



The Palm Beach & Whale Beach Association Inc.
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SUBMISSION TO LAND AND ENVIRONMENT COURT

23 OCTOBER 2024 ON SITE SECTION 34 HEARING

Fish & Chip Shop Site – 1102 Barrenjoey Road, Palm Beach

ASIA DIGITAL INVESTMENTS PTY LTD V NORTHERN BEACHES COUNCIL

Case No. 2023/242901

This site is an especially important one in the centre of Palm Beach Village. It is one of only 5 tiny E-zones under the Pittwater LEP. It is also one of only 2 sites where shop-top housing is a current possibility. It is of great interest to the Palm Beach & Whale Beach community, as evidenced by the more than 180 submissions lodged, 98% of them against the amended plans issued in July. We have been advised by the Council's solicitor that all relevant statutory provisions have been complied with but most of those who lodged submissions were not advised of the issue of the amended plans nor of the decision to hold this morning's conciliation hearing. Even the body I represent – the PBWBA which has lodged at least 8 submissions and represents over 460 local residents, property owners and business owners did not receive a copy of the proposed consent order. Notification is a statutory obligation – the effect of non-compliance on these proceedings is not clear.

The Council has advised those who were privileged to be given notice of this hearing that it had exhausted the avenues available to it, pursuant to the advice from its experts. There are a number of problems with that statement. First, the Council did not need experts to advise it that the amended plans do not comply with the provisions of the Pittwater LEP or DCP nor with the State Apartment Design Guide nor SEPP65. Second, the Council should not have accepted the Section 4.6 Report in relation to the height breaches, because it did not show that, under the specific language of the Pittwater LEP, compliance with the provisions of that LEP was unnecessary or unreasonable. Third, the Council did not, so far as we know, include geotechnical advice amongst the experts it used; that is a matter of critical concern for this site and for the adjoining residents. Fourth, the precedent set by the Land and Environment case of Forest Apartments Pty Ltd v Northern Beaches Council (Case No. 2023/NSWLEC 1042) , decided last year for a site less than 150 metres from where we are, rejecting a shop-top housing DA for similarly breaching planning controls, has not been taken into account.

We would like to expand on our objections.

PITTWATER LEP

The Pittwater LEP contains, in Section 4.3, specific planning objectives, comprising 6 sub-objectives. The most important for this case are set out in paras. (a), (b), (c) and (f) of Section 4.3 and are: -

- (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) and*
- (e) – not relevant*
- (f) To minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

The exact wording of these subclauses is important because they are not the same as for example in the Ashfield LEP, the City of Sydney LEP, the North Sydney LEP or the Woollahra LEP (chosen because they are dealt with in the leading cases). We attach a table setting out these differences. The Council is bound to act in accordance with the wording of the Pittwater LEP, not one or other of the ones I have mentioned. Why do I spell this out? Because the Section 4.6 Report relied upon by the Council quotes cases relating to those other Council areas and does not attempt to relate the decisions in those cases back to the specific wording of the Pittwater LEP. As a result, any conclusion it draws that those cases justify breaches of the Pittwater LEP are fatally flawed because that conclusion is not founded on the specific language of the Pittwater LEP.

The next question is what is a development standard? The EP & A Act defines a development standard as *“provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development including but without limiting the generality of the foregoing, requirements or standards in respect of*

- (a) (not relevant)*
- (b) the proportions or a percentage of the area of a site which a building or a work may occupy;*
- (c) the character, location, siting, bulk, scale shape, size, height, density, design or external appearance of a building or work;*
- (d) (not relevant)*
- (e) (not relevant)*
- (f) The provision of public access, open space, landscaped space, tree planting or other treatment for the preservation, conservation or enhancement of the environment;*
- (g) (not relevant)*
- (h) (not relevant)*
- (i) (not relevant)*
- (j) (not relevant)*
- (k) The carrying out of earthworks;*
- (l) (following provisions not relevant).*

That definition encompasses numerical standards such as height but also includes non-numerical standards such as scale, design and appearance. It is clear from this definition that each of the provisions of Clause 4.3 of the Pittwater LEP constitutes a development standard. They are not alternative – it is not a case of pick which one suits best. Therefore each of them needs to be examined for compliance and, where there is a compliance breach, the Section 4.6 Report should respond.

In our view, there are breaches of compliance with subclauses (a), (b), (c) and (f) of Section 4.3 of the LEP and the Section 4.6 Report should have responded to each.

As to the conclusion on page 12 of the amended Section 4.6 Report that “most observers would not find the proposed development by virtue of its height, scale and pitched roof forms offensive, jarring or unsympathetic in a streetscape context nor having regard to the built forms characteristics within the site’s visual catchment”, there are over 180 discrete submissions which clearly demonstrate the opposite. In any case that negative conclusion is not the test. The Report has to provide positive reasons, derived from environmental planning grounds, that demonstrate that compliance is unnecessary or unreasonable. (*Forest Apartments Pty Ltd v Northern Beaches Council* at [24] and [29]).

But there is another problem with the Section 4.6 Report. It needs to track the exact criteria set out in each of the sub-clauses and it does not. The sub-clauses (a) and (b) don’t talk about “height” – they talk about “height and scale”. There can be no question that the proposed development not only breaches the height control but it is also substantially out of scale with both the desired character of the locality and also the scale of the nearby and surrounding development. Because the Section 4.6 Report does not deal with “height and scale”, it is in our view deficient and not capable of justifying the breaches. There is no attempt to minimise the height or scale by increased landscaping and the planting of canopy trees to soften the massing above the height control; there is no stepping back from the side boundaries of the upper floors to reduce the scale. The scale of the proposed development is like nothing else in the locality or the Palm Beach area and it is massively different from the D/A approved for this site ten years ago; the Council decided that the differences between the 2014 D/A and the current one were so major that the current development could not proceed by way of modification to the 2014 D/A and so it is irrelevant to the consideration of the current D/A.

The Report also does not comment on subclause (c) at all and it should have.

In relation to subclause (f) we submit that the treatment is insufficient as it does not deal with the recommendations in the ADG that there should be a 9 metre separation between a new apartment and a heritage item in accordance with the approach laid out in *Sandoval Investments v North Sydney Council* 2006NSWLEC 721. The intention of heritage protection provisions is to “showcase” heritage items, not overwhelm them. Set beside the only other extant commercial building in this E1 zone, the 101-year-old Barrenjoey House, , it is beyond question that the D/A is substantially out of scale with Barrenjoey House and the setback at 3 metres is inadequate. The photomontage submitted with the amended plans showing Barrenjoey House in the foreground and the proposed building in the background is misleading. A much better view of the relationship between the two buildings can be found in the architect’s drawings number DA71.1, 71.2 or 71.3 – these are sun-view drawings but they are clearer than the photomontage and there is no false perspective or manipulation; these drawings also show that the eaves of the development are in fact higher than their counterparts at Barrenjoey House. The proposed building is also way out of scale compared to the other heritage item in this locality, Winten House, on the hillside behind Barrenjoey House.

The first of the sub-clauses quoted above refers to the character of the locality. For a statement of the desired character of the locality, the Court can turn to the Pittwater DCP, as it has in other cases, where a statement of the desired character is set out in Clause A4.12 of Section A. We submit that the DCP contains the only authorised and authoritative statement of the character of the area. It doesn’t matter what the developer thinks the character is or should be, it doesn’t even matter what this community

body PBWBA thinks the character is; the DCP was the subject of public consultation and advice and it is the only document the Court can turn to for authoritative advice on the character of the area. And because of the language of the para I quoted from the LEP, any proposed development must be consistent with the desired character of the area. This DA does not comply.

As to the objectives of the zone in which this site sits (E1), there is no suggestion that this type of development is not in general accord with the first five objectives of the zone set out in the Land Use Table in the Pittwater LEP. We do, however, draw the Court's attention to the sixth objective which we quote: -

"To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and the natural environment".

One of the features of the design is the roof. It is falsely described as a "pitched" roof – it is not as the section drawings DA16 demonstrate. It is a flat roof for, I suggest, at least two-thirds of the building's footprint and all of that roof is in breach of the height standard. The edges are tapered or chamfered – that is all. As the Section 4.6 Report makes clear, that tapering has been made steeper to increase the volume of the rooms behind it. The effect is to increase the area of flat roof and to bring the upper edges of the roof closer to the road, increasing the bulk and intrusion of the design into the environment. It would appear from the Massing Height Diagram (Drawing No DA2a) that rather more than 50% of the roof is in breach of the height control based on the site as it is today. There is an argument that because of the developer's intention to excavate the entire site to the eastern boundary, the entire roof when constructed will be in breach of the height control. That is not "flexibility" in terms of Clause 4.6 of the LEP. To quote Commissioner Walsh in the Forest Apartments case: - "Notable is the proportionate footprint of the building contravening the height standard. Mr Susko (*the Council's expert witness*) calculated that the proportion occupied by the building in excess of the standard was 58%." More than a little similar to the present case.

Overall, the height of the flat roof breaches the height standard by between 21.1% and 31.1% at various points across the roof. Coincidentally these breaches are almost the same as the height breaches (between 20.5 and 29.1%) rejected in the recent local case of Forest Apartments Pty Ltd v Northern Beaches Council for a site about 150 metres from here - the case is not mentioned in the Section 4.6 Report. These breaches are the same as in the earlier plans rejected by the Northern Beaches Local Planning Panel in April last year.

The Report makes mention of the need to raise the building height to allow for a raised ground floor level to avoid future flooding risks. That is not a permissible justification for breaches of the height control in the LEP.

On another aspect of design, the E1 zoning calls for a range of retail, business and community uses. In an attempt to minimise the height problem, the ceilings of the commercial areas were lowered to the point that no food preparation businesses, such as cafes, can operate from these areas and the plans show no presence of the required ventilation. So the most likely use of these premises is excluded – the fish and chip shop previously operating on this site was a booming business. There is very little demand for other uses of commercial premises in Palm Beach; there is already a clothing shop and an attempt by a second shop to operate prior to COVID failed. There was art gallery until last week but it has now moved to Avalon and its former site is empty; there are several other empty shops in the area.

There are already three or four estate agents so little room there. So who is going to take up a lease of these premises?

Much is made of the proposed public plaza at the front of the building, with its feature of one canopy tree. It would appear to be the only canopy tree of the landscaping. In this well-treed area, that is truly incongruous. There is thus no possibility of using canopy tree planting to minimise the massing above the height control limit as required by the Pittwater DCP Clause A4.12.

It is, with all due respect, difficult to identify the environmental planning grounds put forward to justify non-compliance. On page 13, for example, the Report says ...*"I have formed the considered opinion that the bulk and scale of the building is contextually appropriate with the floor space appropriately distributed across the site to achieve acceptable streetscape, heritage conservation and residential amenity outcomes"*. The residential amenity is easily disposed by reference to the 180 objections and the particular problems experienced by the owners of 1100, 1110B and 1110C Barrenjoey Road. "Floor space" is not mentioned in the objectives and is not an environmental planning ground. The context is Barrenjoey House and three residences and the height, mass and scale of this proposed building is entirely contextually inappropriate. That is by way of example only but our conclusion is that environmental planning grounds which, on the authorities have to be positive, not negative, cannot be found to justify the breaches of the development standards in the LEP, Clause 4.3.

To summarise, our arguments are that (a) because the Section 4.6 Report does not deal with the matters required by the Pittwater LEP, the consent authority cannot be satisfied that it has adequately addressed the matters required to be demonstrated by Section 4.6(3);

(b) The Report does not establish that compliance with the development control is unreasonable or unnecessary;

(c) The Court cannot be satisfied that the development will be in the public interest because it is not consistent with the objectives of the development standards set out in Clause 4.3(1) of the LEP. In fact the development is contrary to the objectives of the development standard because of its height and scale.

GEOTECHNICAL ISSUES

The second problem is the absence of independent geotechnical advice for the Council. As you can see, this is a difficult, very steep site beyond the level area at the front. There are known to be floaters in that hillside and one large exposed one lies across the boundary between the DA site and the neighbour at 1100 Barrenjoey Road; any neighbour to the immediate east of those two sites would also be affected by instability of the hillside, if the floater moves significantly. The Council is aware of significant differences between the geotechnical advisers employed by the developer and the owners of 1100 Barrenjoey Road and has chosen to be guided by the advisers of the developer. The Council has acknowledged in other places that it does not possess significant geotechnical advice of its own and has elected not to obtain expert advice. The Northern Beaches Council Local Planning Panel had already found in April 2023 that the then proposal did not comply with Clause 7.7 of the LEP and the developer's Geotech report has not been significantly upgraded since then, while the risks have been significantly increased by the extension of excavation. Clause 7.7 requires the consent authority to be satisfied that the objectives of Section 7.7 (1) are met, including ensuring that the development (a) is

consistent with the underlying geotechnical conditions of the land; and (c) does not endanger life or property. This is a substantial responsibility for the consent authority to assume, to provide security for the adjoining owners and residents. We submit that there is insufficient evidence for the consent authority to be so satisfied.

Since the amended plans emerged, another geotechnical issue has emerged and has not been dealt with. The amended plans reveal that the developer proposes that the excavation will go further into the hillside to a distance of 6 metres right to the eastern boundary of the site. There has been no geotechnical exploration of what might lie within those 6 metres. The present “face” of the area to be excavated lies behind a concrete and piled retaining wall and nobody appears to have any information as to what the “face” looked like before the retaining wall was built. An amended Geotech report has been provided by the developer but it does not cast any additional light on the composition of the hillside; it uses exactly the same language as the earlier report in relation to the boulder on the boundary between the site and 1100 Barrenjoey Road, namely that it will be trimmed back to the boundary, without any indication of measures to secure it in place during the trimming process and construction stages and afterwards. Given the steepness of the hillside, the presence of floaters in other parts of the hillside and the hazard rating of this hillside (=H1), it is in our view, critical that the underlying nature of those 6 metres be explored and that the Court obtain independent geotechnical advice to evaluate the data and the risks. The Court has a major responsibility to ensure that the interests and security of adjoining owners and residents are protected.

PITTWATER DCP AND THE ADG

There are a number of other breaches of the Pittwater DCP and the ADG which are highly relevant. Although the DCP does not require a setback from side or rear boundaries for shop-top housing, the Apartment Design Guide (ADG) as a more recent document, wishes to implement a totally different regime of separation which will be reflected in the new Northern Beaches DCP. Where a development of up to 4 storeys in a medium density zone (which this one is) adjoins a lower density zone (which this one does), the ADG (Part 3) recommends a separation of at least 9 metres and up to 12 metres between habitable rooms. Where there are different uses for adjoining blocks, the ADG recommends a separation of between 9 and 12 metres. As a separation between a development and a heritage item, the ADG recommends a minimum separation of 9 metres. This development does not comply.

PRECEDENT

The fourth problem is the precedent set by the decision of the Court in *Forest Apartments Pty Ltd v Northern Beaches Council*. It concerned a redevelopment of part of the Iluka Apartments on the corner of Barrenjoey Road and Iluka Road, less than 150 metres away. The Court was concerned about breaches of height control, lack of setback, bulk and scale, lack of landscaping and the flat roof design and ruled that the Section 4.6 Report lacked environmental planning grounds to justify the breaches. These grounds are very similar to the many objections to the DA proposed in this case. The Commissioner ruled that the roof (which was a similar style to this D/A) was not a pitched roof. That DA was refused because the environmental planning grounds to justify the non-compliance were not established and so should this one be. We recommend consideration of this case because (a) it is local; (b) it is recent; (c) the breaches are very similar; and (d) the two Section 4.6 Reports are in almost identical terms – they were prepared by the same firm.

It is also worth recalling that the Northern Beaches Council Local Planning Panel rejected an earlier but not dissimilar version of the plans but at with a lesser degree of non-compliance as not being in the public interest on 20 April 2023 and was particularly concerned the failure to deal with the requirements of Section 7.7 of the LEP.

The grounds for refusal were that the 4.6 Report had not adequately addressed and demonstrated that (a) compliance with the standards was unreasonable or unnecessary; (b) there were sufficient environmental planning grounds to justify the contraventions; and (c) the proposed development would be in the public interest because it is consistent with the standards and the objectives for development within the zone. It did not comply with Clauses 5.10 (Heritage Conservation) and Clause 7.7 (Geotechnical Hazards) of the LEP or the provisions of Section 4.15(1) of the EP&A Act in relation height of buildings, context and neighbourhood character or SEPP65 in relation to Design Quality Principles 1,2 and 9 and was not in the public interest. We would have expected the Council to defend this decision because the decision of the Panel is, in fact, the decision of the Council. The Court is faced with the challenge of approving plans with a greater degree of non-compliance than the Panel.

We keep referring to the Forest Apartments case because (a) it is local; (b) it is recent; (c) its breaches are very similar; and (d) consent was refused. The Section 4.6 reports are in almost identical terms in that case and this current D/A – they were prepared by the same firm.

CONDITIONS OF CONSENT

The conditions of consent are unremarkable and do not in any way make up for the magnitude of the breaches of this proposal nor the risks involved. We would expect to see Conditions on dilapidations in any proposal involving excavation, not just one with the higher level of risks of this one.

CONCLUSION

This D/A should be refused. Its tortuous process has been flawed, its breaches of compliance are of considerable magnitude and it is not appropriate for this important and highly visible site.

Palm Beach & Whale Beach Association, Inc.

Frank Bush AM – Vice President

21 October 2024

APPENDIX A

PROVISIONS OF CLAUSE 4.3 OF COMPARABLE LEP'Ss

Pittwater LEP	<p>(a) To ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality;</p> <p>(b) To ensure that buildings are compatible with the height and scale of surrounding and nearby development;</p> <p>(c) To minimise any overshadowing of neighbouring properties'</p> <p>(d) N/A</p> <p>(e) N/A</p> <p>(f) To minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.</p>
Ashfield Council	<p>(a) To achieve height quality built form for all buildings;</p> <p>(b) To provide a transition in built form and land use intensity between different areas having particular regard to the transition between heritage items and other buildings;</p>
City of Sydney Council	<p>(a) To ensure the height of development is appropriate to the condition of the site and context;</p> <p>(b) To ensure appropriate height transitions between new development and heritage items</p>
North Sydney Council LEP	<p>4.3(1)(a) To promote development that conforms to and reflects natural landforms, by stepping developments on sloping land to follow the natural gradient;</p> <p>(f) to encourage an appropriate scale and density of development that is in accordance with and promotes the character of an area;</p>
Woollahra Council LEP	<p>4.3(1)(a) To establish building heights that are consistent with the desired future character of the neighbourhood;</p> <p>(d) To minimise the impact of new development on adjoining or nearby properties from disruption of views, loss of privacy or visual intrusion;</p>