
Sent: 21/05/2020 4:44:35 PM
Subject: Attention - Lashta Haidari - DA 2020/442 - 231 Whale Beach Road, Whale Beach - Objection on behalf of 233 Whale Beach Road
Attachments: 201408.1l.pdf;

Attention: Lashta Haidari

Please find attached an objection (Ref: 201408.1L) to DA 2020/442 at 231 Whale Beach Road, Whale Beach on behalf of the owners of the neighbouring property at 233 Whale Beach Road.

Regards,

Jody Scanlan
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21 May 2020
Ref: 201408.1L

The General Manager
Northern Beaches Council
By email: council@northernbeaches.nsw.gov.au

Dear Sir/Madam,

Attention: Lashta Haidari

Re: DA 2020/442 – Demolition of existing structures and construction of a 5 storey shop-top housing development, comprising five residential apartments, three retail premises, basement car parking, associated site and landscaping works and strata subdivision at 231 Whale Beach Road, Whale Beach

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 this DA.

We note that feedback was provided to the project architect on behalf of our client during the preparation of this DA as noted in the submitted SEE (p. 5). Minimal changes were made in response to the matters raised with most of our client's concerns not addressed in the submitted scheme.

Our brief now is to review DA 2020/442 using our expertise as town planners with the view to lodging a submission with your Council detailing our client's objections to the proposed development based on the submitted documentation. To assist with our assessment, an inspection of the site and surrounding area was carried out and we have had an opportunity to review the entirety of the submitted DA documentation.

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 proposal as it shows and relies on screen landscaping on her property along its southern boundary. Our client's consent has not been sought and will not be granted for the use of part of her land for the subject proposal. The DA plans and documentation are, therefore, misleading in their depiction of the north elevation of the proposed development where that vegetation is shown and the associated level of impact on our client's property.

In addition, our client strongly objects to the impact of the proposal on the amenity of her dwelling house and garden, especially with respect to the excessive bulk and scale of the proposed building overall and adjacent the common boundary, in particular, and its related impacts, including overlooking, loss of visual and acoustic privacy and adverse visual impact. These impacts are exacerbated by the minimal setbacks proposed, the design of external screening elements and the lack of site landscaping. Our client also strongly objects to the location of the garbage storage facilities, their proximity to her property and related amenity impacts. The proposal is considered to be out of character with the local area and not consistent with the beachside village of Whale Beach.

The amenity impacts of the proposed development relate to the use of both the proposed retail premises and the proposed residential units as well as cumulative amenity impacts. The proposal will increase levels of activity on and around the site, including both road frontages, arising from the combination of proposed uses and the number of retail premises 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, together with two of the residential apartments. This will result in a significant reduction in the residential amenity of our client's property.

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

We note that the submitted SEE refers to Pre-DA discussions held with Council which advised the need for "an extensive redesign" of the scheme (p. 4). It is not clear from the documentation what changes were made in response to Council's concerns, but in our view, based on our assessment below, the proposal would still require an extensive redesign to provide for an acceptable development outcome in relation to both its impacts on our client's property and the wider locality.

We also note that, while the applicant has sought to rely on the site constraints to justify the proposal and departures from the controls, the proposal also maximises the level of development on the site in a manner that does not reflect or appropriately respond to those constraints. As a result, the external impacts of the proposed development, both on our client's property and the wider locality, are not able to be satisfactorily addressed or mitigated by the proposed development. Therefore, the proposed development is considered to be an overdevelopment of the site.

Our assessment has concluded that the proposal in its current form would have an unreasonable and significant adverse impact on our client and the locality and, on that basis, the application should be refused.

The Proposed Development

The proposal 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 and strata subdivision. 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 6) – parking for 15 cars plus plant, storage and stairs/lifts accessible from Surf Road (south end of frontage);
- Ground Floor (RL 9.3) – Retail space 1 opening onto Surf Road frontage (with future outdoor seating) with parking behind for 4 cars plus garbage rooms, storage, 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;
- 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 private open space partly in the side setback;
- Level 2 (RL 16.45) – Apartments 2 (upper) and 3 with associated terraces/balconies;
- 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 adjoins the common boundary with our client's property and has an external balcony on its eastern side and opens onto Whale Beach Road on its western side (with future outdoor seating), together with a projecting screen to the northern façade. A disabled ramp is located in the NW corner of the site, abutting the common boundary with our clients' property. A garbage room and substation are 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 surrounded by brick screen over NW corner and butterfly roof element to the Whale Beach Road frontage.

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 DA 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 Proposal on Our Client's Property

As referred to above, our client strongly objects to the proposed development as it relies on the use of part of her land for the subject proposal for which her consent has not been sought or granted.

In addition, the proposed development will have a significant and unreasonable adverse impact on the amenity of her property as a result of its excessive bulk and scale, exacerbated by the minimal setbacks proposed, the design of external screening elements and the lack of site landscaping proposed, which will result in an adverse visual impact as viewed from her dwelling house and, in particular, from her garden. The proposal is considered to be out of character with the local area and not consistent with the beachside village of Whale Beach.

Further, the proposal will result in a loss of visual privacy to our client's property as a result of overlooking from the apartments and retail space and associated balconies/roof

terraces to the east and north elevations. The proposal will also result in a loss of acoustic privacy due to increased noise associated with the use of the retail spaces, in particular, which include outdoor areas. The proposed retail uses also have the potential to result in odour impacts on our client's property.

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 landslip area and the proposed waste management arrangements in proximity to our client's property. Our client strongly objects to the location of the garbage storage facilities, their proximity to her property and related amenity impacts.

We detail the issues as follows.

1. Owner's Consent has not been sought from or provided by our Client

As noted above, the proposal shows and relies on screen landscaping which is situated on our client's property along its southern boundary in a manner which is unacceptable and inappropriate (see **Figure 1**). Our client's consent has not been sought and will not be granted for the use of part of her land for the subject proposal.

The DA plans and related documentation are, therefore, misleading in their depiction of the northern elevation of the proposed development where that vegetation is shown and the associated level of impact on our client's property. The DA plans and related documentation which shows that vegetation (photomontages etc) should be required to be amended to show the proposed development with only the plantings proposed on the development site.



Figure 1: Extract from Photomontage showing screening plantings along our client's southern boundary circled red

Source: DA Photomontage

2. 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. This impact is considered to be well-illustrated in the Photomontage forming part of the DA documentation and partially reproduced in **Figure 1** above.

From Whale Beach Road, the brick surround to the roof top plant increases the visual bulk of the built form from that vantage point also resulting in adverse impacts on the public domain.

The proposed built form dominates 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.*

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, its design and lack of landscaping. The proposal does not incorporate landscaping into the building design, as required by Council's controls and will not complement the character of the beachside location.

The proposal lacks sufficient landscaping to soften the building and mitigate impacts when viewed from our client's property and adjoining public spaces. This is accentuated by the fact that, as noted above, the plans show plantings along our client's southern boundary between an existing wall and the southern boundary line and relies on those plantings to ameliorate the impacts of the proposal. As also noted above, those plantings are shown in the foreground of views of the northern elevation in the DA documentation which is misleading and inappropriate.

In addition, our review of the submitted landscape calculations (which, in our view, utilise colours and hatching which are difficult to read and interpret) indicates that the proposal does not comply with the landscaped area requirement of the DCP, in that parts of the site are counted towards deep soil/landscaped area which are over structure (either below ground or in the form of elevated planters). Based on the information on the plans, excluding the large elevated planters (and not accounting for errors in the calculation of deep soil areas) would reduce the landscaped area of the proposal to just over 126 sqm, well below the required 175sqm.

Landscaping along the northern site boundary adjacent our client's property is minimal as the side setback also contains the private open space courtyard of Apartment 2 (over 2 levels) together with the disabled ramp at the western end. The disabled ramp, in particular, abuts the common boundary not allowing for any landscaping along the boundary line. 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.

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. In particular, the encroachments into the 3m side setbacks for windows/screening elements add to the bulk of that elevation with the screening element to Retail space 2 at Level 3 being particularly problematic and adding considerably to the visual bulk of the façade.

This aspect of the proposal is considered to be inconsistent with the side and rear setback controls in Part D12.6 of the DCP. In this regard, it is noted that the controls do not permit variations of the side and rear setback controls for *shop-top housing* developments such as that proposed. The exclusions are permitted only for *residential flat buildings* or *multi dwelling housings* (both of which are prohibited in the applicable B1 zone).

Nevertheless, the proposal is not considered to be consistent with the variations criteria in that, for the reasons set out above and elsewhere in this submission, it does not achieve the following Outcomes of the control:

- *To achieve the desired future character of the Locality. (S)*
- *The bulk and scale of the built form is minimised. (En, S)*
- *To ensure a reasonable level of privacy, amenity and solar access is provided within the development site and maintained to residential properties. (En, S)*
- *Substantial landscaping, a mature tree canopy and an attractive streetscape. (En, S)*
- *Vegetation is retained and enhanced to visually reduce the built form. (En)*
- *To ensure a landscaped buffer between commercial and residential zones is established.*

In addition, the louvred structure to Retail 2, in particular, is not considered to be a *minor encroachment*, as referred to in the controls, as it is 1.2m wide and around 13-15m long. Nor is it consistent with the other permitted exclusions. Its louvred design means that from some vantage points it will appear solid and would not be a *light or open structure*.

Further, the proposal 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.

3. Loss of Privacy

The proposal will result in a loss of privacy to our client's dwelling house and garden due to overlooking from Retail space 2 at Level 3, Apartment 2 (upper) at Level 2 and Apartment 5 at Level 4 and their associated external terrace areas. Unobstructed views will be available to our client's garden and dwelling from the terraces/balconies from a distance of only 3m from the common boundary. No screening is proposed to the external terrace areas.

In addition, there will be noise impact and loss of privacy associated with the use of the external areas of the retail spaces, in particular, with outdoor seating areas in close

proximity to our client's property. The increase in the number and scale of the retail/café spaces will generate greater levels of activity, noise and disturbance in both the upper and lower parts of the site compared with the existing situation. In this regard, the Acoustic Report submitted with the application assumes that Retail space 1 will have a capacity of 70 persons, and Retail space 2 will have a capacity of 76 persons (including outdoor areas).

The proposed retail uses also have the potential to result in odour impacts on our client's property. The amenity of her property is already affected by cooking smells emanating from the existing development on the DA site.

There are a number of aspects of the submitted Acoustic Report which raise questions regarding its findings in respect of noise impacts:

- The adjustment of the amenity criterion by +10dB(A) as set out in Table 6 on p. 12 is not considered to be appropriate or justified for the subject circumstances. The background noise generated by the Ocean, as relied upon in the report, has a completely different character to that which would be generated by the proposed development associated with people congregating inside and outside the retail spaces or residents utilising their balconies or other such "urban" background noise. The approach taken in the Acoustic Report artificially inflates the criteria and the adopted benchmark is not reflective of the ambience of the location allowing much greater noise emissions from the proposed development than would otherwise be the case;
- Figure 5 to the Acoustic Report incorrectly shows the distance from the proposed development to our client's property, extending beyond the boundary line into her property which would affect all calculations based on these distances;
- The impact of only two of the proposed retail spaces has been assessed. The Acoustic Report excludes Retail space 3 on the Whale Beach Road frontage. There is no explanation given of this omission in the Report;
- In its assessment of noise impact from the two retail premises, the Acoustic Report assumes (p. 17), together with the capacities referred to above, operation between 7am and 10pm, no background music and all windows closed for noise breakout assessment. The two latter assumptions appear to us to be completely unrealistic. In particular, the assumption regarding the windows/openings is not realistic for café spaces such as those proposed which would be expected to be, and which are shown in the submitted Photomontages to be, fully open to the outdoor areas. It is considered highly likely that the retail spaces would be subject to significant levels of noise breakout from their internal areas during normal operations during the day and evening;
- If the above assumptions are to be accepted, the application must be amended through conditions of consent prohibiting background music, enforcing the hours of operation on any further fit-out consent, the fixing of all glazing and a requirement for doors to be closed but for ingress and egress;
- The Acoustic Report also assumes that certain areas are assessed based on "normal" vocal effort and others with "raised" vocal effort with no explanation why this is the

case. An assessment based on “normal” vocal effort would necessarily generate lower noise levels than one based on “raised” vocal effort;

- The breakout assessment includes assumptions for the minimum composite sound insulation of the façades (see Tables 19 and 20 and pp. 20-21) with which the report states the development would need to comply to meet the adopted criteria. Notwithstanding the comment above regarding the shortcomings of the breakout assessment, there is no evidence that the proposal has been designed or is capable of being designed to meet these façade requirements and conditions as noted above would be required; and
- No cumulative impact assessment has been undertaken of the noise generated by the retail premises. This includes no cumulative assessment of the operation of each of the retail premises individually, ie. indoor plus outdoor area/s of each retail space, as well as no cumulative assessment of the multiple premises operating at the same time. This is considered to be significant shortcoming of the impact assessment as it does not reflect the conditions likely to apply during the operation of the development resulting in a significant underestimation of the overall noise impact of the proposed development.

On the basis of the above matters, the impact assessment undertaken in the Acoustic Report is not considered to be reliable and it is considered that it would underestimate the impact of the proposed development on our client’s property due to shortcomings in both the noise criteria adopted, together with the impact assessment methodology and assumptions. It cannot be concluded that the proposal will have an acceptable performance with respect to noise generation or that it will comply with relevant acoustic criteria.

4. 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 premises 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 two of the residential apartments at Levels 1, 2 and 4.

Retail space 2 is particularly problematic in this regard as it extends parallel to the common boundary with our client’s property but at a higher level and is setback only 1.8m to the external screen. That space also has an external, east-facing balcony overlooking our client’s garden, together with opening onto Whale Beach Road to the east adjacent to our client’s frontage to that road. Added to this is the siting of the proposed disabled ramp as noted above.

5. *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.

Our client has significant concerns regarding the proposed location of the garbage rooms which, as noted above, are adjacent to the nearest driveway to her property off Surf Road. Concern is raised regarding noise and disturbance arising from the collection of wastes, together with impacts arising from improper maintenance and management of the waste facilities.

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 and, moreover, form part of the proposed retail areas. 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, side setbacks, landscaping and privacy, 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;

landscaping will be incorporated into building 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), Side and rear building line (D12.6), 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 nay 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;

vegetation is ... enhanced to visually reduce the built form;

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

Our review of the development application reveals that the proposal will have significant adverse impacts on our client's property and the locality generally with respect to its excessive bulk and scale, lack of appropriate landscaping and siting and design relative to our clients' property which results in significant visual intrusion, as well as privacy impacts, from the overbearing built form and should be refused.

In addition, the proposal has sought to rely on screening plantings on our client's property for which owner's consent has not been granted which is unacceptable. The design of the proposal has had minimal regard for the beachside locality and will be unsympathetic and out of character with its context.

The applicant has sought to maximise the level of development on the site in a manner that does not reflect or appropriately respond to the site constraints. As a result, the external impacts of the proposed development, both on our client's property and the wider locality, are not able to be satisfactorily addressed or mitigated by the proposed development. Therefore, the proposed development is considered to be an overdevelopment of the site.

A number of concerns are raised regarding the submitted Acoustic Report as detailed in this submission which indicate that its findings are questionable and the acoustic impact of the proposal on our client likely to have been significantly underestimated.

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 development application.

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

A handwritten signature in black ink, appearing to read 'J Lidis', with a horizontal line extending to the right and two dots at the end.

J Lidis
Director