



The Palm Beach & Whale Beach Association Inc.
www.pbwba.org.au | PO Box 2 Palm Beach NSW 2108

LAND AND ENVIRONMENT CASE NO. 2024/400881

Kalloghlian Investments Pty Ltd V Northern Beaches Council

S.34 Conciliation Hearing – 13 May 2025

FINAL SUBMISSION

The Palm Beach & Whale Beach Association, Inc. is grateful for the opportunity to make a submission to the Court in this case. The Association is a community association, formed in 1918, to protect the environment of the Palm Beach and Whale Beach area and to protect the residential amenity and interests of the residents and businesses in the area. It has over 450 members, including residents, landlords and small businesses operating in the area.

The Development Application in this case, DA 2023/1532, has been considered by the professional planning staff of Northern Beaches Council who recommended refusal, and by the Northern Beaches Local Planning Panel which, on behalf of the Council, determined that the DA should be refused in May 2024. The reasons for that refusal are before the Court; there are ten of them; they are detailed, specific and comprehensive and we will not repeat them. However we totally support their reasoning in each and every respect.

At the time of preparation of this Submission (9 May 2025), the Association does not know whether the Council will defend the decision of the Planning Panel, (which is the Council's decision), before the Court. If the Council does not do so, then the interests of the community are not represented before the Court by the statutory body charged with representing the community's interests. In that situation, we will seek the leave of the Court to appear before the Court representing the interests of the Palm Beach and Whale Beach community, the people most affected by this D/A.

This submission is based on the Newly Amended Plans which were released to certain members of the community by email at around 4.09 pm on Friday, 9 May, ahead of the S.34 conciliation hearing at 9.30 am on Tuesday, 13 May. The Newly Amended Plans are different from the previous amended plans lodged by the Applicant with the Council on 4 April 2024, which were the plans considered by the Planning Panel. It is unfair on the community for such short notice to be given to the community and the S.34 hearing should have been adjourned to a later date.

The Newly Amended Plans do not address the ten reasons for the refusal of the Application by the Planning Panel, other than through a minor (around 500 mm) reduction in height. There has been no amended Statement of Environmental Effects provided by the developer and no updated SOFAC provided by the Council.

The site is a highly visible and prominent site on the main traffic route to the beach at Palm Beach. It is close to a heritage item at 2 Palm Beach Road and beside a key historic site for Palm Beach, the Palladium, 16 Ocan Road.

The principal planning issues which are our concern are as follows: -

- ZONING.

The property is zoned C4 – Conservation Living, the objectives for which are to

- Provide for low-impact residential development in areas with special ecological, scientific or aesthetic values;
- Ensure that residential development does not have an adverse effect on those values;
- Provide for residential development of low density and scale integrated with the landform and landscape.

In relation to the first objective, the Palm Beach locality is accepted as an area of special ecological, scientific and aesthetic values.

This development clearly fails all three of these objectives.

- BREACH OF HEIGHT CONTROL

What are the objectives of the height control? They are set out in Section 4.3(1) of the Pittwater LEP. There are six objectives but for this case the important ones are (a), (b), (e) and (f) which are set out below: -

- (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;
- (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.

The purpose of the inclusion of Section 4.6 in the Pittwater Local Environment Plan (LEP) is set out in the Section – “(a) to apply an appropriate degree of flexibility in applying certain development standards to particular development;

(b) to achieve better outcomes for and from development by allowing appropriate flexibility in particular circumstances”.

What “appropriate” means is not defined but to cast a light on these provisions, reference to Section 4.3 (Height Control), subsection (2D), is enlightening. The introductory words are “Despite subclause (2), development on land that has a maximum building height of 8.5 metres shown for that land on the *Height of Buildings Map* may exceed 8.5 metres **but not be more than 10 metres** if (a) the consent authority is satisfied that the portion of the building above the maximum height shown for the land on the *Height of Buildings Map* is **minor** (emphasis added); (b) the objectives of this clause are achieved; plus (c) the building footprint is situated on a slope that is in excess of 16.7 degrees (30%); and (d) the buildings

are sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step **down** the slope.

The use of the word “minor” is the only indication in Section 4 of the degree of flexibility in contemplation.

One of the reasons that the 10 metre height control does not apply is that there is no attempt to step the property **down** the slope – the site is excavated to the depth necessary and the building rises up from the excavated area.

The height of the development as shown on Drawing A1201 is 12.6 metres (to the t.o.w.) at the line of the front wall of the top level (before any staggering could be claimed to occur) but this is measured from the top of the ground floor slab. It should be measured from natural ground level in accordance with the Court’s rulings, which we assume would add a further 225 mm. So the building has a height of 12.825 metres which is 2.825 metres above a height control of 10.0 metres (assuming it is applicable), a variance of 28.25%. That is a long way away from “minor”.

To the east of this point, (i.e. towards the water) the height is 9.525 metres, making the same adjustment to go to the bottom of the slab, not the top. So there is still a substantial breach (12%) of the 8.5 metre height control which requires a Section 4.6 Report to address.

The developer has not previously argued that Section 4.3 (2D) applied to this development. With all due respect, we would agree – there is no serious attempt to stagger this building down the slope, again based on Drawing A 1201, and it does not meet the objectives of the control, particularly Section 4.6(2D) (c) and (d) and it would still exceed 10m while Section 4.6(2D) requires that the height be no more than 10 metres. On that basis, the relevant height control is 8.5 metres, which the previous amended plans accepted, and the breach for the fourth floor would be 52.42%, which would be serious over-development. Even if the entire fourth floor of the development were removed, reducing the height by 3.2 metres, the height control would still be breached by 12.0% - that also is not “minor”. This is not using “an appropriate degree of flexibility” – this is egregious over-development.

- THE SECTION 4.6 REPORT

The Court as the consent authority needs to be satisfied that the Applicant has demonstrated that “(a) compliance with the development standard is unnecessary or unreasonable; and (b) there are sufficient environmental planning grounds to justify the contravention of the development standard”.

The way this is accomplished is through the Report provided in accordance with Section 4.6 and the Environmental Planning Regulations. One has been supplied in this case. The only Report before the Court, so far as we are aware, is the one provided for the original plans - this does not appear to have been updated to reflect the Amended Plans or the Newly Amended Plans. If that is correct, the consent authority does not have a Section 4.6 Report

before it to justify breach in the Newly Amended Plans and therefore cannot come to a decision to approve them.

It is worth observing that “the locality” and “surrounding and nearby development” does not mean 11 and 9 Ocean Road – “locality” as used in the Pittwater DCP means the whole of Palm Beach and Whale Beach and vicinity means all properties within a reasonable purview of the proposed development, Ocean Road, Palm Beach Road, Florida Road, Sunrise Road and so on. The overwhelming majority of these properties are two or three stories above the natural ground level and this development is not consistent with the majority. Numbers 11 and 9 Ocean Road are anomalies because of their particular topography which does not apply to this development and they were entitled to the benefit of the 10 metre control. Both these buildings are built against almost vertical hillsides and they are the exception, rather than the rule – there are no other similar buildings on Ocean Road or Palm Beach Road or at the end of Florida Road (from which point the development site can easily be seen). In any event, Number 9 is a three-storey building, not four storeys like the current Application. Comparisons with the approved development at 14 Ocean Road are misleading because that is to be constructed on land which is at least 3 metres higher than the subject land – see Drawing A1305.

Our submission is that the Court cannot accept the Report as providing any substantiation of the matters required by Section 4.6. There is no explanation or reasoned argument as to why the substantial contravention of the height control is either unnecessary or unreasonable. There is no evidence that the objectives of the control can be met notwithstanding the breach and none of the other means of establishing that compliance is unnecessary or unreasonable as set out in Wehbe’s Case are established. There are no environmental planning grounds provided to support the claim that compliance would be unnecessary or unreasonable. Instead there are simply a collection of statements that this is so and they were comprehensively rejected by the Local Planning Panel.

The Court has previously decided that it prefers environmental planning grounds to be positive grounds. Despite this, the Report relies on negative statement to justify the contravention – for example (page 52) “there is an absence of environmental harm arising from the contravention of the development standard”. That’s a negative statement, apart from being more than a little arguable. Or again (same page) “The proposed variation of the height is a necessary outcome to allow for a well-resolved and functional floor plate arrangement offering high levels of residential amenity”. There is no rule of design that we are aware of that says it is necessary to have four floors in breach of height control and other planning requirements in order to have a well-resolved outcome. Or again (same page), “The height breaches will result in no adverse impact on adjoining properties in terms of visual bulk, views, privacy or overshadowing” – the submissions from neighbouring properties argue strongly otherwise. The arguments are all negative and do not present any positive reasons why compliance is unnecessary or unreasonable, nor that the objectives of the controls will still be realised.

There are also many statements that are quite simply mistaken. For example, the statement (page 52) that “a shadowing analysis prepared by BJB Architects affirms that the extent

of additional shadow cast over neighbouring properties, specifically 16 Ocean Road to the south as a result of the breach, will not be adversely influenced by the extent of height non-compliance observed” – see next heading. Or again (page 53) “The height breach will result in no adverse impacts on adjoining properties in terms of visual bulk, views, privacy or overshadowing”. Or (same page), “The elements which breach the height do so largely as a result of the site’s topography which as observed displays a significant slope from the rear towards the street.” This is simply wrong – the development is proposed mostly on the more level land near the street with some excavation into the slope behind – the topography plays no part whatsoever in the height of the building.

To summarise where the argument is at this point and to bring threads together: -

- 1. The development does not meet the objectives of the C4 zoning;**
- 2. The development breaches the height control of 8.5 metres over a substantial portion of the proposed structure;**
- 3. No argument is made by the developer that the 10 metre height control applies and the development does not meet the criteria for it to apply.**
- 4. No Section 4.6 Report on the Newly Amended Plans has been provided and the former report on the original plans has not been updated to apply to the new plans.**
- 5. Without a Section 4.6 Report dealing specifically with the Newly Amended Plans, the Court cannot be satisfied that the Applicant has demonstrated that compliance with the controls is unnecessary or unreasonable nor that there are sufficient environmental planning grounds to justify the contravention**
- 6. The old 4.6 Report does not advance any arguments as to why compliance with the height control is unnecessary or unreasonable nor that there are sufficient environmental planning grounds to justify the contravention.**

- VIEWS.

There is only a dismissive reference to the impact on views from this development affecting 2 Palm Beach Road , and none at all in relation to 8, 10 and 12 Sunrise Road.

For example, “The primary view for the heritage listed property at 2 Palm Beach Road is from along (sic) Palm Beach Road itself. Therefore any built form on the subject site, specifically the breaching elements, will in no way hinder views to from and across this item of relevance from along this vantage point”. (Page 52) In fact 2 Palm Beach Road has important views across the subject site to the ocean and towards Barrenjoey Headland which will be totally blocked by this development and on the Tenacity principles, these would be its most important views. The secondary dwelling at 16 Ocean Road has similar views which will be damaged by the proposed development.

- BULK AND SCALE

The bulk and scale of the building is not significantly different from the earlier Amended Plans and is grossly out of line with the vicinity. It is not minimised as required by the Pittwater DCP (D12.8). The footprint in the Newly Amended Plans is said to have been

reduced from earlier plans but there is no quantification of this and it does not affect bulk and scale, particularly from public viewpoints.

- DENSITY AND LOW IMPACT

The Pittwater DCP requires (A4.12) “The Palm Beach locality will remain a low-density residential area with dwelling houses in maximum of two stories in any one place.” Section D12.1 provides “Within residential areas, buildings give the appearance of being 2-storey maximum.”

- OVERSHADOWING.

Drawing A1501 shows the entire roof of 16 Ocean Road in shadow at midday. – makes a mockery of the statement. The Section 4.6 Report (which has not been updated from the original plans) contains on page 52, the following statement: - “a shadowing analysis prepared by BJB Architects affirms that the extent of additional shadow cast over neighbouring properties, specifically 16 Ocean Road to the south as a result of the breach, will not be adversely influenced by the extent of height non-compliance observed”. At present, the roof is not shadowed at all until late afternoon when it is shaded by the trees further up the slope. With all due respect, this statement is simply not true.

The height pole erected by one of the owners of 16 Ocean Road shows dramatically the extent of overshadowing and how overwhelming the Application will be – height poles were not erected by the developer. The intrusion into the private space of 16 Ocean Road will be total and complete – there will be no private space available to the owners of 16 Ocean Road.

- LOCAL CHARACTER – DCP

As mentioned earlier, the Application does not comply with any of the criteria for local character in the Pittwater DCP, specifically Sections A3.4, A4.12, B.12, D12.1, D12.3, and D12.8.

- RESPECT FOR HERITAGE ITEMS

The development is close to 2 Palm Beach Road which is a listed heritage item on the Pittwater Heritage List. The development will interfere with its views and be detrimental to the amenity of this property. The property next door, 16 Ocean Road, known as the Palladium is being considered for heritage listing – it was the social heart of Palm Beach from the 1930’s to the 1960’s, providing meals and entertainment, such as visiting artists and Saturday night dancing. The development is too close to the Palladium and will absolutely overwhelm it.

DUE PROCESS

The Newly Amended Plans were made available to us after 4pm on Friday, 9 May. So the members of the community who objected to the earlier plans have had a very limited opportunity to consider the new plans and certainly no time to update their submissions. This is not an acceptable way to treat the community, either by the developers, nor the Council nor, we submit humbly, by the Court. This S.34 conference should have been

postponed or adjourned to allow the community a reasonable opportunity to consider and react to the Newly Amended Plans.

The other aspect of process which we object to is the practice of the Council in using a panel of experts, unnamed, to provide advice, never exposed to public consideration, that the Council has gone as far as it can, to achieve a reasonable planning result, for a development which still does not comply with the applicable planning controls. The fact that the problems found by the Local Planning Panel still exist means that the Council is not in a position to ignore its decision and seek to approve this Application. It cannot walk away from its own decision and it should leave the matter to the Court to decide, without the assistance of the Council.

CONCLUSION

The Association's submission is that the Development Application should be refused for the reasons spelt out above and for the reasons it was refused by the Local Planning Panel.

Again our appreciation for the opportunity to address this conciliation hearing of the Court.

Yours Truly

A/Prof Richard West AM

President

Palm Beach & Whale Beach Association, Inc.