

4 December 2019

The General Manager
Northern Beaches Council
725 Pittwater Road,
DEE WHY 2099

Dear Sir,

**DEVELOPMENT APPLICATION REFERENCE DA2019/0229
SECTION 4.55 (1A) MODIFICATION – PROPOSED MINOR DESIGN MODIFICATIONS TO DA
APPROVAL DA2019/0229
STATEMENT OF ENVIRONMENTAL EFFECTS
18/99 ALFRED STREET, NARRAWEENA**

1.0 INTRODUCTION

On 6 June 2019 Northern Beaches Council issued a deferred commencement approval to Development Application (Ref DA2019/0229) for the change of use to a café at the subject site. The deferred commencement consent was activated on 14 November 2019 after satisfying the condition of the deferred commencement consent after a building certificate was issued for the fit out works.

This modification application relates to amending condition 10 of the consent relating to the hours of operation.

2.0 DETAIL OF THE MODIFICATIONS

This application seeks to modify the hours of operation. The proposed hours of operation are as follows:

5.30am – 7pm – Monday to Saturday

No change proposed for the opening hours on Sunday.

3.0 BACKGROUND

The café has been operating in the unit for approximately 15 years with the current owners purchasing the business approximately 2 years ago. The café, however, had been operating without development consent during this time and the current owners were issued with a notice of intent which has since been addressed by way of a development application for the use and building certificate for the fit out works.

The café had been opening at 5.30am and running without incident until a complaint was made to Council in December of 2018.

The café is in a well-established neighbourhood centre in Narraweena where there are a number of commercial business and 2 schools in close proximity.

The hours of operation imposed by Council was to ensure that the local amenity is maintained. We note that submissions received during the Development Application were overwhelmingly supportive of the café and is a well-established small business in the Narraweena community. The café acts a meeting place for many local residents.

The original complaint regarded the noise impacting the resident in the apartment above and in that respect an acoustic report was prepared to analyse both the noise generated by the café as well as the noise generated from the street in the early morning. The report is provided with this application.

The early morning coffee trade is integral to the viability of the café and also important for those people who work in professions that begin early in the morning who seek to utilise this service.

4.0 SECTION 4.55 (1A) ENVIRONMENTAL PLANNING & ASSESSMENT ACT 1979

The application is made pursuant to Section 4.55 (1A). Section 4.55 of the Act provides:

(1A) Modifications involving minimal environmental impact

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent authority and subject to and in accordance with the regulations, modify the consent if:

- a) It is satisfied that the proposed modification is of minimal environmental impact, and*
- b) It is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as modified (if at all), and*
- c) It has notified the application in accordance with 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 that requires the notification or advertising of applications for modification of a development consent, and*

(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.

In this instance it is not considered the proposed modification as approved substantially alters or changes the development as consented to an extent that it would not be considered to be the same, or substantially the same development. The land use outcome remains as per the approved land use.

A consideration of whether the development is substantially the same development has been the subject of numerous decisions by the Land & Environment Court and by the NSW Court of Appeal in matters involving applications made pursuant to S.96 of the Act. *Sydney City Council v Ilene Pty Ltd (1984) 3 NSWLR 414* drew a distinction between matters of substance compared to matters of detail. In *Moto Projects (No.2) Pty Ltd v North Sydney Council (1999) 106 LGERA 298* Bignold J referred to a requirement for the modified development to be substantially the same as the originally approved development and that the requisite finding of fact to require a comparison of the developments. However, Bignold noted the result of the comparison must be a finding that the modified development is 'essentially or materially' the same as the (currently) approved development. Bignold noted;

"The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the development being compared in their proper contexts (including the circumstances in which the development consent was granted)."

In *Basemount Pty Ltd & Or v Baulkham Hills Shire Council NSWLEC 95* Cowdroy J referred to the finding of Talbot J in *Andari – Diakanastasi v Rockdale City Council* and to a requirement that in totality the two sets of plans should include common elements and not be in contrast to each other. In *North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468; 97 LGERA 443* Mason P noted:

"Parliament has therefore made it plain that consent is not set in concrete. It has chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity. The consent authority can withhold its approval for unsuitable applications even if the threshold of subs (1) is passed.

I agree with Bignold J in Houlton v Woollahra Municipal Council (1997) 95 LGERA 201 who (at 203) described the power conferred by s. 102 as beneficial and facultative. The risk of abuse is circumscribed by a number of factors. Paragraphs (a), (b) and (c) of subs (1) provide narrow gateways through which those who invoke the power must first proceed. Subsection (1A) and subs (2) ensure that proper notice is given to persons having a proper interest in the modified development. And there is nothing to stop public consultation by a Council if it thinks that this would aid it in its decision making referable to modification. Finally, subs (3A), coupled with the consent authorities discretion to withhold consent, tend to ensure that modifications will not be

enterprised, nor taken in hand, unadvisedly, lightly or wantonly. Naturally some modifications will be controversial, but decision making under this Act is no stranger to controversy.”

Senior Commission Moore in *Jaques Ave Bondi Pty Ltd v Waverly Council (No.2) (2004) NSWLEC 101* relied upon *Moto Projects* in the determination, involving an application to increase the number of units in this development by 5 to a total of 79. Moore concluded the degree of change did not result in the a development which was not substantially the same, despite the fact that in that case the changes included an overall increase in height of the building. Moore relied upon a quantitative and qualitative assessment of the changes as determined by the Moto test.

In my opinion a quantitative and qualitative assessment of the application is that it remains substantially the same. The approved land use is as approved is not substantially altered as a result of the proposed change to hours of operation and the development as consented remains as per the approval.

There is considered to be no statutory impediment to the making and determination of this application.

5.0 MATTERS FOR CONSIDERATION PURSUANT TO S4.15 OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 AS AMENDED

The following matters are to be taken into consideration when assessing an application pursuant to S4.15 of the Environmental Planning and Assessment Act 1979 (as amended):

The provisions of any environmental planning instrument, proposed instrument that has been the subject of public consultation under this Act and any development control plan.

5.1 Warringah Development Control Plan 2011

5.1.1 Noise

Pursuant to clause D3 of the Warringah DCP the objectives of the clause are as follows:

- *To encourage innovative design solutions to improve the urban environment.*
- *To ensure that noise emission does not unreasonably diminish the amenity of the area or result in noise intrusion which would be unreasonable for occupants, users or visitors.*

An acoustic report has been prepared which accompanies this application. The report concluded that there is minimal impact expected from the café opening earlier in regard to potential intrusiveness and sleep disturbance.

Given the café is located within an established neighbourhood centre much of the noise generated from 6am is due to the street activities such as garbage collection. The report states that the opening of the café makes no measurable contribution to the overall ambient noise level. There is also an Australia Post Office and bakery within the neighbourhood centre that opens prior to 7am.

Much of the noise generated by the café relates to the coffee machine which has been observed by the acoustic engineer. The report measured that the activities of the café will be heard by the resident above when their windows are closed however external street noise not associated with the café results in a greater noise impact. The café generated noise is considered to be minimal to the residents above and within a reasonable level for a mixed use building. Some noise should be expected when living above a commercial space.

The café will, and has already, taken steps to ensure that noise generated by the café and its patrons are minimised. The café will ensure that customers are to come inside the café prior to 7am so to limit the external noise and will not put the external seating before 7am. Signage will be erected asking patrons to be mindful of the neighbours and to minimise the noise.

6.0 CONCLUSION

Pursuant to Section 4.55 (1A) of the Environmental Planning and Assessment Act 1979 (As Amended), the consent authority can be satisfied that the modified consent as sought by this submission is substantially the same development as referred to in the original application.

The proposed modification to the opening hours do not substantially alter or change the development as consented to an extent that it would not be considered, to be the same, or substantially the same development. The land use outcome remains as per the approved land use.

The acoustic report provided demonstrates that the café opening earlier will not give rise to any unreasonable levels of noise associated with the operation of the café nor will create an unreasonable impact on the local residents.

The café has been found to be an important local business for the community and improves the amenity of the neighbourhood centre.

Please do not hesitate to contact me to discuss any aspect of this submission.

Yours Faithfully

William Fleming
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Planner