
Sent: 21/09/2021 8:55:17 AM
Subject: Att: Rebecca Englund - Re: REV2021/0034 (DA2020/0442) - 231 Whale Beach Road, Whale Beach - Objection
Attachments: 201408.2l.pdf;

Attention: Rebecca Englund

Please find attached an objection (Ref: 201408.2L) on behalf of the owner of 233 Whale Beach Road, Whale Beach in relation to the above matter.

Regards,

Jody Scanlan
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20 September 2021

Ref: 201408.2L

The General Manager

Northern Beaches Council

By email: council@northernbeaches.nsw.gov.au

Attention: Rebecca Englund

Dear Sir/Madam,

REV2021/0034 (DA2020/0442) – 231 Whale Beach Road, Whale Beach – Objection on behalf of 233 Whale Beach Road

Introduction

We act on instructions from Ms Robyn Jarvis, the owner and occupier of 233 Whale Beach Road, Whale Beach whose property adjoins to the north of the site the subject of REV2021/0034 (The Review proposal).

On behalf of our client, we previously made a submission to Council dated 21 May 2020 objecting to DA 2020/0442 on a number of grounds. That DA is now the subject of the above Review application.

In preparing this submission, we have had regard to the original DA proposal, our previous inspection of the site and surrounding area and our review of the submitted documentation for the Review proposal.

We have had extensive experience in advising on, preparing and assessing similar proposals under the Environmental Planning and Assessment Act, 1979, including appearing as expert town planning witnesses in the NSW Land and Environment Court.

Our client strongly objects to the Review proposal as it involves minimal changes from the originally proposed (and refused) DA in terms of its overall height, bulk and scale, its density and its relationship with neighbouring development, including her property, and will result in significant adverse impacts on the amenity of her dwelling house and garden, including overlooking, loss of visual and acoustic privacy and adverse visual impact. The Review proposal will have cumulative amenity impacts, arising from the combination of proposed uses and the number of retail spaces and apartments proposed in proximity to her property.

While the Review proposal incorporates additional setbacks from the side boundaries compared with the DA, it otherwise appears to generally maintain the building envelope and built form of the original DA. The Review proposal is considered to be out of character with the local area and not consistent with the beachside village of Whale Beach. It is considered to be an overdevelopment of the site based on its bulk and scale and on its impacts from the intensity of its use.

Our client also strongly objects to the location of the garbage storage facilities, their proximity to her property and related noise impacts associated with the movement and transport of wastes (including truck movements). In this regard, it is noted that an Acoustic Report prepared by Koikas Acoustics was lodged in respect of the original DA on behalf of our client. That report found that the original DA was likely to give rise to offensive noise and sleep disturbance after 10pm.

Concern is also raised regarding the excavation of the site given the site's location in a landslip area and other matters addressed further below.

Our assessment has concluded that the Review proposal would have an unreasonable and significant adverse impact on our client and the locality and, on that basis, the original refusal of the development should be maintained.

The Review Proposal

Documentation submitted with the Review proposal indicates that it involves the demolition of the existing development and the construction of a five (5) storey shop-top housing development with five (5) residential units and three (3) retail premises, together with basement car parking, site works and landscaping. The proposed development is excavated into the site and has a height of two storeys above Whale Beach Road and 5 storeys above Surf Road.

The proposed development accommodates the following at each level:

- Basement (RL 5.2) – parking for 18 cars (incl. 5 x 2 car stackers), bicycle and motor bike parking, plus plant, storage and stairs/lifts accessible from Surf Road (south end of frontage);
- Ground Floor (RL 9.3) – Retail 1 opening onto Surf Road frontage (with outdoor seating (72sqm)) plus garbage rooms, amenities, plant, stairs and lifts, also accessible from Surf Road (north end of frontage). The two garbage rooms for the development are located on the northern side of the driveway and open onto it with a service vehicle bay on the frontage to Surf Road;
- Level 1 (RL 13.2) – Apartments 1 and 2 (lower) with associated terraces. Apartment 2 is adjacent the northern site boundary, adjacent our client's property, with 2.3m wide landscaped areas off the bedrooms in the side setback;
- Level 2 (RL 16.45) – Apartments 2 (upper) and 3 with associated terraces/balconies and landscaped areas 2.3m wide in the side setback off the bedrooms and living area of Apt 2 (northern side setback);
- Level 3 (RL 19.7) – Retail spaces 2 and 3 and Apartment 4. The retail spaces front onto the Whale Beach Road frontage. Retail 2 is adjacent the common boundary with our client's property. Apartment 4 has a terrace at the NE corner of the building adjoining our client's property. A disabled ramp is located in the NW corner of the site, abutting the common boundary with our clients' property. A substation is located at the southern end of the frontage;

- Level 4 (RL 23.3) – Apartment 5 and associated balcony; and
- Roof (RL 26.4) – containing photo-voltaic cells and plant area in centre of the Whale Beach Road frontage.

Uncertainty regarding Use of Proposed Retail Spaces

There is confusion and uncertainty regarding the nature of the “retail premises” proposed in the Review proposal:

- The SEE states that the use of Retail 2 at the Whale Beach Road level (and adjacent our client's property) is to be a “neighbourhood shop” (p. 7) as defined in the LEP;
- The Acoustic Letter of Support states that ‘Retail 2 and Retail 3 are shown as local shops. These spaces were nominated as cafés [in the original DA] and noise impact from patrons was assessed. Change of use implies no associated outdoor seating areas and therefore no impact to nearest noise sensitive receivers from patrons in these spaces’ (p. 1);
- Elsewhere in the documentation, however, the proposal is described as comprising 3 x “retail premises” (including the SEE (p. 2) and Council's description of the proposal on its web site/notification); and
- The SEE also states, on p. 55, that ‘the proposed retail premises are likely to be used for cafes’, inconsistent with earlier statements; and
- Other than in the Acoustic letter, we have not located any other reference to Retail 3 also being proposed as a “neighbourhood shop”.

The retail uses for which consent is sought need to be clarified as use for “retail premises” has quite different and potentially significant implications in terms of potential impacts compared with a “neighbourhood shop”. A restaurant/café use is clearly quite different to a neighbourhood shop, in terms of its potential impact, as highlighted in our submission on the original DA. Certainty is required that Retail 2 and 3 are proposed as and will only be used as “neighbourhood shops”, in accordance with the LEP definition, with no outdoor seating or outdoor use associated with them.

The Applicant should be required to clarify this matter and the description of the Review proposal modified accordingly (including in any consent ultimately issued by Council in respect of the proposal).

Our Client's Property

Our client's property is a triangular shaped site at the intersection of and bounded on two sides by Whale Beach Road and Surf Road. It otherwise adjoins the Review proposal site to the south.

Our client's property contains a two-level dwelling house set below the level of Whale Beach Road and above the level of Surf Road. Its main recreational areas are on the eastern side of the dwelling house and along the common boundary with the DA site comprising ground level garden areas and an elevated deck. It enjoys views from the dwelling house and garden areas to Whale Beach and the Pacific Ocean.

Statutory framework

Section 4.15 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) provides that in determining a development application, a consent authority is to take into consideration matters which include:

(a) the provisions of:

(i) any environmental planning instrument, and

(iii) any development control plan, and

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

(c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest.

Council would also be aware that the objects of the EP&A Act have been amended to include:

(g) to promote good design and amenity of the built environment

Accordingly, Council is required to consider the likely impacts of the proposed development, including environmental impacts on the built environment (section 4.15).

Having regard to the objects of the Act, the Council should be satisfied that the development promotes good design and amenity of the built environment.

For reasons that follow below, it is clear that the proposed development fails to satisfy these tests.

Objections to the Proposed Development and Impacts of the Review Proposal on Our Client's Property

As referred to above, our client strongly objects to the proposed development as it will have significant adverse impacts on the amenity of her property as a result of its excessive bulk and scale which will result in an adverse visual impact as viewed from her dwelling house and, in particular, from her garden. The proposed built form, bulk and scale is considered to be out of character with the local area and not consistent with the beachside village of Whale Beach.

In this regard, the extent and viability of landscape screening proposed along the northern boundary is questioned on the basis that parts of the setback identified as landscaped area also act as courtyard spaces for the adjoining units, being the proposed location for facilities such as clothes lines. Without these spaces, a planting width of only 1.7m is provided adjacent the site boundary.

In addition, the proposal will result in a loss of visual privacy to our client's property due to overlooking from the apartment balconies/roof terraces to the east and north elevations.

The proposal will also result in a loss of acoustic privacy due to increased noise arising from the use of the retail spaces, particularly Retail 1 which includes a large outdoor seating area (72 sqm,) as well as noise associated with the use of the garbage room and movement of wastes to garbage collection vehicles on Surf Road. Our client strongly objects to the location of the garbage storage facilities, their proximity to her property and related amenity impacts. The proposed retail uses also have the potential to result in odour impacts on our client's property.

As discussed above, the lack of certainty in the Review proposal documentation regarding the nature of future retail uses on the site has the potential to increase impacts on our client's property given the range and varying degree of impacts associated with uses that may be undertaken under the definition of "retail premises". As noted above, confirmation is required from the Applicant that Retail 2 and 3 are proposed as "neighbourhood shops" (and not "retail premises") and the description of the Review proposal revised accordingly to provide certainty to our client, other neighbours and Council and to enable proper assessment of the proposal.

The proposed development will give rise to adverse cumulative amenity impacts as a result of the proposed uses to be accommodated and the increased levels of activity on and around the site. These impacts will significantly impinge on our client's property and reduce its residential amenity.

Concern is also raised regarding the excavation of the site given the site's location in a landslide area.

We detail the issues as follows.

1. Excessive Bulk and Scale which is Out of Character with the Locality

The overall intensity of the proposed development and its bulk and scale are out of character with the beachside location and Council's Palm Beach Locality controls. The built form incorporates insufficient stepping down the slope and does not minimise bulk and scale resulting in a built form significantly greater than surrounding buildings and having an overbearing impact when viewed from our client's property and from Surf Road, in particular.

Comparison of the original DA and the Review proposal plans (see **Figure 1** below) indicate that, while additional side setbacks are now proposed, the built form is otherwise very similar to the original with similar stepping profile and bulk and scale to the side elevations.

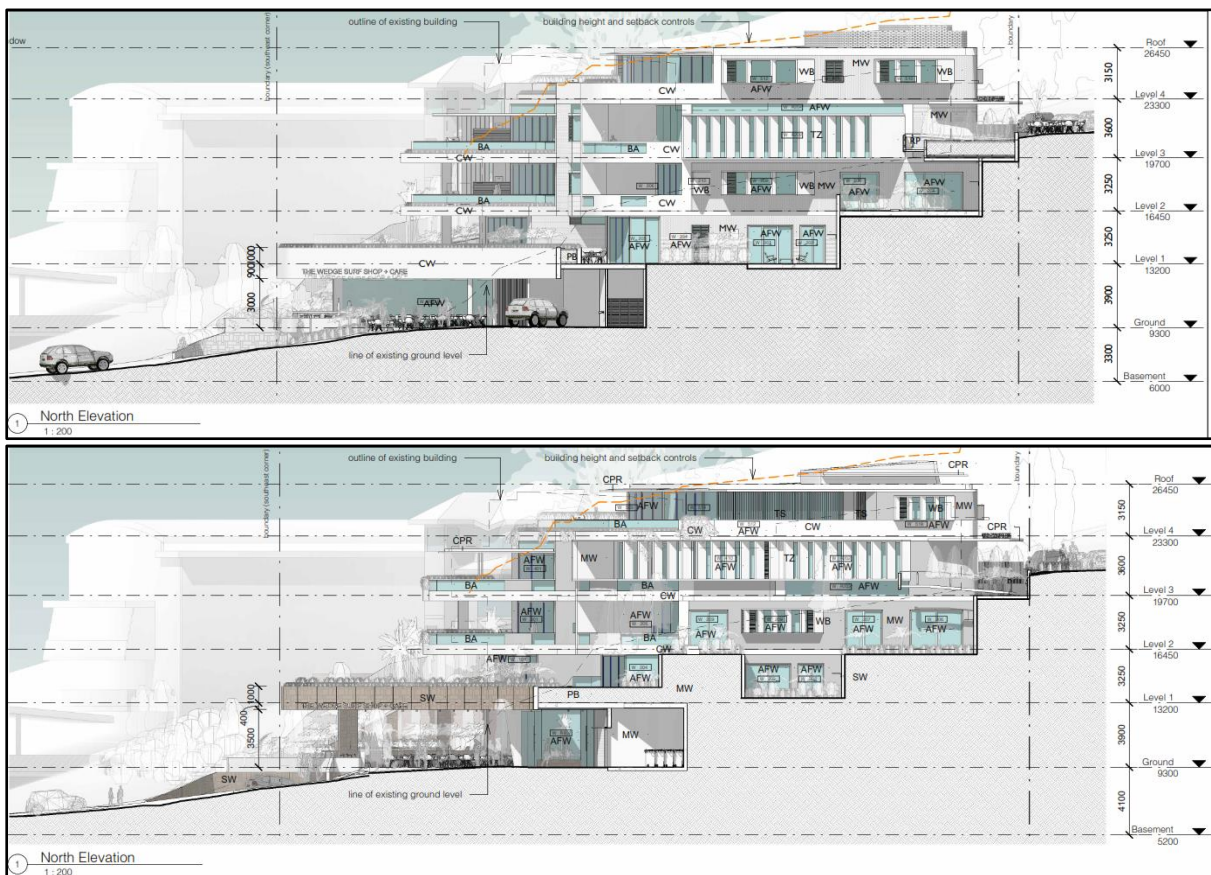


Figure 1: North Elevation - Original DA (top) and Review Proposal (bottom)
 Source: Plans prepared by Richard Cole Architecture

The proposed built form is still considered to dominate the landform and landscape in a manner inconsistent with the Desired Future Character of the Locality which requires that *development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance*. Virtually no change has been made to the original proposal in terms of stepping down the slope as shown in **Figure 1** above.

The bulk and scale of the proposed north elevation adjacent to our client's property is excessive and will have an adverse impact on our clients' property and the wider public domain. While the Review proposal meets the DCP side setback requirements, it still involves a breach of the side setback requirement for residential accommodation under SEPP 65 and the ADG which requires a minimum side setback of 6m (a total of 12m separation across boundaries). While this setback applies only to residential accommodation, the provision of greater setbacks to the proposed development would allow for more site landscaping and reduce the overall built form.

The proposed development will not achieve the 'sea-side village' character sought by Council's controls as a result of its excessive bulk and scale and its design. The Review proposal incorporates more landscaping than the original proposal, however, as noted above, the viability and extent of landscape screening along the northern (and southern) boundary is questioned on the basis that parts of the setbacks act as courtyard spaces for the adjoining units, being the proposed location for facilities such as clothes lines, as illustrated in the plans. The inclusion of tree plantings within these areas is considered questionable as they are likely to be sought to be used by future residents. Excluding these spaces, landscape screening along the boundary is reduced to 1.7m in width from the 4m shown on the plans.

In addition, there is a lack of landscaping at the western end of the northern site boundary adjacent our client's property due to the siting of the disabled ramp at the western end. This was an aspect of the original DA to which our client also objected and it has not been modified or revised in the Review proposal. The disabled ramp abuts the common boundary, not allowing for any landscaping along the boundary line. (In this regard, it is noted that the submitted Landscape Plan shows plantings adjacent the ramp on our client's property which is entirely inappropriate). The provision of planting through the middle of the ramp, as proposed, is not considered to ameliorate or address this impact in any meaningful way. This element should be setback from the side boundary to allow for landscaping or relocated elsewhere on the frontage.

2. Loss of Privacy

The proposal will result in a loss of privacy to our client's dwelling house and garden due to overlooking from Apartment 2 (upper) at Level 2, Apartment 4 at Level 3 and Apartment 5 at Level 4 primarily from their external terraces. Views will be available to our client's garden and dwelling from the terraces/balconies from a distance of only some 4m from the common boundary. While screening is proposed to part of the terrace to Apartment 4 and a planter to the terrace to Apartment 5, there is still potential for overlooking to our client's dwelling and garden from these terraces.

In addition, there will be noise impact and loss of privacy associated with the use of the external area of Retail 1, with an outdoor seating area to the Surf Road frontage in proximity to our client's property. That proposed retail/café space, together with Retail 2 and 3, will generate greater levels of activity, noise and disturbance in both the upper and lower parts of the site compared with the existing situation.

Further, our client has significant concerns regarding the noise impact associated with the proposed garbage room sited close to the common boundary with her property. The Review proposal relies on the enclosure of the proposed garbage room to demonstrate that it is acceptable. The submitted 'Section 8.2 Review' (Richard Cole Architecture) states:

The owner of No. 233 commissioned an acoustic report into the acoustic impacts of the garbage collection for the proposed development upon her property. The report concluded with the following recommendations:

- *Allowing the garbage collection between 0800 and 2200 hours only.*

- *Glass bottles are to be bagged and wrapped with newspapers to prevent cluttering noise to occur.*
- *Truck reversing beeping alarms to be replaced with a smart alarm system.*
- *A solid building enclosure should be erected over the garbage collection area.*

These concerns have been addressed by amendments to the proposed development including:

- *The garbage storage area has been redesigned to comply with Council requirements. It has been moved further from the street and enclosed within the building to provide better acoustic separation. Glass bottle noise will be limited by the enclosure of the garbage area.*
- *A 2.5 x 9.7m indented service vehicle access bay has been provided to Surf Road. This will not require garbage collection vehicles to reverse to collect garbage. (p. 25)*

However, the above matters do not address noise generated by the movement of waste to the frontage for collection or noise associated with the movement of collection trucks to and from the site. In this regard, truck movements are particularly problematic given the slope of Surf Road along the frontage to our client's property.

Noise associated with the use of Retail 1 and the garbage room/collection, in particular, are not addressed in the Review proposal. Indeed, there is no revised acoustic assessment accompanying the Review proposal; only an 'Acoustic Letter of Support' which relies on the assessment of the original DA.

In this regard, it is noted that we raised a number of concerns regarding the original DA acoustic assessment and its assumptions which, in our view, raised questions regarding its findings. The Review proposal has not addressed any of these issues and instead relies on, in our view, a flawed assessment for a different proposal.

This is considered unacceptable. It is not appropriate to rely on the previous (flawed) assessment as Retail 1 has increased in size compared with the original DA and is therefore likely to give rise to a greater noise impact, while there is no assessment of the noise generated by the movement and collection of wastes (including vehicle noise) from the site.

The Applicant should be required to provide an acoustic assessment of the Review proposal to address these matters and provide an appropriate basis for assessment of the Review proposal.

In addition, the recommendations of our client's acoustic report with respect to garbage collection (summarised above) should be imposed on any consent for the Review proposal that may be issued by Council.

3. Cumulative Impacts on the Use and Enjoyment of Our Client's Property

The proposed development will give rise to cumulative amenity impacts on the residential amenity of our client's dwelling house associated with the increased levels of activity on and around the site arising from the combination of proposed uses and the number of retail spaces and apartments proposed. The design of the proposal is such that these impacts will significantly impinge on our client's property and reduce its residential amenity as two of the retail spaces are in proximity to our client's property at different levels (Ground and Level 3), together with three of the residential apartments at Levels 1 to 4, as well as the garbage room adjacent the common boundary at the Ground floor.

4. Other Matters

The site is within a geotechnical hazard area and the extent of site disturbance and excavation is significant raising concerns about stability and land slip. The extent of site disturbance is inconsistent with Council's controls. The reduction in excavation compared with the original DA is minimal apparently involving only a triangular section along the northern site boundary and narrow strip along the southern boundary.

The Landscape Calculations plan for the proposed development identifies parts of the outdoor areas associated with the retail spaces as "communal open space" (as required by SEPP 65/the ADG) for the residents of the proposed apartments. The areas identified are clearly inappropriate for communal open space. Future residents will not have any rights to their exclusive use as they are located within the "public" areas at the frontages of the building. The proposed development does not provide any useable communal open space.

Town Planning Controls and Objectives

The principal shortcomings of the DA with respect to impacts on our client relate to the amenity of her dwelling and garden, especially with respect to bulk and scale, development intensity and cumulative impacts, noise and privacy impacts, together with impacts on the character of the wider locality and public domain. In this regard, the proposed development does not meet the following controls and objectives of the applicable planning instruments and policies:

- Inconsistent with Cl. 14 of the SEPP (Coastal Management) 2018 in that it is *likely to cause an adverse impact on the visual amenity and scenic qualities of the coast and has not been designed or sited to avoid such an impact*;
- Inconsistent with the design quality principles of SEPP 65 in relation to *context and neighbourhood character, built form and scale, density and landscape*;
- Inconsistent with the aims of Pittwater LEP 2014 *to ensure development is consistent with the desired character of Pittwater's localities (Cl. 1.2(2)(b))*;
- Inconsistent with the Desired Future Character of the Palm Beach Locality as set out in A4.12 of Pittwater DCP that:

development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance;

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 good urban design; and

a balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land.

- Inconsistent with the Landscaping outcomes at C1.1 and C2.1 of the DCP:

a built form softened and complemented by landscaping; and

landscaping reflects the scale and form of the development.

- Inconsistent with the Visual privacy outcomes at Cl. C1.5 of the DCP:

habitable rooms and outdoor living areas of dwellings optimise visual privacy through good design.

- Inconsistent with the Acoustic privacy outcomes at Cl. C1.6 of the DCP:
noise is substantially contained within each dwelling and noise from any communal or private open space areas are limited.
- Inconsistent with the Waste and recycling facilities outcomes at Cl. C1.12 of the DCP:
to minimise and adverse environmental impacts associated with the storage and collection of waste.
- Inconsistent with the Protection of residential amenity outcomes at Cl. C2.12 of the DCP:
development does not have an adverse impact upon adjoining residential accommodation; and
maintenance of reasonable ... visual privacy to residential properties.
- Inconsistent with the Palm Beach Locality outcomes at Part D12 of the DCP in relation to Character as viewed from a public place (D12.1) and Scenic Protection Category One Areas (D12.14):
to achieve the desired future character of the locality;
to ensure new development responds to, reinforces and sensitively relates to the spatial characteristics of the existing built and natural environment;
to enhance the existing streetscapes and promote a scale and density that is in scale with the height of the natural environment;
the visual impact of the built form is softened by landscaping and vegetation;
high quality buildings designed and built for the natural context and any natural hazards;
buildings do not dominate the streetscape and are at 'human scale';
to ensure that development adjacent to public domain elements ... complements the landscape character, public use and enjoyment of that land;
the bulk and scale of built form is minimised;
to ensure a reasonable level of privacy, amenity ... is provided within the development site and maintained to residential properties;
substantial landscaping, a mature tree canopy and an attractive streetscape;
to ensure a landscape buffer between commercial and residential zones is established;
to maintain and enhance the natural environment of Pittwater as the predominant feature of the landscape with built form being a secondary component;
development shall minimise any visual impact on the natural environment when viewed from any waterway, road or public reserve.

Conclusion

The Review proposal will have significant adverse impacts on our client's property and the locality generally with respect to its excessive bulk and scale relative to our clients' property which results in significant visual intrusion, as well as privacy impacts, from the overbearing built form. A loss of privacy will also result from noise associated with the cumulative effect of the increased activity on the site arising from the proposed 3 retail spaces (including at least 1 café/food and drink premises with outdoor seating), 5 residential apartments and the associated servicing activities, particularly waste collection.

The amendments made to the original DA are not considered sufficient to address its shortcomings with minimal improvement in its overall height, bulk and scale, relationship with the natural environment and impacts on the amenity of adjoining properties and the wider locality. The design of the Review proposal still does not have sufficient regard for the beachside locality and will be unsympathetic and out of character with its context.

Additional certainty and clarification is required of the proposed retail uses in the Review proposal. The Applicant should be required to clarify that Retail 2 and 3 are proposed as "neighbourhood shops" (and not "retail premises"), in accordance with the LEP definition and the description of the Review proposal modified accordingly (including in any consent ultimately issued by Council in respect of the proposal).

The Applicant should also be required to provide an acoustic assessment of the Review proposal to provide an appropriate basis for its assessment. The Review proposal's reliance on the previous (in our view, flawed) acoustic assessment is unsatisfactory as Retail 1 has increased in size compared with the original DA and is therefore likely to give rise to a greater noise impact, while there is no assessment of the noise generated by the movement and collection of wastes (including vehicle noise) from the site. The recommendations of our client's acoustic report with respect to garbage collection should be imposed on any consent for the Review proposal that may be issued by Council.

The application is contrary to the objects of the Environmental Planning and Assessment Act 1979, in particular, Clause 1.3(g) it that it does not promote good design and amenity of the built environment and is inconsistent with the objectives and outcomes of the other applicable planning controls.

As a result of these matters, we believe there are compelling reasons for Council to refuse the Review proposal.

Should the application be further amended and notified, we request that we be advised so that we may have the opportunity to review those details.

Should you have enquiries with respect to the above please do not hesitate to contact us to discuss.

Yours faithfully,

DESIGN COLLABORATIVE PTY LTD



J Lidis
Director