater. The existing Pasadena building is located to the north of the dwelling at 2195 Pittwater Road. Water views toward the north and north-west from both the internal living areas and balcony of 2195 Pittwater Road are also predominantly heavily filtered by existing vegetation. Potential water views northwards are also obscured by the existing Pasadena building.

Unobscured water views appear to be only available from the interior of the first floor of the dwelling at 2195 Pittwater Road and its balcony in two locations. The first and smallest unfiltered water view corridor toward the north-west (‘north-west view corridor’) can be seen from a seated and standing position from the dining room and through the dining room window on the north-east elevation of the dwelling. It is also visible from a standing and seated position from the north-western edge of the balcony. This view corridor includes a small water view of Pittwater and a small pocket of land/water interface with the western foreshore.

The second water view corridor is much larger than the north-west view corridor and is toward the north and over the first and second floor rooftops of the existing Pasadena building (‘northern view corridor’). It does have some minor filtering of vegetation but this is not considered to be overly disruptive. The extent of the length of the existing Pasadena building approximates the width of the northern view corridor. This view corridor is available from both a seated or standing position from most locations on the front balcony and from a standing position from the living room. This northern view corridor over the existing Pasadena building includes water views of Pittwater and land/water interface views of Pittwater, the western foreshore and Scotland Island.

In accordance with the Tenacity Planning Principle, the northern view corridor over the existing Pasadena building is considered to be the most highly valued view available from the dwelling at 2195 Pittwater Road as it includes an appreciably larger amount of water view and land/water interface view than the north-west view corridor. The northern view corridor over the Pasadena building would also be highly valued as water views from this dwelling are relatively limited. The north-western view corridor described above would also be valued but to a much lesser extent.

The second step in the Tenacity Planning Principle is to consider the part of the property from which the views are obtained. The Planning Principle notes that the “protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries.”

The vantage points from which the views are available have already been discussed above. These views are over a side boundary however, the adjoining land to the north-west of 2195 Pittwater Road is 2199 Pittwater Road, which is vacant parcel of land that is zoned 6(a) Existing Recreation and is unlikely to be developed. The protection of views from 2195 Pittwater Road over its side boundary is considered to be a reasonable expectation in these circumstances.

The third step in the Tenacity Planning Principle is to assess the extent of the impact arising from the development. The Planning Principle notes that the impact on views from the living areas of a dwelling is more significant than from bedrooms. It suggests that view loss should be assessed qualitatively as negligible, minor, moderate, severe or devastating. All of the northern view corridor views are from living areas or outdoor living areas immediately connected to the internal living areas.

Based on the height and location of height poles erected on the Site that have been duly certified by a surveyor, it is considered that the majority of the water view available to this dwelling in its most valued northern view corridor will be lost although the land water interface view should still be visible from a standing position but not a seated position from either the internal living area or the front balcony. It is considered that this view impact is moderate to severe.

It should be noted that the previous shop top housing development (Consent N0051/05, detailed under **section 4.0** of this report) and the view impacts it may have caused has not been taken into account in this view impact assessment. This is because it is clear in the Land and Environment Court judgement of this case that the exceptionally high standard of design and finishing of this development was given some weight by the Court that to the extent that a greater level of impact was permitted than would have otherwise been considered acceptable for a more ordinary style of development.

The fourth step in the tenacity Planning Principle assessment of view impact is to assess the reasonableness of the proposal that is causing the view impact. It notes that a development that complies with all of the planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable.

In the case of the subject proposal, the proposed new second floor has been identified as contributing to an unacceptable height, bulk and scale that has unacceptable impacts on the surrounding public domain and the setting of the heritage items. In **section 7.2** of this report, it is established that the subject development amounts to a demolition and rebuilding of the Pasadena building. The *Fodor* and the *Stromness Pty Ltd* Planning Principles establish that there is no automatic entitlement to another building of the same floor space ratio, height and parking if the merits assessment results in the conclusion that the impacts of such a building are unacceptable.

Given the above cumulative impacts, it is not considered that the further impact of the proposed development on views from 2195 Pittwater Road is reasonable or supportable.

With regard to the potential view impacts from the public domain (i.e. the Church Point Graveyard and adjoining reserve), it is considered that the proposal has the potential to obscure some water views and some land/water interface views, depending upon where the viewer is standing within the reserve. These views are considered to be important and valuable public assets and the erosion of the quality of these views is not considered reasonable in circumstances where the offending elements of the building obscuring these views are also having numerous other unacceptable impacts.

For the above reasons, the view impacts from both 2195 Pittwater Road, Church Point and also from the adjoining public reserve are considered to be unreasonable. This is a recommended reason for refusal.

#### **7.4 Planning Principle 4 – What is the Internal Amenity?**

As the proposal does not include dwellings, this planning principle is not relevant in the assessment of this Application.

#### **7.5 Section 79C(1)(d) – Any Submissions Made**

This section of the report covers issues raised in submissions and not addressed elsewhere in the body of this report.

##### Illegal Building Works

Objections raised concern that illegal building works were being undertaken on the Pasadena building. Council's Compliance Officers responding to a complaint raising this issue on 11 April 2013 and determined by inspection of the building that the works being undertaken were exempt development not requiring consent as it included minor internal building alterations.

##### Intensification of Use

Concern has been raised in objections that the proposal represents a significant and unacceptable intensification of the use of the building and site, compared to the previous use.

The Applicant maintains that there is no intensification of the use of the Site and bases this assertion on a comparison of "approved" floor areas for indoor and outdoor dining between the former restaurant use and the proposed restaurant/bar/café use. The legitimacy of this assertion and the comparisons made are rejected because of the unique history of the development assessment and control of the use of this Site. This is detailed in **section 4.0** of this report.

The restaurant that formerly operated on the Site was restricted in terms of its maximum capacity for patrons and staff in both indoor and outdoor dining areas of 138 persons at any one time. This restriction in capacity, based on maximum number of persons was imposed by the Land and Environment Court in a judgement of *M.Romeo & Anor v Pittwater Council* [Proceedings No.10261 of 1997] (detailed in **section 4.0** of this report) in preference to restricting capacity by setting maximum floor areas for indoor and outdoor dining, which was Council's stated preference at the time.

The Court recognised the need to restrict capacity mainly because of the “chaotic parking situation”. The judgment noted that “Using controls based on floor space, the number of patrons is only limited by the degree of comfort acceptable by patrons....” In making this decision, the Court over-ruled Council’s desire to contain the intensity of use of the restaurant by setting maximum permitted dining areas. The containment of the intensity of the restaurant use was considered necessary by both Council and the Court in order to restrict the parking demand that it generated.

Following this decision, increases in both the internal and external dining areas of the restaurant were possible and occurred as it was the maximum patron capacity that limited the intensity of the restaurant use on this site. Notably, as a result of this Court decision, the operators of the restaurant were able to extend the effective area of the outdoor dining area from 120sqm to 190sqm on the basis that removable pots be placed on 70sqm rendering this portion of the covered outdoor dining space unusable for additional seating and the maximum capacity for the entire premises remain at 138 persons.

The Applicant now claims that the previous restaurant had an outdoor dining area of 200sqm and that they are actually providing less than that with only 186sqm of total outdoor dining area being proposed. This calculation appears to include the restaurant outdoor dining area noted as being 118sqm and the café/bar outdoor dining area noted on the plans as being 68sqm.

The Applicant’s calculations of outdoor dining area are disputed as, scaling off the plans, the restaurant outdoor dining area is actually 127.72sqm. The café/bar outdoor dining area is actually 71.78sqm. There is a second outdoor space on the northern side of the café that is identified in the Site plan (Drawing Number 03, Issue B, dated July 2013) as being “Café Outdoor Seating”. This space has an area of 16.69sqm. Then, there are additional outdoor dining areas on the western side of the café of 11.5sqm and 9.4sqm. In total, it is calculated that the actual proposed outdoor dining area is 237.09sqm. Thus, the Applicant’s claim that less outdoor dining area is proposed than what is existing is false. It is based on the false assumption that the claimed 200sqm of previously used outdoor dining area was approved. The relevant comparison would be 120sqm of approved outdoor dining area versus 237.09sqm of proposed outdoor dining area. This is clearly an intensification of the use.

A further point of concern regarding the increased intensity of the use of the Site that would result from the proposal is the fact that the Applicant maintains that, based on the floor area of indoor and outdoor dining areas, there is no intensification of use compared to the previous use of the Site. It is not agreed that this is the case. The previous use included 3 retail shops that covered the entire western half of the ground floor and (based on floor areas provided by Applicant’s traffic report) and totalled 205sqm. These are being replaced by a single shop of 58sqm and a licensed café of 96sqm of indoor seating and 109.37sqm of outdoor seating. Based on the plans submitted to the Section 102 Application to modify Development Consent 90/393 in 1996, the indoor dining area of the previous restaurant measured approximately 9m x 15m giving a total approved dining area of 135sqm. The traffic and parking report for the Applicant states that the approved dining area for the original restaurant was 240sqm. These discrepancies result in a significant difference between the calculation of the approved total indoor and outdoor dining spaces for the previous restaurant given by the traffic consultant for the Applicant (440sqm) and that calculated by Council’s Executive Planner (255sqm). If the combined indoor and outdoor dining areas of the proposed café/bar/restaurant (458.09sqm) is compared to the combined area actually approved then the proposal represents an intensification to this previous use of indoor/outdoor dining space of approximately 179.6%.

As long ago as 1990, when Warringah Council granted consent to the outdoor dining area and expressed concern over the “chaotic parking situation” and stated that any further intensification of the use “could not be justified” (as detailed under section 4.0 of this report), there has been a very clearly expressed concern that the premises had reached its maximum capacity that could be reasonably tolerated. In the Land and Environment Court proceedings in 1997 (M.Romeo & Anor v Pittwater Council [Proceedings No.10261 of 1997] as detailed in section 4.0), Council’s expert planning witness expressed concern that “the seating capacity of the restaurant was being increased by stealth”. This concern has subsequently been realised and is evident in the claims of what has been previously “approved” and the incorrectly stated areas proposed made by the Applicant.

The Applicant states on page 3 of their letter dated 4 July 2013 and responding to Council’s intensification of use concerns that:

*“...Council is entitled to impose a condition restricting the number of restaurant/café seats to 138 being a condition ordinarily imposed and enforced for this form of development.”*

Whilst Council has the option of imposing such a condition, this would be entirely at Council’s discretion and there is no onus placed on Council, as the responsible consent authority to address this concern by imposing such a condition. In this case and noting the significant increase in the combined indoor/outdoor dining area proposed, it is considered that such a condition would be inappropriate as there would be considerable friction between the arbitrary imposition of a maximum capacity of 138 persons, set for a restaurant with much smaller dining area, and the much greater potential comfortable seating capacity that the premises has been clearly designed for. This would inevitably result in enforcement issues as there are multiple entry/exit points to the premises that would have to be monitored in a co-ordinated way to ensure that the maximum capacity was not breached.

What can be learned from the years since the 1997 decision by the Court to restrict intensity of use purely by setting a maximum seating capacity is that it needs to be imposed in concert with other measures such as a maximum floor area and maximum amenities capacity to avoid the gradual creep over ensuing years of a greater indoor/outdoor dining capacity than what had been formerly deemed appropriate. Restricting floor area and toilets is considered to reduce the comfort level of patrons once numbers exceed the set maximum capacity, such that patrons would be more likely to leave or not stay once the capacity is reached. Thus, the maximum capacity is, in part, self-enforced.

There were indications in the seating plans provided with the original architectural plans and the assumptions by the Applicant’s Acoustic Engineer of patron numbers in the external dining areas that suggest the more realistic capacity of the ground level uses of the development is about 380 persons. Based on BCA requirements, there are enough toilets provided on the ground floor for in excess of 350 persons. If over 350 persons is the designed for capacity then it is highly likely that there would be regular breaches of a condition limiting numbers to 138. If the Applicant is legitimate about 138 being the maximum number of patrons then the dining floor areas should be reduced such that it is comfortable for this number and the number of toilets is limited to cater only for this number.

No conditions can be recommended at this time that restrict both indoor/outdoor dining areas and setting an acceptable maximum capacity for the restaurant/café/bar uses because insufficient information has been submitted by the Applicant (particularly regarding the availability of parking in the area) to enable Council to make any informed decision on what (if any) level of intensification of the Site could be considered acceptable.

Concern is raised in relation to the nature of the uses proposed on the Ground Floor. The Application states that the café component of the development is to be a “licensed café”. It is noted that the indoor café space (and associated outdoor areas) do not have their own kitchen facility. Food would have to come from the kitchen connected to the restaurant, should it be legitimately used for a café. This kitchen is some distance from the café space on the other side of the building and would necessitate staff regularly carrying plates of food from the kitchen, through the restaurant indoor dining area, past the bar to the indoor and outdoor dining areas for the café. Conversely, there is a large commercial bar servery that has serving counters opening directly onto the indoor dining area for the café and also the outdoor dining area for the café. The fact that this space is nominated as a “bar” and not a “kitchen”, “food servery” or “barista’s station” implies that it is ultimately more likely to be used primarily for serving alcohol in these spaces. The proposed hours of operation for the licensed café are 6am until 11pm 7 days per week. It is considered that, should the café be used primarily for the sale of alcohol to its patrons, as is likely, particularly during the evenings, then the number of patrons at peak times (when patrons may quite readily stand while they drink, leading to greater potential numbers fitting into the same space) could easily creep over a maximum capacity of 138 persons for all of the indoor and outdoor dining areas and staff. In addition, a pub is likely to be a greater noise generator than a café as intoxicated persons may unintentionally raise their voices during conversation.

380 persons is more than two and a half times the maximum permitted capacity for the previous restaurant/bar use at Pasadena. This significant increase in capacity at the premises, where capacity has been strictly limited by both Council and the Land and Environment Court for over 20 years to minimise the impacts of its operations, is likely to have numerous detrimental impacts on the character and amenity of Church Point. These impacts are discussed under **section 7.3** of this report.

The combination of various impacts arising from the increased number of patrons, greater demand for parking for extended periods coinciding with the operating hours, increased traffic, more noise over longer business hours and greater numbers associated with the restaurant/café/bar uses will erode the quality of residential amenity in the area.

Taking into account the proposed building additions to accommodate the intensification of the use of the Site, this new work will add height and bulk to the existing and already bulky building, it will erode the quality of the character and aesthetics of the locality, erode the quality of the setting to adjacent heritage items and erode the scenic quality and natural character of the foreshore of Pittwater.

Given the above, the proposal is considered to represent a clear and significant intensification of the previous use of the Site. This intensification is not considered to be reasonable or supportable due to the numerous detrimental impacts that it would have on the amenity, scenic quality and character of Church Point and its surrounds. Consequently, this is recommended as a reason for refusal.

## 8.0 PITTWATER 21 DCP TABLE

**Note:** The table below has been included within this report to maintain consistency with other Council reports in terms of report structure. It does not include any assessment of compliance against the DCP but merely acknowledges the nature of issues raised in objections received and includes comments against DCP headings where they are relevant .

- T - Can the proposal satisfy the technical requirements of the control?
- O - Can the proposal achieve the control outcomes?
- N - Is the control free from objection?

Control	Standard	Proposal	T	O	N
<b>REF - Development Engineer</b>					
B3.9 Estuarine Hazard - Business, Light Industrial and Other Development			-	-	Y
B3.22 Flood Hazard - Flood Category 3 - All Development			-	-	-
B3.23 Climate Change (Sea Level Rise and Increased Rainfall Volume)			-	-	Y
B3.24 Interim Draft - Flood Hazard - Flood Category 3 - Overland Flow Path - Minor			-	-	Y
B5.4 Stormwater Harvesting			-	-	Y
B5.5 Rainwater Tanks - Business, Light Industrial and Other Development			-	-	Y
B5.9 Stormwater Management - Water Quality - Other than Dwelling House, Dual Occupancy and Secondary Dwellings			-	-	Y
B5.10 Stormwater Discharge into Public Drainage System			-	-	-
B5.11 Stormwater Discharge into Waterways and Coastal Areas			-	-	Y
B5.12 Stormwater Drainage Systems and Natural Watercourses			-	-	-
B5.12 Interim Draft - Stormwater Drainage Systems and Natural Watercourses			-	-	-
B5.13 Development on Waterfront Land			-	-	-

Control	Standard	Proposal	T	O	N
B5.14 Stormwater Drainage Easements (Public Stormwater Drainage System)			-	-	-
B6.2 Access Driveways and Works on the Public Road Reserve- All Development other than Dwelling Houses, Secondary Dwelling and Dual Occupancy			-	-	-
B6.4 Internal Driveways - All Development other than Dwelling Houses, Secondary Dwelling and Dual Occupancy			-	-	Y
B6.6 Off-Street Vehicle Parking Requirements - All Development other than Dwelling Houses, Secondary Dwelling and Dual Occupancy		All 133 objections received from the original notification process and 18 further objections received following notification of the amended plans have raised concern over the lack of on-site parking provided and the existing parking shortfall within the locality. This issue is discussed in <b>section 7.3</b> of this report. It is concluded that the proposed on-site parking provision is inadequate and that, as a result, this development is likely to have significant unacceptable and unreasonable impacts on the availability of parking in the public car park adjacent to the Site and in surrounding streets.	-	-	N
B6.9 On-Street Parking Facilities - All Development other than Dwelling Houses, Secondary Dwellings and Dual Occupancy			-	-	-
B6.10 Transport and Traffic Management - All Development other than Dwelling Houses, Secondary Dwelling and Dual Occupancy		The submitted "Assessment of Traffic and Parking Implications" report supporting this application provides no detail on the anticipated increase in patronage arising from the proposal. It makes no assessment whatsoever of the likely increase in vehicle trips to and from the Site. It merely states " <i>The upgrading of the building/uses will attract some increased patronage...</i> " There is no detail on what increases will occur but, based on the parking impact assessed above, it is likely to be significant. The submitted traffic assessment is inadequate for the purposes of assessment and this inadequacy is recommended as a reason for refusal.	-	-	N

Control	Standard	Proposal	T	O	N
B8.1 Construction and Demolition - Excavation and Landfill			-	-	-
B8.2 Construction and Demolition - Erosion and Sediment Management			-	-	Y
B8.3 Construction and Demolition - Waste Minimisation			-	-	Y
B8.4 Construction and Demolition - Site Fencing and Security			-	-	-
B8.5 Construction and Demolition - Works in the Public Domain			-	-	Y
B8.6 Construction and Demolition - Traffic Management Plan			-	-	-
<b>REF - Health</b>					
B5.2 Wastewater Disposal			-	-	Y
B5.3 Greywater Reuse			-	-	-
C2.10 Pollution Control		Numerous objections received have raised concern regarding the impact of additional noise arising from the proposed use at the proposed operating hours. This issue is discussed in <b>section 7.3</b> .	-	-	N
C2.21 Food Premises Design Standards			-	-	Y
D15.20 Commercial waterfront development - pollution prevention		From the information in the acoustic report, it is evident that music may be played externally to the proposed outdoor dining areas. This could be prohibited, in accordance with this DCP control, by a condition of consent. Objections have raised noise as a concern. This is discussed under <b>section 7.3</b> .	-	-	N
<b>REF - Heritage</b>					
B1.1 Heritage Conservation - Items and areas listed in Pittwater Local Environmental Plan 1993			-	-	-

Control	Standard	Proposal	T	O	N
B1.2 Heritage Conservation - Items in the vicinity of a heritage item, heritage conservation areas, archaeological sites or potential archaeological sites		Objections raise concern over the impact of the development on the heritage significance of the heritage items in the vicinity of the Site. This is discussed in more detail under section B1.2	-	-	N
<b>REF - Natural Resources</b>					
B1.4 Aboriginal Heritage Significance		<i>"There are known heritage sites (middens) recorded in the locality however the subject site is highly modified with a seawall present and altered soil levels. There is no apparent evidence of any items on the surface of the site and therefore due to the highly modified nature of the landscape a referral to the Aboriginal Heritage Office is not considered to be necessary. The standard condition is to be applied."</i>	-	-	Y
B3.5 Acid Sulphate Soils		Acid Sulphate Region 2 ...only minor excavation which is within previously disturbed soils, and is unlikely to extend to the natural ground level. Condition recommended.	-	-	Y
B4.15 Saltmarsh Endangered Ecological Community		Refer to <b>section 7.3.</b>	-	-	Y
B4.16 Seagrass Conservation		Refer to B4.15	-	-	Y
B4.19 Estuarine Habitat		Refer to B4.15	-	-	Y
B4.20 Protection of Estuarine Water Quality		Refer to B4.15	-	-	Y
<b>REF - Planner</b>					
EPA Act Section 147 Disclosure of political donations and gifts			-	-	Y
3.1 Submission of a Development Application and payment of appropriate fee		The letter request for additional information sent to the Applicant on 23 May 2013 required confirmation that all of the proposed work on Crown Land had owners consent. An email has been received from the relevant NSW government department however, it is not formal land owner's consent and actually states that a more detailed response will be submitted. This has not been submitted and is a recommended reason for refusal.	-	-	Y
3.2 Submission of a Statement of Environmental Effects			-	-	Y

Control	Standard	Proposal	T	O	N
3.3 Submission of supporting documentation - Site Plan / Survey Plan / Development Drawings		Although a revised survey plan was requested and submitted, the amended survey is dated from 2009 and still does not accurately show the boundaries of part of the subject site identified as Lot 3 in DP 1148738. In addition, the submitted survey is not to scale. This is a recommended reason for refusal.	-	-	Y
3.4 Notification		Concern was raised in objections received during the re-notification of additional information that 14 days was not sufficient time in which to respond to this new information.  This was considered to be adequate and in accordance with Council's Notifications policy given the nature and extent of the additional information and the time constraints imposed by the operations of the Land and Environment Court, noting that an appeal has been lodged with this court based on the deemed refusal of the application.	-	-	N
3.5 Building Code of Australia			-	-	Y
3.6 State Environment Planning Policies (SEPPs) and Sydney Regional Environmental Policies (SREPs)			-	-	-
3.7 Designated Development			-	-	-
4.1 Integrated Development: Water Supply, Water Use and Water Activity		Comments from the Office of water have been provided dated 14th March 2013. If the application were to be approved, conditions of consent have been recommended by the Office of Water that can be incorporated into the consent.	-	-	Y
4.5 Integrated Development: Aboriginal Objects and Places			-	-	-
4.6 Integrated Development - Protection of the Environment			-	-	-
4.7 Integrated Development - Roads			-	-	-
4.8 Integrated Development - Rivers, Streams and Foreshores		Application was referred to the NSW Office of Water and comments were received on 14th March 2013 with recommended conditions of consent.	-	-	Y

Control	Standard	Proposal	T	O	N
5.1 Referral to the Roads and Traffic Authority under SEPP (Infrastructure) 2007			-	-	-
5.2 Referral to the NSW Police Service		The Application was referred to NSW Police Service. The Police have made a number of recommendations which can be made conditions of consent. In addition, the Police have objected to the proposed operating hours as they are contrary to the current standard trading hours are set out in the Liquor Act 2007 No.90. This is recommended as a reason for refusal.	-	-	Y
5.3 Referral to NSW Department of Environment and Climate Change (DECC)			-	-	-
A1.7 Considerations before consent is granted		Issues raised in objections and not addressed elsewhere in this report under the relevant headings are addressed in <b>section 7.5</b> . Objections have been received regarding the intensity of the use of the proposal as well as concern over potential illegal work carried out on the premises.	-	-	N
B2.3 Subdivision - Business Zoned Land			-	-	-
B3.6 Contaminated Land and Potentially Contaminated Land			-	-	Y
B5.1 Water Management Plan			-	-	-
B5.2 Wastewater Disposal			-	-	Y
B5.3 Greywater Reuse			-	-	-
B5.11 Stormwater Discharge into Waterways and Coastal Areas		Application was referred to the NSW Office of Water and response with recommended conditions received 14th March 2013.	-	-	Y
B5.12 Stormwater Drainage Systems and Natural Watercourses			-	-	-
B5.12 Interim Draft - Stormwater Drainage Systems and Natural Watercourses			-	-	-
B5.13 Development on Waterfront Land			-	-	Y

Control	Standard	Proposal	T	O	N
C2.1 Landscaping		The Application was referred to Council's Landscape Architect who recommended a number of conditions as well as raised concern over land-based pedestrian access which is addressed in <b>section 7.3</b> of this report.	-	-	Y
C2.2 Safety and Security		Safety and security issues are able to be addressed by conditions of consent.	-	-	Y
C2.3 Awnings		No awnings are provided as part of the proposal. The existing first floor balcony over the pathway fronting Pittwater Road provides weather protection to pedestrians at this location.	-	-	Y
C2.5 View Sharing		Submissions have been received regarding the expected view loss as a result of the proposed development, particularly in relation to a nearby dwelling at 2195 Pittwater Road. Height Poles have been erected to enable an assessment of the impact of the proposed development in terms of view loss from both the public domain and private properties. Detailed discussion of this issue is provided under <b>section 7.3</b> of this report.	-	-	N
C2.6 Adaptable Housing and Accessibility		The proposal goes some way toward improving the accessibility of the existing building including the provision of a lift, accessible toilets and disabled access ramps. A disabled car space is also provided that is non-compliant with applicable provisions. This issue could be addressed by a condition. Whilst no Accessibility Report has been provided, a condition of consent could require one prior to the issue of CC.	-	-	Y
C2.7 Building Facades			-	-	Y
C2.8 Energy and Water Conservation			-	-	Y
C2.9 Waste and Recycling Facilities		Waste and recycling facilities have been incorporated into the development. In response to Council's concerns, the Applicant has relocated the commercial garbage store area from the Crown land adjacent to the southern corner of the existing building to a store room located inside the building and adjacent to the kitchen. This is considered to be an acceptable location.	-	-	Y
C2.11 Business Identification Signs			-	-	Y

Control	Standard	Proposal	T	O	N
C2.12 Protection of Residential Amenity	The relevant outcome of this section of PDCP 21 is as follows: Business development that does not have an adverse impact upon adjoining residential development.	Noise issues are discussed under <b>section 7.3.</b>	-	-	Y
C2.14 Commercial Swimming Pools			-	-	-
C2.15 Car/Vehicle/Boat Wash Bays			-	-	-
C2.16 Undergrounding of Utility Services			-	-	-
C2.20 Public Road Reserve - Landscaping and Infrastructure			-	-	Y
C2.22 Plant, Equipment Boxes and Lift Over-Run		The proposal includes a lift over run and ventilation stack which protrude above the proposed roof line of the development and add to the height and bulk of the development. Height and bulk is discussed under <b>section 7.1.</b>	-	-	Y
C5.20 Liquor Licensing Applications		Objections have raised concern over the proposed hours of operation. the NSW Police have objected to the proposed hours of operation as they are inconsistent with the current standard trading hours are set out in the Liquor Act 2007 No.90. This is a reason for refusal.	-	-	N
D4.1 Character as viewed from a public place		Concern has been raised in objections regarding the visual impact of the proposed development on the amenity of the adjoining public domain and visual character of the locality. The bulk and scale of the development is not considered to be adequately or reasonably minimised, as discussed under <b>section 7.1.</b>	-	-	N
D4.2 Scenic protection - General		Submissions have been received regarding the visual impact of the proposal when viewed from the Pittwater waterway. It is agreed that the development results in unacceptable impacts in this regard as discussed under <b>section 7.1.</b>	-	-	N
D4.3 Building colours and materials		The proposal includes dark and earthy colours.	-	-	Y

Control	Standard	Proposal	T	O	N
D4.4 Height		Numerous objections received raised concern in relation to the excessive height and bulk and scale of the proposed development. These issues are discussed in more detail later in section 7.1 of this report.	-	-	N
D4.5 Front building line	3.5m	Front building line is discussed under <b>section 7.1</b> of this report.	-	-	Y
D4.6 Side and rear building line		Side setback is discussed under <b>section 7.1</b> of this report.	-	-	N
D4.7 Foreshore building line		The foreshore building line is discussed in <b>section 7.1</b> of this report.	-	-	N
D4.12 Fences - Flora and Fauna Conservation Areas			-	-	Y
D4.14 Scenic Protection Category One Areas			-	-	-
D15.1 Character as viewed from a public place		See D4.1	-	-	N
D15.2 Scenic protection - General		See D4.2	-	-	N
D15.3 Building colours and materials		See D4.3	-	-	Y
D15.5 Height - Seaward of mean high water mark		No works are proposed seaward of the MHWM	-	-	-
D15.9 Public foreshore access		Public foreshore access is discussed under section 7.3 of this report.	-	-	N
D15.11 Waterfront lighting		A submission has been received regarding light shine across the water to Scotland Island. If the development were to be approved a condition of consent could require any lighting to be designed and installed such that it does not create glare nuisance.	-	-	N
D15.12 Development seaward of mean high water mark			-	-	-
D15.13 Lateral limits to development seaward of mean high water mark		No works proposed seaward of the MHWM	-	-	-
D15.14 Minimum frontage for marine facilities		No marine facilities proposed	-	-	-
D15.15 Marine facilities			-	-	-

Control	Standard	Proposal	T	O	N
D15.18 Seawalls		No seawalls proposed	-	-	-
D15.19 Dredging			-	-	-
D15.21 Charter boat facilities			-	-	-
SEPP No 71 Coastal Protection		SEPP 71 is not applicable due to the application of existing use rights.	-	-	N

\*Issues marked with an **x** are discussed later in the report.  
Issues marked with a - are not applicable to this Application.

## 9.0 CONCLUSION

In response to a very detailed request for additional information vital to any possibility of Council supporting the Application, the Applicant has either ignored the requests or asserted that the information is irrelevant and not required. Most notably, this includes a parking survey and full details of the anticipated maximum capacity of patrons that the proposal has been designed for.

Notwithstanding the above, this Development Application has been assessed objectively, based on the information provided to Council by the Applicant, a detailed examination of the assessment history of the use of the Site and in accordance with the provisions of Section 79C of the Environmental Planning and Assessment Act 1979.

The proposal seeks to benefit from the retention of the existing building and maintaining a similar height, floor space, setbacks and general lack of on-site parking or opportunity for new on-site parking. However, an assessment against the relevant Land and Environment Court Planning Principles has established that the proposal is a new development, it is not 'adaptive re-use' and does not constitute alterations and additions to an existing building. Consequently, the poor manner in which the existing building relates to its surroundings is a highly relevant consideration in concluding that it already has excessive height, bulk and scale and that any new development on this site does not have any automatic entitlement to the same building envelope and should certainly not increase this envelope, as is proposed. Most importantly, a new development on this site should seek to provide as much on-site parking as possible, including a basement car park.

Numerous significant shortcomings have been identified in this proposal such that it cannot be supported in its current form. These include the excessive additional intensification of use proposed, the excessive generation of car parking demand and significant inadequacy in terms of the on-site provision of parking to cater for the additional parking demand it will create. In an area where parking is already clearly a problem this impact is totally unacceptable. The proposal also will result in a building that will be excessive in height, bulk and scale and result in numerous unacceptable impacts on its surroundings, including view loss, the degradation of the quality of the surrounding public domain and heritage impacts. Furthermore, it will prolong the life of an unattractive, bulky and undesirable building on a prominent and important landmark site. This would be a poor outcome for the community of Church Point and the offshore community.

Consequently, the only recommendation that can be made with respect to this application is that it be refused for the reasons given in the attached draft determination.

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**RECOMMENDATION OF DEVELOPMENT OFFICER / PLANNER**

That Council, as the consent authority, pursuant to section 80 of the Environmental Planning and Assessment Act, 1979, refuse Development Application N0021/13 for adaptive re-use of the existing building to include a café, restaurant, bar, shop and motel uses at 1858 Pittwater Road, Church Point for the reasons contained in the attached draft determination.

Report prepared by

Gordon Edgar  
**EXECUTIVE PLANNER**

## DRAFT DETERMINATION

### REFUSAL

#### ENVIRONMENTAL PLANNING & ASSESSMENT ACT, 1979 (AS AMENDED) NOTICE TO APPLICANT OF DETERMINATION OF A DEVELOPMENT APPLICATION

Applicants Name and Address:

**BOSTON BLYTH FLEMING**  
**1/9 NARABANG WAY**  
**BELROSE NSW 2085**

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Being the applicant in respect of Development Application No **N0021/13**

Pursuant to section 80(1) of the Act, notice is hereby given of the determination by Pittwater Council, as the consent authority, of the Development Application for:

*Adaptive re-use of the existing building to include a café, restaurant, bar, shop and motel uses*

At:

1858 PITTWATER ROAD, CHURCH POINT (Lot 142 DP 752046) AND ADJOINING CROWN LAND IDENTIFIED AS LOT 3 in DP 1148738

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#### **Decision:**

The Development Application has been refused for the following reasons:

1. The development will have an excessive and unacceptable height, bulk and scale for the locality generally and compared to surrounding development. Consequently, it is likely to have unreasonable detrimental impacts on the scenic quality, character and amenity of the surrounding public domain.
2. The development fails to provide sufficient on-site car parking to cater for the likely parking needs generated by the proposed uses. This is likely to have an unacceptable and unreasonable impact on the demand for car parking in the area, where there is a history of an inadequate supply of parking to meet the current needs of the local community.
3. Noting the inadequate car parking provided to service the proposed use of the Site and the lack of options to provide additional car parking on-site, the subject site is not considered to be suitable for a development of this magnitude.
4. The development application fails to include adequate information to demonstrate that the proposal will not have an unacceptable detrimental impact on the demand and supply of parking in the locality as it fails to include a parking survey to indicate what capacity the adjacent public car park and adjoining streets may have to absorb the likely additional demand for parking generated by the development, particularly during peak periods. Furthermore, the submitted "Assessment of Traffic and Parking Implications" report does not acknowledge or take into account the historic and existing parking problems experienced in the area in its parking impact assessment or make any assessment of the parking demand generated by the likely patronage of the development.

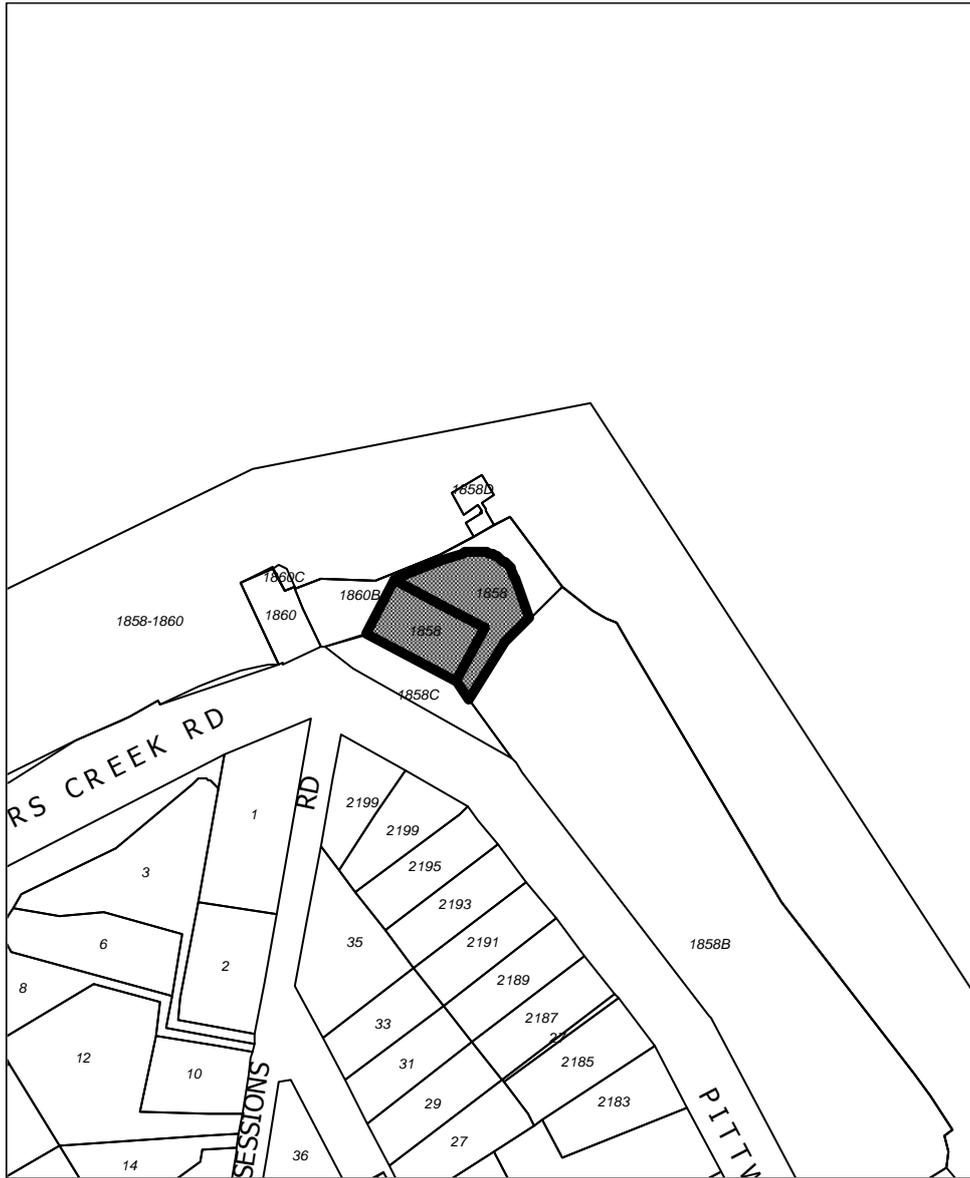
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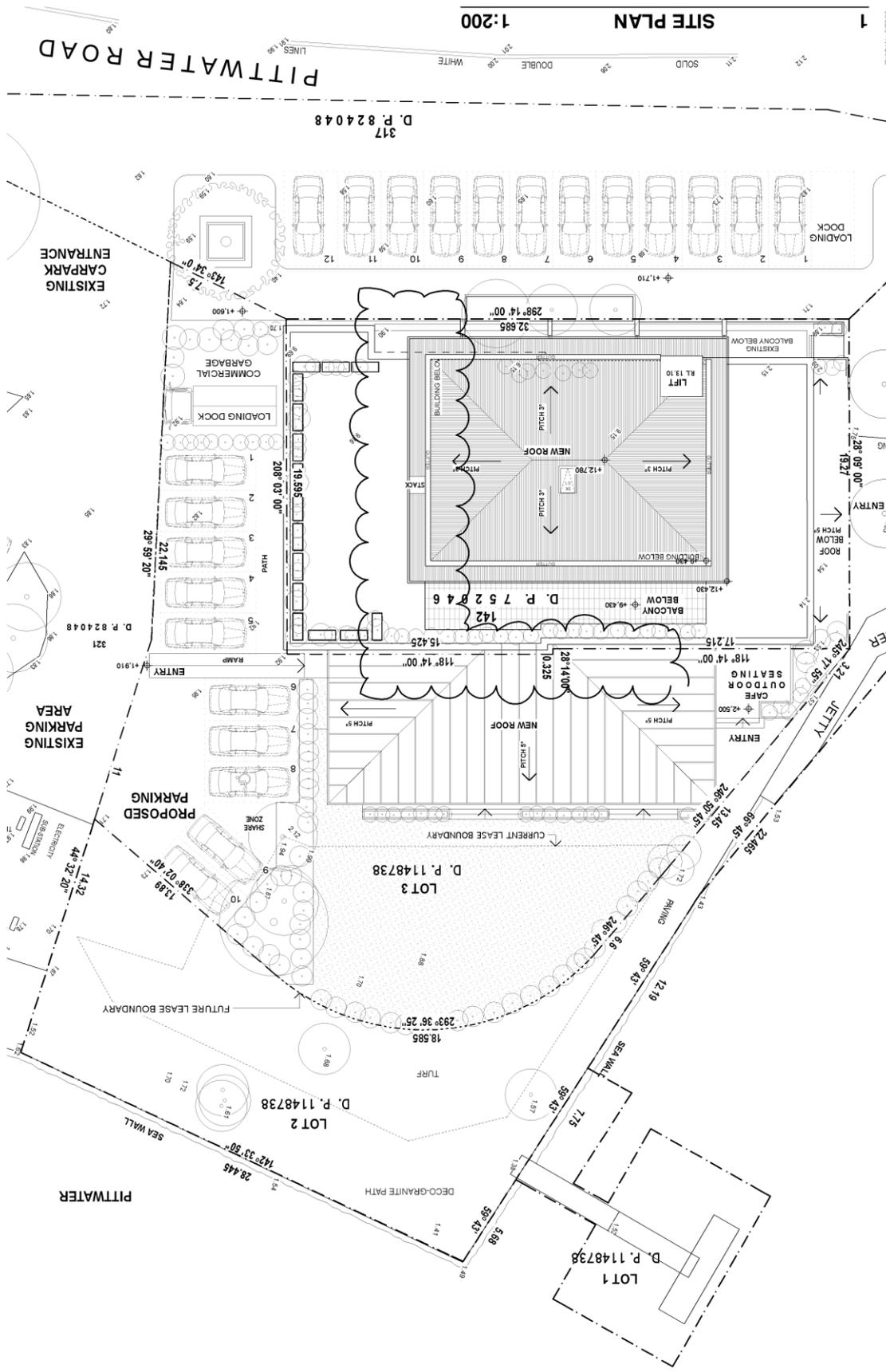
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5. The submitted "Assessment of Traffic and Parking Implications" report accompanying the development application fails to provide any information regarding the likely traffic generation that may arise from the proposal and the potential impact of this additional traffic on the local road network. This is inadequate for the purposes of the proper assessment of the likely traffic impacts of the proposal.
6. The proposed increase in the intensity of use of the Site is excessive and unsupported. This intensification is represented by the likely additional patron capacity of the restaurant/café/bar use, the additional indoor/outdoor dining areas if the restaurant/café/bar uses beyond that which has been previously, the extended hours of operation and the excessive additional height and bulk proposed to the existing building. The cumulative impacts of this proposed intensification of use will cause unreasonable impacts on residential amenity, the scenic quality of the foreshore, the heritage value of the adjacent heritage items and the character of the Church Point locality generally. The development is therefore not satisfactory having regard for section 79C(1)(b) and (c) of the EPA Act.
7. The development will have a detrimental impact on the setting of the two adjoining heritage items, including the Church Point Post Office and General Store and the Church Point Ferry Wharf due to the unsympathetic bulk, design and construction of the proposed additions.
8. The development application does not include formal landowner's consent from the NSW Department of Trade & Investment / Crown Lands for all of the proposed work on Crown land.
9. The Application is not supported by an adequate survey as the submitted is not up to date, it is not to scale and it does not show a parcel of land affected by proposed works and identified as Lot 3 in DP 1148738.
10. The proposed hours of operation are excessive and not respectful or sympathetic to the predominantly low density residential character of the locality. Furthermore, the NSW Police has objected to the proposed hours of operation as they are inconsistent with the current standard trading hours are set out in the Liquor Act 2007 No.90.
11. The development is not considered to be satisfactory having regard to section 79C(1)(b) of the EPA Act as a reasonable sharing of views has not been achieved from both the dwelling at 2195 Pittwater Road, Church Point and also from the adjoining public reserve located immediately to the north-west of this dwelling.
12. More than half of the existing external fabric of the building is being demolished. As a consequence, the proposal is a new development and should be treated as such. It does not constitute 'adaptive re-use' and should not be assessed any differently to a proposal that does not involve adaptive re-use.
13. The development is not in the best interests of the public and is not satisfactory having regard to section 79C(1)(e) of the EPA Act.

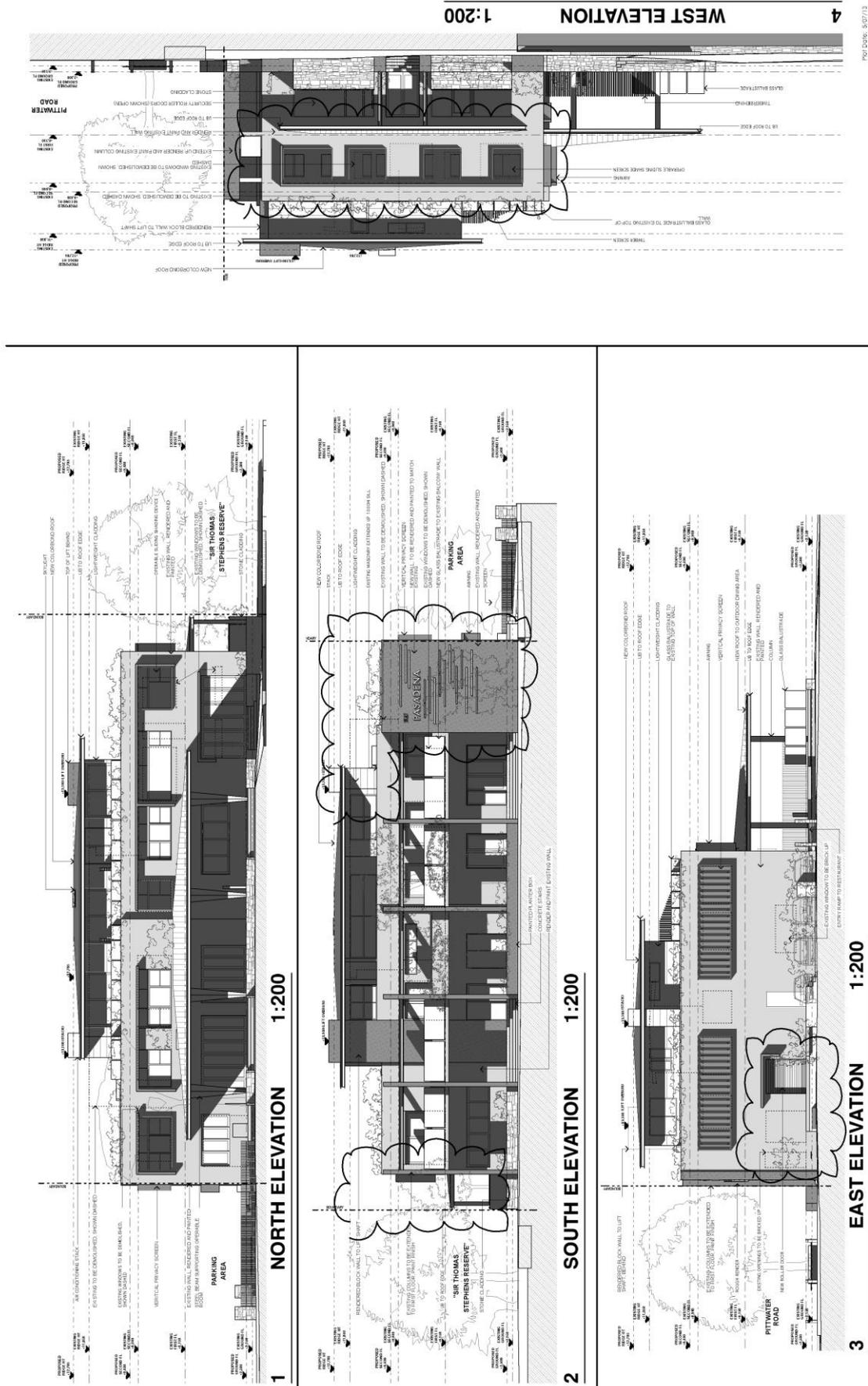
# LOCALITY MAP



# NOTIFICATION PLAN



<b>Date:</b> DEC 2012	<b>Drawn/Designed:</b> SG/NS	<b>Date:</b> DEC 2012	<b>Scale:</b> AS SHOWN @ (A3)	<b>Issue:</b> A
<b>Project:</b> DEVELOPMENT APPLICATION 'PASADENA', 1858 PITTSBURGH RD, CHURCH POINT	<b>Project Number:</b> 1218	<b>Client:</b> Altius Pty Ltd	<b>Drawing No.:</b> 12	<b>Issue:</b> A
<b>GARTNER TROVATO ARCHITECTS</b>				
<p style="font-size: small;">This project will be built and all errors are the responsibility of the architect. Drawings shall not be used for construction purposes until issued by the architect for construction.</p>				
<p style="font-size: small;">GARTNER TROVATO ARCHITECTS A 47/50 HOVEA RD, PASADENA, VIC 3084 P 03 9499 4313 F 03 9499 4314 E info@gartner-trovato.com.au W www.gartner-trovato.com.au</p>				



<p>The builder shall check and verify all dimensions to all areas of the site to ensure that the drawings, drawings shall not be used for any other purpose until issued by the architect for construction.</p>		<p><b>GARTNERTROVATO</b> ARCHITECTS</p>		<p><b>Project:</b> DEVELOPMENT APPLICATION PASADENA, 1858 PITTWATER RD, CHURCH POINT</p>	<p><b>Drawn/Designed:</b> SC/NS</p>	<p><b>Date:</b> DEC 2012</p>
<p><b>Date:</b> DEC 2012</p>	<p><b>Issue:</b> A</p>	<p><b>Scale:</b> AS SHOWN @ (A3)</p>	<p><b>Client:</b> Atilus Pty Ltd</p>	<p><b>Project Number:</b> 1218</p>	<p><b>Issue:</b> 13</p>	<p><b>Drawing No.:</b> A</p>
<p><b>NOTIFICATION PLAN 2/2</b></p>						