



The Palm Beach & Whale Beach Association Inc.
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5 December 2025

To The NSW Ombudsman

www.ombo.nsw.gov.au

15 Ocean Road, Palm Beach

D/A 2023/1532 – Land & Environment Court Case [2025] NSWLEC1349

Lack of Due Process

Introduction – who is PBWBA.

The Palm Beach & Whale Beach Association, Inc. is a community organisation, founded in 1918, to campaign for the protection of the environment and the amenity of the residents and businesses of Palm Beach and Whale Beach. We have more than 450 members, all of whom are individual property owners, tenants or business owners in these two suburbs. As part of our work, we review many of the development applications lodged with the Northern Beaches Council for the development of properties in this area and make representations to the Council, the Local Planning Panel and the Land & Environment Court where these applications raise issues of compliance with applicable planning controls and regulation.

Submission

This submission is lodged in support of the submission lodged by David Elfick on behalf of the owners of The Palladium, 16 Ocean Road, Palm Beach, the adjoining property to 15 Ocean Road, Palm Beach on 4 December 2025. We respectfully suggest that there were procedural failings in the handling of this D/A.

History

This development application was lodged with the Council on 31 October 2023 and is for the demolition of an existing dwelling and the construction of a new four-storey dwelling at 15 Ocean Road, Palm Beach in a prominent beachfront location. The property is zoned C4 – Conservation Living under the Northern Beaches Local Environment Plan 2014

which allows for the construction of low impact single unit housing. The site is currently occupied by a single storey dwelling over a garage on a block which rises steeply towards the rear of the block. It is adjoined on the north by a block for which a three-storey dwelling has been approved by the Council (but not yet started) and on the south side by an historic single-storey building erected in 1931 as a café and dance venue (but now used as a dwelling) and known as The Palladium.

Breach of height controls was a critical issue in the assessment of the D/A – the height control is 8.5 metres and the height of the proposal is 13.3 metres, exceeding the control by 56.5%. (According to the LEC decision, the height exceedance is 9.95 metres which equals 117.1% of the control). Because of the magnitude of the breach, the owners of the Palladium requested the installation of height poles on the subject property. The developers refused permission for the poles to be installed and thereby deprived the Council, the Court, the community and the objectors of a critical piece of evidence for their assessment. The refusal of the height poles should not have been accepted by the Council – it was not due process.

There were 23 objections lodged against the development application. It was rejected by the Council on 20 May 2024 on a number of grounds, including breach of height controls, overlooking of adjoining properties, visual impact, impact on views and inconsistency with zoning. Importantly the Council, as consent authority, was not satisfied that any of the breaches of controls could be excused from compliance on the grounds that compliance with the controls was unnecessary and unreasonable because the aims of the controls was nevertheless achieved despite the breaches; in other words, the Section 4.6 Report was not fit for purpose (“the defective Section 4.6 Report”). The full grounds of rejection remain on the public record on the Council’s website.

In view of the number of objections, the decision was automatically referred to the Northern Beaches Local Planning Panel. The Panel heard the case on 5 June 2024 and unanimously rejected the application on ten grounds, including: -

- The Section 4.6 Report was not fit for purpose.

The complete reasons for the Planning Panel’s rejection of the D/A are in the public record and remain available on the Council’s website.

Court Appeal –

The developers lodged an appeal to the Court on 28 October 2024, 4 months after the Panel decision. The Council, following its own particular interpretation of the Government’s Model Litigant Policy which we believe is flawed, did not defend its own decision to refuse nor that of its Local Planning Panel. The Council based its reason not to support its decisions on an unreleased Joint Expert Report by unnamed expert or experts, that it had exhausted its powers. It agreed to participate in a Section 34

conciliation conference. This practice adopted by the Council effectively denies due process to the community in relation to the observance of the Pittwater LEP and the interests of the community in the proper consideration of D/A's.

The Council was asked by the owners of the Palladium to name the independent expert/s and to release the Joint Expert Report. The Council declined on the ground that the developers had refused to consent to the release; why the developers' consent was considered relevant or necessary is distinctly unclear. This is another denial of due process.

As part of the conciliation process, the developers produced amended plans. These plans were not made available to the objectors until 12 May 2025, only 1 business day before the conciliation conference. This timing allowed the objectors almost no time to prepare submissions to the conference and denied them the opportunity to engage town planning specialists to assist in building their case. This was another denial of due process.

The Council, having twice rejected the Section 4.6 Report as being not fit for purpose and in the light of other numerous defects, should not have consented to the use of the defective Section 4.6 Report; it should have entered those negotiations with the developer only on the basis of a new, proper Section 4.6 Report and failure to do so is a failure of due process because none of the consent authorities can have properly reached a decision to approve the D/A, without receiving a satisfactory Section 4.6 Report which justified accepting the planning control breaches.

The S.34 conference, held on 13 May 2025, permitted the owner of the adjoining property, The Palladium, to call two witnesses to advise the Commissioner of their objections and a representative of the Association also to address the Court. The breaches of the planning controls were put before the Commissioner in detail, as were the problems with the defective Section 4.6 Report. The Commissioner was invited to inspect The Palladium and to see for himself the impact of the proposed development – he did not avail himself of this opportunity – this is another failure of due process. Unlike other Commissioners before whom the Association has appeared, the Commissioner warned the owners of the Palladium not to be present when he visited the property.

Negotiations between the Council and the developers resulted in heads of agreement which were referred to in the Commissioner's decision. No part of the previous history of the D/A and none of the issues raised in the submissions (the written ones lodged with the Council or the oral ones delivered to the Commissioner), nor the Council's own assessment and refusal, nor the Panel's rejection of the developers' appeal were referred to in the decision. The decision was handed down on 14 May 2025 less than 24 hours after the conference and the 18-page decision was clearly prepared before the Section

34 conference took place, making a farce of the public consultation. This was clearly a denial of due process.

The Commissioner did not refer to the Court's previous decision in *Merman v Woollahra Municipal Council* which could have changed his reasoning.

Council's Model Litigant Interpretation

The Council has a particular interpretation of its Model Litigant obligations which results in consequences not envisaged by the Model Litigant Policy. In this case, it prevented the Council from defending its own decisions and from arguing the case on its merits. This deprives the community of any opportunity for the merits of a case to be argued, due to legislative changes introduced by the current Government. So the community is deprived, by the Council's own actions, of a vital service normally delivered by the Council. This is not due process.

We would be happy to assist the Ombudsman in the event of an enquiry being launched into these events.

Yours Truly

FWE Bush AM

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