

APPLICATION FOR MODIFICATION ASSESSMENT REPORT

Application Number:	Mod2022/0007
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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:	Modification of Development Consent DA2021/1311 granted for 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:	25/01/2022
Integrated Development:	No
Designated Development:	No
State Reporting Category:	Refer to Development Application
Notified:	02/02/2022 to 16/02/2022
Advertised:	Not Advertised
Submissions Received:	9
Clause 4.6 Variation:	Nil
Recommendation:	Refusal

EXECUTIVE SUMMARY

This application seeks to modify development consent DA2021/1311 granted for use of premises as a cafe including a change of hours which was approved by the Northern Beaches Local Planning Panel (NBLPP) on 10 December 2021.

The modification involves the deletion of Conditions 5 and 6 relating to partial removal of unauthorised works, the location of acoustic screening and landscaping. These conditions were imposed by the NBLPP.

As the subject modification application has been made under Section 4.55(2) of the EPA Act and seeks to delete conditions of consent imposed by the NBLPP, the application is referred back to the NBLPP for determination.

Concerns raised in the objections predominantly relate to the proposal resulting in an unreasonable impact to the residential amenity of the locality through the deletion of Conditions 5 and 6.

Critical assessment issues include that the amenity of surrounding residences would be unreasonably impacted by deletion of Conditions 5 and 6.

This report concludes with a recommendation that the NBLPP refuse to grant consent to the modification application.

PROPOSED DEVELOPMENT IN DETAIL

The applicant seeks to modify development consent DA2021/1311 granted for use of premises as a cafe including a change of hours.

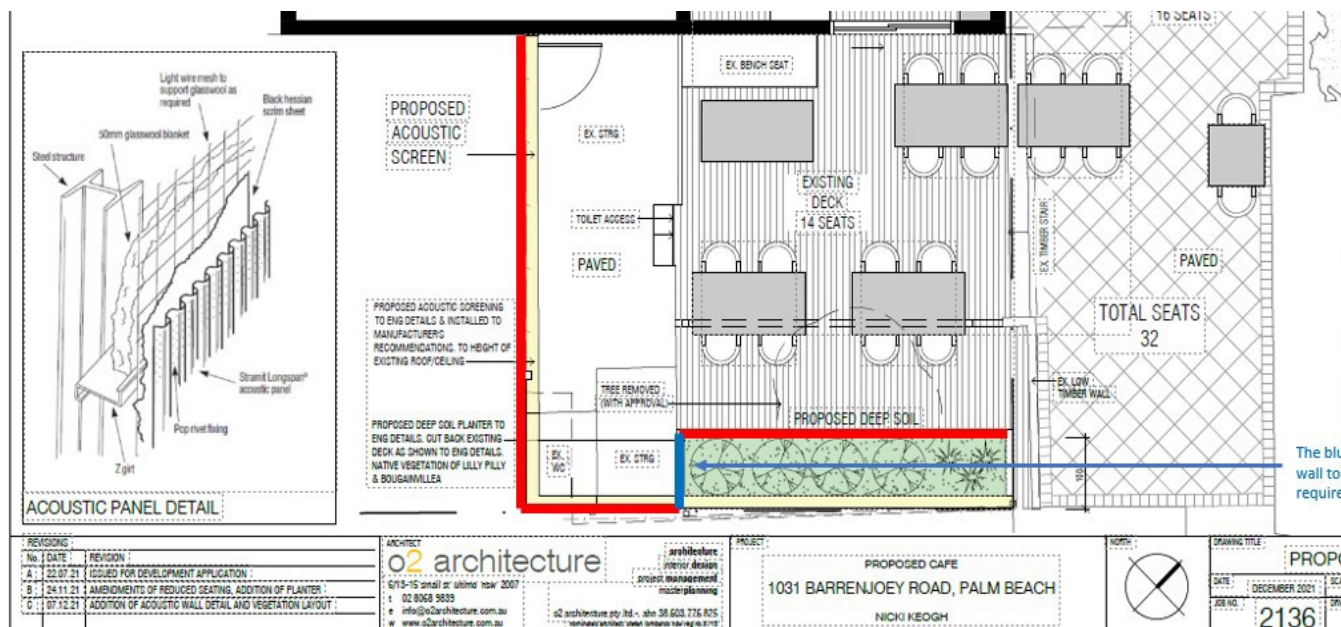
The modification proposes to delete Conditions 5 and 6 that were imposed by the Local Planning Panel.

Condition 5 reads as follows:

5. Amendments to the approved plans

The following amendments are to be made to the approved plans to the satisfaction of Council's Executive Manager Development Assessment prior to the issue of the Construction Certificate:

- a) The roof is to be altered and removed from above the deep soil planting.
- b) The acoustic screen is to be relocated to between the deep soil landscaping and the deck as illustrated red and blue on the following diagram.
- c) All works are to be within the boundaries of the subject property.



Reason: To ensure the development minimises unreasonable impacts upon neighbouring property.

Condition 5 requires amendments to be made to the approved plans, including the removal of the unauthorised pergola above the landscaped area, the relocation of the proposed acoustic wall from along the southwestern side boundary to the southwestern edge of the deck and the requirement that all works are located within the lot boundaries. The amended plans must be submitted to the Executive Manager

Development Assessment for approval prior to the issue of a construction certificate.

Condition 6 reads as follows:

6. Landscape Planting

The species of plants to be planted in the landscaped area adjacent to the deck shown in the approved plans are to be as approved by Council's Executive Manager Development Assessment prior to the issue of the Construction Certificate with the object of screening the acoustic wall as viewed from the neighbouring property, and are to be properly maintained in perpetuity.

Reason: to improve the amenity of the neighbouring property and the streetscape.

Condition 6 requires a planting schedule for the landscaped area be submitted to the Executive Manager Development Assessment for approval prior to the issue of the construction certificate. This was imposed to ensure suitable vegetation species are planted to screen the acoustic wall and improve the visual amenity of the adjacent residential property and streetscape.

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:	The subject site consists of one (1) allotment located on the southwestern side of Barrenjoey Road.

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.

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.

The site is generally flat and is free of any significant vegetation.

Detailed Description of Adjoining/Surrounding Development

Adjoining and surrounding development is characterised by low density residential dwellings, many with ancillary structures and/or outbuildings.

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:

Consent No. **98/56** for the legalisation for an unauthorised refreshment room (restaurant) was approved on 27 April 1998 by the former Pittwater Environment and Planning Committee. This consent was modified on 1 November 1999 to remove Condition No. 1 that restricted the operation of the consent to 12 months.

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) was approved on 22 February 2001 by the former Pittwater Development Unit.

Application **DA2021/1311** for Use of premises as a cafe including a change of hours was approved on 10 December 2021 by the Northern Beaches Local Planning Panel.

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

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

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 and is attached taking into all relevant provisions of the Environmental Planning and Assessment Act 1979 and associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon all lands whether nearby, adjoining or at a distance;
- Consideration was given to all documentation provided (up to the time of determination) by the applicant, persons who have made submissions regarding the application and any advice given by relevant Council / Government / Authority Officers on the proposal;

In this regard, the consideration of the application adopts the previous assessment detailed in the Assessment Report for DA2021/1311, in full, with amendments detailed and assessed as follows:

The relevant matters for consideration under Section 4.55 (2) of the Environmental Planning and Assessment Act, 1979, are:

Section 4.55 (2) - Other Modifications	Comments
<p>A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:</p>	
<p>(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and</p>	<p>The development, as proposed, has been found to be such that Council is satisfied that the proposed works are substantially the same as those already approved under DA2021/1311 for the following reasons:</p> <ul style="list-style-type: none"> • The modification does not alter the approved use of the site for the purpose of a restaurant or cafe. • The modification relates specifically to the wording of conditions imposed on the original consent that dictates where the acoustic screening for the outdoor deck is located. • The expected outcomes of the original assessment will be maintained under the modification.

Section 4.55 (2) - Other Modifications	Comments
(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and	Development Application DA2021/1311 did not require concurrence from the relevant Minister, public authority or approval body.
(c) it has notified the application in accordance with: (i) the regulations, if the regulations so require, or (ii) a development control plan, if the consent authority is a council that has made a development control plan under section 72 that requires the notification or advertising of applications for modification of a development consent, and	The application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000, and the Northern Beaches Community Participation Plan.
(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.	See discussion on “Notification & Submissions Received” in this report.

Section 4.15 Assessment

In accordance with Section 4.55 (3) of the Environmental Planning and Assessment Act 1979, in determining an modification application made under Section 96 the consent authority must take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application.

The relevant matters for consideration under Section 4.15 of 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	Pittwater 21 Development Control Plan applies to this proposal.

Section 4.15 'Matters for Consideration'	Comments
control plan	
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 in the original 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> <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 matter has been addressed via a condition in the original consent.</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 in the original 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 have a detrimental social impact in the locality considering the character of the proposal.</p>

Section 4.15 'Matters for Consideration'	Comments
	(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.
Section 4.15 (1) (c) – the suitability of the site for the development	The site is considered unsuitable 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	This assessment has found the proposal to be contrary to the relevant requirement(s) of Section C2.12 of the P21DCP and will result in a development which will create an undesirable precedent such that it would undermine the desired future character of the area and be contrary to the expectations of the community. In this regard, the development, as proposed, is not considered to be in the public interest.

EXISTING USE RIGHTS

Existing use rights for the site were established in the assessment of the original development application.

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.

The proposed modification does not alter the level of compliance of the original development proposal with the requirements with Planning for Bush Fire Protection.

NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited from 02/02/2022 to 16/02/2022 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 9 submission/s from:

Name:	Address:
Mr Marcello Giacomazzi	1 Iluka Road PALM BEACH NSW 2108
Mr Geoffrey William Grist	3 Iluka Road PALM BEACH NSW 2108
Ms Jacqueline Tate	2 / 1026 Barrenjoey Road PALM BEACH NSW 2108
Anthony Tate	2 / 1026 Barrenjoey Road PALM BEACH NSW 2108
Mr Philip Georgouras	10 Lorne Avenue KENSINGTON NSW 2033
Hamish Turner	1024 Barrenjoey Road PALM BEACH NSW 2108

Name:	Address:
Leanne Tate	Address Unknown
Mr Francis Charles Curtin	1018 Barrenjoey Road PALM BEACH NSW 2108
Slater & Elias Solicitors	DX 406 Sydney NSW

The following issues were raised in the submissions:

- Amenity impacts caused by deletion of Conditions 5 & 6
- Garbage bins on street verge
- Hours of operation

The above issues are addressed as follows:

- **Amenity impacts caused by deletion of Conditions 5 & 6**

The submissions raised concerns that the deletion of Conditions 5 & 6 would result in unreasonable impact to the amenity of surrounding residences.

Comment:

Council does not support the applicant's proposal to delete Conditions 5 & 6 due to the unreasonable impact that this would cause on surrounding residences. The application is recommended for refusal on this basis.

- **Garbage bins on street verge**

The submissions raised concerns that the business operator consistently places garbage bins on the street verge.

Comment:

This modification does not relate to the ongoing operation of the business. The original development consent included a condition for the business to establish a garbage area within the property to store bins and waste prior to collection.

- **Hours of operation**

The submissions raised concerns that the hours of operation unreasonably impact upon the residential amenity of the locality.

Comment:

Matters relating to the existing and proposed hours of operation of the business were dealt with under the original development application. This modification does not propose to alter the approved hours of operation of the business.

REFERRALS

Internal Referral Body	Comments
Environmental Health (Food Premises, Skin Pen.)	<p>General Comments</p> <p>There are no modifications to the food premises.</p> <p>Regarding the acoustic screen, Environmental Health have no objection to the screen in either location.</p>
NECC (Coast and Catchments)	<p>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 provisions of Pittwater LEP 2014 and Pittwater 21 DCP.</p> <p>Proposed development the subject of this modification application does not change the coastal assessment for the approved development application (DA2021/1311) and no additional or amended coastal related conditions are recommended.</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	Approved	Proposed	% Variation	Complies
Height of Buildings:	8.5m	Acoustic screens - 2.6m	Unaltered	N/A	Yes

Compliance Assessment

Clause	Compliance with Requirements
4.3 Height of buildings	Yes
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. The modification does not alter the built form of the existing building and structures on the site. As such, the built form controls do not apply to this proposal.

Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
A1.7 Considerations before consent is granted	Yes	Yes
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
B3.11 Flood Prone Land	N/A	N/A
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
C2.1 Landscaping	Yes	Yes
C2.2 Safety and Security	Yes	Yes
C2.5 View Sharing	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	No
C2.22 Plant, Equipment Boxes and Lift Over-Run	Yes	Yes

Detailed Assessment

B6.3 Off-Street Vehicle Parking Requirements

The modification does not alter the approved off-street parking situation of the site.

C2.12 Protection of Residential Amenity

The applicant seeks to delete Conditions 5 and 6 which relate to the protection of residential amenity.

Condition 5 includes the requirement to remove the area of the pergola above the landscaped area and relocate the acoustic walls from the side boundary to the outer edge of the deck. The aim of this condition was to increase the spatial buffer between the deck and the adjacent property to help minimise acoustic impacts caused by the use of the deck and to allow vegetation to be planted in the landscaped area that would not be constrained by a roof above.

Condition 6 requires the applicant to submit a schedule of planting for the landscaped area on the approved plans to the Executive Manager Development Assessment for approval prior to the issue of the construction certificate. This condition was also imposed during deliberation on the original development application by the Local Planning Panel. The panel imposed this condition with the aim to ensure appropriate species are selected to be planted in the landscaped area to help mitigate visual impact from the acoustic screening.

The applicant seeks to delete Conditions 5 and 6 on the basis that the relocation of the acoustic screens will remove the ability for the landscaped area between the deck and boundary to be enjoyed by the cafe patrons and that the acoustic screens will result in an undesirable sense of enclosure for users of the deck. Further, maintenance of vegetation would become virtually impossible because of the 'tunnel like' effect the fencing and screening on either side of the landscaped area would create. The applicant argues the requirement for planting within the landscaped area to be used to screen the acoustic screens serves no purpose due to the existing boundary fence and screening vegetation already planted along the boundary of the adjacent property.

In light of the outcomes of this control, Council does not agree there is sufficient justification to delete Conditions 5 and 6.

While it is acknowledged the landscaped area will not be able to be enjoyed by patrons of the cafe, it is considered that the protection of residential amenity must be of greater importance than the amenity of cafe patrons in this case. Notwithstanding the historical operation of the site for the purpose of a restaurant and cafe, the site is located within an established residential area where occupants of the surrounding dwellings will experience ongoing operational impacts of the business. All attempts to minimise these impacts must be incorporated into the design of development to ensure reasonable residential amenity is maintained. This is the primary reason for the imposition of Conditions 5 and 6.

As such, the deletion of Conditions 5 and 6 will result in a poorer amenity outcome for surrounding residences and is not supported.

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

Section 7.12 contributions were levied on the Development 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, in this regard the application is not considered to be acceptable and is recommended for refusal.

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

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

This proposal to modify development consent DA2021/1311 has been referred to the Northern Beaches Local Planning Panel (NBLPP) due to the application being submitted under Section 4.55(2) of the EPA Act and involves deletion of conditions imposed by the NBLPP.

The concerns raised in the objections relating to the impact of residential amenity have been addressed and are not considered to be appropriately resolved by the proposal.

The critical assessment issue of residential amenity impact caused by the business operation is not able to be appropriately mitigated by the proposal. The proposal is expected to result in a poorer residential amenity outcome compared to that of the original development consent.

Overall, the development fails to demonstrate a high quality design and does not perform well against the relevant controls. The proposal is expected to result in unreasonable impacts on adjoining or nearby properties. The proposal has therefore been recommended for refusal. It is considered that the proposed development does not satisfy the appropriate controls and that all processes and assessments have been satisfactorily addressed.

RECOMMENDATION

THAT Council , as the consent authority REFUSE Modification Application No. Mod2022/0007 for Modification of Development Consent DA2021/1311 granted 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 reasons outlined as follows:

1. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause C2.12 Protection of Residential Amenity of the Pittwater 21 Development Control Plan. The proposal will result in increased visual and acoustic amenity impacts to the adjacent and nearby residential dwellings and the applicant's justification to delete Conditions 5 and 6 is not well founded.
2. Pursuant to Section 4.15(1)(e) of the Environmental Planning and Assessment Act 1979, the proposed development is not in the public interest.