
From: Leung, Shirley [REDACTED]
Sent: Monday, 13 February 2023 4:34 PM
To: Planning Panels - Northern Beaches
Cc: Vatala, Stephanie
Subject: Objection to DA2022/0469 - 1102 Barrenjoey Road, Palm Beach - Dentons Submission [DENTONS-Documents.FID10661516]
Attachments: 101367597_1_Dentons Submission - 13 February 2023.PDF

Dear Panel Members

Please see attached our submission, sent on behalf of our client at [REDACTED], Palm Beach, in relation to development application 2022/0469.

Would you please confirm receipt?

Kind regards,



Shirley Leung
Senior Associate

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13 February 2023

Mr Peter Biscoe QC
The Panel Chair
Northern Beaches Planning Panel

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

Our ref: SSV:42025415

Dear Sir

**Objection to DA2022/0469 - Construction of shop top housing
Property: 1102 Barrenjoey Road, Palm Beach**

1. We act for the owner of the immediate residential property at [REDACTED] Palm Beach, Ms Prudence Rydstrand.
2. We refer to our letters to the Council dated 13 May 2022 and 16 January 2023 (**Earlier Letters**), in which we objected, on behalf of our client, to the proposed construction of shop top housing at 1102 Barrenjoey Road, Palm Beach (**Property**), the subject of development application DA2022/0469 (**DA**).
3. We also refer to the submissions prepared on behalf of our client by Mr Robert Chambers of BBC Planners dated 13 May 2022, 14 October 2022 and 13 February 2023 and Mr Warwick Davies dated 13 February 2023.
4. In this submission, we address the legal flaws in the Council's assessment report recommending approval of the DA and ask the Panel to consider these matters.

Clause 4.6 Request

5. As the Panel will know from the documents, the Applicant has lodged a clause 4.6 request seeking to vary the 8.5m height of buildings development standard under clause 4.3 of the Pittwater Local Environmental Plan 2014 (**PLEP**) by some 34.94%.
6. In our Earlier Letters, we set out why the Applicant's clause 4.6 request is inadequate in demonstrating there are sufficient environmental planning grounds to justify the contravention. We also refer to Mr Chambers submissions in this regard.
7. We are concerned to see that the Council's assessing officer, in his report recommending approval of the DA, appears to have adopted a similar, erroneous approach, to consideration

of the clause 4.6 request. In particular, the assessing officer appears to have engaged in a comparison exercise in accepting that the proposed development will result in a “better environmental planning outcome for the site” when compared to the development the subject of development consent granted to DA N0119/14.

8. With respect to the assessing officer, this is not the test.
9. The Panel will be aware that clause 4.6(3)(b) of the Pittwater Local Environmental Plan 2014 (**PLEP**) requires there to be sufficient environmental planning grounds to justify contravention of a development standard. Significantly, the test does not require a non-compliant development to result in a “better environmental planning outcome for the site” when compared to a development that complies with the relevant development standard¹ or when compared to an earlier approved development for the site.
10. Instead, the test requires the consent authority to consider whether the proposed development *on its own merits* can demonstrate sufficient environmental planning grounds. 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”.²
11. From the Council’s Assessment Report (**Assessment Report**), it seems clear that the assessing officer has fallen into the same error as the Applicant in its clause 4.6 request. By way of example, we draw the Panel’s attention to the following parts of the Assessment Report:
 - a. At page 55 of the PDF copy of the Assessment Report, in relation to the existing consent and built form of the proposed development:

“Both Council, Council’s Heritage advisor and the Design Sustainability Advisory Panel are in agreement that the proposed development will be a superior architectural and urban design outcome when compared to design approved by the existing consent on the land (N0119/14) and therefore achieving the objective (g) to promote good design and amenity of the built environment. Whilst it could be argued that Council should not have regard to the existing three (3) storey consent on the land and enforce strict compliance with the height control, the reality of the situation is that the existing approved development has physically commenced through geotechnical works and could be constructed at any time. This may ultimately result in a lesser outcome than what is proposed under this application in terms of heritage, urban design and streetscape.”

(our emphasis in underlining)

- b. At page 56 of the PDF copy of the Assessment Report:

“Whilst it could be argued that strict compliance with the height limit should be enforced and no regard should be had for the existing approval on the land, this is considered to be counter productive to achieving a good urban design and heritage outcome for the site given the reality of the situation and existing approval on the site.”

(our emphasis in underlining)

¹ *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [88].

² *Rocla Pty Ltd v The Minister for Planning and Sutherland Shire Council* [2007] NSWLEC 55 at [60] – [62] and *Milne v Minister for Planning & Anor (No 2)* [2007] NSWLEC 66 at [114]

- c. At page 56 of the PDF copy of the Assessment Report:

“Whilst the proposed development is higher at 11.47m the additional 1.17m in height is a result of the pitched roof which has been introduced to the development as a response to the Palm Beach character, of which there are many houses with pitched traditional roof forms in the locality...Although taller than the previous approval by 1.17m, the third level being contained within the pitched roof form is considered by the DSAP and Council’s heritage advisor as a superior outcome in terms of character and context.”

(our emphasis in underlining)

- d. At page 57 of the PDF copy of the Assessment Report:

“The proposal is a comparable height to previous approvals on the land and has strategically matched the eave line of Barrenjoey House to maintain consistency in the building height at the street edge.”

(our emphasis in underlining)

12. Further, in addressing the objectives of the height of building development standard, the assessing officer makes the following comments which indicates he has misunderstood the exercise required by clause 4.6:

- a. At page 58 of the PDF copy of the Assessment Report, in relation to objective (a) of clause 4.3 of the PLEP, the Council officer states:

“...the proposed development is of similar height [to] a consent that currently exists upon the land which is a three storey form.”

(our emphasis in underlining)

- b. At page 59 of the PDF copy of the Assessment Report, in relation to objective (b) of clause 4.3 of the PLEP, the Council officer states:

“The proposal is a comparable height to previous approvals on the land and has strategically matched the eave line of Barrenjoey House to maintain consistency in the building height at the street edge.”

(our emphasis in underlining)

13. The assessing officer appears to conclude that a 34.94% departure from the height standard is reasonable and appropriate on the basis that if consent for this DA is not granted, the Applicant would otherwise proceed with the existing approved development (which the Council appears to now say is not appropriate for the site). This is, in our submission, an error and inconsistent with the principles in *Rocla* and *Milne*.

14. Such a justification would not, in our submission, be accepted by the Panel.

Geotechnical Issues

15. We now turn to the serious geotechnical issues raised by Mr Davies in his report dated 13 February 2023.

16. Under section 4.15(1)(b) of the *Environmental Planning & Assessment Act 1979 (EP&A Act)*, the Panel must 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”.

17. The Chief Judge of the Land and Environment Court has held that this extends to a consent authority assessing off-site impacts, where there is a “real and sufficient link” with the proposed development: see *Ballina Shire Council v Palm Lake Works Pty Ltd (Palm Lake Works)*.³

18. Clause 7.7 of the PLEP also relevantly provides that:

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

...

*(b) the consent authority **is satisfied** that –*

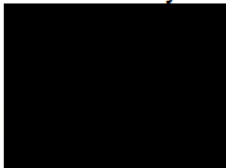
(i) the development is designed, sited and will be managed to avoid any geotechnical risk or significant adverse impact on the development and the land surrounding the development, or...”

19. There is no information about how the proposed excavation will be carried out in a manner to manage the risks to our client’s land nor any assessment or consideration of those risks. Having regard to the matters raised by Mr Davies in his report and contrary to the comments by the Council’s assessing officer, there is insufficient information before the Panel for the Panel to be able to consider and assess the impacts on our client’s property and to be satisfied of the matters required by clause 7.7 of the PLEP.

20. Further information to enable the consent authority to consider and assess the risks to our client’s property and proposed mitigation measures is required. It would not, in our submission, be appropriate for the Panel to impose a deferred commencement condition requiring that information to be provided at a later date. It is essential information which must be provided now (not deferred), so as to enable a proper and lawful assessment of the DA. Such an approach would also be consistent with the Court’s decision in *Palm Lake Works*.

For the reasons set out above, the Panel would, in our submission, **refuse** the development application.

Yours sincerely



Stephanie Vatala
Partner
Dentons Australia

³ [2020] NSWLEC 41 at [6].