

DEVELOPMENT APPLICATION ASSESSMENT REPORT

Application Number:	DA2021/1311
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Responsible Officer:	Nick Keeler
Land to be developed (Address):	Lot A DP 404349, 1031 Barrenjoey Road PALM BEACH NSW 2108
Proposed Development:	Use of premises as a cafe including a change of hours
Zoning:	R2 Low Density Residential
Development Permissible:	No
Existing Use Rights:	Yes
Consent Authority:	Northern Beaches Council
Delegation Level:	NBLPP
Land and Environment Court Action:	No
Owner:	Carolyn Ann Robertson
Applicant:	Turnbull Planning International Pty Ltd

Application Lodged:	04/08/2021
Integrated Development:	No
Designated Development:	No
State Reporting Category:	Commercial/Retail/Office
Notified:	12/08/2021 to 26/08/2021
Advertised:	Not Advertised
Submissions Received:	32
Clause 4.6 Variation:	Nil
Recommendation:	Approval subject to conditions

Estimated Cost of Works:	\$ 0.00
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EXECUTIVE SUMMARY

The proposal is for the use of the ground floor of the existing building and associated structures for the purpose of a restaurant or cafe with new hours of operation. The application is referred to the Northern Beaches Local Planning Panel for determination due to the receipt of more than ten (10) unique objections to the proposal.

The proposed development does not include the construction of any new building or structure but does include seeking development consent for the use of an unauthorised extension to the deck and pergola on the southeastern side of the building. The unauthorised extension has a nil setback to the southeastern side boundary.

The proposed development relies on existing use rights as the use of a restaurant or cafe is a prohibited

land use in the R2 zone under Pittwater LEP 2014.

The application was placed on public notification for 14 days and Council has received 32 submissions, including 27 objection letters and five (5) in support.

The critical assessment issues for the proposal relate to concerns raised by objectors relating to the residential amenity impacts caused by the proposal. Concerns relate to the late evening acoustic amenity impacts that may be caused by the proposed 9:30pm closure time on Friday and Saturday nights. Concerns are also raised that the unauthorised deck extension will cause further detrimental impacts to the residential amenity of the locality due to the increase in patrons at the site. These matters are addressed in detail in the report.

It is considered that the proposed development is generally acceptable and consistent with past approvals for similar uses on the site. However, the use of the unauthorised deck and pergola extension is not supported due to the expected unreasonable amenity impacts to surrounding residential dwellings. A condition is included to prohibit the use of the extended deck and pergola area. A condition limiting the capacity of the existing deck to twelve (12) patrons is also included to help manage amenity impacts.

When assessed on its merits, the proposal (as recommended to be conditioned) is found to be acceptable and suitable in the context of the site. Therefore, it is recommended that the NBLPP approve the application, subject to the conditions attached to this report.

PROPOSED DEVELOPMENT IN DETAIL

The applicant seeks development consent for the use of the ground floor of the existing building and the attached deck for the purpose of a restaurant or cafe, including the use of an unauthorised extension to the existing deck area and pergola on the southeastern side of the building.

The proposed hours of operation of the tenancy are:

- Monday to Thursday – 6:30am to 5:00pm
- Friday – 6:30am to 9:30pm
- Saturday – 7:00am to 9:30pm
- Sunday – 7:00am to 6:00pm

The cafe is proposed to cater for a total of twenty (20) patrons at any one time, including four (4) inside the building and sixteen (16) on the outdoor deck, plans indicate that 4 seats are proposed on the unauthorised deck. The café currently has a license for 10 seats on the footpath and seeks to increase this to 16. This is subject to a separate application to increase the license numbers for outdoor dining.

ASSESSMENT INTRODUCTION

The application has been assessed in accordance with the requirements of the Environmental Planning and Assessment Act 1979 and the associated Regulations. In this regard:

- An assessment report and recommendation has been prepared (the subject of this report) taking into account all relevant provisions of the Environmental Planning and Assessment Act 1979, and the associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon the subject site and adjoining, surrounding and nearby properties;

- Notification to adjoining and surrounding properties, advertisement (where required) and referral to relevant internal and external bodies in accordance with the Act, Regulations and relevant Development Control Plan;
- A review and consideration of all submissions made by the public and community interest groups in relation to the application;
- A review and consideration of all documentation provided with the application (up to the time of determination);
- A review and consideration of all referral comments provided by the relevant Council Officers, State Government Authorities/Agencies and Federal Government Authorities/Agencies on the proposal.

SUMMARY OF ASSESSMENT ISSUES

Pittwater 21 Development Control Plan - B6.3 Off-Street Vehicle Parking Requirements
 Pittwater 21 Development Control Plan - C2.12 Protection of Residential Amenity

SITE DESCRIPTION

Property Description:	Lot A DP 404349, 1031 Barrenjoey Road PALM BEACH NSW 2108
Detailed Site Description:	<p>The subject site consists of one (1) allotment located on the southwestern side of Barrenjoey Road.</p> <p>The site is irregular in shape with a frontage of 12.19m along Barrenjoey Road and a depth of 31.73m. The site has a surveyed area of 284.5m².</p> <p>The site is located within the R2 Low Density Residential zone and accommodates a two-storey building containing a cafe premises at the ground floor and residential occupancy on the upper floor.</p> <p>The site is generally flat and is free of any significant vegetation.</p> <p>Detailed Description of Adjoining/Surrounding Development</p> <p>Adjoining and surrounding development is characterised by low density residential dwellings, many with ancillary structures and/or outbuildings.</p>

Map:



SITE HISTORY

The land has been used for commercial purposes for an extended period of time. A search of Council's records has revealed the following relevant history:

On 27 April 1998, the former Pittwater Environment and Planning Committee resolved to approve a Development Application (Consent No. **98/56**), for the legalisation for an unauthorised refreshment room (restaurant) at the subject premises. The consent contained a number of conditions including;

"1. This consent is for a period of 12 months from the date of Consent, to allow Council and the community to monitor its operation. Within this period details of patronage and effect on parking in the locality and the amenity of the locality are to be evaluated by Council. This condition is to be the subject of a modification of consent application if it is proposed to operate beyond the 12 month period."

"5. The trading hours of the restaurant are to be confined to 12 noon to 7pm Monday to Thursday, 12 noon to 9.30pm Friday and Saturday with takeaway to operate until 10pm and 12 noon to 8pm on Sundays."

"6. The seating capacity of the restaurant is not to exceed a total of 20 seats. Such seating is to be confined to the area inside the building and the outside area adjacent the southern side of the building (no more than 12 seats outside)."

On 01 November 1999, the former Pittwater Environment and Planning Committee resolved to approve an application to modify Development Consent 98/56 to delete condition 1 as above and to increase the hours of operation to 12 noon to 9:30pm Monday to Sunday.

On 22 February 2001, the former Pittwater Development Unit resolved to approve Development Application **N1255/00** for the change of use of the existing premises from a refreshment room (restaurant) to a refreshment room (cafe and takeaway food). The consent contained a number of conditions including;

“D216. This consent is to operate for a period of 12 months from the date of occupation to allow Council and the community to monitor its operation. Within this period the effect on parking in the locality and the amenity of the locality with regards to hours of operation are to be evaluated by Council. In this respect, a diary is to be kept by the operator indicating any complaints received regarding the operation of the premises.”

“D219. The trading hours of the refreshment room are to be confined to 7am to 8pm, 7 days a week with no use of the outside area to occur before 8 am or later than 8pm on any day.”

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

The relevant matters for consideration under the Environmental Planning and Assessment Act, 1979, are:

Section 4.15 Matters for Consideration'	Comments
Section 4.15 (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on “Environmental Planning Instruments” in this report.
Section 4.15 (1) (a)(ii) – Provisions of any draft environmental planning instrument	Draft State Environmental Planning Policy (Remediation of Land) seeks to replace the existing SEPP No. 55 (Remediation of Land). Public consultation on the draft policy was completed on 13 April 2018. The subject site has been used for residential purposes for an extended period of time. The proposed development retains the residential use of the site, and is not considered a contamination risk.
Section 4.15 (1) (a)(iii) – Provisions of any development control plan	Pittwater 21 Development Control Plan applies to this proposal.
Section 4.15 (1) (a)(iiia) – Provisions of any planning agreement	None applicable.
Section 4.15 (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation 2000)	<p><u>Division 8A</u> of the EP&A Regulation 2000 requires the consent authority to consider "Prescribed conditions" of development consent. These matters have been addressed via a condition of consent.</p> <p><u>Clause 50(1A)</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer at lodgement of the development application. This clause is not relevant to this application.</p> <p><u>Clauses 54 and 109</u> of the EP&A Regulation 2000 allow Council to request additional information. No additional information was requested in this case.</p>

Section 4.15 Matters for Consideration'	Comments
	<p><u>Clause 92</u> of the EP&A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This clause is not relevant to this application.</p> <p><u>Clauses 93 and/or 94</u> of the EP&A Regulation 2000 requires the consent authority to consider the upgrading of a building (including fire safety upgrade of development). This clause is not relevant to this application.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This clause is not relevant to this application.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider the provisions of the Building Code of Australia (BCA). This matter has been addressed via a condition of consent.</p> <p><u>Clause 143A</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer prior to the issue of a Construction Certificate. This clause is not relevant to this application.</p>
Section 4.15 (1) (b) – the likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality	<p>(i) Environmental Impact The environmental impacts of the proposed development on the natural and built environment are addressed under the Pittwater 21 Development Control Plan section in this report.</p> <p>(ii) Social Impact The proposed development will not have a detrimental social impact in the locality considering the character of the proposal.</p> <p>(iii) Economic Impact The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.</p>
Section 4.15 (1) (c) – the suitability of the site for the development	The site is considered suitable for the proposed development.
Section 4.15 (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs	See discussion on “Notification & Submissions Received” in this report.
Section 4.15 (1) (e) – the public interest	No matters have arisen in this assessment that would justify the refusal of the application in the public interest.

EXISTING USE RIGHTS

- Does the existing use satisfy the definition of "existing use" under the *Environmental Planning and Assessment Act 1979* (the 'Act')?

Section 4.65 of the Act defines an existing use as:

"(a) the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part, have the effect of prohibiting that use, and

(b) the use of a building, work or land:

*(i) for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and
(ii) that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse."*

This necessarily requires the following questions to be answered:

1. Was the use of the building, work or land a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part 4 of the Act, have the effect of prohibiting that use?

Comment:

Council records indicate that multiple development and land use consents have been granted for the use of the premises for the purpose of a restaurant, cafe and takeaway food business, including Consent No. **98/56**, granted for use of shop as refreshment room use of existing shop as a refreshment room (restaurant) on 27/04/1998 and development consent **N1255/00**, granted for change of use from refreshment room (restaurant) to refreshment room (café & takeaway) on 02/03/2001.

Consent N1255/00 included a condition limiting its operation period to 12 months. No subsequent modification was submitted requesting deletion of this condition. As such, the operation period of this consent is considered to have lapsed.

On the lapsing date of the operational period of consent N1255/00, the operation of the premises reverted back to consent 98/56 granted for use of the premises as a restaurant. As such, it is considered the use of the building commenced as a lawful purpose on 27/04/1998, prior to the coming into force of Pittwater Local Environmental Plan 2014 on 30/05/2014.

2. Was the use of the building granted development consent before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use?

Comment:

The use of the building was lawfully approved by Council on 27 April 1998, prior to the coming into force of Pittwater Local Environmental Plan 2014 on 30 May 2014.

3. Has the use of the building been carried out within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse?

Comment:

A site inspection reveals that the land is used for the purpose of a restaurant or cafe which was granted consent on 27 April 1998. The applicant advises that the use has been ongoing since the original development consent was issued.

- **What is “the land on which the existing use was carried out” for the purposes of cl 42(2) (b) of the Environmental Planning and Assessment Regulation 2000 (“the Regulation”)?**

Meagher JA in *Steedman v Baulkham Hills Shire Council [No. 1] (1991) 87 LGERA 26* stated (at 27) the rule to be applied as follows: “if the land is rightly regarded as a unit and it is found that part of its area was physically used for the purpose in question it follows that the land was used for that purpose”.

Comment:

Having regard to the above case law, it is noted that a part of the area of the land was physically used for the purpose in question and therefore, it is considered that the land was used for that purpose and that existing use rights apply to the whole of the subject site.

- **What are the planning principles that should be adopted in dealing with an application to alter enlarge or rebuild and existing use?**

The judgement in *Fodor Investments v Hornsby Shire Council (2005) NSWLEC 71*, sets out the planning principles that should be applied in dealing with development applications seeking to carry out development on the basis of existing use rights.

The following four principles adopted by the NSW Land and Environment Court in this case will have general application in dealing with development applications that rely on existing use rights:

1. How do the bulk and scale (as expressed by height, floor space ratio and setbacks) of the proposal relate to what is permissible on surrounding sites?

While planning controls, such as height, floor space ratio and setbacks do not apply to sites with existing use rights; they have relevance to the assessment of applications on such sites. This is because the controls apply to surrounding sites and indicate the kind of development that can be expected if and when surrounding sites are redeveloped. The relationship of new development to its existing and likely future context is a matter to be considered in all planning assessments.

Comment:

The proposed development relates to the use of the tenancy. No change to the built form of the existing building is proposed. Consent for the use of an unauthorised extension to the existing deck and pergola is proposed. Further discussion regarding this is provided in point 3 below and under an assessment of part C2.12 of P21DCP.

2. What is the relevance of the building in which the existing use takes place?

Where the change of use is proposed within an existing building, the bulk and scale of that building are likely to be deemed acceptable, even if the building is out of scale with its surroundings, because it already exists. However, where the existing building is proposed for demolition, while its bulk is clearly an important consideration, there is no automatic entitlement to another building of the same floor space ratio, height or parking provision.

Comment:

The existing building is to remain unchanged and is generally consistent with the bulk and scale of other buildings in the locality.

3. What are the impacts on adjoining land?

The impact on adjoining land should be assessed as it is assessed for all development. It is true that where, for example, a development control plan requires three hours of sunlight to be maintained in adjoining rear yards, the numerical control does not apply. However, the overshadowing impact on adjoining rear yards should be reasonable.

Comment:

The proposal includes the seeking of consent for the use of an unauthorised extension to the deck and pergola on the southeast side of the building. It is considered the extension of the deck will result in additional amenity impact to adjacent and surrounding residential properties. As the site is located within a residential area, it is considered the residential amenity impact of the deck extension is unreasonable.

To ensure that the impact of the proposed restaurant and cafe on adjacent and surrounding residential properties, a condition is included to exclude the unauthorised portion of the deck and pergola from this development consent with the requirement to revert the area to soft landscaping and vegetation. An additional condition is included to limit the capacity of the deck to 12 patrons. This is consistent with condition no. 6 of Consent No. 98/56.

4. What is the internal amenity?

Internal amenity must be assessed as it is assessed for all development. Again, numerical requirements for sunlight access or private open space do not apply, but these and other aspects must be judged acceptable as a matter of good planning and design. None of the legal principles discussed above suggests that development on sites with existing use rights may have lower amenity than development generally.

Comment:

No change to the existing built form of the internal area of the building is proposed. It is considered the existing building provides acceptable internal amenity for the continues use of the site for a restaurant or cafe.

Conclusion

The use has been approved under a previous environmental planning instrument (Pittwater Local Environmental Plan 1993) and, therefore, is a lawful use. Subsequently, the use can be retained under the current environmental planning instrument (Pittwater Local Environmental Plan 2014).

BUSHFIRE PRONE LAND

The site is classified as bush fire prone land. Section 4.14 of the Environmental Planning and Assessment Act 1979 requires Council to be satisfied that the development conforms to the specifications and requirements of the version (as prescribed by the regulations) of the document entitled Planning for Bush Fire Protection.

As the proposed development relates only to the use of the premises, there are no building works that require compliance with the requirements with Planning for Bush Fire Protection.

NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited from 12/08/2021 to 26/08/2021 in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the Community Participation Plan.

As a result of the public exhibition process council is in receipt of 32 submission/s from:

Name:	Address:
Ms Sandra Parsonage	1 A Iluka Road PALM BEACH NSW 2108
Jo Horgan	911 Barrenjoey Road PALM BEACH NSW 2108
Mr Andrew Darroch	6/20 Wylde Street POTTS POINT NSW 2011
Mr Michael Allan Blackwell	915 Barrenjoey Road PALM BEACH NSW 2108
Ms Joanne Elizabeth Flew	10 Nabilla Road PALM BEACH NSW 2108
Ms Simone Louise Keogh	915 Barrenjoey Road PALM BEACH NSW 2108
Ms Francoise Catherine Marie Porter	884 Barrenjoey Road PALM BEACH NSW 2108
Ms Dawn Frances Ford	943 Barrenjoey Road PALM BEACH NSW 2108
Nicholas Connelly	Address Unknown
Leanne Tate	Address Unknown
Anna Wynn	Address Unknown
Simon Wynn	Address Unknown
Nicole Hulme	Address Unknown
Sandra Isaac	Address Unknown
James Nelson	317 Hudson Parade CLAREVILLE NSW 2107
Ms Jacqueline Tate	2 / 1026 Barrenjoey Road PALM BEACH NSW 2108
Withheld	PALM BEACH NSW 2108
Mr Danny Barnes	1 / 9 Avalon Parade AVALON BEACH NSW 2107
David Garcia	317 Hudson Parade CLAREVILLE NSW 2107
Hamish Turner	1024 Barrenjoey Road PALM BEACH NSW 2108
Mr Marcello Giacomazzi	1 Iluka Road PALM BEACH NSW 2108
Mr Geoffrey William Grist	3 Iluka Road PALM BEACH NSW 2108
Mr Rodger Alan Morton	1041 Barrenjoey Road PALM BEACH NSW 2108
Mr Francis Charles Curtin	1018 Barrenjoey Road PALM BEACH NSW 2108
Mr Michael Georgouras	1040 Barrenjoey Road PALM BEACH NSW 2108
Mr Philip Georgouras	10 Lorne Avenue KENSINGTON NSW 2033
Ross George Arblaster	1119 Barrenjoey Road PALM BEACH NSW 2108
Leti Smith	12 North Avalon Road AVALON BEACH NSW 2107
Jane Gill	69 Old Barrenjoey Road AVALON BEACH NSW 2107
Sian Gilchrist	1 / 8 Lagoon Street NARRABEEN NSW 2101
Mrs Sharon Helena Lois	1028 Barrenjoey Road PALM BEACH NSW 2108

Name:	Address:
Magrin	
Timothy John Woodforde	9A Nelson Road LINDFIELD NSW 2070

Of the 32 submissions received, 27 object to the proposal partially for in full and five (5) support the proposal.

The following issues were raised in the submissions and each have been addressed below:

- Acoustic and amenity impacts
- Footway dining
- Existing use rights
- Parking impacts

The matters raised within the submissions are addressed as follows:

- *Concerns are raised that the proposed hours of operation extension will unreasonably impact upon the acoustic amenity of surrounding residential dwellings in the late evening.*

Comment:

The proposed hours of operation are generally consistent with the existing approved hours of operation under Consent No. 98/56. The restaurant is currently approved to operate between the following hours:

12 noon to 7pm Monday to Thursday
 12 noon to 9:30pm Friday and Saturday
 12 noon to 8pm Sunday

The proposed hours of operation are:

6:30am to 5pm Monday to Thursday
 6:30am to 9:30pm Friday
 7am to 9:30pm Saturday
 7am to 6pm Sunday

It is considered the proposed hours of operation will not cause any additional late evening acoustic amenity impact to the surrounding residences and will reduce the existing impact due to the reduction of late hours from Sunday and Thursday evenings (subject to the unauthorised deck not being used). Additional acoustic impact is expected during the morning hours due to the earlier proposed operating times, but this impact is not expected to cause unreasonable impact due to the less intensive use of the business during morning trade.

To ensure that all patrons depart the venue no later than 9:30pm on Friday and Saturday evenings, the hours of operation condition limits food and drink service to 9:00pm with an additional 30 minutes permitted to allow patrons to leave the venue.

The submitted acoustic report has been reviewed by Council's Environmental Health team who do not raise any objection to the proposed hours of operation, subject to compliance with the recommendations of the acoustic report.

- *Concerns are raised that the outdoor deck enlargement will cause unreasonable additional amenity impact to the adjacent property and surrounding properties.*

Comment:

Due to the proximity of the unauthorised deck to the southeast boundary and the ability to seat more patrons in this area, the amenity impact to the adjacent property is considered to be unreasonable. As such, a condition is included to exclude approval for the use of the unauthorised deck structure from the consent. A condition is also included to limit capacity of the existing approved deck to 12 patrons.

- *Concerns are raised that the proposed footway dining will cause unreasonable impact to pedestrian traffic around the business.*

Comment:

Approval for footway dining is not included as part of this development consent and a condition is included to expressly exclude footway dining from the consent. Approval under a separate outdoor dining application must be sought.

- *Concern is raised that the applicant has not provided sufficient details in the submitted documents that prove existing use rights apply to the site.*

Comment:

During assessment, Council requested additional information from the applicant to demonstrate that existing use rights apply to the site. The applicant has provided information to satisfy this request. As such, it is determined that existing use rights apply to the site and that Clause 41 of EPA Regulation is satisfied.

- *Concern is raised that the proposal will cause additional parking demand and impact on the availability of on-street parking spaces.*

Comment:

Detailed assessment of the parking impact of the proposed development is included in this report below under part B6.3 of P21DCP.

REFERRALS

Internal Referral Body	Comments
Environmental Health (Food Premises, Skin Pen.)	Environmental Health has reviewed the proposal for extended hours of the restaurant/cafe, including acoustic report, capacity of WC and capacity for patrons. We find the proposal satisfactory as it is presented -a total of 36 patrons and indoor speakers to 75 dB(A). Thus, we recommend conditions to comply with the acoustic report, both in the construction of an acoustic barrier, and the operational

Internal Referral Body	Comments
	<p data-bbox="518 318 798 347">plan of management.</p> <p data-bbox="518 387 1439 627">Please note that if at any point in time in the future, regulatory action on noise is required via a complaint process, the owner of the building and operator/s of the business can expect that noise and impacts on amenity are reasonable only limited to the bounds of the acoustic report. Beyond 36 patrons and 'light' background music from internal speakers, noise is more likely to be considered excessive or offensive, and a nuisance to residential amenity.</p> <p data-bbox="518 667 769 696">Recommendation</p> <p data-bbox="518 736 943 766">Supported- subject to conditions</p> <p data-bbox="518 770 1445 1037">Comments: Whilst the proposal includes an increase from 10 to 16 seats, this is the subject of a separate approval process. The acoustic report addresses the increased numbers and the likely cumulative impact of the increased outdoor dining on council's footpath which is satisfactory to Council's Environmental Health Team. Given the proposed condition to reduce the total number of patrons within the site, the net increase of seated patrons is reduced from 10 to 6, this will further reduce any likely impact on surrounding properties.</p>

NECC (Coast and Catchments)

The DA seeks approval to use the ground floor of the premises as a cafe. The application has been assessed in consideration of the Coastal Management Act 2016, State Environmental Planning Policy (Coastal Management) 2018 and has also been assessed against the coastal relevant requirements of Pittwater LEP 2014 and Pittwater 21 DCP.

Coastal Management Act 2016

The subject site has been identified as being within the coastal zone and therefore the Coastal Management Act 2016 is applicable to this DA. The proposed development is considered to be consistent with the objects, as set out under Clause 3 of the Coastal Management Act 2016.

State Environmental Planning Policy (Coastal Management) 2018

The subject land has been included on the 'Coastal Environment Area' and 'Coastal Use Area' maps under State Environmental Planning Policy (Coastal Management) 2018 (CM SEPP). Hence, Clauses 13, 14 and 15 of the CM SEPP apply for this DA.

On internal assessment and as assessed in the Statement of Environmental Effects prepared by Turnbull Planning International Pty Ltd (July 2021), the proposal satisfies requirements under clauses 13, 14 and 15 of the CM SEPP. As such, it is considered that the proposed development does comply with the requirements of State Environmental Planning Policy (Coastal Management) 2018.

Pittwater LEP 2014 and Pittwater 21 DCP

Estuarine Risk Management

The subject property has also been identified as affected by estuarine wave action and tidal inundation on Council's Estuarine Hazard Mapping. As such, the Estuarine Risk Management Policy for Development in Pittwater (Appendix 7, Pittwater 21 DCP) and the relevant B3.7 Estuarine Hazard Controls will apply to any proposed development of the site.

The ground floor level of the existing building is shown on the survey as RL 2.59m AHD and is above the applicable EPL (RL 2.2m AHD) adopted by Council for the site. The proposed development is

Internal Referral Body	Comments
	therefore able to satisfy the relevant estuarine risk management requirements of P21 DCP.
Property Management and Commercial	<p>The proposal is for an extension to an existing cafe, and plans submitted with the DA (DA03 Proposed Seating Plan dated June 2021 drawn by o2 architecture) appear to propose an extension to the approved outdoor dining associated with the cafe.</p> <p>Under their current Outdoor Dining Approval, dated 6 May 2021, the cafe has approval to place 3 tables and 10 seats on the public road way. Any proposal to increase the amount of outdoor dining furniture on the public roadway must be applied for under the Outdoor Dining Application on Council's website and cannot be approved under this DA.</p>

ENVIRONMENTAL PLANNING INSTRUMENTS (EPIs)*

All, Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the merit assessment of this application.

In this regard, whilst all provisions of each Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the assessment, many provisions contained within the document are not relevant or are enacting, definitions and operational provisions which the proposal is considered to be acceptable against.

As such, an assessment is provided against the controls relevant to the merit consideration of the application hereunder.

State Environmental Planning Policies (SEPPs) and State Regional Environmental Plans (SREPs)

Nil

Pittwater Local Environmental Plan 2014

Is the development permissible?	No
After consideration of the merits of the proposal, is the development consistent with:	
aims of the LEP?	Yes
zone objectives of the LEP?	Yes

Principal Development Standards

Standard	Requirement	Proposed	% Variation	Complies
Height of Buildings:	8.5m	Change of use only	N/A	N/A

Compliance Assessment

Clause	Compliance with Requirements
4.3 Height of buildings	N/A

Clause	Compliance with Requirements
5.21 Flood planning	N/A
7.1 Acid sulfate soils	N/A
7.2 Earthworks	N/A
7.10 Essential services	Yes

Pittwater 21 Development Control Plan

Built Form Controls

As this proposal is reliant upon existing use rights, the strict application of the controls of P21DCP does not apply to the development. Notwithstanding, this assessment considers the requirements of P21DCP as a guide to determine whether the merits of the proposal are acceptable.

This application relates only to the use of the premises for the purpose of a restaurant or cafe. As such, the built form controls do not apply to the proposal.

Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
A4.12 Palm Beach Locality	Yes	Yes
B1.3 Heritage Conservation - General	Yes	Yes
B1.4 Aboriginal Heritage Significance	Yes	Yes
B3.6 Contaminated Land and Potentially Contaminated Land	Yes	Yes
B3.9 Estuarine Hazard - Business, Light Industrial and Other Development	Yes	Yes
B3.11 Flood Prone Land	Yes	Yes
B4.5 Landscape and Flora and Fauna Enhancement Category 3 Land	Yes	Yes
B5.15 Stormwater	Yes	Yes
B6.3 Off-Street Vehicle Parking Requirements	No	Yes
C2.2 Safety and Security	Yes	Yes
C2.8 Energy and Water Conservation	Yes	Yes
C2.9 Waste and Recycling Facilities	Yes	Yes
C2.10 Pollution Control	Yes	Yes
C2.11 Signage	N/A	N/A
C2.12 Protection of Residential Amenity	No	Yes
C2.21 Food Premises Design Standards	Yes	Yes
C2.22 Plant, Equipment Boxes and Lift Over-Run	Yes	Yes
D12.1 Character as viewed from a public place	Yes	Yes
D12.14 Scenic Protection Category One Areas	Yes	Yes

Detailed Assessment

B6.3 Off-Street Vehicle Parking Requirements

Description of non-compliance

The control requires an off street parking rate of one (1) space per 30m² of gross lettable area (GLA).

Based on a GLA of approx. 86m² (excluding unauthorised deck extension), the proposed development requires three (3) off street parking spaces. No off-street parking spaces for the cafe are proposed.

Merit consideration

With regard to the consideration for a variation, the proposal is considered against the underlying outcomes of the control as follows:

- *An adequate number of parking and service spaces that meets the demands generated by the development.*

Comment:

While the proposed is deficient of off street parking spaces, it is noted that the existing business operation at the site does not rely upon any off street parking spaces. The proposed development is not expected to increase demand for parking above that of the existing business. It is considered that due to the small scale of the proposed development and the spatial limitations of the site, the need to provide off street parking is unreasonable. The site is well connected being within easy walking catchment of many dwellings. The nearest bus stop is located approximately 20m to the south of the site which has regular connections to most of the Northern Beaches.

- *Functional parking that minimises rainwater runoff and adverse visual or environmental impacts while maximising pedestrian and vehicle safety.*

Comment:

Not applicable, no parking provided.

- *Safe and convenient parking.*

Comment:

Not applicable, no parking provided.

Having regard to the above assessment, it is concluded that the proposed development is consistent with the relevant objectives of P21DCP and the objectives specified in s1.3 of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is supported, this particular circumstance and given the proposed reduction in patron numbers by condition of consent the potential impacts on street parking is lessened.

C2.12 Protection of Residential Amenity

The proposed development includes seeking consent for the use of the unauthorised extension of the existing deck and pergola on the southeastern side of the building. The deck and pergola have a nil setback to the southeast side boundary. The floor level of the deck is approx. 300mm above the

existing ground level. It is expected that this height at the side boundary and additional patron capacity of the deck will cause unreasonable visual and acoustic amenity impacts to the adjacent property.

Prior to the extension of the deck, a large Norfolk Pine tree and 2m wide landscaped area was located in this area. The tree was approved to be removed on 07/10/2020. While the removal of the tree was approved, the 2m setback of the original deck from the boundary limited the potential for visual privacy impacts to the adjacent property and created an acoustic buffer between the properties.

To ensure that the impact of the proposed restaurant and cafe on adjacent and surrounding residential properties, a condition is included to exclude the unauthorised portion of the deck and pergola from this development consent. An additional condition is included to limit the capacity of the deck to 12 patrons. This is consistent with condition no. 6 of Consent No. 98/56.

THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES

The proposal will not significantly affect threatened species, populations or ecological communities, or their habitats.

CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN

The proposal is consistent with the principles of Crime Prevention Through Environmental Design.

POLICY CONTROLS

Northern Beaches Section 7.12 Contributions Plan 2021

As the estimated cost of works is less than \$100,001.00 the policy is not applicable to the assessment of this application.

CONCLUSION

The site has been inspected and the application assessed having regard to all documentation submitted by the applicant and the provisions of:

- Environmental Planning and Assessment Act 1979;
- Environmental Planning and Assessment Regulation 2000;
- All relevant and draft Environmental Planning Instruments;
- Pittwater Local Environment Plan;
- Pittwater Development Control Plan; and
- Codes and Policies of Council.

This assessment has taken into consideration the submitted plans, Statement of Environmental Effects, all other documentation supporting the application and public submissions, and does not result in any unreasonable impacts on surrounding, adjoining, adjacent and nearby properties subject to the conditions contained within the recommendation.

In consideration of the proposal and the merit consideration of the development, the proposal is considered to be:

- Consistent with the objectives of the DCP
- Consistent with the zone objectives of the LEP

- Consistent with the aims of the LEP
- Consistent with the objectives of the relevant EPIs
- Consistent with the objects of the Environmental Planning and Assessment Act 1979

The proposed development involves seeking consent for the use of the ground floor of the existing building and associated structures as a restaurant or cafe with proposed new hours of operation. The proposal includes seeking consent for the use of an unauthorised extension of the existing deck and pergola on the southeastern side of the building.

Several submissions have raised concerns that the proposed development will cause unreasonable amenity impact to the surrounding residential dwellings.

It is considered that the proposal is generally consistent with the existing use of the building and past approvals on the site. However, the unauthorised deck and pergola extension is considered to cause unreasonable additional amenity impact to the surrounding residential dwellings and consent for the use of this structure is not supported. The unauthorised deck and pergola extension is not supported and excluded from use by the café with the existing deck limited to a capacity of 12 patrons . The unauthorized works will be subject to separate action.

Accordingly, it is recommended that the NBLPP approve the application, subject to the conditions attached to this report.

It is considered that the proposed development satisfies the appropriate controls and that all processes and assessments have been satisfactorily addressed.

RECOMMENDATION

THAT the Northern Beaches Local Planning Panel, on behalf of Northern Beaches Council as the consent authority grant Development Consent to DA2021/1311 for Use of premises as a cafe including a change of hours on land at Lot A DP 404349, 1031 Barrenjoey Road, PALM BEACH, subject to the conditions printed below:

DEVELOPMENT CONSENT OPERATIONAL CONDITIONS

1. **Approved Plans and Supporting Documentation**

The development must be carried out in compliance (except as amended by any other condition of consent) with the following:

a) Approved Plans

Architectural Plans - Endorsed with Council's stamp		
Drawing No.	Dated	Prepared By
2136 DA00 Rev A	15/07/2021	O2 Architecture
2136 DA01 Rev A	15/07/2021	O2 Architecture

Reports / Documentation – All recommendations and requirements contained within:		
Report No. / Page No. / Section No.	Dated	Prepared By
Operational Noise Emission Assessment (Ref: 51261R001.MW.210622)	21/07/2021	Acoustic Dynamics

b) Any plans and / or documentation submitted to satisfy the Conditions of this consent.

In the event of any inconsistency between conditions of this consent and the drawings/documents referred to above, the conditions of this consent will prevail.

Reason: To ensure the work is carried out in accordance with the determination of Council and approved plans.

2. **Approved Land Use**

Nothing in this consent shall authorise the use of the tenancy and associated structures as detailed on the approved plans for any land use of the site beyond the definition of a *restaurant or cafe*.

A *restaurant or cafe* is defined as:

“a building or place the principal purpose of which is the preparation and serving, on a retail basis, of food and drink to people for consumption on the premises, whether or not liquor, takeaway meals and drinks or entertainment are also provided.”

(as defined by the Pittwater Local Environment Plan 2014 (as amended) Dictionary)

Any variation to the approved land use and/occupancy of any unit beyond the scope of the

above definition will require the submission to Council of a new development application.

Notwithstanding the above, the consent for the use of the unauthorised deck and pergola highlighted in yellow on the stamped plans is not granted and must be removed from the site. Soft surface landscaping and vegetation must be established in this area.

Reason: To ensure compliance with the terms of this consent.

3. **Prescribed Conditions**

- (a) All building works must be carried out in accordance with the requirements of the Building Code of Australia (BCA).
- (b) BASIX affected development must comply with the schedule of BASIX commitments specified within the submitted BASIX Certificate (demonstrated compliance upon plans/specifications is required prior to the issue of the Construction Certificate);
- (c) A sign must be erected in a prominent position on any site on which building work, subdivision work or demolition work is being carried out:
 - (i) showing the name, address and telephone number of the Principal Certifying Authority for the work, and
 - (ii) showing the name of the principal contractor (if any) for any building work and a telephone number on which that person may be contacted outside working hours, and
 - (iii) stating that unauthorised entry to the work site is prohibited.Any such sign is to be maintained while the building work, subdivision work or demolition work is being carried out, but must be removed when the work has been completed.
- (d) Residential building work within the meaning of the Home Building Act 1989 must not be carried out unless the Principal Certifying Authority for the development to which the work relates (not being the Council) has given the Council written notice of the following information:
 - (i) in the case of work for which a principal contractor is required to be appointed:
 - A. the name and licence number of the principal contractor, and
 - B. the name of the insurer by which the work is insured under Part 6 of that Act,
 - (ii) in the case of work to be done by an owner-builder:
 - A. the name of the owner-builder, and
 - B. if the owner-builder is required to hold an owner-builder permit under that Act, the number of the owner-builder permit.If arrangements for doing the residential building work are changed while the work is in progress so that the information notified under becomes out of date, further work must not be carried out unless the Principal Certifying Authority for the development to which the work relates (not being the Council) has given the Council written notice of the updated information.
- (e) Development that involves an excavation that extends below the level of the base of the footings of a building on adjoining land, the person having the benefit of the development consent must, at the person's own expense:
 - (i) protect and support the adjoining premises from possible damage from the excavation, and
 - (ii) where necessary, underpin the adjoining premises to prevent any such damage.

- (iii) must, at least 7 days before excavating below the level of the base of the footings of a building on an adjoining allotment of land, give notice of intention to do so to the owner of the adjoining allotment of land and furnish particulars of the excavation to the owner of the building being erected or demolished.
- (iv) the owner of the adjoining allotment of land is not liable for any part of the cost of work carried out for the purposes of this clause, whether carried out on the allotment of land being excavated or on the adjoining allotment of land.

In this clause, allotment of land includes a public road and any other public place.

Reason: Legislative requirement.

4. **General Requirements**

- (a) Unless authorised by Council:
Building construction and delivery of material hours are restricted to:
 - 7.00 am to 5.00 pm inclusive Monday to Friday,
 - 8.00 am to 1.00 pm inclusive on Saturday,
 - No work on Sundays and Public Holidays.

Demolition and excavation works are restricted to:

- 8.00 am to 5.00 pm Monday to Friday only.

(Excavation work includes the use of any excavation machinery and the use of jackhammers, rock breakers, excavators, loaders and the like, regardless of whether the activities disturb or alter the natural state of the existing ground stratum or are breaking up/removing materials from the site).

- (b) Should any asbestos be uncovered on site, its demolition and removal must be carried out in accordance with WorkCover requirements and the relevant Australian Standards.
- (c) At all times after the submission the Notice of Commencement to Council, a copy of the Development Consent and Construction Certificate is to remain onsite at all times until the issue of a final Occupation Certificate. The consent shall be available for perusal of any Authorised Officer.
- (d) Where demolition works have been completed and new construction works have not commenced within 4 weeks of the completion of the demolition works that area affected by the demolition works shall be fully stabilised and the site must be maintained in a safe and clean state until such time as new construction works commence.
- (e) Onsite toilet facilities (being either connected to the sewer or an accredited sewer management facility) for workers are to be provided for construction sites at a rate of 1 per 20 persons.
- (f) Prior to the release of the Construction Certificate, payment of the Long Service Levy is required. This payment can be made at Council or to the Long Services Payments Corporation. Payment is not required where the value of the works is less than \$25,000. The Long Service Levy is calculated on 0.35% of the building and construction work. The levy rate and level in which it applies is subject to legislative change. The applicable fee at the time of payment of the Long Service Levy will apply.
- (g) The applicant shall bear the cost of all works associated with the development that

occurs on Council's property.

- (h) No skip bins, building materials, demolition or excavation waste of any nature, and no hoist, plant or machinery (crane, concrete pump or lift) shall be placed on Council's footpaths, roadways, parks or grass verges without Council Approval.
- (i) Demolition materials and builders' wastes are to be removed to approved waste/recycling centres.
- (j) No trees or native shrubs or understorey vegetation on public property (footpaths, roads, reserves, etc.) or on the land to be developed shall be removed or damaged during construction unless specifically approved in this consent including for the erection of any fences, hoardings or other temporary works.
- (k) Prior to the commencement of any development onsite for:
 - i) Building/s that are to be erected
 - ii) Building/s that are situated in the immediate vicinity of a public place and is dangerous to persons or property on or in the public place
 - iii) Building/s that are to be demolished
 - iv) For any work/s that is to be carried out
 - v) For any work/s that is to be demolished

The person responsible for the development site is to erect or install on or around the development area such temporary structures or appliances (wholly within the development site) as are necessary to protect persons or property and to prevent unauthorised access to the site in order for the land or premises to be maintained in a safe or healthy condition. Upon completion of the development, such temporary structures or appliances are to be removed within 7 days.

- (l) A "Road Opening Permit" must be obtained from Council, and all appropriate charges paid, prior to commencement of any work on Council property. The owner/applicant shall be responsible for all public utilities and services in the area of the work, shall notify all relevant Authorities, and bear all costs associated with any repairs and/or adjustments as those Authorities may deem necessary.
- (m) The works must comply with the relevant Ausgrid Network Standards and SafeWork NSW Codes of Practice.
- (n) Requirements for new swimming pools/spas or existing swimming pools/spas affected by building works.
 - (1) Child resistant fencing is to be provided to any swimming pool or lockable cover to any spa containing water and is to be consistent with the following;

Relevant legislative requirements and relevant Australian Standards (including but not limited) to:
 - (i) Swimming Pools Act 1992
 - (ii) Swimming Pools Amendment Act 2009
 - (iii) Swimming Pools Regulation 2018
 - (iv) Australian Standard AS1926 Swimming Pool Safety
 - (v) Australian Standard AS1926.1 Part 1: Safety barriers for swimming pools
 - (vi) Australian Standard AS1926.2 Part 2: Location of safety barriers for swimming pools.
 - (2) A 'KEEP WATCH' pool safety and aquatic based emergency sign, issued by Royal Life Saving is to be displayed in a prominent position within the pool/spa area.

- (3) Filter backwash waters shall be conveyed to the Sydney Water sewerage system in sewered areas or managed on-site in unsewered areas in a manner that does not cause pollution, erosion or run off, is separate from the irrigation area for any wastewater system and is separate from any onsite stormwater management system.
- (4) Swimming pools and spas must be registered with the Division of Local Government.

Reason: To ensure that works do not interfere with reasonable amenity expectations of residents and the community.

5. **Operational Noise Controls**

Operations must be in accordance with the recommendations within Section 5 of the Acoustic Report prepared by Acoustic Dynamics dated 21 July 2021 (Reference 51261R001.MW.210622).

Any design recommendations and plan of management made by the consultant must be implemented in order to achieve compliance with noted conditions of this consent.

Details demonstrating compliance are to be submitted to the satisfaction of the Principal Certifying Authority.

Reason: To maintain amenity of the surrounding area.

6. **No approval for use of unauthorised deck and pergola**

The use of the unauthorised deck and pergola highlighted in yellow on the stamped plans is not granted by this consent Patrons to be excluded from using this area.

Reason: To ensure compliance with the terms of this consent and mitigate amenity impact on surrounding dwellings.

CONDITIONS WHICH MUST BE COMPLIED WITH PRIOR TO THE ISSUE OF THE OCCUPATION CERTIFICATE

7. **Compliance with acoustic report**

An acoustic assessment is to be undertaken by a suitably qualified professional such as an acoustic engineer to determine acoustic treatments are in accordance with the recommendations within Section 5 of the Acoustic Report prepared by Acoustic Dynamics dated 21 July 2021 (Reference 51261R001.MW.210622).

Any design recommendations made by the consultant must be implemented prior to issuing the Occupational Certificate in order to achieve compliance with noted conditions of this consent.

Details demonstrating compliance are to be submitted to the satisfaction of the Principal Certifying Authority.

Reason: To maintain amenity of the surrounding area.

ON-GOING CONDITIONS THAT MUST BE COMPLIED WITH AT ALL TIMES

8. Outdoor Dining

Outdoor footpath dining is not approved under this consent.

Applications for outdoor dining and modifications to existing outdoor dining areas must be made to Council's Property Team on the Outdoor Dining Application form available on Council's website.

Reason: To ensure outdoor dining complies with the requirements of the Roads Act 1993.

9. Hours of Operation

The hours of operation are to be restricted to:

- i Monday to Thursday – 6:30am to 5:00pm
- i Friday – 6:30am to 9:00pm
- i Saturday – 7:00am to 9:00pm
- i Sunday and Public Holidays – 7:00am to 6:00pm

Upon expiration of the permitted hours, all service (and entertainment) shall immediately cease, no patrons shall be permitted entry and all customers on the premises shall be required to leave within the following 30 minutes.

Reason: Information to ensure that amenity of the surrounding locality is maintained.

10. Patron Capacity

The maximum capacity of the tenancy is limited to twenty (20) patrons, including no more than twelve (12) patrons on the outdoor deck on the southeastern side of the building at any one time.

Reason: To ensure development minimises unreasonable impacts upon surrounding land.

11. Commercial Waste Collection

Waste and recyclable material, generated by this premises, must not be collected between the hours of 9pm and 6am on any day.

Reason: To protect the acoustic amenity of surrounding properties.

12. Deliveries

No deliveries, loading or unloading associated with the premises are to take place between the hours of 9pm and 6am on any day.

Reason: To protect ensure the acoustic amenity of surrounding properties.