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**Sent:** 13/08/2024 10:47:41 AM  
**Subject:** Fwd: Submission on the Fish & Chip shop site  
**Attachments:** PBWBA1102AmendedPlansSubmission.docx;

Hi Staff -  
Could you please forward this to the appropriate person?

Cheers,  
Miranda Korzy

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**From:** Richard West <westsireland@yahoo.com.au>  
**Sent:** Tuesday, August 13, 2024 10:00 AM  
**To:** Councillors Northern Beaches <councillors@northernbeaches.nsw.gov.au>; Northern beaches Council <council@northernbeaches.nsw.gov.au>; Peter Robinson <Peter.Robinson@northernbeaches.nsw.gov.au>; Louise Kerr <Louise.Kerr@northernbeaches.nsw.gov.au>; Amon Rory <pittwater@parliament.nsw.gov.au>; Chris Gough <ChrisGough@sglaw.com.au>; Scamps Sophie <sophie.scamps.MP@aph.gov.au>; Phillips Scott <scott.phillips@northernbeaches.nsw.gov.au>  
**Subject:** Fwd:Submission on the Fish & Chip shop site

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This submission relates to the major problems of the development more closely to the relevant legal provisions of the LEP and DCP and thus gives the Court and NBC legal points on which to hang a decision.

This is an important development and could set a precedent for the rest of Palm Beach.

There are multiple breaches of the LEP these have not been addressed in the new plans. There are major problems with the Geotech report.

It is due to go to the new hearing of the land and environment court in October. There will be another on site sitting of the court.

Richard West AM

President Palm Beach and Whale Beach Association



The Palm Beach & Whale Beach Association Inc.  
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3 August 2024

Northern Beaches Council

Attn. Jordan Davies

### **1102 Barrenjoey Road, Palm Beach Amended Plans**

This submission is in response to the amended development plans released by the Council on 19 July for public comment, ahead of the scheduled hearing in the Land and Environment Court.

As has been pointed out before, this site is one of the two most important sites in the whole of Palm Beach facing development at this point. It is a key component of the 'village' of Palm Beach and whatever is decided for this site will have very strong implications for the other key site on the other side of the historic and heritage-listed Barrenjoey House.

Whilst there have been some changes to reduce the scale and impact of the building, these changes do not address significant problems of height, scale, setbacks and geotechnical issues. Our comments on these issues follow: -

#### 1. Height

There remains significant breaches of the Pittwater LEP height control, over large areas of the proposed roof. They are caused in part by design features introduced to reduce or eliminate problems caused by the earlier plans – in effect, a new breach is caused in trying to fix an old one but there is still a breach. The breaches are not insignificant – they range from 1.8 metres or 21.1% of the control from the dormer windows facing Barrenjoey Road to 2.65 metres or 31.1% for the parapet facing the road; the clerestory windows and adjacent roof-top plant enclosure breach the control by between 2.3 metres (or 27% of the control) and 2.5 metres (29.4% of the control). The majority of the site has been levelled and on the authority of the Merman case, that is taken as ground level and the developer's intent to clear the remainder of the site to the same level reinforces the point; an attempt to "interpolate" a theoretical former ground level is therefore irrelevant and should not be in the Section 4.6 Report; similarly if the size of a variation is not material, it is irrelevant that some case involving the locality of Rose Bay accepted a variation of 49%. Having said that, Section 4.6 talks about "an appropriate degree of flexibility" – on any normal interpretation, this does not translate into substantial additions, like an additional floor. Despite the alterations in the plans, this remains a three-storey building breaching height controls, setbacks and respect for its surroundings and neighbourhood.

The height control is set out in Section 4 of the Pittwater LEP and it is important to understand the planning objectives behind the imposition of the control, as set out in Section 4.3. Most important is objective (a) which is “*To ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality*”; the second objective is also important – “*To ensure that buildings are compatible with the height and scale of surrounding and nearby development*”; also relevant is (f) “*To minimise the visual effect of development on the natural environment, heritage conservation areas and heritage items*”.

It has to be said that the desire of a developer to increase his return from the development by adding a floor which breaches the height control is not a basis for arguing that the development meets the aim of the planning controls nor that compliance with the control is unnecessary or unreasonable and those arguments are not sustained by the Section 4.6 Report. A better development result is not the same as a better planning result.

It should also be pointed out that the language of objective (a) above clearly requires attention to be paid to the desired character of the locality, not to its zoning. That said, then, while it is important to consider principles enunciated in LEC decisions involving height controls and other councils, it is necessary to consider the application of those principles in the light of the desired local character as required by the Pittwater LEP. It must also be pointed out that the desired character of the Palm Beach/Whale Beach locality is like very few other localities in Sydney – it can with justification be described as unique. By way of demonstrating this, Palm Beach/Whale Beach lies on a narrow, steep and rocky peninsula with substantial bodies of water both sides and two ocean beaches and substantial tree cover; the most comparable localities in Sydney would be Manly and Cronulla but both of these are dominated by medium- and high-rise developments, have little tree cover and Cronulla is flat. Palm Beach has no medium- or high-rise developments and has only 3 multi-unit shop-top buildings out of the total of 1,474 buildings in the locality; the majority of those buildings are 2-storey detached residential houses. These are significant factors in determining the character of the locality. In addition to these factors is the description of the desired local character set out in the Pittwater DCP which provide corroboration of the factors involved in arriving at the desired local character; while not of the same force as the LEP, the DCP is at least an authoritative statement by a competent and properly constituted local authority and consent authority. The Section 4.6 Report quotes the DCP statement in full, without qualification. However the Section 4.6 Report does not mention Clause 12.6 of the DCP which sets out 5 tests to be satisfied by a new development, dealing with bulk and scale, privacy, amenity, vegetation and landscaping – all 5 tests are failed by this development.

The Section 4.6 Report supplied to the Court does not consider how the breaches of the height control of this development achieve any of the objectives for the height control set out in Section 4.3 of the Pittwater LEP. It also does not put forward any reasoned arguments as to why compliance should be considered unnecessary or unreasonable – it simply assumes that this is the case. The Report is therefore not complete, fails in its statutory purpose and should not be accepted by the Court.

The proposed development fails the first test proposed in Wehbe’s case because it cannot be substantiated that the development achieves the objective of the planning control in Section 4.3(a).

It also fails the second, third, fourth and fifth tests because the evidence to satisfy the tests cannot be substantiated in the circumstances of this case.

In the only truly relevant recent case in this locality, the Court refused a development application involving a three-storey shop-top over basement parking development at 1105 Barrenjoey Road and 43 Iluka Road, Palm Beach in October 2022, on the grounds of a number of breaches of planning controls, including height, and because the Section 4.6 Report was insufficient (*Forest Apartments Pty Ltd v Northern Beaches Council*, 2023NSWLEC 1042). This is a most pressing and persuasive precedent.

In our view, the development is not in the public interest and should not be approved by the Court.

## 2. Setbacks

Setbacks are dealt with in both the Pittwater DCP and the NSW Apartment Design Guide. We understand that the Court regards the planning rules set out in a DCP as having the status as guidance only which we would wish to contest when an opportunity presents itself. In our view the DCP is a valid exercise of its powers and its responsibilities by the Council under the EPA Act and is a valid planning policy document designed to meet the needs and desires of its community.

The Apartment Design Guide is supported by SEPP65 and some of its provisions are therefore State Government documents, like the LEP, but can overrule both LEP's and DCP's.

This development breaches both DCP and the Design Guide in relation to setbacks against northern, eastern and southern boundaries. The northern boundary has a 3-metre setback but because Barrenjoey House is a heritage item, that setback should be 6 metres. The Design Guide would require a 9 metre separation between habitable rooms on the northern side of the development and habitable rooms in Barrenjoey House.

There is no setback from the eastern boundary – the development is constructed right up to the eastern boundary. This denies the adjoining owners the opportunity to be shielded from the development by landscaping. The montage filed with the amended plans gives a misleading impression of the hillside behind the site because it shows an existing green hedge which will disappear with the additional proposed excavations, leaving the houses on the hillside totally exposed to the proposed development and without any means of putting in any screening at all. This lack of setback results a substantial breach of Clause 12.6 of the Pittwater DCP which requires a minimum of a 3-metre setback for good reason.

There is a small setback along the southern boundary which appears to be somewhat less than 2 metres; under the Design Guide there should be 9 metre separation between habitable rooms on the south side of the development site and habitable rooms in 1100 Barrenjoey Road. There are substantial overlooking and privacy issues affecting the property at 1100 Barrenjoey Road.

## 3. Geotechnical Issues

The additional Geotechnical Report supplied in connection with the Court proceedings contains no new material or insight into the risks posed by “floaters” on the southern and eastern boundaries of the development site. It simply repeats the intention to “trim” the floaters which provides no

comfort to adjoining owners. The developer does not assume any responsibility for any damage caused by movement of the “floaters” during the “trimming” process. This is a major objection to the trimming process. We understand that the proposed new structure for the eastern boundary supporting wall will produce a stronger wall than the earlier proposal but we are not competent to decide whether it is sufficient and we would suggest that the Court require an independent review of the proposed new structure. The construction of the development immediately adjacent the supporting wall will also assist in supporting the wall.

#### 4. Heritage

The amended heritage report does not acknowledge that there are two heritage items within the vicinity of the development site, not one. The second one, Winten House, is shown but not named on the maps with this report and is not commented on. The effect on Barrenjoey House is underestimated by the report because there is not sufficient separation between the development and Barrenjoey House as required by the Pittwater DCP. The effect on Winten House should be considered in the report – it is within the curtilage that is, the “vicinity”, of the development and therefore affected by it – because of the height breaches of the proposed development, Winten Hous’s amenity will be affected..

#### 5. Parking

The plans provide an inadequate number of parking spaces nor an appropriate parking layout and do not comply with the parking requirements of the local planning instruments. It is not appropriate to rely on public parking spaces in South Pittwater Park to provide compliance.

#### 6. Summary

As mentioned earlier, because of the major defects in this development application, we do not believe that the development is in the public interest and it should be refused by the Court.

We very much appreciate the opportunity to put forward our views on the amended plans.

Yours truly

A/Prof Richard West AM

President

Palm Beach & Whale Beach Association