
Sent: 13/05/2022 7:04:21 PM
Subject: Dentons Submission - Objection to DA 2022/0469 - 1102 Barrenjoey Road, Palm Beach [DENTONS-Documents.FID10359443]
Attachments: 97811275_1_Letter from Dentons - 1102 Barrenjoey Rd - 13 May 2022.PDF;

Dear Mr Brownlee,

Please see **attached** our submission, on behalf of our client at 1100 Barrenjoey Road, in relation to the above development application.

Regards



Stephanie Vatala
Partner

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13 May 2022

Mr Ray Brownlee
The General Manager
Northern Beaches Council
1 Belgrave Street
Manly NSW 2095

By email council@northernbeaches.nsw.gov.au

Our ref: SSV:42025415

Dear Sir

**Objection to DA 2022/0469 - Construction of shop top housing
Property: 1102 Barrenjoey Rd, Palm Beach**

1. We act for the owner of the immediate residential property at 1100 Barrenjoey Road, Palm Beach, Ms Prudence Rydstrand.
2. This submission is lodged, on our client's behalf, in opposition to the proposed development the subject of DA 2022/0469 for shop top housing and associated works (**New DA**) at 1102 Barrenjoey Rd, Palm Beach (**Property**). We also refer to and adopt the submissions by our client and by Mr Robert Chambers of BBC Planners of today's date.
3. By way of background, we note that a development application was previously approved by Council for the Property, being DA N0119/14 (**Approved DA**). A subsequent modification application was submitted, being MOD 2021/0203 (**Modification Application**), but was withdrawn by the Applicant after design concerns were raised by the community and the Council's Design and Sustainability Assessment Panel (**DSAP**).
4. In our submission, the following issues would lead the Council to refuse the New DA:
 - (a) The insufficient and inconsistent information DA which has been submitted with the New DA means that the Council cannot be satisfied that there will be no adverse planning outcomes if the New DA is approved.

- (a) The documents submitted with the New DA include documents stated to be the same as, and therefore assessed against, the Approved DA, which is inappropriate.¹

Insufficient information provided with New DA

- 5. Further to the town planning matters raised by Mr Chambers on behalf of our client and the submission of our client, we submit that insufficient information has been provided to Council in support of the New DA to enable it to make a decision.
- 6. The following documents give either inconsistent or deficient information, as identified in Mr Chambers' submission. In particular:
 - (a) The description of the development the subject of the New DA in the Statement of Environmental Effects prepared by BBF Town Planners in March 2022 (**SEE**), includes reference to an out of date Heritage Impact Statement to identify the site features. The building which was on the site has been demolished and the site is clear.
 - (b) The numerical non-compliance with the 8.5 metre height development standard in the *Pittwater Local Environmental Plan 2014 (PLEP)* is not adequately addressed in the clause 4.6 variation request. The variation request does not refer to the existing ground level to measure height, but to an interpolated ground level in circumstances where the site is now clear, the previous building having been demolished. The Council cannot assess the New DA without proper information about how the height of the New DA has been determined by the Applicant.

Significantly, in our opinion, the current clause 4.6 variation also does not demonstrate there are sufficient environmental planning grounds to justify contravention of the height standard. Erroneously, in our submission, the Applicant appears to compare the height proposed under the New DA as against the height of the Approved DA to justify the contravention. Consistent with the decision of the Land and Environment Court in *Rocla Pty Ltd v The Minister for Planning and Sutherland Shire Council*² (**Rocla**) at [60]-[62], a consent authority must assess a New DA on its own merits and not by a comparison to an earlier approved consent.

- (c) Reference to the JK Geotechnics Pty Ltd report provided with the Modification Application and dated November 2020 (**Geotechnical Report**), which refers to the previous documents submitted with the Modification Application not the New DA, does not identify current risks and relies upon access to our client's property to excavate the existing rock boulder, for which consent has not been given. The New DA also does not address the impact of any removal of the boulder on our client's property, including potential destabilisation of our client's property, noise impacts during construction, for example, from the water pumping or how that work may impact the nearby heritage listed Barrenjoey House.
- (d) Information relating to car parking is inconsistent, with parking spaces varying between 21 and 2. No consideration has been given to the impacts on on-street parking.
- (e) Information provided in the landscape and architectural plans, identifying landscaping along the south elevation directly impacting our client, are inconsistent as identified in the submission of Mr Chambers.

¹ *Rocla Pty Ltd v The Minister for Planning and Sutherland Shire Council* [2007] NSWLEC 55 at [60]-[62].

² [2007] NSWLEC 55.

- (f) The shadow diagrams and analysis do not demonstrate either the difference between the current and proposed shadow impacts or the change to shadow impacts with the numerical non-compliance in the height for the New DA.
7. We submit that either as standalone matters or cumulatively, the above deficiencies in the documents provided with the New DA make it impossible for the Council to carry out its assessment pursuant to the requirements under section 4.15 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.
8. We draw the Council's attention to the decision of Chief Judge Preston in *Ballina Shire Council v Palm Lake Works Pty Ltd*³ (**Ballina**), where his Honour found that any impacts, including off-site impacts that have "a real and sufficient link with the proposed development" must be assessed as part of the application (see [6]).
9. In considering the test in *Ballina*, the Council must have regard to off-site impacts in respect of the New DA, and the information provided with the New DA must be sufficient to allow for the assessment of off-site impacts.
10. We submit there is insufficient information in the New DA documents for a consent authority to properly consider and assess the likely impacts on our client's property, so as to meet its obligations as identified by the Chief Judge in *Ballina* and arising from:
- (a) Section 4.15(1)(b) of the EP&A Act, which requires the consent authority to consider "the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality".
- (b) The PLEP, including but not limited to:
- (i) clause 4.3 (height of buildings) which provides:
- 4.3 Height of buildings**
- (1) *The objectives of this clause are as follows—*
- (a) *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*
- (b) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (c) *to minimise any overshadowing of neighbouring properties,*
- (d) *to allow for the reasonable sharing of views,*
- (e) *to encourage buildings that are designed to respond sensitively to the natural topography,*
- (f) *to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items;*
- (ii) clause 7.2 which provides:
- 7.2 Earthworks**
- (3) *In deciding whether to grant development consent for earthworks (or for development involving ancillary earthworks), the consent authority must consider the following matters—*
- ...

³ [2020] NSWLEC 41.

(d) the effect of the development on the existing and likely amenity of adjoining properties,

...

(h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development,

(i) the proximity to and potential for adverse impacts on any heritage item, archaeological site or heritage conservation area.

- (iii) Clause 7.7, which applies to the site and our client's land as identified in the PLEP (Geotechnical Hazard Map 6370_COM_GTH_015_010_20140217), which provides:

7.7 Geotechnical hazards

...

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

(a) the consent authority is satisfied that the development will appropriately manage waste water, stormwater and drainage across the land so as not to affect the rate, volume and quality of water leaving the land, and

(b) the consent authority is satisfied that—

(i) the development is designed, sited and will be managed to avoid any geotechnical risk or significant adverse impact on the development **and the land surrounding the development**, or

[emphasis added]

11. Further to the above, there is, in our opinion, a risk of **serious adverse impacts** on our client's property arising from the New DA if carried out, particularly in relation to geotechnical matters concerning the treatment of the boulder which is partly on our client's land. These adverse impacts are not sufficiently addressed in the information before the Council and the New DA should, in our submission, be refused for that reason alone.

Inappropriate reference to previous material

12. We further submit that Council is not able to discharge its assessment functions by considering material submitted with the Approved DA in making a decision about the New DA.
13. Pursuant to the decisions in *Rocla* and *Milne v Minister for Planning & Anor (No. 2)*⁴ (**Milne**), the task of the consent authority is to consider "the merits of the application before it and to make an assessment based on the evidence in respect of the relevant issues".⁵
14. The SEE makes numerous comparisons between the New DA and the Approved DA, rather than providing information in respect of the New DA to enable the Council to assess the New DA on its merits (not against the Approved DA). The following are examples of the SEE's attempt to draw Council's attention to the Approved DA and also to the Modification Application which was withdrawn:

- (a) At page 5, the SEE states that:

⁴ [2007] NSWLEC 66.

⁵ Above n3 at [60]-[62] and n4 at [114].

following further discussions with Council staff in relation to the DSAP minutes and the community concerns raised following the formal notification of the application, the proponent was encouraged to withdraw the application and develop a new scheme responding to the DSAP feedback and incorporating pitched roof forms in favour of the flat roof forms approved pursuant to the existing physically commenced development consent (Development Application N0119/14). The modification application (Mod2021/0203) was subsequent[sic] withdrawn.

- (c) The SEE goes on at page 6 to note that design of the development under the New DA is in response to comments from the DSAP and community which:

“facilitates the development of the site in a manner which provides far superior urban design, heritage conservation, residential amenity and landscape outcomes compared to the development approved and physically commenced pursuant to Development Consent N0119/14”;

- (b) At page 36, the SEE provides a copy of correspondence from Council confirming physical commencement for the Original DA, the correspondence referencing the Geotechnical Report provided with the Original DA as being the basis for physical commencement.
- (c) The SEE refers to and incorporates a Clause 4.6 variation request to vary the height development standard in the PLEP. That Clause 4.6 request, at page 8, reproduces the reference to the Modification Application and the physical commencement of the Original DA.
- (d) The Traffic and Parking Impact Assessment prepared by McLaren Traffic Engineers and Road Safety Consultants states that it is a report submitted for the Modification Application.

15. The effect of these references in the SEE, the annexed Clause 4.6 request and documents such as the Geotechnical Report submitted with the Approved DA, mean that the New DA before Council inappropriately incorporates matters such that the Council would not be assessing the New DA on the basis of ‘fresh’ information before it. The principles outlined in the *Rosca* and *Milne* cases support a conclusion that Council would not be carrying out the task of assessment of the New DA before it, which would be an error.

For the reasons outlined above, the Council should, in our submission, **refuse** the development application for shop top housing at 1102 Barrenjoey Rd, Palm Beach.

Yours sincerely



Stephanie Vatala
Partner
Dentons Australia