
From: Leung, Shirley
Sent: 16/01/2023 4:53:30 PM
To: Council Northernbeaches Mailbox
Cc: Vatala, Stephanie
Subject: TRIMMED: Dentons submission - Objection to DA2022/0469 - 1102 Barrenjoey Road, Palm Beach [DENTONS-Documents.FID10843635]
Attachments: Letter from Dentons - 1102 Barrenjoey Road - 16 January 2023.pdf;

Dear Mr Davies

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

Regards,

 Shirley Leung
Senior Associate

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16 January 2023

The General Manager
Northern Beaches Council
PO Box 82
Manly NSW 1655

Attention Mr Jordan Davies

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

Our ref: SSV:42054475

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 1100 Barrenjoey Road, Palm Beach, Ms Prudence Rydstrand.
2. We refer to our letter to the Council dated 13 May 2022 (**Earlier Letter**), 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 (**New DA**).
3. We reiterate the issues set out in our Earlier Letter and adopt the submissions made by our client dated 14 May 2022 and by Mr Robert Chambers of BBC Planners dated 13 May 2022 and 14 October 2022.
4. This submission is lodged, on our client's behalf, in response to the Applicant's Updated Clause 4.6 Request – Height of Buildings by Greg Boston of Bostyn Blyth Fleming (**Updated CI 4.6 Request**).

Ground level (existing)

5. The height limit which applies to the property must be measured from the existing ground level.

6. The Updated CI 4.6 Request relies on the decision of *Merman Investments Pty Ltd v Woollahra Municipal Council*,¹ in which Commissioner O’Neill found that the “ground level (existing) within the footprint of the existing building is the extant excavated ground level on the site and the proposal exceeds the height of buildings development standard in those locations where the vertical distance, measured from the excavated ground level within the footprint of the existing building, to the highest point of the proposal directly above, is greater than 10.5m. The maximum exceedance is 2.01m at the north-eastern corner of the Level 3 balcony awning.”
7. However, Merman should be distinguished from this case because, unlike Merman, in this case, ground level (existing) can be easily measured as the existing building on the Property has been demolished.
8. In our opinion, the Updated CI 4.6 Request is flawed as ground level (existing) has not been calculated properly.

Inappropriate reference to previous material

9. As mentioned in our Earlier Letter, in assessing the proposed development, it is inappropriate for the consent authority to consider material submitted with the approved development consent DA N0119/14 (**Approved DA**) or the subsequent modification application MOD 2021/0203.
10. 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. However, the Updated CI 4.6 Request continues to, in our opinion, erroneously compare the new DA to the Approved DA to justify the breach in height. This is inconsistent with the principles in *Rocla* and *Milne*, as the consent authority is to consider the merits of the height variation proposed under the New DA on the basis of ‘fresh’ information.

Insufficient environmental planning grounds

12. Under clause 4.6(3)(b) of the Pittwater Local Environmental Plan 2014 (**PLEP**), the relevant test is whether there are sufficient environmental planning grounds to justify the contravention of the height of building development standard. The test does not require a non-compliant development to result in a “better environmental planning outcome for the site” relative to a development that complies with the relevant development standard.³
13. Similarly, the test does not require a non-compliant development to result in a “better environmental planning outcome for the site” relative to an earlier approved development. Instead, the test requires a consideration of whether the proposed development, on its own merits, can demonstrate sufficient environmental planning grounds to justify a contravention of a development standard.
14. However, the Updated CI 4.6 Request engages in a comparison exercise to demonstrate that the proposed development under the New DA would achieve better environmental outcomes than the Approved DA. For example:
 - a. At page 16 in relation to Ground 1 – better environmental planning, urban design, heritage conservation and public benefit outcomes, the Updated CI 4.6 Request states that:

¹ [2021] NSWLEC 1582 at [73].

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]

³ *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [88].

Approval of the building height variation will facilitate development which provides far superior environmental, urban design, heritage conservation and public benefit outcomes compared to the development approved and physically commenced pursuant to Development Consent N0119/14.

- a. At page 17 in relation to objective (c) of section 1.3 of the *Environmental Planning & Assessment Act (EP&A Act)*, the Updated CI 4.6 Request states that:

[A]pproval of the variation to the building height standard will promote the orderly and economic use and development of the land through achieving superior environmental, urban design, heritage conservation and public benefit outcomes compared to the development approved and physically commenced pursuant to Development Consent N0119/14.

...Strict compliance would likely result in the previously approved development being completed and occupied which, given the detailing of the previous approval, would result in inferior environmental outcomes to and from development and not represent the orderly development of land.

- b. At page 18 in relation to objective (g) of section 1.3 of the EP&A Act, the Updated CI 4.6 Request states that:

[A]pproval of the building height variation will facilitate development which provides far superior environmental, urban design, heritage conservation and public benefit outcomes compared to the development approved and physically commenced pursuant to Development Consent N0199/14. In this regard, I note that the extent of building height non-compliance is increased through the provision of characteristically pitched roof forms with the variation able to be significantly reduced through the adoption of a flat roof form consistent with that previously approved pursuant to Development Consent N0119/4. Such outcome would not, in my opinion, represent good design nor promote the amenity of the built environment.

15. Such a comparison exercise means the Applicant has failed to adequately justify that there are sufficient environmental planning grounds for the contravention of the height of building development standard.
16. In addition, the focus of clause 4.6(3)(b) of the PLEP is on the aspect or element of the development that contravenes the development standard, not the development as a whole.⁴
17. However, the Updated CI 4.6 Request takes into consideration when determining that there are sufficient environmental planning grounds to justify the height contravention, design elements other than the height contravention.
18. For example at page 16 the Updated cl 4.6 Request identifies the following elements that will facilitate environmental, urban design, heritage conservation and public benefit outcomes far superior than the Approved DA:
- *The 3 storey building incorporates pitched roof forms and is of a design which is both sympathetic to its context and contemporary in its use of materials and forms in response to local climate and the “seaside village” character anticipated by the Palm Beach Locality Statement.*

⁴ Ibid at [24].

- *The adoption of a design which relates to the built form proportions, eave levels and control lines of Barrenjoey House whilst maintaining contextually appropriate setbacks.*
- *The creation of a publicly accessible plaza, open to the sky, at the northern end of the site to facilitate the provision of a feature tree whilst providing broader public benefit in terms of its usage and the maintenance of views to the southern façade of Barrenjoey House.*
- *The provision of additional landscaping adjacent to the southern boundary of the Property where the development interfaces with the adjoining dwelling house.*
- *The provision of a deep and generously proportioned colonnade adjacent to the frontage of the property including level access to the adjacent commercial tenancies.*

19. In our opinion, such an assessment is flawed and the Updated CI 4.6 Request inadequately addresses the mandatory test of whether there are sufficient environmental planning grounds that justify the height contravention.

For the reasons set out above, the Council should, in our submission, **refuse** the clause 4.6 written request to vary the height of building development standard.

Yours sincerely



Stephanie Vatala
Partner
Dentons Australia