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**From:** Willis, Stephanie  
**Sent:** 14/08/2024 9:41:33 AM  
**To:** Council Northernbeaches Mailbox  
**Cc:** Chris Gough; Therese Edwell; Vatala, Stephanie  
**Subject:** TRIMMED: FW: Northern Beaches Council ats Asia Digital Investments Pty Ltd | 1102 Barrenjoey Road, Palm Beach | Submissions on behalf of Ms Rydstrand [DENTONS-Documents.FID10661516]  
**Attachments:** 107852069\_1\_Dentons Submission - 12 April 2024.PDF;  
107852273\_1\_Annexure A - Mr Chambers submission.PDF;  
107852301\_1\_Annexure B - Mr Davies Submission.PDF;

Dear Council,

I refer to the below and attached submissions made on 12 April 2024 in relation to DA2022/0469, which is the subject of the above Court proceedings.

We note that these submissions have not been uploaded to the development application search tool on Council's website. We therefore request that these submissions be uploaded to Council's website.

Kind regards,

Stephanie

Stephanie Willis  
Senior Associate

[REDACTED]  
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**From:** Vatala, Stephanie [REDACTED]  
**Sent:** Friday, April 12, 2024 4:44 PM  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** Northern Beaches Council ats Asia Digital Investments Pty Ltd | 1102 Barrenjoey Road, Palm Beach | Submissions on behalf of Ms Rydstrand [DENTONS-Documents.FID10661516]

Dear Chris and Therese,

As you know, we act for Ms Rydstrand of 1100 Barrenjoey Road, Palm Beach.

We **attach** the following submissions in relation the Applicant's amended plans and material you provided us on 28 March 2024:

1. Dentons letter dated 12 April 2024.

2. Submission by Bob Chambers, town planner.
3. Submission by Warwick Davies, geotechnical engineer.

Can you please keep us informed of the Council's position on the matter.

Kind regards

Stephanie Vatala  
Partner



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12 April 2024

Northern Beaches Council  
C/- Chris Gough  
Storey & Gough Lawyers  
'Harrisford', 182 George Street  
Parramatta NSW 2150

By email

Our ref: SSV/42025415

Dear Chris

**Northern Beaches Council ats Asia Digital Investments Pty Ltd**  
**Land and Environment Court Proceedings No. 2023/242901**  
**Property: 1102 Barrenjoey Road, Palm Beach**

### **Introduction**

1. We refer to the above proceedings and write with respect to the amended plans and documents provided by Council to objectors under cover of email from Therese Edwell on 28 March 2024 at 12:43PM.
2. We act for the registered proprietor of the immediate residential property at 1100 Barrenjoey Road, Palm Beach, Ms Prudence Rydstrand (**our client**).
3. This submission is lodged, on our client's behalf, raising serious concerns with the amended proposal.
4. We annex hereto and adopt the submissions of today's date by Mr Robert Chambers of BBC Planners (**Annexure A**) and Mr Warwick Davies of EI Australia (**Annexure B**).

### **Submission**

5. We raise the following matters that would, in our opinion, result in the Council not agreeing to enter into a section 34 agreement and would prevent the Court from being able to grant approval to the amended proposal as presently proposed.

Clause 4.6 Objection

6. As set out in Mr Chamber's submission, the amended proposal continues to significantly breach the height control and by that breach effectively adds a third storey to the building. That third storey creates additional bulk and, in combination with the building being shifted approximately 2m closer to our client's boundary and towards Barrenjoey Road, now takes away our client's northern outlook from her house. Mr Chambers has also raised doubt about the solar impacts demonstrated in the amended material, given the proximity of the development to our client's property.
7. Contrary to the Applicant's argument in its clause 4.6 objection, the proposed development as amended is not consistent with the desired future character of the locality – it is not compatible (that is, not capable of coexisting in harmony) with the surrounding and nearby development as demonstrated by the adverse impacts on our client's property.
8. As set out in our submission dated 13 February 2023 to the Local Planning Panel, the test in clause 4.6 does not require, relevantly, a non-compliant development to result in a better environmental planning outcome for the site when compared to a development that complies with the relevant development standard<sup>1</sup> or when compared to an earlier approved development for the site.
9. Rather, the test requires the consent authority to consider whether the proposed development *on its own merits* can demonstrate sufficient environmental planning grounds. The task of the consent authority is to consider "the merits of the application before it and to make an assessment based on the evidence in respect of the relevant issues".<sup>2</sup>
10. The Council nor the Court can be satisfied, in our opinion, that there are sufficient environmental planning grounds to justify such a gross breach of the height control by up to 2.65m at the street facing parapet, given the adverse impacts on our client's property as set out in Mr Chamber's submission.

Clause 7.7 of the Pittwater Local Environmental Plan 2014

11. Under section 4.15(1)(b) of the *Environmental Planning & Assessment Act 1979 (EP&A Act)*, the Court must consider "*the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality*".
12. The Chief Judge of the Land and Environment Court has held that this extends to a consent authority assessing off-site impacts, where there is a "real and sufficient link" with the proposed development: see *Ballina Shire Council v Palm Lake Works Pty Ltd (Palm Lake Works)*.<sup>3</sup>
13. Council will be aware that the development site is identified as being "Geotechnical Hazard H1" on the Geotechnical Hazard Map under Pittwater Local Environmental Plan 2014 (**PLEP**).
14. Accordingly, clause 7.7 of the PLEP applies and provides as follows:

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<sup>1</sup> *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [88].

<sup>2</sup> *Rocla Pty Ltd v The Minister for Planning and Sutherland Shire Council* [2007] NSWLEC 55 at [60] – [62] and *Milne v Minister for Planning & Anor (No 2)* [2007] NSWLEC 66 at [114]

<sup>3</sup> [2020] NSWLEC 41 at [6].

“(1) The objectives of this clause are to ensure that development on land susceptible to geotechnical hazards—

- (a) matches the underlying geotechnical conditions of the land, and
- (b) is restricted on unsuitable land, and
- (c) does not endanger life or property.

(2) This clause applies to land identified as “Geotechnical Hazard H1” and “Geotechnical Hazard H2” on the Geotechnical Hazard Map.

(3) Before determining a development application for development on land to which this clause applies, the consent authority **must consider** the following matters to decide whether or not the development takes into account all geotechnical risks—

- (a) site layout, including access,
- (b) **the development’s design and construction methods,**
- (c) the amount of cut and fill that will be required for the development,
- (d) **waste water management, stormwater and drainage across the land,**
- (e) the geotechnical constraints of the site,
- (f) **any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.**

(4) Development consent **must not** be granted to development on land to which this clause applies **unless—**

- (a) the consent authority is satisfied that the development **will appropriately manage waste water, stormwater and drainage across the land so as not to affect the rate, volume and quality of water leaving the land,** and
- (b) the consent authority is satisfied that—
  - (i) the development is designed, sited and will be managed to avoid any geotechnical risk or significant adverse impact on the development and the land surrounding the development, or
  - (ii) if that risk or impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that risk or impact, or
  - (iii) if that risk or impact cannot be minimised—the development will be managed to mitigate that risk or impact.” (our emphasis in bold)

15. The proposal as amended now involves:

- a. Excavation on our client’s boundary to a depth of 12.5m at the eastern corner. There is also significant excavation, to a depth of 12.5m, proposed on the southern boundary.

- b. Removal of the large rock boulder which straddles our client's boundary. This is not detailed in the architectural plans or engineering material, but in the architectural "impressions" the boulder is shown as being removed.
16. The amended material does **not** provide any information on the design and construction methodology for the proposed excavation and removal of the boulder, including how our client's property will be supported and protected from damage. At the very least, detailed design and construction information is required so that the Court and Council can assess the impacts of the proposed excavation on our client's property as it is required to do under s 4.15(1)(b) of the EP&A Act, clause 7.7 of the PLEP, and having regard to the Court's decision in Palm Lake Works. This information should include any proposed measures to mitigate the adverse impacts on our client's property.
17. As the Court found in *Russo v Northern Beaches Council* [2020] NSWLEC 1259, clause 7.7 is a jurisdictional pre-requisite to the grant of consent and the Court must be satisfied of the matters in cl 7.7(4) before it can exercise its power to grant consent. In *Russo*, the Court found that there was insufficient information in the application to be satisfied of the matters in clause 7.7(4) of the PLEP.
18. As it stands, the Court has no power, in our submission, to approve the amended proposal having regard to the complete absence of critical design and geotechnical information as comprehensively explained in Mr Davies' submission.
19. If the Applicant subsequently provides further information, we ask that Council urgently provides this information to us so that our client and her geotechnical expert may consider it and provide a further submission if required.

#### Failure to consider impacts on Sydney Water Asset

20. In addition, the Applicant appears to have completely ignored the impact of its proposed works, including its significant excavation works, on the Sydney Water sewer line and storage asset which is located on our client's property, but proximate to, approximately 50cm to 1m, and running parallel to the boundary of the development site. We are instructed the sewer pipe connects uphill properties to the sewer main on Barrenjoey Road. There has been no reference to nor assessment of this at all in the Applicant's material.
21. Given the significant excavation proposed along this boundary, it seems to us that a referral to Sydney Water is required so that Sydney Water can provide comment on its requirements to ensure the asset is protected during the proposed works.

#### **Conclusion**

22. Given the complete absence of information on how the geotechnical risks associated with the proposed excavation and removal of the boulder will impact our client's property and what measures will be taken to mitigate against those risks, neither the Council nor the Court can be satisfied, in our opinion, that the development will be managed so as to avoid, minimise and mitigate against geotechnical risk. The consent authority cannot, therefore, be satisfied of the jurisdictional pre-requisite to the grant of consent set out in clause 7.7(4)(b), per *Russo v Northern Beaches Council*.
23. The consent authority must be satisfied of the matters in clause 7.7(4)(b) **prior** to granting consent. It cannot lawfully, in our submission, grant a consent imposing a deferred commencement condition requiring information addressing the matters in clause 7.7(4)(b) to be provided at a later date. It is established law that a jurisdictional prerequisite cannot be satisfied by

a deferred commencement condition, because without the power to grant consent, there is no consent for which conditions can be imposed – see *PC Infrastructure Pty Ltd v Wentworth Shire Council* [2024] NSWLEC 1139 at [149]; *Zhiva Living Dural Pty Ltd v Hornsby Shire Council* [2019] NSWLEC 1222 at [39]-[41]; *Olsson v Goulburn Mulwaree Council* (2010) 176 LGERA 71 at [26]. We also refer you to the Chief Judge's decision in *Palm Lake Works* where the Court found that a deferred commencement condition postponing consideration of the impacts of development was not appropriate.

24. In summary, we submit the consent authority does not have power to grant consent to the proposal as documented in the amended material provided by the Council on 28 March 2024, because:
- a. the clause 4.6 objection has not demonstrated there are sufficient environmental planning grounds to justify a breach of the height control, given the adverse impacts on our client's property; and
  - b. there is insufficient information for the consent authority to consider the matters required by cl 7.7(3) of the PLEP and to be satisfied of the matters in cl 7.7(4), in particular, that the development will be designed, sited and managed to avoid, minimise or mitigate geotechnical risk or significant adverse impacts on our client's property.

Yours sincerely



Stephanie Vatala  
**Partner**  
Dentons Australia

Enc

**Annexure A – Letter from Robert Chambers of BBC Planners dated 12 April 2024**

**Annexure B – Letter from Warwick Davies of EI Australia dated 12 April 2024**



12 April 2024

RJC:21-131

Northern Beaches Council  
C/- Storey and Gough Lawyers  
'Harrisford', 182 George Street  
Parramatta NSW 2150

**Attention: Chris Gough  
Therese Edwell**



Dear Chris and Therese,

**Re: Northern Beaches Council ats Asia Digital Investments Pty Ltd  
Land and Environment Court No. 2023/242901  
Application No. DA 2022/0469  
1102 Barrenjoey Road, Palm Beach (“the development site”)  
Description: Construction of shop-top housing.**

I write in response to your email of 28 March 2024 (@12.43pm) regarding the above DA in respect of which I have made four prior submissions to Council (dated 4 August 2021, 13 May 2022, 14 October 2022 and 13 February 2023) all on behalf of Ms Prue Rydstrand (“my client”) who is the owner and occupier of 1100 Barrenjoey Road, Palm Beach (“my client’s property”) which adjoins and is located immediately to the south of the development site. My prior submissions are all attached hereto.

As noted in your email, the Applicant has recently provided amended DA documents as part of the Section 34 conciliation process. The amended DA documents, in addition to the amended set of DA plans, comprise: -

- a Clause 4.6 variation request seeking to justify and obtain Council’s support for the non-compliant height;
- a SEPP 65 ADG Compliance Analysis;
- an amended Landscape Plan;
- a Photomontage;
- a Geotechnical Report, advice and conditions; and
- BASIX Documentation.

Thank you for providing me with an opportunity to comment on the amended DA documents.

When compared to the set of drawings prepared after the meeting of the Local Planning Panel on 8 March 2023: -

- the part of the elevated rock shelf on the development site which straddles the common boundary with my client's property is now to be removed;
- the proposed building's southern side setback from my client's property (i.e. from the subject site's southern boundary) has been reduced from around 4.4m to around 2.0m;
- whereas on Level 1 there were previously no windows in the southern elevation, there are now 4 windows, two with what appear to be fixed privacy screens;
- whereas on Level 1, at the proposed building's south western corner, there was previously a narrow terrace around 1.0m deep off a bedroom there is now a balcony three times that depth (i.e. 3.0m) off a living room: what appear to be fixed privacy screens are proposed on the balcony's southern end;
- whereas the above-mentioned previously proposed narrow terrace was setback around 3.0m from the common boundary with my client's property, the much larger balcony now proposed in its place is setback 2.0m;
- whereas a landscaped setback from my client's property (i.e. from the southern boundary of the subject site) some 4.0m wide was previously proposed, now there is a landscaped setback only 2.0m wide;
- on the southern elevation on Level 2 there were previously windows with opaque glazing to 1.7m above ground level – the same is also now proposed, however, whereas previously there appeared to be sliding privacy screens those screens have now been deleted; and
- previously on the architectural drawing set there was a north-south section which ran through the western part of the site: as a result, it showed the dwelling on my client's property: now that section is through the eastern part of the site so does not show the dwelling on my client's property thereby omitting a key graphic illustration of the unreasonable height, bulk and scale as the amended proposal and its unacceptable inter-relationship.

In short, the current design moves the proposed building further to the south and further to the west, has a reduced front setback and southern side setback, has (as a result of the reduced southern side setback) less landscaping adjacent to the common side boundary with my client's property, adds windows to the southern elevation on Level 1 whereas there were none previously, and introduces a wide balcony off a living room in lieu of a narrow terrace off a bedroom at the proposed building's south western corner closer to my client's property.

Notwithstanding the reduced side and front setbacks, the "views from the sun" in the amended plan package show what appears to be a reduced shadow affectation of my client's property. This is something I have been unable to reconcile given that the proposed building is now closer to my client's property when compared with the previous proposal and with the same maximum height (i.e. RL 13.75m).

Your email states that Council's experts are of the opinion that the amended plans address the issues raised by Council. Respectfully, I request that Council's experts take into consideration the following comments when determining whether the amended application should be supported.

### **1. The side setback from my client's property is inadequate**

The amended plans have reduced the Level 1 side setback from the southern site boundary (i.e. the common boundary between the development site and my client's property) from 4.4m to 2.0m. The second floor side setback has been reduced from 4.6m to 3.0m.

The Council's minimum side setback requirement is 3.0m whereas the side setback requirement requests in the ADG is 6.0m to habitable rooms and 3.0m to non-habitable rooms.

As you will appreciate, the amended plans result in a far worse outcome for my client. When amended plans are prepared as part of a potential negotiated outcome it is almost always the case that the outcome is not made distinctly worse for any neighbour. That is not the position in this case.

The setback from my client's property should preferably be increased to 6.0m as per the ADG but certainly should be no less than the 4.4m (first floor) and 4.6m (second floor) setbacks which were provided in the prior scheme.

### **2. The front setback is inadequate**

The amended plans have reduced the front setback at the site's south western corner on Level 1 from around 7.0m to around 4.0m, excluding the balcony. If the balcony is included the setback has reduced from 6.0m to 2.0m.

As the front setback at the proposed building's south western corner has been significantly reduced, the northern outlook from the dwelling on our client's property is now more occupied by the proposed building as shown on Viewpoint 7 overleaf.



## VIEWPOINT 07

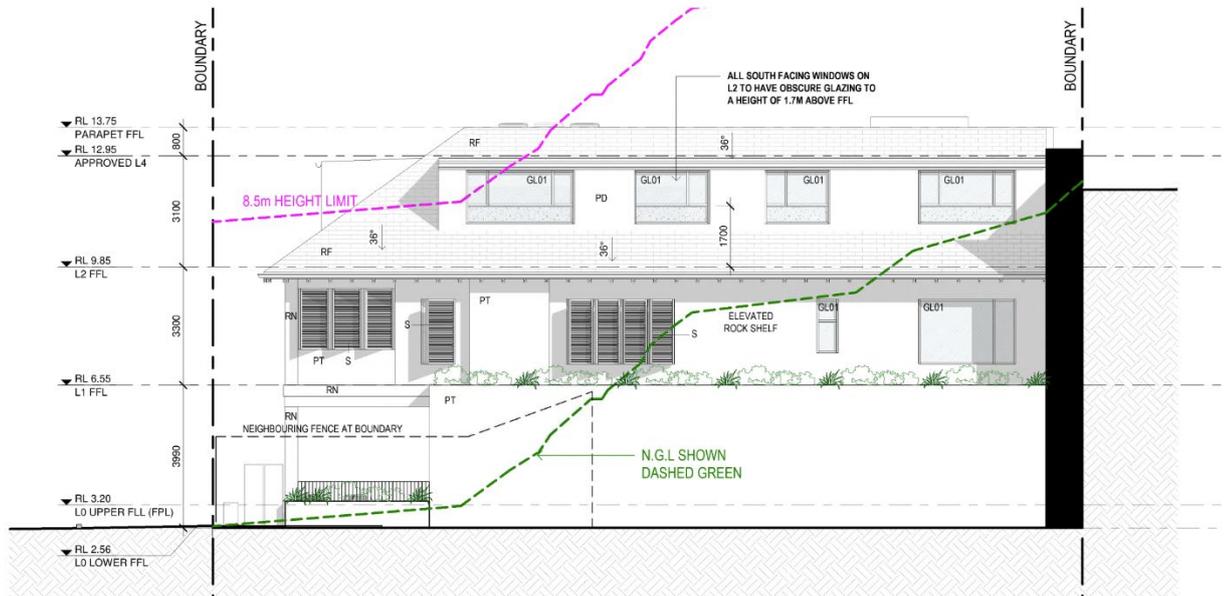
The south western corner of the building in the amended proposal is, in fact, completely different to the previously proposed south western corner. The terrace (1.0m deep) of the main bedroom of Apartment A3 on Level 1 was setback around 6.0m from the front boundary. Now, the balcony (3.0m deep) extends to within 2.0m of the front boundary. When this is combined with the amended proposal's reduced southern side boundary setback, the amended proposal will appear much bigger and bulkier when seen from my client's property and obscure more of the northern outlook.

The front setback in the south western corner should be increased to at least 6.0m measured to the balcony line, so as to lessen the bulk and scale and ensure my client's northern outlook is not obscured.

### **3. The privacy impacts of the amended proposal are unacceptable**

The amended plans have reduced the privacy of my client's property as a result of introducing windows where there were previously none and a wide balcony where previously there was a narrow terrace.

As shown on south elevation on Drawing DA.11 (see overleaf) there are now windows facing directly towards our client's property. The windows on Level 1 are only 2.0m from the common boundary with my client's property. The windows on Level 2 are 3.0m from my client's property.



The internal viewpoints which the architects have provided, such as Viewpoint 4 below, do not show a worst case position or even a typical position. Clearly, from within the kitchen area of proposed Apartment 03 there will be more of my client's property exposed to adverse privacy impacts than is shown in Viewpoint 04.



**VIEWPOINT 04**

The large balcony off the main living area of Apartment 03, within only 2.0m of my client's property, gives rise to the real prospect of unacceptable acoustic impacts.

The balcony should be deleted and the windows in the southern façade fixed with opaque glass so as to mitigate against privacy impacts to my client.

**4. The height of the amended proposal remains non-compliant**

The building proposed on the amended plans still significantly breaches the height control in the LEP. The height breach facilitates inclusion of a third storey.

As shown on the height plane diagram below, a very large part of the amended proposal, comprising much of the upper level, exceeds the 8.5m height limit.



The amended proposal fails to satisfy the objective of the E1 Local Centre zone which is:

*“To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment.”*

Also, the maximum roof height remains the same at RL13.75m. The nearest point of that maximum roof height to the common boundary with my client’s property has been shifted southwards (i.e. closer to my client’s property) by approximately 2.0m.

I respectfully submit that there is no proper basis for the Applicant’s amended Clause 4.6 variation request to be upheld. In this regard, the amended proposal’s non-compliance with the height limit in the LEP has greater adverse impact on my client’s property than did the prior scheme. The Applicant’s amended Clause 4.6 variation request is not well-founded.

The building height should be far more consistent with the height control standard of 8.5m, with the only (potential) exceedance by lift overruns or plant enclosures which should be centrally located on the roof.

## **5. The geotechnical related issues remain unresolved**

The geotechnical issues associated with the amended proposal are addressed in the separate submission from Warwick Davies. However, it appears to me that having decided to remove the boulder adjacent to the southern boundary of the development site, the Applicant has made a conscious decision to push the building setback southwards so that it is now 2.4m closer to our client’s property (i.e. within 2.0m distance). That distance is to the southern wall of Level 1. The roof, in contrast, extends to within 1.0m (approximately) of my client’s property. This means: -

- (a) that the south eastern corner of the site which was previously to be unexcavated is now fully excavated; and
- (b) that my client’s property needs to be retained along its eastern half of the common side boundary. The plans show a retaining wall some 4.5m high adjacent to the common boundary with my client’s property. No details are provided of how this wall is to retain my client’s property. No discussions had been held with my client in this regard.

## **6. Inconsistency in how our client’s property is depicted**

On Drawing DA.10 in the amended set of plans the levels of my client’s property are higher than in the prior set of plans. No physical changes have been made to my client’s property in the period between March 2023 and March 2024, therefore the inconsistency between the two sets of plans insofar as they depict the height of my client’s property should be explained by the Applicant.

## 7. Summary

In summary, the amended application has increased impacts on my client's property when compared to the prior scheme and therefore the amended scheme should be refused for the similar reasons to those that the NBLPP refused the prior scheme on 20 April 2023, those reasons being as follows: -

*"1. The applicant's written request under clause 4.6 of the Pittwater LEP 2014 seeking to justify a contravention of clause 4.3 Height of Buildings development standard has not adequately addressed and demonstrated that:*

- a) compliance with the standards is unreasonable or unnecessary in the circumstances of the case*
- b) there are sufficient environmental planning grounds to justify the contraventions, and*
- c) the proposed development will be in the public interest because it is consistent with the objectives of the standards and the objectives for development within the zone in which the development is proposed to be carried out.*

*2. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development is inconsistent with the provisions of Clause 4.3 Building Height of the Pittwater Local Environmental Plan 2014 as it is not considered to be compatible with the height and scale of surrounding development and does not minimise the adverse visual impact of development on the natural environment and heritage items.*

*3. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development is inconsistent with the provisions of Clause 5.10 Heritage Conservation of the Pittwater Local Environmental Plan 2014.*

*4. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 7.7 Geotechnical Hazards of the Pittwater Local Environmental Plan 2014.*

*5. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposal is inconsistent with Part D12 (Palm Beach locality) of the Pittwater 21 DCP.*

*6. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposal is not considered to satisfactorily meet the relevant Design Quality Principles of SEPP 65, in particular Principle 1: Context and Neighbourhood Character and Principle 2: Built Form and Scale and Principle 9: Aesthetics*



*7. Pursuant to Section 4.15(1)(e) of the Environmental Planning and Assessment Act 1979, the proposed development is not in the public interest.”*

Thank you for the opportunity to make this further submission.

Yours faithfully  
**BBC Consulting Planners**

A handwritten signature in blue ink, consisting of a large, stylized initial 'R' followed by a long, horizontal flourish.

**Robert Chambers**  
**Director**  
**Email** [REDACTED]



## **ATTACHMENTS**

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4 August 2021

RJC:21-131

The General Manager  
Northern Beaches Council  
P O Box 82  
Manly NSW 1655

**Attention: Mr Jordan Davies**

email: [council@northernbeaches.nsw.gov.au](mailto:council@northernbeaches.nsw.gov.au)

Dear Jordan,

**Re: Mod2021/0203 (“the Modification Application”);  
Modification of Development Consent N0119/14 for the demolition of all existing structures and construction of a Shop Top Housing development comprising 3 retail tenancies, four residential units and underground parking (“the original consent”)  
1102 Barrenjoey Road, Palm Beach (“the development site”);**

We write in relation to the above Modification Application on behalf of Ms. Prue Rydstrand (“our client”) who is the owner and occupier of 1100 Barrenjoey Road, Palm Beach (“our client’s property”) which is located to the south of the development site.

In this regard, you might recall our Alice Steele contacted you on 26 July 2021 to discuss the lodgement of a submission on behalf of our client, and your assistance in that regard is appreciated.

We note that the Applicant has claimed and Council has accepted that although the original consent dates from 13 November 2014 (lapsing within 5 years of that date in the absence of physical commencement) that physical commencement has occurred via the carrying out of geotechnical investigations immediately prior to the lapse date.

We further note that the modification of the original consent for which the Applicant is seeking consent via the Modification Application relate to both design changes and changes to conditions. These proposed changes to the approved scheme are as follows (as described in the Applicant’s SEE): -

## **Proposed Design Modifications**

### ***“Basement Plan***

- *The approved basement and access driveway are reconfigured / augmented to facilitate a double width driveway entrance and the provision of the required quantum of carparking and residential storage in accordance with the ADG. A 3 metre deep soil zone is maintained to the rear boundary. Bin storage remains in the basement in accordance with the original approval.”*

### ***“Ground Level Floor Plan***

- *The 3 approved retail tenancies are consolidated into 2 with the residential entrance relocated to a central location on the site. An access ramp is provided from the front boundary to the retail and residential entry podium level to achieve the necessary level of accessibility with the floor level and driveway crest established by the required flood planning level. Additional deep soil landscaping is provided adjacent to both immediately adjoining properties.”*

### ***“Level 1 Floor Plan***

- *This floor plate is reconfigured to accommodate 1 x additional 3 bedroom apartment. The previously approved setbacks are generally maintained to both immediately adjoining properties with the floor plate extended towards the rear of the site whilst maintaining a 3 metre deep soil landscape zone to the rear boundary.”*

### ***“Level 2 Floor Plan***

- *This floor plate is reconfigured to accommodate 1 x additional 3 bedroom apartment. The previously approved setbacks are generally maintained to both immediately adjoining properties with the floor plate extended towards the rear of the site whilst maintaining a 3 metre setback to the rear boundary. We note that additional skylights are provided to the roof together with mechanical plant and solar panels located along its rear edge where they will not be visually discernible as viewed from outside the site.”*

In summary, the Modification Application proposes: -

- an additional 2 apartments;
- an increased building depth;
- a significant increase in GFA both residential and retail;
- additional balconies with additional privacy impacts;
- a widened driveway access adjacent to our client’s property;

- an increase in glazing, including in the elevation facing our client's property;
- extensive modification of the front elevation;
- increased building height; and
- a quite different design.

### **Proposed Modifications to Conditions**

The modifications to the conditions of consent which are proposed by the Modification Application are as follows: -

- *“Condition 5 to be modified to reference a Flood Planning Level of 3.2m AHD.*
- *Condition 32 to be deleted based on the design outcomes achieved by the modified plans.*
- *Condition 16 to be modified to reflect the current contribution plan.*
- *Condition 20 to be deleted based on the design outcomes achieved by the modified plans.*
- *Condition 21 to be deleted based on the design outcomes achieved by the modified plans.*
- *Condition 22 to be deleted based on the design outcomes achieved by the modified plans.*
- *Condition 23 to be deleted based on the design outcomes achieved by the modified plans.*
- *Condition 24 to be deleted based on the design outcomes achieved by the modified plans.*
- *Condition 25 to be deleted based on the design outcomes achieved by the modified plans.”*

We now make the following submission on behalf of our client.

- 1. The proposed modification, if approved would render the development as modified is no longer “substantially the same development” as the development originally approved.**

The number of units is increasing from 4 to 6 (an increase of 50%), the residential GFA is increasing from 755m<sup>2</sup> to 1,100m<sup>2</sup> (an increase of 46%), and the retail GFA is increasing from 327 to 410m<sup>2</sup> (an increase of 25%). The maximum height is also increasing from 10.155m to 10.972m (an increase of 817mm).

We agree with the advice given to the Applicant by Council officers at the pre-lodgement meeting for the Modification Application that the modifications are so substantial as to render the development as modified not substantially the same as the development approved by the original consent.

In this regard, we note that the Modification Application was considered by Council's Design and Sustainability Advisory Panel Meeting on 24 June 2021 and that the Panel described the design modification as a "great departure from the current approved drawings". We agree with the Panel. The Modification Application fails the relevant test and the Applicant should submit a new DA.

## **2. The modified design is not in keeping with the character of the area**

We also agree with the Council's Design and Sustainability Advisory Panel that the concrete forms, solid balustrades, strong horizontality and hanging gardens/ horizontal planter style of development are not in keeping with either the "seaside village feel" or the desired aesthetic expected by the Palm Beach Locality Statement in Pittwater DCP.

## **3. The building height is non-compliant with the 8.5m height standard in Pittwater LEP 2014**

The proposed building height is excessive. The development approval by the original consent exceeds the 8.5m height limit in PLEP 2014 by 1.655m or 19.4%. The amended design in the Modification Application increases the non-compliant approved height by 0.817m to 10.972m which is 29% over the height standard in the LEP.

In addition to being non-compliant with the Pittwater LEP, the building height is out of character with the surrounding area, as many of the surrounding buildings are 2 to 3 storeys. In this regard, the 3 dimensional studies which form part of the Modification Application clearly illustrate the incongruity in height, scale and bulk when compared to our client's property (and to Barrenjoey House).

## **4. There is too much glazing and the privacy impacts are unacceptable**

We agree with the comment of Council's Design and Sustainability Advisory Panel that the façade glazing which is proposed is more akin to the glazing expected in certain curtain wall glazing of commercial office towers, and is inappropriate and out of character in this seaside setting.

Whatever internal privacy devices are proposed on the extensive south-facing windows (i.e. the windows facing our client's property) there will remain the potential for overlooking and the permanent perception of being potentially overlooked.

## **5. The proposed design modifications give rise to new and unacceptable geotechnical risks**

There are two geotechnical reports referenced in the Modification Application: one prepared by JK Geotechnics dated November 2020 and another, earlier geotechnical report, prepared by Witt Consulting dated November 2019.

The JK Geotechnics report refers to upper and lower boulders on the southern boundary. Both of these boulders extend onto our client's property. Parts of these boulders on the development site are proposed to be removed and excavation is proposed which will remove part of the support.

In this regard, the report says: -

*“Excavation and removal of support will need to be completed with care so as not to de-stabilise the existing boulders or cause instability of the material below the large boulder.”*

The combination of the increased building footprint extending eastwards into the existing land form and the presence of the boulders referred to above which are partly on the development site and partly on our client's property is of great concern to our client.

Council is urged (if it has not already done so) to obtain independent geotechnical advice to peer review the submitted geotechnical reports.

Our client has not been asked for, and has not therefore given, consent to the carrying out of any works by the Applicant on our client's property.

It would appear from the geotechnical reports that partial removal of the boulders which are on the common boundary by the Applicant may necessitate remedial works on our client's property. Such work has not been consented to.

## **6. The proposal is non-compliant with the parking requirements in Pittwater DCP**

The proposed development includes 23 parking spaces in total, including 14 residential, 2 visitor and 7 retail spaces. This falls short of the requirements of Clause B6.3 in the Pittwater DCP which requires a total of 28 spaces for the proposed development, comprising 12 residential spaces, 2 visitor spaces and 14 retail spaces. This represents a shortfall of 5 parking spaces which is unacceptable in a location of such high parking demand.

## **7. The proposal crowds the view of and unreasonably impacts on Barrenjoey House**

By increasing the building footprint at the north western corner (replacing a plaza area) the proposal encroaches on an existing view corridor of Barrenjoey House, an iconic local structure.

The proposal, in its scale, bulk, size, form and design is unsympathetic and out of character with Barrenjoey House (and with our client's home).

## **8. Further action**

Noting the present COVID-19 restrictions on movement it will, we expect, be difficult for you to visit our client's home to see for yourself the privacy impacts (in particular)



which are anticipated. In this regard, if you would like us to co-ordinate provision to you of photos of or from our client's property, please let us know and we will arrange for this to happen.

Thank you for the opportunity to make this submission.

Yours faithfully  
**BBC Consulting Planners**

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a long, horizontal tail stroke.

**Robert Chambers**  
**Director**  
**Email** [REDACTED]



13 May 2022

RJC:21-131A

The General Manager  
Northern Beaches Council  
P O Box 82  
Manly NSW 1655

**Attention: Mr Jordan Davies**

email: [council@northernbeaches.nsw.gov.au](mailto:council@northernbeaches.nsw.gov.au)

Dear Jordan,

**Re: DA2022/0469 (“the DA”);  
Construction of shop top housing (“the proposal”);  
1102 Barrenjoey Road, Palm Beach (“the development site”).**

We write in relation to the above DA on behalf of Ms. Prue Rydstrand (“our client”) who is the owner and occupier of 1100 Barrenjoey Road, Palm Beach (“our client’s home”) which is located to the south of and which adjoins the development site.

As described in the Applicant’s SEE, the proposal is as follows: -

### **Proposal**

#### ***“Basement Plan***

- *Driveway access is provided from Barrenjoey Road to basement car parking accommodation for 21 vehicles incorporating 9 commercial, 10 residential and 2 residential visitor spaces. The basement also incorporates bicycle parking, 5 electric vehicle (EV) charging points, residential storage, commercial and residential bin storage and mechanical plant areas.*
- *Separate residential and commercial lift and stair access is provided to the levels above.*

#### ***Ground Level Floor Plan***

- *The existing substation located in the south-western corner of the property is relocated to accommodate the proposed double width driveway entrance.*

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ABN 24 061 868 942

- *This floor plate incorporates 2 x commercial tenancies having a total combined floor area of 387.5m<sup>2</sup>.*
- *A publicly accessible Plaza is located in the north-western corner of the property with a colonnade providing weather protected outdoor seating adjacent to the commercial tenancies.*
- *A shared foyer provides disabled access to the rear of the commercial tenancies which are located at the Flood Planning Level (FPL) with bathroom facilities and a residential foyer located towards the rear of this floor plate.*

### **Level 1 Floor Plan**

- *This floor plate accommodates 1 x 2 and 2 x 3 bedroom apartments. The apartments have open plan kitchen, living and dining areas opening onto west facing terraces. The bedrooms associated with the 3 bedroom apartments open onto rear facing terraces.*

### **Level 2 Floor Plan**

- *This floor plate accommodates 2 x 4 bedroom apartments. The apartments have open plan kitchen, living and dining areas opening onto west facing terraces. The main bedrooms also open onto west facing terraces.”*

We make the following submission on the proposal on behalf of our client.

#### **1. The development site is not adequately described in the DA documentation**

The Statement of Environmental Effects (“SEE”) submitted in support of the DA does not describe the development site and instead relies on a description of the development site in a prior (now superseded) Heritage Impact Statement. The consequence of not describing the development site (and of including photo’s in the SEE of its prior condition, before the buildings that used to be on the development site were demolished) is that there is no reference to the existing ground levels on the development site. Existing ground level is the level from which height needs to be measured for the purpose of applying the development standard relating to height (i.e. 8.5m) in Pittwater LEP 2014 (PLEP 2014). Similarly, the site survey dates from 2020 and was last updated in February 2021. It shows buildings and site levels which have subsequently been removed/ altered.

#### **2. The building height is non-compliant with the 8.5m height standard in Pittwater LEP 2014 and is excessive**

Neither the DA plans nor the Clause 4.6 variation request submitted in support of the non-compliance with the height limit shows or describes the existing ground level of the development site. The height limit which applies to the development site has to be measured from existing ground level. Instead, however, the DA plans and the Clause 4.6 variation request show/ rely on an interpolated existing ground level that has no bearing on or relationship to the actual existing ground level. In order for the DA to be properly addressed the survey needs to be re-done to plot the existing ground levels

across the site. The Clause 4.6 variation request then needs to be re-written so that it references and relates to the existing ground levels.

The proposed building height is excessive. The redevelopment already approved on the development site (which the Applicant says has been physically commenced as a result of geotechnical investigations having been carried out) exceeds the 8.5m height limit in PLEP 2014 by 1.655m or 19.4%. The new proposal exceeds the 8.5m height limit by approximately 3.0m or 35%.

In addition to being non-compliant with the building height limited in PLEP 2014, the proposal is out of character with the surrounding area, and is incongruous in height, scale and bulk when compared to our client's property (and to Barrenjoey House).

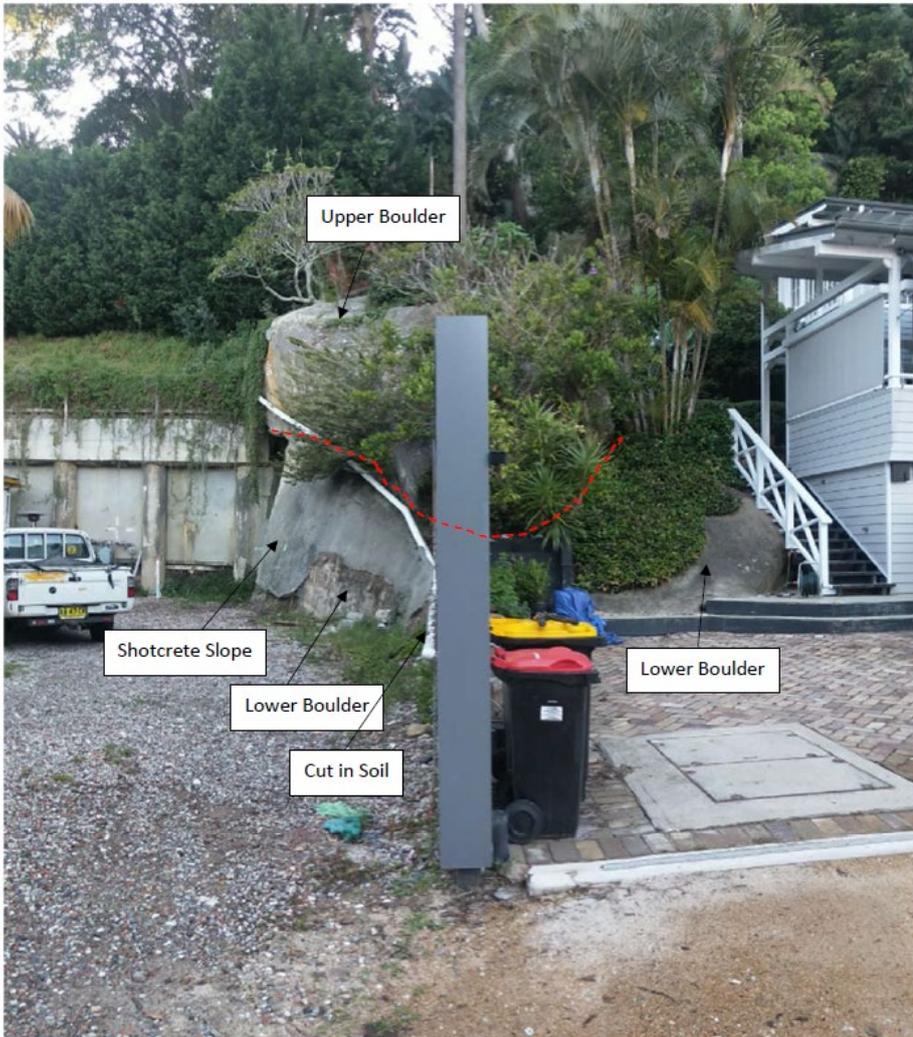
The Applicant's Clause 4.6 variation request is not well-founded. As detailed above, the Applicant's Clause 4.6 variation request is based on site conditions different to those which currently exist. This is a consequence of the DA documentation not properly describing the development site.

### 3. The proposal gives rise to unacceptable geotechnical risks

The JK Geotechnics report from November 2020 refers to upper and lower boulders on the southern boundary. Both of these boulders extend onto our client's property.

The common boundary condition between the development site and our client's home is shown on the photographs in the geotechnical report submitted with the DA: see below: -





*Photos extracted from report prepared by JK Geotechnics*

The geotechnical report says that “portions of the existing boulders and shotcrete (and possibly mesh and bolts) at the southern end of the site will be removed during excavation of the proposed excavation footprint) (Section 7.1.3, page 19, JK Geotechnics report).

We understand this to mean that the part of the boulder above the excavation will be removed/ cut. Our understanding is reinforced by reference to Section 7.3.3 on page 26 of the JK Geotechnics report which states:

*“Following removal of the required section of the sandstone boulder along the southern boundary, excavation and support of the underlying siltstone bedrock must be completed with care.”*

We do not understand these statements to suggest or imply that the large boulder is somehow to be retained in situ as both the DA and landscape plans suggest. Please

can you ask the Applicant to clarify what is proposed in relation to the large boulder on the boundary and to re-submit plans consistent with the actual engineering intent?

The geotechnical report further states that the proposal involves the use of rock anchors into adjoining properties. Our client's consent has neither been requested nor obtained by the Applicant for the installation of rock anchors on our client's property.

Our client has not been asked for, and has not therefore given, consent to the carrying out of any works by the Applicant on our client's property. It would appear from the geotechnical reports that partial removal of the boulders which are on the common boundary by the Applicant may necessitate remedial works on our client's property. Such work has not been consented to.

The combination of the building footprint extending eastwards and southwards into the existing land form and the presence of the boulders referred to above which are partly on the development site and partly on our client's property is of great concern to our client. Council is urged (if it has not already done so) to obtain independent geotechnical advice to peer review the submitted geotechnical reports. In this regard, we note that on page 19 the geotechnical report states: -

- *“Our risk assessment has considered Hazards A, B and C to have been previously engineered and certified during construction.*
- *While we observed that some remedial works have been carried out from our site inspection, the design and as-built records were not available to confirm the design and construction details.*
- *According to the D.F. Dickson report they have been involved during the construction period and have certification of these elements. In this regard we recommend that the D.F. Dickson reports, design drawings and as-built records are obtained so that our assessment of the likelihood of instability of these Hazards can be confirmed. If these records cannot be obtained, we recommend further investigation for Hazard C be carried out as discussed further in Section 7. We understand that Hazard B will be demolished during construction and that Hazards A and D can be managed during construction.”*

Clearly, further geotechnical analysis is needed. Similarly, the geotechnical report states on page 19 that in the absence of built records for the rear wall on the site further investigation is required. This is because “if the rear wall is not engineered it is prone to failure without warning.”

We also raise concern about construction and excavation impacts on our client's home. Page 22 of the geotechnical report states: -

*“Harder rock” excavation techniques may consist of percussive or non-percussive techniques. Percussive techniques comprise the use of rock hammers, while non-percussive techniques comprise rotary grinders, rock saws, ripping, rock splitting etc. Where percussive excavation techniques are adopted there is the risk that transmitted vibrations may damage nearby*

*movement sensitive structures such as the 'Barrenjoey House' building to the north and the residential building to the south." (our emphasis)*

#### **4. The proposal is non-compliant with the parking requirements in Pittwater DCP**

The proposed development includes 21 parking spaces in total, including 10 residential, 2 visitor and 9 retail spaces. This falls short of the requirements of Clause B6.3 in the Pittwater DCP which requires a total of 24 spaces for the proposed development, comprising 10 residential spaces, 2 visitor spaces and 12 retail spaces. This represents a shortfall of 3 parking spaces which is unacceptable in a location of such high parking demand.

The traffic report submitted with the DA says it has been prepared for a Section 4.55 application rather than for a new DA. It also refers to "the existing development" notwithstanding that there is no "existing development" as the site is vacant. References to "existing car parking shortfall" are therefore of no utility to Council's assessment of the parking demands of the proposal (i.e. there can't be said to be a parking demand from something that's not there).

Although 9 parking spaces are to be provided for the non-residential component of the proposal these are not to be made available to customers of the retail uses in order to limit vehicle movements across the footpath. The justification for placing the customer component of the non-residential parking demand on the existing supply of off-site spaces is the "existing car parking shortfall". Therefore, not only is the proposal deficient in the number of spaces it provides, the spaces it does provide for the non-residential use are not to be available to patrons.

#### **5. The landscape plans and architectural plans are inconsistent**

The landscaping plans shows the exposed rock boulder which staddles the common boundary with our client's home being retained (see Drawing LCP-02 Rev D), however, the land on the site beneath the boulder is being excavated for the driveway so there is no prospect of the exposed rock being retained. The architectural plan shows the same thing (see Drawing DA07 Rev A).

The landscaping on the first floor slab adjacent to the common boundary with our client's home includes a note which says "Architectural feature planting alongside windows", however, the south elevation on Drawing 11 Rev A doesn't show any windows, just a blank wall. Please request the Applicant to clarify whether or not there will be windows in the south elevation.

The same south elevation shows a landscape planter on the second floor, however, that planter does not appear either on the plan for the second floor (see Drawing DA 08 Rev A) or on the landscape plan for the second floor (see Drawing LCP-03 Rev C). Please request the Applicant to clarify whether or not there is to be a planter on the second floor level on the south elevation.

The landscape planter on the south elevation on Level 1 does not appear on the section on Drawing DA 16 Rev A so the soil depth for planting is not apparent. It also does not appear on the eastern elevation on Drawing DA 11 Rev A. Please request the Applicant

to provide amended plans showing the detail of the planter, what the soil depth will be, how it is to be maintained and who by and an accurate representation of how it will appear from our client's home.

In short, the DA is very unsatisfactory insofar as it purports to detail the landscaping along the south elevation which of course is the elevation that our client will be exposed to permanently if the DA is approved.

#### **6. The shadow analysis contained in the DA plans is inconsistent**

The set of DA drawings provides shadow diagrams for 9.00am, midday and 3.00pm in mid-winter (see Drawing DA 50-52 Rev A). The set also includes a solar access analysis of the proposal at hourly intervals between 9.00am and 3.00pm in mid-winter (see Drawing DA 72 Rev A). Reference to the latter shows our client's home visible on only the 3.00pm diagram. If these are 'views from the sun' they either contradict the shadow drawings on sheets DA 50-52 or simply omit our client's home. Please ask the Applicant to add our client's home to the solar access analysis on each sheet. Please also ask the Applicant to prepare a "Solar Access Analysis – Existing" so a comparison between the two (i.e. existing and proposed) can be provided.

Additionally, the Applicant should identify how much of the additional shadow is associated with the non-compliant height of the proposal.

#### **7. Concern regarding noise from pumping of the ground water**

At page 17, the geotechnical report submitted with the DA states that the predicted daily water extraction rate required to keep the basement in a dry condition will be 10,700 litres/ day although this may be 4,130 litres/ day or 23,600 litres/ day depending on the permeability of the soil and rock mass (i.e. the volume of a pump out depends on which assumption is correct). Our client's are concerned about noise from the pump and also seek clarification to where the pumped water will be discharged. Could you please request the Applicant to clarify this aspect of the proposal?

#### **8. View Impact**

The Architect's design verification statement says that the proposal has no view impact on our client's home. It is self-evident that a building of the size, scale, height and bulk, as proposed when compared to buildings previously erected on the site will have an adverse impact on northern views and the northern outlook from our client's home.

In this regard, please see below the northern outlook from our client's home in which the vegetated hillside character of this part of Palm Beach is readily apparent. The Applicant needs to identify what adverse view impact arises from the non-compliant height of the proposal. It is clear, contrary to what is stated in the DA documentation that there will be an adverse view impact from our client's home.



## 9. Further action

We anticipate that you will want to visit our client's home to see for yourself the relationship it has to the development site. In this regard, our client can be contacted by email at the following address: [REDACTED]

Thank you for the opportunity to make this submission.

Yours faithfully  
**BBC Consulting Planners**

**Robert Chambers**  
**Director**  
**Email** [REDACTED]



14 October 2022

RJC:21-131A

The General Manager  
Northern Beaches Council  
P O Box 82  
Manly NSW 1655

**Attention: Mr Jordan Davies**

email: [council@northernbeaches.nsw.gov.au](mailto:council@northernbeaches.nsw.gov.au)

Dear Jordan,

**Re: DA2022/0469 – AMENDED PLANS (“the Amended DA”);  
Construction of shop top housing (“the proposal”);  
1102 Barrenjoey Road, Palm Beach (“the development site”).**

We write in relation to the above Amended DA on behalf of Ms. Prue Rydstrand (“our client”) who is the owner and occupier of 1100 Barrenjoey Road, Palm Beach (“our client’s home”) which is located to the south of and which adjoins the development site.

As described in the Applicant’s Supplementary Statement of Environmental Effects (“SEE”) dated 20 September 2022, the amended plans provide for the following built form changes: -

**“Basement**

- *Minor changes to the services area at the southern end of floorplate to accommodate the relocated booster assembly at ground level above.*

**Ground Floor**

- *The relocation of the fire booster assembly from the publicly accessible forecourt to a location to the south of the driveway.*
- *The redesign of the publicly accessible forecourt areas to enhance accessibility and utility.*

### **First Floor**

- *A reduction in the northern extent of the west facing terrace adjacent to the main bedroom and kitchen.*
- *The reconfiguration of the west facing balconies to provide additional façade articulation.*

### **Second Floor**

- *The reconfiguration and reduction in floor space at this level to provide increased setbacks to the northern and southern boundaries and to enable the floor space to be located predominantly within a pitched roof form with dormer style projections to afford light and ventilation to the apartments at this level.”*

Our concerns with the original proposal were set out in our letter to Council dated 13 May 2022, a copy of which is attached hereto for your convenience.

In the time available we have been unable to adequately confer with our client and others on the Amended DA, so please accept this as an interim submission.

#### **1. Geotechnical hazards**

The updated seepage analysis and geotechnical assessment prepared by JK Geotechnics are being reviewed by an expert in this field and further comment will be provided to Council in due course.

#### **2. Building Height**

The supplementary SEE references the LEC decision in *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*. In that case, there was an existing building on the site. This is quite different to the subject case where ground level (existing) is obvious. In the circumstances of this case, the Applicant should not be able to place reliance on “the interpolated 8.5m height blanket” as being “generally reflective of the undisturbed levels of the site which would have likely existed prior to any development on the site”. In this regard, the Applicant’s Clause 4.6 variation request is flawed. We reiterate our comments in our prior submission (see attached) in relation to building height and the related impacts on our client’s home.

#### **3. Issues with the plans**

Section 4 is missing from the plans. Section 4 would help explain how there can simultaneously be a hedge along the common boundary with our clients home and a bin storage area. Can you please ask the Applicant to supply Section 4?

The south elevation now contains south facing bedroom windows on Level 2. The lower part of the windows is shown as opaque. No dimension is provided on the plans to identify to what height the opaque glazing extends. Can you please ask the Applicant to confirm the height above finished floor level to the top of the opaque glazing? High

sill height windows, in any event, should be preferred above opaque glazing in these bedrooms. The sill height should be at least 1.6m above finished floor level.

On Drawing DA 7.2B which is the solar access drawing, our client's home has been "greyed out" except on the 3.00pm image where it is shown in part. Could you please request the Applicant to include our client's home on this drawing and then provide it to us? The solar access drawing is of much greater utility than the shadow diagrams when interpreting the overshadowing impacts of the proposal.

#### **4. Further action**

We will respond further in due course but as soon as possible.

Thank you for taking the above matters into account in your assessment of the Amended DA.

Yours faithfully  
**BBC Consulting Planners**



**Robert Chambers**  
**Director**  
**Email** [REDACTED]



13 February 2023

RJC:21-131

Northern Beaches Local Planning Panel  
C/- Northern Beaches Council  
Mona Vale office  
1 Park Street  
Mona Vale NSW 2103

**Attention: Panel Members**

email: [planningpanels@northernbeaches.nsw.gov.au](mailto:planningpanels@northernbeaches.nsw.gov.au)

Dear Panel Members,

**Re: Application No. DA 2022/0469**

**Address: 1102 Barrenjoey Road, Palm Beach (“the development site”)**

**Description: Construction of shop-top housing.**

I write with reference to the above DA in respect of which I have made two prior submissions to Council (dated 13 May 2022 and 14 October 2022) on behalf of Ms Prue Rydstrand who is the owner and occupier of 1100 Barrenjoey Road, Palm Beach which adjoins and is located immediately to the south of the development site.

I am unable to attend the Panel meeting because of commitments in the Land and Environment Court. I note, however, that the Panel will consider additional written submissions. In this regard, I urge the Panel to take into account the additional written submission prepared by Warwick Davies, geotechnical engineer on behalf of Ms. Rydstrand. I respectfully submit that based on Mr Davies’ observations in his additional written submission that the Panel cannot achieve the necessary level of satisfaction as is required by Clause 7.7(4)(a) and (b) of Pittwater LEP 2014, and therefore should not support the officer’s recommendation to approve the DA.

I also ask the Panel to consider the following matter, being the proposal’s substantial non-compliance with 8.5m building height standard. In order to approve the DA, the Panel needs to achieve the necessary level of satisfaction being that the Applicant’s Clause 4.6 variation request in relation to the substantial non-compliance with the 8.5m building height standard is well-founded. In my prior submissions, I have set out why the Applicant’s Clause 4.6 variation request is not well-founded and I note that the Panel has those submissions and will consider the issues raised therein in its determination of the DA. Additionally, however, the Panel should consider the DA’s reliance on the Clause 4.6 variation in the light of the very recent decision

of the Land and Environment Court (“LEC”) in *Forest Apartments Pty Ltd v Northern Beaches Council* [2023] NSWLEC 1042 (“the recent LEC Decision”) a copy of which is attached hereto. The recent LEC Decision is relevant in the following respects: -

- it is very recent (i.e. the week before last);
- it concerns a shop-top housing proposal on a nearby site at Palm Beach at 1105 Barrenjoey Road: -
  - which is zoned B2 Local Centre being a higher order zone than the B1 Neighbourhood Centre in which the subject site is located;
  - which is similarly subject to a 8.5m building height limit, the same as the site; and
  - which, like the subject site, is in the Palm Beach Locality to which the Locality Statement in Clause A4.12 in Pittwater 21 DCP applies;
- the shop-top housing proposal subject to the recent LEC Decision, like the subject proposal, involved two residential levels above ground floor retail tenancies, over a basement car park;
- the proposal subject of the recent LEC Decision breached the 8.5m height limit up to 28.3% whereas the subject proposal breaches the same 8.5m height limit by 34.94%;
- the focus of the recent LEC Decision is on the Clause 4.6 variation request submitted in support of the proposal which relates to the same 8.5m building height control;
- the Clause 4.6 variation request relating to the 8.5m maximum building height non-compliance which was considered by the LEC in the recent LEC Decision cites similar arguments to justify the non-compliance as in the Clause 4.6 variation request which supports the subject DA; and
- the appeal was refused by the LEC on the basis that the Clause 4.6 variation request was not well-founded.

Although all DA’s require assessment on their own particular merits, the fact that the LEC has very recently found against a nearby shop-top housing proposal, on land subject to the same 8.5m height limit, which has a non-compliance of 28.3% (as opposed to the 34.99% non-compliance of the subject proposal), indicates that the Panel would not be inconsistent with the recent LEC Decision were it to similarly decide that the Clause 4.6 variation request for the subject DA is also not well-founded.



Thank you for the opportunity to make this additional submission.

Yours faithfully  
**BBC Consulting Planners**

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a long horizontal stroke that tapers to the right.

**Robert Chambers**  
**Director**  
**Email** [REDACTED]



## Land and Environment Court New South Wales

<b>Medium Neutral Citation:</b>	<b>Forest Apartments Pty Ltd v Northern Beaches Council [2023] NSWLEC 1042</b>
<b>Hearing dates:</b>	24 and 25 October 2022
<b>Date of orders:</b>	03 February 2023
<b>Decision date:</b>	03 February 2023
<b>Jurisdiction:</b>	Class 1
<b>Before:</b>	Walsh C
<b>Decision:</b>	The Court orders that: (1) The appeal is dismissed. (2) Development application DA2021/2362 for a three-storey building over basement parking at 1105 Barrenjoey Road, Palm Beach and 43 Iluka Road, Palm Beach (Lot CP SP 87024 and Lot CP SP 87022) is determined by refusal of consent. (3) The exhibits are returned except Exhibits 1, A, B, D and E which are retained.
<b>Catchwords:</b>	DEVELOPMENT APPLICATION – shop top housing development – height of building contravention – whether written request demonstrates sufficient environmental planning grounds to justify the contravention
<b>Legislation Cited:</b>	Environmental Planning and Assessment Act 1979 ss 1.3, 8.7 Land and Environment Court Act 1979 Pittwater Local Environmental Plan 2014 cl 4.3, 4.6
<b>Cases Cited:</b>	Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118
<b>Texts Cited:</b>	Pittwater 21 Development Control Plan
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Forest Apartments Pty Ltd (Applicant) Northern Beaches Council (Respondent)
<b>Representation:</b>	Counsel: N Eastman (Applicant)

**S Patterson (Solicitor) (Respondent)**

Solicitors:

Beazley Lawyers (Applicant)

Wilshire Webb Staunton Beattie (Respondent)

**File Number(s):** 2022/89442**Publication restriction:** No

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**JUDGMENT**

1 This judgement is concerned with an appeal by the applicant under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal by Northern Beaches Council (Council) of development application No DA2021/2362 (DA) for a mixed use development at 1105 Barrenjoey Road and 43 Iluka Road, Palm Beach (Lot CP SP 87024 and Lot CP SP 87022), hereafter referred to as the site.

**Site and locality**

- 2 The site is triple fronted and irregularly shaped. It is bound to the east by Barrenjoey Road and to the north by Iluka Street. When Iluka Street bends to the south, at the site's north-western corner, this street also provides the western boundary to the site.
- 3 The site's surveyed area is 1366.5m<sup>2</sup>. It presently accommodates a part two/ part three storey development comprising commercial premises at ground level and residential accommodation on the levels above. The site does not have basement car parking. Council's Statement of Facts and Contentions filed 11 October 2022 (Ex 1) suggests the current building was constructed between 1991 and 1994.
- 4 The site sits near the northern extremity of a strip of commercially zoned land running along the western side of Barrenjoey Road. To the immediate south, the site abuts a building commonly known as Iluka Apartments, which has commercial tenancies below. To the west across Iluka's Street are beachfront detached dwelling houses. To the north, across Iluka Street, is a single storey retail premises which includes a bottleshop. To the east of the site is McKay Reserve zoned for public recreation, with other dwelling houses and residential flat buildings further north and south of the reserve along Barrenjoey Road.

**Proposal**

- 5 The DA seeks consent for demolition of existing structures, excavation and ground works, and construction of a three-storey building over one level of basement car parking, two ground floor retail tenancies and eight three-bedroom apartments on Levels 1 and 2 along with associated landscaping and public domain works.

## Planning provisions

- 6 The site is located within the B2 Local Centre zone under Pittwater Local Environmental Plan 2014 (PLEP). It was not contested that the proposal is permissible in the zone. There is a breach to the height of building development standard at cl 4.3 of PLEP, which will be seen to be determinative in this appeal. Also of relevance are certain inclusions in Pittwater 21 Development Control Plan (PDCP).

## Issues

- 7 Following certain amendments to the proposal, three matters remained in contention in this appeal: (1) the building height contravention, (2) character and landscape, (3) impact on neighbouring amenity.
- 8 I also note there were many objections submitted to Council by lay persons (Ex 8). I heard submissions from some of these objectors during the site inspection on the first day of the hearing and had the chance to visit premises within Iluka Apartments. Given my findings, there is no need to particularise the concerns raised in lay submissions. Suffice to say they included the three matters pressed by Council in the proceedings and listed above.
- 9 Here I will also mention the experts giving oral evidence in the proceedings were G Boston (appointed by the applicant) and A Susko (appointed by the Council).

## Height of building development standard contravention

### *Conditional permissive powers*

- 10 There are permissive powers in cl 4.6(2) of PLEP which allow approval of a proposal notwithstanding a contravention of a development standard, such as the height of buildings contravention evident in this proposal. But use of these permissive powers by a consent authority is subject to the restrictions at subcll 4.6(3)-(5) of PLEP:

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless—

(a) the consent authority is satisfied that—

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.

11 Thus, the Court must form two positive opinions of satisfaction under cl 4.6(4)(a) of PLEP to enliven the permissive power under cl 4.6(2) to grant development consent in instances of a development standard contravention (*Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [14]).

12 The first opinion of satisfaction, at cl 4.6(4)(a)(i) of PLEP, is in regard to a written request from the applicant seeking to justify the contravention of the development standard and, specifically, whether it has adequately addressed the two matters required to be demonstrated at cl 4.6(3) of PLEP. Because I am not satisfied in regard to this first opinion of satisfaction, at cl 4.6(4)(a)(i), there is no need for me to go to the second opinion of satisfaction, at cl 4.6(4)(a)(ii) of PLEP.

13 The applicant has opened the door to the Court's consideration of the use of the permissive powers at cl 4.6(2) of PLEP by providing a written request seeking to justify the height of building contravention. The written request was prepared by Boston Blyth and Fleming Town Planners and was dated 24 October 2022 (Ex E).

#### *Particulars of the contravention*

14 The applicable height of building standard under cl 4.3 of PLEP is 8.5m. According to the written request, the proposed works have a building height measured to the top of the lift overruns of between 10.96m and 10.98m representing a variation of between 2.41m (28.3% exceedance) and 2.48m (29.1%). The roof parapet would exceed the standard by between 1.75m (20.5%) and 2m (23.5%). The proposed acoustic screen around an internal roof top service area is suggested to have a building height of about half a metre higher than the lift overruns. In the course of the hearing, a floor plan of this roof top service area was produced which indicated a reduced footprint (Ex 11).

15 Notable, is the proportionate footprint of the building contravening the height standard. While not dimensioned, this is depicted isometrically in Figure 1 of the written request. Mr Susko calculated that the proportion of the site occupied by building height in

excess of the standard was 58% (Expert Planning Report, (Ex 3) par 3.1.4.13), a figure which Mr Boston accepted in oral evidence.

*Whether written request adequately demonstrates sufficient environmental planning grounds*

- 16 The first opinion of satisfaction, under cl 4.6(4)(a)(i) of PLEP, itself involves two thresholds. One of these is that I must not grant consent to this application unless I am satisfied that the written request has adequately addressed the requirement to demonstrate that there are sufficient environmental planning grounds to justify the contravention (PLEP cll 4.6(3)(b) and 4.6(4)(a)(i), in part).
- 17 At pages 15-16, the written request nominates two environmental planning grounds, seen as sufficient to justify the contravention. These were: (1) that the proposal provides a contextually responsive building design, and (2) that the proposal promoted the achievement of certain nominated objects of the EPA Act itself. In the written request, under these two nominated environmental planning grounds, there were a number points of explanation which can be thought of as “sub-grounds”. I address the two grounds and explanatory sub-grounds below. I will note here that in this consideration of the written request’s demonstration of environmental planning grounds, (to justify contravening the development standard) I am not only considering the commentary at pages 15-16, but rather I have considered the written request as a whole. It will be seen that, in this case, the written request has nominated the proposal’s argued alignment with relevant zone and development standard objectives as part of the environmental planning grounds it relies upon, calling these matters of the written request coverage to attention in any event.

**Environmental planning ground 1: Contextually responsive building design**

Sub-ground 1.1: proposal adopts established design characteristics

- 18 The written request indicates that the proposal adopts design characteristic established by other three-storey mixed use development within this local centre and within the street block. Three points are drawn to attention, with the proposal, seen as: (1) “maintaining a predominant 2 storey building form with the upper-level apartments contained predominantly within a pitched roof form”, (2) “(using) natural materials and finishes” and (3) “(adopting) recessed verandas at both ground and first floors levels”. The written request also calls up relevant policy provisions by suggesting the proposal is seen to “(reflect) the 'seaside-village' built form character identified in the Palm Beach Locality desired future character statement for development within the commercial centre”.

Consideration

- 19 The area falls within the land subject to clause A4.12 Palm Beach Locality under PDCP. The “desired character” commentary to this clause includes the following:

“Future development will maintain a building height limit below the tree canopy and minimise bulk and scale whilst ensuring that future development respects the horizontal massing of the existing built form. Existing and new native vegetation, including canopy

trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.

The design, scale and treatment of future development within the commercial centres will reflect a 'seaside-village' character through building design, signage and landscaping, and will reflect principles of good urban design. Landscaping will be incorporated into building design. Outdoor cafe seating will be encouraged.

A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, to provide feed trees and undergrowth for koalas and other animals, and to enhance wildlife corridors.”

- 20 While I note the written request’s argument, it seems to me a fairer analysis to see the proposal as quite partial in its adoption of both established design characteristics and policy provisions. It is true that the other reference mixed use developments (gaining most attention were the Iluka Apartments to the immediate south, and a mixed use development further south again at 1073-1077 Barrenjoey Road) do adopt a built form comprising ground level retail and commercial then, two levels of residential above, with the uppermost apartments within a pitched roof form. However, the proposal embodies significant differences when compared with these other mixed use developments. First is in regard to the form of the roof, which I go to later. Second is in regard to the proportionate scale of the third-floor element (which is related to the scale of the building height contravention of 58% site cover). Here I note Figure 4 in Ex 3 and the commentary of Mr Susko generally on the point of the area of the contravening element. A third point of comparison, in regard to established design characteristics, is the adopted boundary setbacks, which considerably breach the 3.5m front boundary setback control under PDCCP. This limits the potential to provide opportunity for landscaping, in particular deep soil landscaping, which may have been able to offset the otherwise building massing above the height control, and in allow for canopy trees, in the longer term, to achieve a setting where building heights (rather than gutterlines) were “below the tree canopy”. Generally, I am not convinced by the written request that the proposal would maintain a predominant two storey building presentation. The scale of the third-level element, the proposed idiosyncratic roof form (short pitch above the

gutter with a largely flat roof) and the lack of opportunities for landscape relief are obvious points of difference to reference buildings which are not effectively countered in the written request.

21 The written requests argument that proposed “colours and materials will harmonise with the natural environment” can be accepted, but this is more seen by me as a basic compliance response rather than as special environmental grounds to justify a contravention of the proposed scale.

22 The written request is correct in describing balcony elements of the ground and first floor as being recessed rather than protruding. There are two points here. First that, under PDCCP, there are considerable front setback breaches at these levels (that is to say it should not be seen as a particular positive that there isn't a further breach by balcony elements). Second is that balconies and dormers in the contravening third level form do protrude.

Sub-ground 1.2: due to the site geometry, any pitched roof form element above a two storey wall height would likely exceed the 8.5m height control

#### Consideration

23 While I note the written requests point, the question here is not whether any or all height contraventions should be deemed inappropriate or otherwise. The points of attention in this case are the specifics and reasonableness of this particular contravention. I comment further on site geometry in my concluding findings in regard to the test under examination here (from [35]).

Sub-ground 1.3: most observers would not find the proposal, by virtue of building height, offensive, jarring or unsympathetic in a streetscape

#### Comment

24 While the author is entitled to hold this opinion in regard to the impressions of future observers, the planning controls are not limited to preventing offence and the like; and are concerned with establishing a certain physical and landscape character. In this instance I am not convinced that these are strong environmental planning grounds to justify a contravention of the scale proposed.

Sub-ground 1.4: height of building breach does not prevent achievement of zone or development standard objectives

25 Under cl 4.6 of PLEP, indirect or direct findings in regard to how a proposal lines up with zone and development standard objectives are separate tests to that of whether a written request establishes sufficient environmental planning grounds to justify a contravention. That does not prevent me from considering the written request's submissions here in relation to the specified objectives.

26 The zone objectives are as follows:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To provide healthy, attractive, vibrant and safe local centres.

- To strengthen the role of centres as places of employment.
- To provide an active day and evening economy.
- To provide for residential uses above street level where they are compatible with the characteristics and uses of the site and its surroundings.

27 I have noted the written request's argument that the proposal is consistent with and does not prevent achievement of the zone objectives. This is largely true. However, there is nothing in the written request's consideration of the relationship between the proposal and the zone objectives which might provide sufficient environmental planning grounds for the breach.

28 The objectives of cl 4.3 of PLEP, which establishes the height of buildings development standard, are as follows:

- (a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,
- (b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,
- (c) to minimise any overshadowing of neighbouring properties,
- (d) to allow for the reasonable sharing of views,
- (e) to encourage buildings that are designed to respond sensitively to the natural topography,
- (f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

29 The most pertinent objectives to the matter at hand are objectives (a) and (b) above. The written request's arguments in regard to them are similar to the points raised at sub-grounds 1.1-1.3 above, and warrant the same response. But it seems to me generally, if the test is concerned with establishing sufficient environmental planning grounds to justify a contravention, something more than compliance or consistency with zone and development standard objectives is sought.

Sub-ground 1.5: it can be demonstrated that the proposal achieves better planning outcome and therefore is in the public interest.

#### Consideration

30 I note the statement in the written request that the proposal achieves a better outcome for and from development by allowing flexibility in particular circumstances, linking to the objectives at cl 4.6(1)(b) of PLEP. I do not see the evidence in the written request to support the statement. But I also acknowledge, as does the written request (p 16), that there is no obligation to achieve the stated objectives at cl 4.6(1) of PLEP.

#### **Environmental planning ground 2: promoting achievement of nominated objects of the EPA Act**

Sub-ground 2.1: promotion of the orderly and economic use and development of land (s 1.3(c) EPA Act)

31 In the written request the proposal is argued to promote the orderly and economic use and development of land by "facilitating a 3rd level of floor space on this site consistent with other 3 storey mixed use development within the sites visual catchment including the existing development on the subject property".

Consideration

32 On the evidence of Mr Susko, with which I agree, the proposal considerably exceeds the proportionate quantum of development that contravenes the height of building development standard when compared to the on-site and nearby three storey mixed use development.

Sub-ground 2.2: promotion of good design and amenity of the built environment (s 1.3(g) EPA Act)

33 The written request points to the proposal's adherence to "more contemporary floor to floor heights both at ground and upper levels, as required by the ADG", when compared to the building immediately to the south.

34 I would acknowledge this comparative design benefit, but I will come back to the question of good design and amenity of the built environment below.

*Written request has not adequately addressed the requirement to demonstrate that there are sufficient environmental planning grounds to justify the contravention*

35 I am not satisfied that the written request has adequately addressed the requirement to demonstrate that there are sufficient environmental planning grounds to justify the contravention. The written request relied on two (headline) grounds. Even if these two grounds were sufficient to justify the contravention, the written request failed to demonstrate either were successfully achieved under the proposed design.

36 The first environmental planning ground was that the proposal provided a contextually responsive building design. It seems to me that the proposal's arguments on contextual responsiveness adopt two perspectives. The first perspective was outward looking. It sought to demonstrate that the proposal was responsive to other buildings in the setting. However, the scale of the height contravention, as proposed, was well in excess of the other referenced buildings. As a result, the development would have an inappropriate and jarring height massing in the streetscape.

37 The second perspective, in regard to contextual responsiveness, was more inward looking and had regard to the site's geometry, or its relatively long frontage to Barrenjoey Road, its triple frontage and its depth. This was to suggest that this site geometry should be seen as an environmental planning ground to justify height contraventions of the nature proposed. It is unconvincing to suggest the site's geometry should be a factor in the consideration of whether the proposal might fit harmoniously into the existing contextual setting. This was not the point of this second perspective. I think it was to suggest that given the site geometry certain allowances were due as a planning ground. While there may be something in that point in the abstract, with a view to development yield and the like, in this instance there is also reasonably direct evidence to suggest that larger and wider sites (such as the proposed site) can accommodate more architecturally responsive design. The corner site development at 1073-1077 Barrenjoey Road, which seems to have a similar area, and a frontage to Barrenjoey Road of similar length, is considerably more responsive to the setting, accommodating buildings with in roof accommodation at a third level which integrate sensitively with roof pitches to visible

ridges or peaks, and does manage to maintain “a predominant two storey building form” as the desired character statement seeks (see [19]), with the upper-level apartments contained predominantly within a pitched roof form, a roof form which the experts seemed to value.

38 The second environmental planning ground referred to the objects of the EPA Act. I need to comment further on the claims in the written request that the proposal lines up with the object at s 1.3(g) EPA Act, which is concerned with promoting good design and amenity of the built environment. I note this particular claim in the written request relates to floor to ceiling heights. However, larger questions arise when this object of the EPA Act is called upon in a written request of this kind.

39 There are beneficial aspects of the proposal in design terms. An increased activity at street level can be anticipated when compared to the existing relatively inactive streetside, but this is an expectation of any new development along Barrenjoey Road.

40 Of itself, the proposed building height contravention would provide for an oversized massing at the upper level when compared to its setting. On the form of the roof of the proposal, I am not convinced the proposal’s roof is the kind of “pitched roof” that might be thought of as a fundamental element to achieving a seaside village character consistent with clause A4.12 Palm Beach Locality of PDCP (mindful of the expert’s agreed position, Ex 3 par 3.1.1.8). There is a pitch, or angle, to the roof above the gutter line but the pitched roof form is broken by quite extensive upper level balconies and is relatively short in its height, in any event, before the major element of the roof design, the flat roof element, begins.

41 The scale and massing of the height contravention would change the streetscape presentation from that which might be reasonably understood from the existing controls. Other elements of the design mean that there is insufficient opportunity for significant canopy landscaping to offset this in a meaningful way.

## Conclusion

42 There may well be opportunities for a redevelopment of the subject site which better achieves planning objectives relating to the addition of vibrancy to this centre and providing increased opportunity for residential uses at upper levels of buildings. However, for height contraventions of the scale proposed here, it seems to me, there needs to be more direct and explicit environmental planning grounds in support.

43 As the written request has not adequately addressed the requirement to demonstrate that there are sufficient environmental planning grounds to justify contravention of the height of buildings at cl 4.3 of PLEP, the facultative powers of cl 4.6(2) of PLEP are not available. In these circumstances, there is no jurisdiction to grant consent.

**Orders**

44 The Court orders that:

- (1) The appeal is dismissed.
- (2) Development application DA2021/2362 for a three-storey building over basement parking at 1105 Barrenjoey Road, Palm Beach and 43 Iluka Road, Palm Beach (Lot CP SP 87024 and Lot CP SP 87022) is determined by refusal of consent.
- (3) The exhibits are returned except Exhibits 1, A, B, D and E which are retained.

**P Walsh**

**Commissioner of the Court**

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Decision last updated: 03 February 2023

12 April 2024  
E26272.G20.01

Nicholas Sproats & Prue Rydstrand  
1100 Barrenjoey Rd  
PALM BEACH NSW 2108

Dear Nicholas & Prue,

## Supplementary Submission on Geotechnical Issues DA2022/0469 No.1102 Barrenjoey Rd Palm Beach, NSW Land & Environment Court No. 2023/242901

### 1.0 INTRODUCTION / BACKGROUND

This letter provides a supplementary submission on geotechnical issues concerning a proposed development on 1102 Barrenjoey Rd adjoining at the northern boundary of your property 1100 Barrenjoey Rd.

Previous geotechnical reports prepared by Davies Geotechnical Pty Ltd and EI Australia (EI) have been submitted to Northern Beaches Council (NBC) in connection with the proposed development, relating to potential impacts upon No.1100 Barrenjoey Rd and geotechnical risk, resulting from the proposed basement/driveway excavation and associated geotechnical aspects of the proposed works.

Two reports prepared by EI dated 16 January 2023 (ref: P21153.01\_draft) and 13 February 2023 (ref: P21153.02 rev1) addressed matters being considered by Northern Beaches Council for DA2022/0469. Those reports concluded as follows:-

- Given the review comments, the correspondence, and the JKG have not adequately addressed the concerns in previous correspondence, and the JKG have not adequately addressed the concerns in previous correspondence, and the JKG have not adequately addressed the concerns in previous correspondence.
- Neither of the JKG reports are relied on by the Council for its recommendation of an approval are suitable for approval as presented to the Council. Accordingly, in our opinion from an engineering perspective, the reports could not be approved without those reports being substantially re-addressed and with independent peer review.
- Geotechnical Risk is left unaddressed due to uncertainty of the existing construction on the southern boundary from past works on the site. JKG have flagged this, but have not followed up to confirm their assumptions necessary for the risk assessment presented in their 2020 report.
- In the end, should this development proceed through an approval, it is our opinion and recommendation that a Deferred Commencement Condition is the only avenue that could satisfy an expectation that the concerns about impact on No.1100 and geotechnical risk be properly and adequately addressed through engineering design and construction.

Since that time, the Pittwater Local Planning Panel (PLPP) determined a refusal for the development. Subsequently, the application was referred to the NSW Land and Environment Court and is currently in progress.

No further documentation has been supplied to EI since the meeting held on 20 April 2023 until a bundle of documents was provided by NBC on 28 May 2023.

EI has subsequently undertaken further geotechnical investigations and is preparing an updated geotechnical report prepared by a suitably qualified geotechnical engineer together with associated geotechnical design and construction details.

The further review reported below has been limited to a bundle of documents provided by NBC on 28 March 2024, listed below:-

Name	Date modified	Type	Size
01 - Amended Architectural Plans - 1102 Barrenjoey Road, Palm Beach	28/03/2024 12:26 PM	Adobe Acrobat D...	38,156 KB
02 - Schedule of Amendments to Arch Plans - 1102 Barrenjoey Road, Palm Beach	28/03/2024 12:26 PM	Adobe Acrobat D...	134 KB
03 - SEPP 65 ADG Compliance Analysis - 1102 Barrenjoey Road, Palm Beach	28/03/2024 12:26 PM	Adobe Acrobat D...	698 KB
04 - Revised Landscape Plans - 1102 Barrenjoey Road, Palm Beach	28/03/2024 12:26 PM	Adobe Acrobat D...	11,263 KB
05 - Photomontage - View 5 - 1102 Barrenjoey Road, Palm Beach	28/03/2024 12:26 PM	IrfanView JPG File	5,284 KB
06 - Updated clause 4.6 variation request - 1102 Barrenjoey Road, Palm Beach	28/03/2024 12:26 PM	Adobe Acrobat D...	861 KB
07a - Cover Letter to Geotechnical Report and Forms - 1102 Barrenjoey Road, Palm Beach	28/03/2024 12:26 PM	Adobe Acrobat D...	233 KB
07b - Geotechnical report 22.03.24 - 1102 Barrenjoey Road Palm Beach	28/03/2024 12:26 PM	Adobe Acrobat D...	14,296 KB
07B - Proposed Geotechnical DA Conditions - 1102 Barrenjoey Road, Palm Beach	28/03/2024 12:26 PM	Adobe Acrobat D...	201 KB
07c - Geotechnical Form 1 and 1A - 1102 Barrenjoey Road Palm Beach	28/03/2024 12:26 PM	Adobe Acrobat D...	176 KB
08 - BASIX Assessment Report - 1102 Barrenjoey Road, Palm Beach	28/03/2024 12:26 PM	Adobe Acrobat D...	380 KB
09 - BASIX Stamped Plans - 1102 Barrenjoey Road, Palm Beach	28/03/2024 12:26 PM	Adobe Acrobat D...	41,671 KB
10 - BASIX Certificate - 1102 Barrenjoey Road, Palm Beach	28/03/2024 12:26 PM	Adobe Acrobat D...	68 KB
11 - NatHERS Certificate - 1102 Barrenjoey Road, Palm Beach	28/03/2024 12:26 PM	Adobe Acrobat D...	448 KB
filed SOFAC B20230828-10924635_Lodge Document_10620908_202300242901_001	28/03/2024 12:26 PM	Adobe Acrobat D...	476 KB

## 2.0 Design Changes

The basement footprint and building above have changed from the design previously submitted for the DA. The changes to the basement are:-

- Eastern side – basement footprint moved 3m back to the eastern boundary, resulting in the excavation on the eastern boundary being ~12.5m deep in one vertical face. Previously, a 3m wide bench in the excavation profile was included in the Rob Mills Architecture design at approximate RL6.5m for a Level 1 terrace at the rear of the building.
- Southern side – increased excavation, now on the southern boundary, right back to the eastern corner, maximum depth ~12.5m.
- Basement FFL lowered 0.35m to RL-0.65.

The changed excavation profile poses even more serious questions on the engineering design for temporary support for the excavation and how that can be achieved without anchors.

The true detail for the boulder impacts on 1100 Barrenjoey Rd from the basement excavation are now clear from the updated JK report. Previous architectural and landscaping 'impressions', that showed the boulder being left intact as landscaping on an external terrace of the building at Level 1, have changed to virtually a complete removal of the boulder by cutting through the boulder on the boundary. According to Section BB on JK's Figure 4, (25 March 2024), this leaves less than about one-third of the B1 boulder remaining on 1100 Barrenjoey Rd, and Section CC shows less than a thin 'slither' remaining after excavation.

The architect's drawing for Section 2 on DA16 (refer also to the plan view on DA05) does not depict the boundary or the ground level at the southern boundary against 1100. The section is taken about 3.7m from the rear SE corner of the property. At this point on the boundary, the excavation down to basement level will be approximately 12m deep (estimated RL11.0 down to BEL about RL-0.95), increasing eastwards to the SE corner of the basement footprint.

### 3.0 Updated JK Geotechnics Report

In the limited time since receiving the updated information for the DA, we have not had opportunity to prepare a comprehensive listing and commentary on factual and editorial problems of JK's updated report that appear evident on a quick reading.

An abridged list has been prepared to assist reading of JK's updated report, and this is appended as **Attachment 1** herewith

However, this further review briefly highlights several significant matters on geotechnical issues, worthy of comment for purposes of the current DA assessment, under the sub-headings below.

#### 3.1 Overview

JK's updated report presents no new data or responses of practical use to answer specific queries and concerns raised in previous EI geotechnical submissions in regard to engineering design for the excavation support, the construction methodology, or the risk analysis.

We have found numerous apparent errors or inconsistencies in the report that, in our opinion, render the JK document unreliable, requiring revision.

Our previously expressed concerns about the process of the DA assessment and a consent if it is to be made, that were based on the previous design(s) and supporting documentation, are unchanged from our review of the submitted amended documentation now before NBC.

The below extracts, together with EI's further comments, are in response to JK's critique of our 2023 submission, and are intended to assist in providing balance to JK's commentary.

The extracts are from the Davies Geotechnical draft Memo 27 October 2021, which is Attachment 1 to EI's submission P21153.01, dated 16 January 2023. The page numbers in brackets are as per the draft Memo.

#### 3.2 The Boulder Stack

(page 2)

In summary, the boulder stack comprises massive rock units of Hawkesbury Sandstone that have fallen or 'rafted' down from higher elevations to their current position near the toe of the extensive hillslope.

The configurations of the boulder geometries and contacts below ground are entirely uncertain, other than three (3) discrete boulders are apparent. Their contacts may be: (i) point to rock surface, or (ii) rock surface on rock surface, or (iii) rock surface on colluvial soil.

An interpreted cross section is provided as **Attachment 2**, taken at the location indicated in red on the Site Plan

(page 4)

If 'trimming' the 'large upper boulder' meant it was to be re-shaped extensively, for example the lateral 'slice' required for the driveway widening was continued vertically to the top of the boulder, it would be left as a very awkwardly shaped rock mass high up on the excavated driveway batter (refer coloured plan attached herewith). In my judgement this would be a very difficult job to underpin, and anchoring would not be a feasible alternative.

It is noted that Attachment 2 (yellow highlight in the above extract) has the hand-written note "*Boulder shapes and interlocking or otherwise are schematic*". JK do not acknowledge this approximation of the boulder outlines that they rely on for their commentary.

### 3.3 – Sydney Water Sewer Line

(page 4 & 5)

#### The Sydney Water Sewer Line

An above-ground cast iron Sydney Water Sewer Main runs through No.1100, connecting uphill properties to the sewer main in Barrenjoey Rd.

The approximate alignment of the sewer main through No.1100 is shown on the 2020 CMS survey. The alignment is roughly 1m inside and parallel to the northern boundary against No.1102. The sewer line bends to the south-west where it meets the 'large upper boulder' (B1), and heads towards the dwelling. It then bends to the north-west cutting across the plan outline of the boulder stack marked on the CMS survey.

It is possible the north-westerly alignment of the sewer line was constructed conveniently along a gap between boulders B1 and B3, rather than being trenched through boulder B3. From our investigation, it appears this part of the sewer line is located uphill from the approximate alignment shown on the survey, ie, closer to the downhill face of boulder B1 (vicinity of HA2/DCP2). This would need to be confirmed by 'pot-holing' along the line of the sewer, or by other means.

Until its position and construction across and adjacent to the boulder stack are verified, the sewer line should be assumed to be vulnerable to any disturbance caused to the boulder units in the boulder stack, most importantly as a result of works associated with excavations on No.1102 against the boundary with No.1100.

EI agree with and support the comments by Davies Geotechnical expressed in the last paragraph of the above extract.

The 150 DICL Sydney Water sewer line asset on 1100, serves numerous properties uphill to the east and south-east, above 1100 and 1110 (refer attached diagram extract from a DBYD search). This asset is an important feature of the slope and existing development on 1100, directly adjacent to the boundary and proposed excavation on 1102.

We note that JK do not rate the sewer line as worthy of inclusion as a hazard in their risk assessment. EI consider this to be a gross omission. Refer also to **Attachment 1, Section A3**.

Displacement of the 150mm diameter DICL ('cast iron') sewer line resulting from the excavation on 1102 will be a risk to the environment as well as to the Sydney Water asset (repairs or replacement and clean-up).

A joint in the sewer line pulling open from movement of the ground or the boulders will result in discharge of raw sewage onto and into the slope within 1100, with direct consequences for contamination/health risk affecting 1100 and 1102. In addition, this could result in collapse of part of the excavation if the excavation is not adequately supported.

### 4.0 Conditions of Consent

Draft Conditions of Consent from NBC have not been provided in the documentation bundle noted under 1.0 above, so EI can only provide the following conclusions at this stage:

- The comments, conclusions and recommendations of EI's previous reports as referenced above remain unchanged, and are reinforced from our current review.
- A proper assessment of the DA cannot and should not be approved in its current form with regard to engineering detail (how the excavation design and its support system can be safely constructed), until the geotechnical issues associated with the excavation against No.1100 and 1110 Barrenjoey Rd are resolved.
- An appropriate engineering design and a construction methodology must be developed, and both must be subject to an independent peer review, prior to lodgement for Construction Certificate.

A Deferred Commencement Condition will provide for the following:

- NBC will have a mechanism for ensuring implementation of (i) adequate geotechnical assessment (ie, further investigations, and updating of current reporting) and (ii) appropriate engineering design and controls;
- a mechanism for an independent review by suitably qualified and experienced geotechnical and structural engineering professionals; and
- consent can then be determined prior to release of the DA for progress to a Construction Certificate.

## 5.0 CLOSURE

Don't hesitate to contact EI if you require further information or assistance at this time.

For and on behalf of,

### **EI AUSTRALIA**

Author



### **Warwick Davies**

Principal Geotechnical Engineer

### Attachments:

1. Abridged List from Updated JK Report
2. Sydney Water Sewer DBYD Map, and extract, 10/4/2024

**Attachment 1 – Abridged Review Comments from Updated JK Report**  
 ref: 33618YJrptrev4C, dated 22 March 2024

**A1 Extract from 1.0, page 1**

Comment 1

Comment 2

*"The new building and garage will be cut into the existing hillside. Over the front or western side of the site the basement will have a finished floor level of RL-0.65m, or an assumed bulk excavation level of RL-1m, that will extend to the eastern, southern and western site boundaries and to within about 0.5m of the northern site boundary. At the eastern edge the excavation steps up to a proposed terrace with a finished floor level of RL6.55m. Excavation will require cuts to a maximum depth of about 12.5m. While maximum excavation depths are anticipated to be in the order of about 12.5m, excavation to these depths is over a relatively minor portion of the eastern portion of the site with the majority of the excavation occurring over the western portion of the site and limited to a depth of about 4m. The proposed excavation will remove the existing retaining structures and along the southern site boundary the sandstone boulders that are present will be trimmed back to the extent that they protrude into the building footprint".*

Comment 3

Comment 4

Comment 5

<p><b>Comment 1</b></p>	<p>This does not tell the full picture. The basement level has been lowered to RL-0.65 over the <u>entire basement footprint</u>, not just the front/western side.</p>
<p><b>Comment 2</b></p>	<p>This statement is <u>entirely in error</u>. Refer to <b>2.0 Design Changes</b> for the correct explanation of the new design for the excavation at the 'eastern edge'. There is <u>no terrace</u> in the new excavation profile.</p>
<p><b>Comment 3</b></p>	<p>This statement is <u>entirely in error</u>. The approx. 12.5m maximum depth of excavation extends along the whole length (about 43m) of the eastern side of the basement footprint, (ie on the eastern boundary of 1102), in one continuous face. <u>This is far from 'relatively minor'</u>.</p> <p>JK do not explain how the 'eastern portion of the site' is defined. EI assumes this would be logically taken to mean the proportion of the basement excavation east from the face of the existing pile support wall indicated in Section D-D' on Figure 5 of their updated report.</p> <p>This 12.5m deep excavation continues ('returns') around the rear SE and NE corners of the basement to run westwards for about 6.5m length along the southern and northern sides of the basement, to the existing pile wall. Over these 'return' sections, the excavation depths on both sides reduce to approx. 8.5m depth, averaging about 10.5m depth over these shorter 'return' lengths.</p> <p>EI's calculation determines the following proportions of the excavation faces around the basement perimeter:-</p> <ul style="list-style-type: none"> <li>• &gt;4m depth of excavation (ie, actually &gt;8.5m excavation) .... 42% of total 134m perimeter length</li> <li>• 4m depth of excavation ..... 58% of total 134m perimeter length</li> <li>• 12.5m depth of excavation ..... 77% of the 'eastern portion of the site'</li> </ul> <p>Excavation amounting to 42% of the total basement perimeter length, to depths greater than 8.5m, including up to the maximum depth 'in the order of about 12.5m', actually comprises 100% of the 43m long eastern side of the basement footprint, and at 77% could hardly be described as a 'relatively minor portion of the eastern portion of the site'.</p>
<p><b>Comment 4</b></p>	<p>EI's calculation determines the following proportions of the excavation faces around the basement perimeter:-</p> <ul style="list-style-type: none"> <li>• &gt;4m depth of excavation (ie, actually &gt;8.5m excavation) .... 65% of total 900m<sup>2</sup> of excavation face area</li> <li>• 4m depth of excavation ..... 35% of total 900m<sup>2</sup> of excavation face area</li> </ul> <p>The majority of the excavation <u>actually occurs over the eastern portion of the site</u>, not the western portion, and is in excess of 8.5m depth.</p>
<p><b>Comment 5</b></p>	<p>This statement is <u>entirely in error</u>.</p> <p>'... trimmed back to the extent that they protrude into the building footprint' is a completely erroneous statement by JK to explain that, in reality, the Upper Sandstone Boulder B1, and Large (Lower) Sandstone Boulder B2 are to be excavated back to the boundary (not to the 'building footprint'), ie, to the extent required to construct the basement excavation to its new design footprint on the southern side against 1100 Barrenjoey Rd.</p> <p>The reality of the boulder interference from the proposed basement excavation is demonstrated on the Sections A-A', B-B' and C-C' in JK's Figure 4.</p>

## **A2 Risk Assessment (5.3), page 14**

EI would agree entirely with JK's short 'dissertation' in the first two paragraphs.

In the context of '....*reducing risk as far as possible*', as is required for the Pittwater Risk Management Policy, in EI's opinion, this would sensibly include determining robust engineering controls for the Conditions of Consent, if consent was to be granted.

As stated in our previous submissions to NBC for the development on this property (refer **1.0 Introduction / Background** in the body of the above supplementary submission, and particularly the last bullet point), EI consider the Conditions should include a mechanism for ensuring the engineering design and construction methodology are determined sufficiently prior to an approval to proceed with construction (ie, prior to issue of a Construction Certificate).

In EI's opinion, given the uncertainty around geotechnical risk in regard to the temporary excavation support on the property boundaries, in particular 1100 Barrenjoey Rd, this robustness must include NBC maintaining a regulatory control under the DA consent until it is satisfied a Construction Certificate could be issued. Such control would be facilitated by:

- an independent peer review of the engineering design and construction methodology, undertaken by a suitably qualified third-party geotechnical practitioner with appropriate landslide/LRA experience, and
- a Deferred Commencement Condition at the DA approval stage.

At the third paragraph on page 15, JK recommend: " .... *the D.F. Dickson reports ..... are obtained so that our assessment of the likelihood of instability .... can be confirmed*". This was previously noted and recommended in the geotechnical submissions to NBC at earlier DA stages, and remains to be (and should be) locked in via the consent conditions.

In EI's opinion, the above, *inter alia*, are important controls within the framework of the JK Risk Assessment in achieving 'Acceptable Risk Management' in accordance with the Pittwater Risk Management Policy.

## **A3 Response to the Comments Raised by EI Australia (9.2)**

EI broadly, and specifically in some instances, disagrees with the responses prepared by JK under this heading. However, EI notes some matters are worthy of a response, being pertinent to the geotechnical issues under evaluation in this supplementary submission.

[page 35, starting last line on the page]

- " ..... *it is almost inconceivable that it [the house] would be damaged. This may not be the same for the sewer*". (EI's emphasis).

EI acknowledge the vulnerability of the Sydney Water sewer, but do not include that in their risk assessment for the DA.

[page 36, second last paragraph and following]

JK's comments are provided on "*environmental risk*".

- " ..... *medium to high risk that eiaustralia [sic] have assessed the boulders to pose*".

The suggestion that environmental risk is important as far as potential consequences are concerned for the community, interested parties or adjoining land owners, due to the proposed excavation on 1102 Barrenjoey Rd, is entirely valid. That is the intended 'message' from the section "Environmental Risk" in the Davies Geotechnical (DG) submission to the PLPP dated 13 February 2023.

The writer agrees that he is not an environmental specialist and doesn't claim to be one.

In fairness however, EI notes the clear link, purposefully made, with environmental issues via NBC's proposed Condition 37 (at that time), in the second paragraph under the DG heading "Environmental Risk".

In developing a suggested approach using the AGS risk assessment methodology, DG state that the AGS risk matrix could be modified in regard to 'consequences to property'. DG then provide an example of how a matrix approach for determining a risk outcome might work for an environmental event or problem (ie an environmental 'hazard'). The working through the example illustrates a process rather than a conclusive environmental risk outcome.

[page 36, last paragraph]

- "*To simply [sic] assume that this matrix can then be directly applied to 'environmental risk' shows a misunderstanding of the application of the AGS methodology*". (EI's emphasis).

As per explanation immediately above, and regardless of JK's claim, DG made no such assumption.

As far as "... misunderstanding of the application of the AGS methodology" is concerned, we reject this assertion completely. That is a naïve statement.

[page 37, first line]

- "*This is clearly a flawed assumption as nowhere has it been stated that excavation would be completed in an uncontrolled manner*". (EI's emphasis).

EI assumes that JK are defending their report here to the extent they have not stated that excavation would be completed in an uncontrolled manner. They don't need to defend their position on that. However, to frame the issue from a different perspective, it is also the case that nowhere in their report do JK provide any certainty that a properly controlled excavation (either in design or construction) is assured or certain.

EI completely reject the notion that the DG assumption is flawed. DG have made that assumption as a 'what-if' case or an example (refer above), "*should the hazard occur*". This is a normal part of a risk assessment methodology, if only to 'test' the risk outcome and assumptions made.

#### **A4** Appendix D, Proposed Construction Methodology, 33618Ylet2rev4, dated 26 June 2023.

Some brief comments are supplied below from a limited review of the Appendix D.

- The document is a revamp of an earlier JK letter 33618Ylet2rev3 dated 31 January 2023. There is only minimal additional content in the current update compared with the previous version.
- Commentary on the 31 January 2023 JK letter was provided in EI's Submission to PLPP ref: P21153.02rev1 dated 13 February 2023. That commentary remains valid in the current review and this supplementary submission above.
- The first line at 1.0 Introduction states the basement FFL to be RL-0.615m. This is in error. The value for the amended design is RL-0.65m.
- Hold Points are basically hidden in the text. They must be highlighted or reconstituted in a more prominent form.
- A Dilapidation Survey of the existing development on 1100 Barrenjoey Rd must include an accurate survey of the physical features of the boulders and the Sydney Water sewer line, including a CCTV inspection record of the sewer over at least the length from the rear SE corner to the front SW corner of 1102.

- There are no requirements for a baseline survey to establish a monitoring regime for the boulders on 1100 Barrenjoey Rd during and following the basement excavation.

The Appendix D has not been sighted until received for review in the NBC bundle on 28 March 2024. Sufficient time has not been available to undertake more than a quick read/review for this supplementary submission.

A thorough detailed review is recommended if the proposed construction methodology is to be used or incorporated into any Conditions of Consent.

**Attachment 2** - Sydney Water Sewer DBYD Map, and extract, 10/4/2024

(2 pages following)

