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**Sent:** 9/10/2021 5:05:56 PM

**Subject:** WRITTEN SUBMISSION: LETTER OF OBJECTION 231 Whale Beach Road  
Whale Beach 2107 REV 2021/0034

**Attachments:** Hof WS 231 Review copy.pdf;

**SUBMISSION: HOFBAUER**  
a written submission by way of further objection to REV 2021/0034

Section 8.2(1A) Review of Determination

**Mr Danny Hofbauer**  
**198 Whale Beach Road**  
**Whale Beach**  
**NSW 2107**

**9 October 2021**

**Chief Executive Officer**  
**Northern Beaches Council**  
**725 Pittwater Road**  
**Dee Why**  
**NSW 2099**

**Northern Beaches Council**  
[council@northernbeaches.nsw.gov.au](mailto:council@northernbeaches.nsw.gov.au)

**Dear Chief Executive Officer,**

**Re: WRITTEN SUBMISSION: LETTER OF OBJECTION**

**231 Whale Beach Road Whale Beach 2107**  
**REV 2021/0034**

**Section 8.2(1A) Review of Determination - Review of Determination of Application DA2020/0442 for demolition works and construction of a Mixed-Use Development comprising Shop Top Housing and retail premises, with associated carparking, landscaping and strata subdivision**

This document is a written submission by way of objection lodged under Section 4.15 of the EPAA 1979 [the EPA Act].

We refer to our Submission dated 17 September 2021. Following amended plan submission, we add further concern regarding the traffic engineering.

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### SECTION 1: EXECUTIVE SUMMARY

Our property is immediately to the east of the subject site. We look across the subject site for our views to the beach and ocean, and to the very important beach/water interface.

We have carefully considered the Section 8.2(1A) Review of Determination Application and ask that Amended Plans are submitted to resolve our outstanding concerns. Equitable preservation of views has not been achieved.

This Written Submission asks Council to request that the Applicant submits Amended Plans to resolve the matters raised within this Submission, and failing a comprehensive set of amendments undertaken by the Applicant as identified within this Submission, to ask the Applicant to withdraw the DA, or if that is not forthcoming, to **REFUSE** this DA.

We are being assisted by a very senior experienced consultant assisting us in the preparation of this Written Submission.

If any Amended Plan Submission is made by the Applicant, and re-notification is waived by Council, we ask Council to inform us immediately of those amended plans, so that we can inspect those drawings on Council website.

The bulk and design of the proposed works are not compatible with neighbouring development and will be a negative contribution to the scenic amenity of the area when viewed from surrounding viewpoints, particularly our property.

The proposal is contrary to the relevant requirement(s) of SEPP 65, the LEP and DCP, including the height development standard. The proposal will result in a bulk and scale that fails to transition to the surrounding low density residential area and will result in unreasonable impacts on neighbouring amenity. The proposal will create an undesirable precedent for NBC and be contrary to the expectations of the community. As such, the proposal is not in the public interest.

This Written Submission addresses our objection to the above development.

We want to emphasise the fact that we take no pleasure in objecting to our neighbour's DA.

We are objecting because the proposed DA has a very poor impact on the amenity of our property, and the urban design particularly in the catchment area, and this is caused by the DA being non-compliant to multiple controls.

If the DA was fully compliant to all controls our amenity loss would be more reasonable.

It does seem unreasonable that the Applicant wishes to remove our amenity to improve his own, and is proposing a catalogue of non-compliant outcomes that would seriously adversely affect our amenity.

In this Submission we ask for Amended Plans to be submitted to achieve the following:

1. Lower the entire built form by 1m. Proposed south-east corner of the roof, sits adjacent to the RL 17.0 Contour. Reduce the Roof Parapet to RL 25.5 to maintain 8.5m building height. Alternatively remove the non-compliant zone above 8.5m building height by greater terracing and a reduced upper level floor plate.
2. Plant Enclosure to have full dimensions and heights shown. Reduce volume to simply cover exhausts and lift over-runs. Minimalise the roof feature to the absolute volume.
3. Roof to be pebbles, rather than exposed membrane.
4. PV Panels to be laid flat on roof and height to be kept below parapet.
5. Glazed Roof height to be kept below parapet.
6. Acoustic treatment to Roof Plant: Car-park and kitchen exhausts to have Fan Silencers, Acoustic Blankets and other Acoustic devices to reduce noise. Update Acoustic report.
7. Delete all landscaping above 2m high at maturity in side setback zones
8. Provision of an additional 8 car parking spaces, on site loading dock, 1.5m footpath in Surf Road, and controls to ensure there is 'no stopping' along Whale Beach Road in this section of the street, to avoid illegal parking
9. Reduce trading hours
10. Height Poles to be erected to test the view loss from the 8.5m height outcome within item 1

## **SECTION 2: SECTION 8.2(1A) REVIEW OF DETERMINATION**

It is very important for any assessment by Council to commence with Council's Assessment Report and NBLPP's reasons for refusal.

We contend there are still insufficient amendments to the proposals to warrant an approval.

- The height of the proposed development at the upper level remains at RL 26.45. View sharing is a significant concern. Excessive overshadowing and visual bulk remain.

- The building height is 9.5m at the south-east corner of the upper level. View sharing is a significant concern. Excessive overshadowing and visual bulk remain.
- The eastern extent of the roof is at the same location. View sharing is a significant concern. Excessive overshadowing and visual bulk remain.
- The neighbouring dwelling to the south at 229 Whale Beach Road has a top of wall at RL 24.00, being 2.45m below the wall height of the proposed development. The proposed development creates a jarring outcome to the neighbouring building.
- The size, mass, bulk and scale of the proposed development does not reflect the objectives and outcomes envisaged by the planning controls on a sloping site, adjacent Whale Beach and surrounding by detached dwelling houses that remain set well below the proposed development by up to a storey height.
- The proposed development fails to achieve the visual and scenic quality outcomes embodied in the planning controls for sloping coastal sites in a low-density residential setting and one that provides better protection of amenity and visual sensitivity to adjoining properties.

Unfortunately, nothing much has altered on the DA refused by NBLPP. There has been very little adjustment to the bulk and scale of the building. Equitable preservation of views has not been achieved.

We contend that there are a series of modifications that might make the proposal more compliant to controls, and warrant consideration of consent. However, without a further re-submission of amended plans, we contend the DA must be once again REFUSED.

In the original DA, the Assessment Report the Executive Summary stated:

*The application is recommended for refusal because having regard to the design and character requirements embodied in the applicable planning controls including the requirements of SEPP 65 and considering the site's prominent beach site location, the proposal is not considered to be an appropriate or suitable response in its current form. Further, the assessment of the proposal against the provisions of P21 DCP, which establishes how successfully the development harmonises with the established and desired future character of the locality has identified that the development, as proposed, is not a successful built form in terms of how it relates to the desirable elements of the neighbourhood or how it transitions the increase in density with the low density residential locality.*

*The bulk and scale of the structure has not been successfully resolved and is ultimately considered to be inconsistent with the character and context of the locality.*

*On balance, the proposal (as lodged) is not sufficiently consistent with the applicable controls and the development will result in a size, mass, bulk and scale of development that does not reflect the objectives and outcomes envisaged by the planning controls on a sloping site, adjacent Whale Beach and surrounding by detached dwelling houses. The design should be more stepped on the site, with greater levels of terracing of the upper levels to better relate to the hillside topography in the area and greater side setbacks to alleviate and ameliorate the sheer bulk and scale of the building.*

*Therefore, it is recommended that substantial amendments be carried out to the built form to address these concerns prior to any approval being given to the proposal.*

*Accordingly, the assessment concludes that proposal cannot be supported in its current form and is recommended for refusal.*

In the original DA, the Assessment Report stated within the Conclusion:

*.....the excessive size, mass, bulk and scale of the building as lodged, unfortunately does not sufficiently satisfy the applicable controls. An amended scheme which addresses these issues should be explored and progressed, one which better achieves the visual and scenic quality outcomes embodied in the planning controls for sloping coastal sites in a low-density residential setting and one that provides better protection of amenity and visual sensitivity to adjoining properties.*

The excessive size, mass, bulk and scale of the proposed building within the Amended Plan submission subject to this Review DA, has not materially altered and the protection of amenity and visual sensitivity to adjoining properties has not been addressed, with the same height and eastern projection well above the 8.5m control.

On 12 December 2020, NBLPP refused DA 2020/0442 for the following reasons:

- 1. Pursuant to Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of State Environmental Planning Policy 65 - Design Quality of Residential Flat Development and its associated Apartment Design Guide.*
- 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 7.7 Geotechnical hazards of the Pittwater Local Environmental Plan 2014.*
- 3. Pursuant to Section 4.15(1)(c) of the Environmental Planning and Assessment Act 1979, the proposed development is not consistent with the Desired Future Character of the location and is an over-development of the site.*
- 4. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause C1.3 View Sharing of the Pittwater 21 Development Control Plan.*
- 5. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause D12.1 Character as viewed from a public place of the Pittwater 21 Development Control Plan.*
- 6. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause D12.6 Side and rear building line of the Pittwater 21 Development Control Plan.*
- 7. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause D12.14 Scenic Protection Category One Areas of the Pittwater 21 Development Control Plan.*

### SECTION 3: OUR MAIN CONCERNS

We have a number of ongoing concerns relating to what is a very nominal reduction to the proposed development envelope compared to that which was refused by NBLPP.

#### 1. MISREPRESENTATION OF HEIGHT

We are disturbed to find a misrepresentation of Heights of Buildings with the *envelope blankets* clearly not aligning with the Registered Surveyors spot levels on the survey.

The Building Height is 9.5m, representing a 12% non-compliance to the 8.5m height. No variation has been sort under Clause 4.6.

The building height exceeds 8.5m, and there is no Clause 4.6 submitted to support this significant non-compliance. Council has no power to grant consent under the Act.

The south-east corner of the Level 4 is positioned well above the 8.5m building height, contrary to the Applicants drawings. The excessive height extends along the southern boundary at Level 4 by up to 8m in length, and extends across the entire eastern 16m edge of the proposed roof.

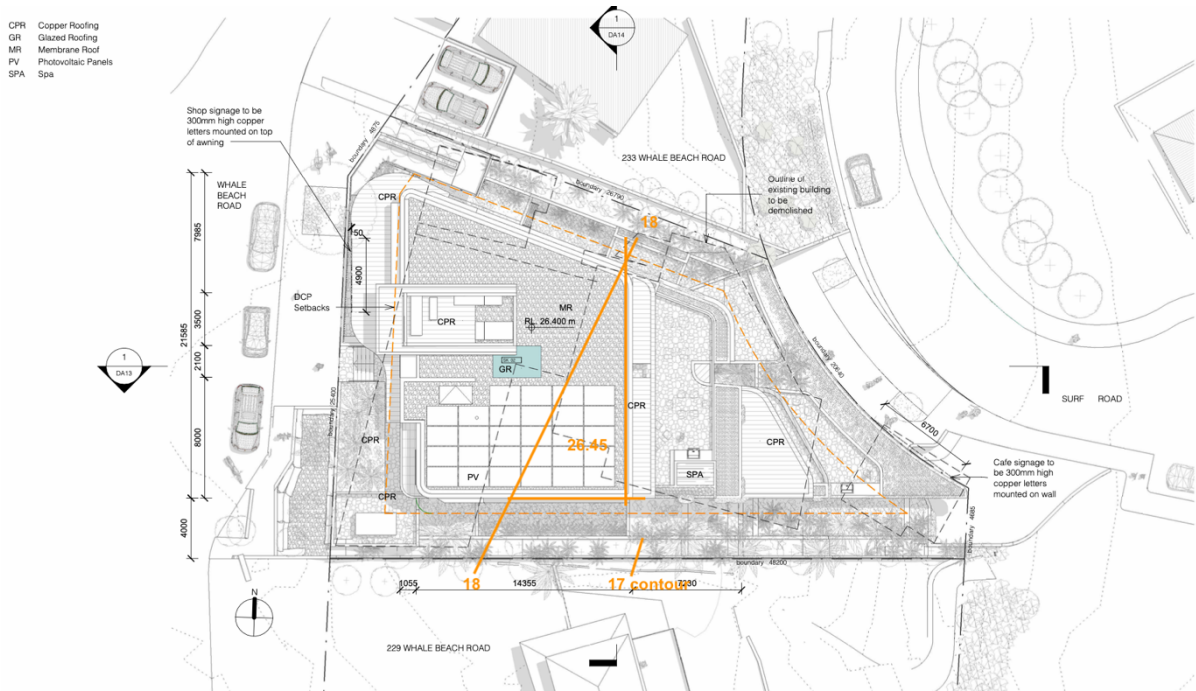
The Registered Surveyors drawings show the 17m contour and a multitude of spot levels between 17m and 18m along the proposed development's southern flank.

The Applicants Height Blanket drawings are unfortunately false and misleading.

The excessive roof zone above 8.5m is a triangular section covering an area of c 65sqm of the south-east corner of Level 4. It is this zone that we contend is unacceptable.

We contend that the excessive height above 8.5m is not 'minor' and **fails LEP 4.3 2D [a]**, and fails the objectives **LEP 4.3 [1] [a] desired character of locality, [b] compatible with neighbours, [c] overshadowing, and [d] view.**

We refer Council and the NBLPP to a recent REFUSAL in May 2021 by the NBLPP on **DA 2020 1136 at 13 Pacific Road Palm Beach**. In that refusal NBLPP refused the DA for very similar reasons, in that *the excessive height above 8.5m is not 'minor' and fails LEP 4.3 2D [a], and fails the objectives LEP 4.3 [1] [a] desired character of locality, [b] compatible with neighbours, [c] overshadowing, and [d] view.*



*Marked-up Roof Plan: Zone in excess of 8.5m building height: the excessive height above 8.5m is not 'minor' and fails LEP 4.3 2D [a], and fails the objectives LEP 4.3 [1] [a] desired character of locality, [b] compatible with neighbours, [c] overshadowing, and [d] view.*

## 2. VIEW SHARING

We are concerned that the proposed height is well above 8.5m to the south-east corner of the upper level. This excessive height is being proposed where currently little built form exists. The top of roof of the existing building on the subject site to the west of this zone is at RL 23.83. The proposed building in this zone is at RL 26.45, being 2.62m higher than the leading edge of the western building on the subject site. The proposed building is 560mm-630mm higher than the existing eastern roof height on the subject site. The proposed roof at RL 26.45 is well above the 8.5m building height. View will be lost. We discuss this matter in greater detail below.

## 3. TRAFFIC ENGINEERING

Council's Traffic Engineer had previously reviewed the proposed development in the initial assessment, and had raised concerns in relation to number of issues relating to traffic impacts. Based on Council's Traffic Engineer's assessment, the concerns raised in this regard were concurred with and were included as reasons for refusal.



There already is traffic and parking problems created by the retail offering at 231 Whale Beach Road. The existing competition for street parking is so great that customers for the Boat House Cafe currently park in my driveway, the Bus Zone and at times double park creating dangerous traffic hazards. If the DA is approved without addressing this problem the situation can only get worse due to the proposed increase in retail.

I find it difficult to accept that there will be enough parking for the new apartment owners and their visitors, let alone the customers of the new retail offerings. There is little doubt there will not be any spare public spaces available in summer.

The carparking will be worse than the existing situation in Whale Beach Road.

In Surf Road, which is a much narrower roadway, the conditions will become dangerous with passengers jumping out of vehicles to place take away orders as they do now right outside my residence, because customers simply cannot obtain a parking spot.

It is obvious that people will not drive down to the beach to look for a paid parking space in the beach car park, and if they are extremely lucky to find one in summer, then hike back up Surf Road to buy take away.

Council must consider the practicality of how the new non-residential uses will operate, and be extremely concerned about public safety of increased usage and foot traffic caused by the proposed development.

There is effectively no parking for the non-residential uses, no loading dock, no access for any trucks of any size within the development, and no consideration of even providing a 1.5m wide footpath in Surf Road, despite the obvious safety concerns.

We ask Council to consider the Traffic & Parking Impacts carefully:

- We are very concerned that there is shortfall by 8 spaces with the Council's Development Control Plan requirements for retail car parking provision. The PDCP control requires 22 spaces. There are only 14 spaces now being offered, with a considerable shortfall of 8 spaces
- We are very concerned that there no loading dock inside the property, nor any access suitable for trucks of any size. The Indented Bay requires unsafe entry.
- We are very concerned that the 1.5m Footpath zone to Surf Road has not been provided.

For these reasons the DA must be refused.

#### **4. TRADING HOURS: NOISE**

We are also concerned with the possible noise issue which will be brought about by additional retail space if the DA is approved. Presently the existing Café closes by 3:00 pm. We fear that if there are no restrictions of trading hours placed on the proposed non-residential uses would create a serious noise problem that would affect the whole suburb. We suggest a closing time for all non-residential uses at 6:00pm.

## 5. DESIGN OF ROOF

We contend that the proposed roof finish is inappropriate considering the vast number of neighbours that will look down onto the roof. We contend that a river pebble finish would be preferable.

There are no dimensions or levels on the plant enclosure. We ask that any excessive bulk be removed other than to simply cover the two exhausts as this element significantly contributes to view loss.

There is a lack of clarity on the PV Panels. We ask that they lie flat, and no higher than the parapet.

There is a lack of clarity on the Glazed Roof. We ask that the roof is flat, and no higher than the parapet.

There is incomplete consideration on acoustic treatment to the roof exhausts. We ask for greater clarity that maximum consideration is given to Fan Silencers, Acoustic Blankets and other acoustic devices to reduce noise, and for the exhausts to face east.

## SECTION 4: VIEW SHARING

We are concerned that the proposed height is well above 8.5m to the south-east corner of the upper level. This excessive height is being proposed where currently little built form exists. The top of roof of the existing building on the subject site to the east of this zone is at RL 23.83. The proposed building in this zone is at RL 26.45, being 2.62m higher than the leading edge of the western building on the subject site. The proposed roof at RL 26.45 is well above the 8.5m building height. View will be lost. We discuss this matter in greater detail below.

**In Tenacity, [Tenacity Consulting v Warringah Council 2004]**, NSW LEC considered Views. Tenacity suggest that Council should consider:

*“A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable.”*

The development breaches multiple planning controls and is unreasonable.

## Recent NBC & NSWLEC Refusals on View Loss

We bring to Council attention two recent refusals by Council on view loss: DA 2020/1338 & DA 2019/0380. Although no two DA are ever the same, we ask Council to consider these matters.

### DA 2020/1338

We bring to the attention of Council a recent refusal by NBC DDP on 24 March 2021, following a Refusal Recommendation of NBC Development Assessment Manager, by NBC Reporting Manager Anna Williams, a very senior and highly experienced NBC Planning Officer, and the NBC Responsible Officer Rebecca Englund, a very senior NBC Planning Officer, that Council as the consent authority refuses Development Consent to **DA2020/1338** for Alterations and additions to a dwelling house on land at Lot 63 DP 8075, **55 Bower Street, Manly**, subject to the conditions that were outlined in the Assessment Report.

The assessment of DA 2020/1338 involved a consideration of a view loss arising from a proposed development that presented a non-compliant envelope to LEP and DCP controls.

The DDP agreed with the recommendation and refused this DA.

The DDP Panel that refused this DA were three of the most senior DDP members: Peter Robinson Executive Manager Development Assessment, Lashta Haidari Manager Development Assessment, and Liza Cordoba Manager Strategic & Place Planning

The Assessment Report found that:

*'the impact associated with the non-compliant built form, specifically the proposed upper floor, is unreasonable and the objectives of the relevant standards and controls are not achieved.'*

The Assessment Report within the Tenacity Assessment concluded:

*Whilst the level of impact is categorised as moderate at worst, the impact would be reduced with a compliant or near compliant design.*

*There is also a question as to whether a more skilful design could reduce the level of impact for adjoining properties.....that a more skilful design could lessen the impact.*

*The proposal is also considered to be inconsistent with the requirements of this control, which require views between buildings to be maximised, in addition to those objectives that seeks to provide for view sharing between properties and to maximise disruption and loss of views."*

The DA was recommended for refusal, and DDP refused the DA in full support of the NBC Reporting Manager and NBC Responsible Officer Assessment Report.

We contend that this DA Refusal by the DDP sets a benchmark of the custom and practice of Council in consideration of all view loss concerns.

The severity of the view loss that was considered unacceptable by the DDP was clearly stated by the DDP. This level of view loss was considered as 'moderate' by the assessing officers and the DDP. The photographs are shown from page 156 of the DDP Agenda, 24 March 2021.

We contend our view loss is of a similar severity.

### **DA 2019/0380**

Council will be aware of a recent 2021 NSWLEC Appeal that was dismissed by a very senior Commissioner on a view loss consideration: DA 2019/0380, 72 Carrington Parade, Curl Curl: **Der Sarkissian v Northern Beaches Council [2021] NSWLEC 1041**

We raise the refusal by Council of the DA, and the subsequent dismissal by NSWLEC of the Applicant's appeal.

Council's Planning Officer was exemplary in this matter, not only defending an unreasonable DA with a recommendation for refusal that would cause a severe view loss to neighbours, but also presenting the case at NSWLEC, that ultimately had the Court dismiss the Applicant's Appeal by a very senior NSWLEC Commissioner. The key issues:

- The main view loss concern was to a neighbour immediately behind 72 Carrington Parade, Curl Curl.
- The view loss involved envelope controls.
- The view loss at Curl Curl was severe

The key matters within the Commissioner's Conclusion:

- *the determinative issue in this case is view loss*
- *the proposal would significantly change the amenity enjoyed for the worse.*
- *both policy controls and view sharing principles suggest the proposal goes too far.*
- *proposal attempts to achieves too much on a constrained site.*
- *a reasonable development at the upper level in regard to view sharing and setback policy,*
- *with good design, there is scope for this to occur while also providing for reasonable floor space on this level.*

It is clear that our view loss occurs through a poor consideration on building height, and envelope non-compliances.

Our commentary on this Review DA is very similar to Commissioner Walsh in **Der Sarkissian v Northern Beaches Council [2021] NSWLEC 1041**

- the determining issue in this case is view loss – in our case a moderate land/water interface view loss
- the proposal would significantly change the amenity enjoyed for the worse.
- policy controls of building height, envelope non-compliances and view sharing principles suggest the proposal goes too far.
- proposal attempts to achieve too much on a sensitive site.

- a reasonable development in regard to view sharing would share the view
- with good design, there is scope for view sharing to occur while also providing for reasonable floor space on all levels

The Applicant has provided inadequate information on impact on views. We contend the view over the non-compliant south-east roof zones, will unreasonably take out views to the south-east of the beach, ocean and interface zones, that are not adequately addressed within the applicant's assessment.

The Architect's Montages has not used a 50mm focal length on the montages that have been provided, to ensure that the images that are presented are '*as the eye sees*'.

A photography standard that is convention for visual impact assessment consists of a 50mm focal length, and height of 1.6 metres consistent with the approach set out in the NSW Land and Environment Court standards for photomontages. This has not been used.

The Architect's Montages have used an extremely distorted zoomed out focal length, and this creates an impression that the building is positioned at a considerable distance to the view point. This is misleading.

We ask that Council request that the Applicant forward to Council 50mm focal length montages, and focused on the south-eastern wing of the proposed development. These montages to be uploaded to Council DA Webpage as soon as possible.

We contend that the erection of **height poles would be significantly preferable**, as we have little faith in the Montages that have not been prepared using NSWLEC standards, and the location of each Montage is very selective. The Montages have not selected the locations from our highly used rooms and entertainment deck zones. Photography of the view has not been used.

We contend that the view loss is '**moderate**', and is equal to the view loss as defined within the refusal on DA 2020/1338.

The Applicant should be requested to erect height poles indicating the building envelope and Council should undertake its own site visit. We would be happy to then take a series of photographs from all our highly used rooms to consider the matter, and pass these directly to Council by way of a further submission. The proposed development is non-compliant to controls, and it is essential that height poles are erected, unless of course Council refuse the DA on a multitude of other grounds.

There is no reasonable sharing of views amongst dwellings. Equitable preservation of views has not been achieved.

The new development is not designed to achieve a reasonable sharing of views available from surrounding and nearby properties.

The proposal has not demonstrated that view sharing is achieved through the application of the Land and Environment Court's planning principles for view sharing.

The development breaches multiple planning controls and is unreasonable.

The impact on views arises as a result of non-compliance with one or more planning controls, and the moderate impact is considered unreasonable.

### **Application of Tenacity planning principle**

We are concerned that no adequate consideration of view impact from our property.

The views lost are views to the water, the beach, and the water/beach interface.

A preliminary analysis and assessment in relation to the planning principle of Roseth SC of the Land and Environment Court of New South Wales in *Tenacity Consulting v Warringah [2004] NSWLEC 140 - Principles of view sharing: the impact on neighbours (Tenacity)* is made, however we have no confidence that the assessment is accurate due to the absence of height poles.

We ask for height poles to be positioned so that a full assessment can be made.

The steps in Tenacity are sequential and conditional in some cases, meaning that proceeding to further steps may not be required if the conditions for satisfying the preceding threshold is not met.

### **Step 1 Views to be affected**

The first step quoted from the judgement in *Tenacity* is as follows:

*The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

Prior to undertaking Step 1 however, an initial threshold in Tenacity is whether a proposed development takes away part of the view and enjoys it for its own benefit and would therefore seek to share the view. In our opinion the threshold test to proceed to Step 1, we provide the following analysis;

An arc of view to the east is available when standing at a central location on the elevated decks, living spaces, and other highly used zones on our property.

The composition of the arc is constrained to the east either side of the subject site, by built forms and landscape.

The central part of the composition includes the subject site.

Views include scenic and valued features as defined in Tenacity.

The proposed development will take away views for its own benefit.

The view from our living zones and decks towards the water view, and the land-water interface.

The existing view is a 'moving landscape', rather than just a 'scenic outlook', given the activity on the water. The extent of view loss is **moderate**, and the features lost are considered to be valued as identified in Step 1 of *Tenacity*.

## **Step 2: From where are views available?**

This step considers from where the affected views are available in relation to the orientation of the building to its land and to the view in question. The second step, quoted, is as follows:

*The second step is to consider from what part of the property the views are obtained. For example, the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.*

The views in all cases are available across the front and rear boundary of the subject site from standing [1.6m] and seated [1.2m] positions.

An arc of view to the east is available when standing at a central location on the elevated decks, living spaces, and other highly used zones on our property. Our combined living area, home office, dining area, kitchen and outdoor living room is on the one floor.

In this respect we make two points:

- We have no readily obtainable mechanism to reinstate the impacted views from our living zones if the development as proposed proceeds; and
- All of the properties in the locality rely on views over adjacent buildings for their outlook, aspect and views towards the water view

## **Step 3: Extent of impact**

The next step in the principle is to assess the extent of impact, considering the whole of the property and the locations from which the view loss occurs.

Step 3 as quoted is:

*The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*

Step 3 also contains a threshold test. If the extent of impact is negligible or minor for example, there may be no justification for proceeding to Step 4, because the threshold for proceeding to considering the reasonableness of the proposed development may not be met. In that case the reasonableness question in Step 4 does not need to be asked and the planning principle has no more work to do.

We consider the extent of view loss in relation to our living room zones to be **moderate** using the qualitative scale adopted in *Tenacity*.

The view lost includes water views and land-water interface. As we rate the extent of view loss as moderate in our opinion the threshold to proceed to Step 4 of *Tenacity* is met.

#### **Step 4: Reasonableness**

The planning principle states that consideration should be given to the causes of the visual impact and whether they are reasonable in the circumstances.

Step 4 is quoted below:

*The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.*

As the proposed development does not comply with outcomes and controls, that are the most relevant to visual impacts, greater weight would be attributed to the effects caused.

In our opinion the extent of view loss considered to be **moderate**, in relation to the views from our living rooms and living room deck of our dwelling, particularly to the east. The view is from a location from which it would be reasonable to expect that the existing view, particularly of the water could be retained especially in the context of a development that does not comply with outcomes and controls.

Once Templates are erected, we can provide additional commentary.

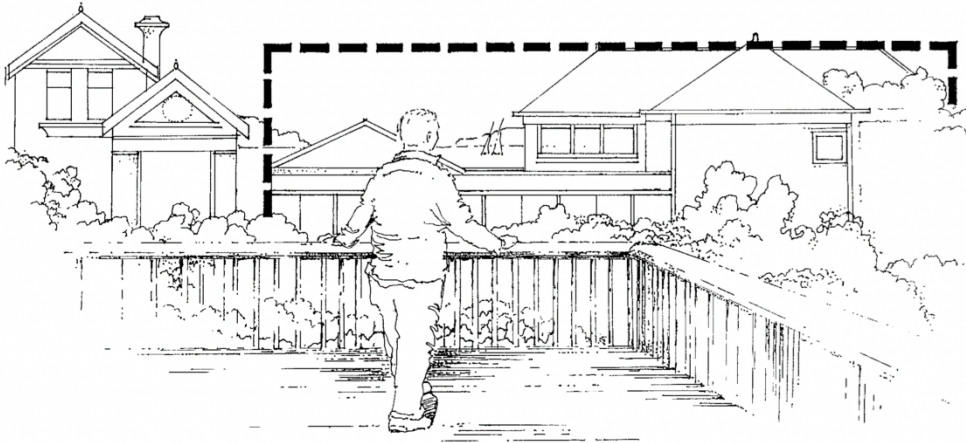
The private domain visual catchment is an arc to the east from which views will be affected as a result of the construction of the proposed development.

The proposed development will create view loss in relation to our property.

The views most affected are from living areas and associated terraces and include very high scenic and highly valued features as defined in *Tenacity*.



Having applied the tests in the Tenacity planning principle and without height poles erected, we conclude that we would be exposed to a moderate view loss.



**Where there is a potential view loss, Council could require a maximum building height of less than 8.5m for part of the building.**

The non-compliance with planning outcomes and controls of the proposed development cause this loss.

Having considered the visual effects of the proposed development envelope, the extent of view loss caused would be unreasonable and unacceptable.

As noted by his Honour, Justice Moore of the Court in **Rebel MH Neutral Bay Pty Ltd v North Sydney Council [2018] NSWLEC 191 (Rebel)**, *“the concept of sharing of views does not mean, for the reasons earlier explained, the creation of expansive and attractive views for a new development at the expense of removal of portion of a pleasant outlook from an existing development. This cannot be regarded as “sharing” for the purposes of justifying the permitting of a non-compliant development when the impact of a compliant development would significantly moderate the impact on a potentially affected view”*.

The same unreasonable scenario in Rebel applies to the current DA. The proposed breaching development will take away views from our property (and possibly other adjoining properties) to the considerable benefit of the future occupants of the proposed dwelling. This scenario is not consistent with the principle of View Sharing enunciated by his Honour, Justice Moore in Rebel. The adverse View Loss from our property is one of the negative environmental consequences of the proposed development

The proposed development cannot be supported on visual impacts grounds. Equitable preservation of views has not been achieved.

## Height Poles/ Templates

We ask Council to request that the Applicant position 'Height Poles/Templates' to define the non-compliant building envelope, and to have these poles properly measured by the Applicant's Registered Surveyor.

The Height Poles will need to define:

- All Roof Forms, and all items on the roof
- Extent of all Decks
- Extent of Privacy Screens
- All proposed Trees & Landscape

## SECTION 5: AMENDED PLANS

We totally accept that the property is long past the replacement date, however Council must not let that emotion cloud the correct decision for the replacement building that perhaps never will be replaced. We ask for a number of simple amendments that if fully implemented would hopefully resolve the amenity loss matters and better respond to the reasons for refusal:

1. Lower the entire built form by 1m. Proposed south-east corner of the roof, sits adjacent to the RL 17.0 Contour. Reduce the Roof Parapet to RL 25.5 to maintain 8.5m building height. Alternatively remove the non-compliant zone above 8.5m building height by greater terracing and a reduced upper-level floor plate.
2. Plant Enclosure to have full dimensions and heights shown. Reduce volume to simply cover exhausts and lift over-runs. Minimalise the roof feature to the absolute volume.
3. Roof to be pebbles, rather than exposed membrane.
4. PV Panels to be laid flat on roof and height to be kept below parapet.
5. Glazed Roof height to be kept below parapet.
6. Acoustic treatment to Roof Plant: Car-park and kitchen exhausts to have Fan Silencers, Acoustic Blankets and other Acoustic devices to reduce noise. Update Acoustic report.
7. Delete all landscaping above 2m high at maturity in side setback zones
8. Provision of an additional 8 car parking spaces, on site loading dock, 1.5m footpath in Surf Road, and controls to ensure there is 'no stopping' along Whale Beach Road in this section of the street, to avoid illegal parking
9. Reduce trading hours
10. Height Poles to be erected to test the view loss from the 8.5m height outcome within item 1

**Reason:** To better respond to the reasons of refusal. *The size, mass, bulk and scale of development that does not reflect the objectives and outcomes envisaged by the planning controls on a sloping site, adjacent Whale Beach and surrounding by detached dwelling houses. The design should be more stepped on the site, with greater levels of terracing of the upper levels to better relate to the hillside topography in the area and greater side setbacks to alleviate and ameliorate the sheer bulk and scale of the building.*

## **SECTION 6: CONCLUSION**

The application is assessed by us as having regard to all documentation submitted by the applicant and the provisions of:

- Environmental Planning and Assessment Act 1979;
- Environmental Planning and Assessment Regulation 2000;
- All relevant and draft Environmental Planning Instruments;
- Local Environment Plan;
- Development Control Plan; and
- Codes and Policies of Council.

This assessment has taken into consideration the submitted plans, Statement of Environmental Effects, all other documentation supporting the application and public submissions, in this regard the application is not considered to be acceptable and should be recommended for REFUSAL.

In consideration of the proposal and the merit consideration of the development, the proposal is considered to be:

- Inconsistent with the objectives of the DCP
- Inconsistent with the zone objectives of the LEP
- Inconsistent with the aims of the LEP
- Inconsistent with the objectives of the relevant EPIs
- Inconsistent with the objects of the Environmental Planning and Assessment Act 1979

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 4.6 Exceptions to Development Standards of the Local Environmental Plan.

The development has been found to not comply with the Development Standard contained in the LEP in respect to Height of Buildings and notwithstanding, the merit consideration with the non-compliance with the LEP development standard, the development does not satisfy the requirements of cl 4.6 Exceptions to development standards to be supported.

In this regard, the proposal is inconsistent with the underlying objectives of development standard and the zone under the LEP.

The development is inconsistent with the objectives contained within the DCP relating to View Sharing.

These issues would require some substantial re-design to address in reviewing the plans, so unless amended plans are submitted to resolve these matters, we contend the DA cannot be addressed by conditions.

Accordingly, we contend the development application should be recommended for refusal.

It is considered that the proposed development does not satisfy the appropriate controls and that all processes and assessments have not been satisfactorily addressed.

We contend that unless amended plans are submitted, resolving all matters within this submission, that the recommendation should be:

THAT the Northern Beaches Local Planning Panel, on behalf of Northern Beaches Council, as the consent authority REFUSE Development Consent to Development Application for the reasons outlined as follows:

1. The proposal is inconsistent with Section 4.15 (b) and (c) of the Environmental Planning and Assessment Act 1979 as the height, scale and bulk of the fails to transition to the adjoining low density residential area. As a result, the proposal will result in unreasonable visual impacts to surrounding properties, and the streetscape and unreasonable impacts on residential amenity including view loss, solar loss, privacy loss, visual bulk, and unreasonable bulk and scale. All of these issues result in a proposed development that is an overdevelopment of the site
2. The proposal is inconsistent with the Design Quality Principles of the State Environmental Planning Policy 65 - Design Quality of Residential Flat Development. The proposal is also inconsistent with the requirements of the Apartment Design Guide
3. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the Clause 1.2 Aims of the Plan of the Local Environmental Plan.
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 the Zone of the Local Environmental Plan 2013.

5. 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 4.4 Height of Buildings of the Local Environmental Plan.
6. 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 4.6 Exceptions to Development Standards of the Local Environmental Plan.
7. 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.
8. Pursuant to Section 4.15(1)(c) of the Environmental Planning and Assessment Act 1979, the proposed development is not consistent with the Desired Future Character of the location and is an over-development of the site.
9. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause B6 Access & Parking of the Pittwater 21 Development Control Plan.
10. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause C1.3 View Sharing of the Pittwater 21 Development Control Plan.
11. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause D12.1 Character as viewed from a public place of the Pittwater 21 Development Control Plan.
12. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause D12.6 Side and rear building line of the Pittwater 21 Development Control Plan.
13. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause D12.14 Scenic Protection Category One Areas of the Pittwater 21 Development Control Plan.
14. The proposal is contrary to the relevant requirement(s) of SEPP 65, the WLEP and WDCP, including the height development standard. The proposal will result in a bulk and scale that fails to transition to the surrounding low density residential area and will result in unreasonable impacts on neighbouring amenity. The proposal will create an undesirable precedent to other NBC similar zones and be contrary to the expectations of the community. As such, the proposal is not in the public interest.

We ask for Amended Plans to be submitted that fully address and resolve the matters raised within this Submission. If this is not forthcoming, we ask Council to **REFUSE** this DA on the above grounds.

Yours faithfully,

**Mr Danny Hofbauer  
198 Whale Beach Road  
Whale Beach  
NSW 2107**

**Appendix:**

We ask for detailed conditions to any future consent relating to:

- Kerbside Parking Restrictions
- Hours of Trade
- Dilapidation Reports to our property
- Vibration Monitoring
- Asbestos
- Survey Certificates to ensure height and extent of roof is built correctly
- External finishes to Roof
- Roof elements to be below roof parapet
- Mechanical plant location to be within basement
- AC Condenser Units to be within basement
- Demolition Traffic Management Plan
- Construction Traffic Management Plan
- On Street Work Zones and Permits
- Parking Restrictions
- Environmental Health Conditions: Commercial & Industrial Use