
Sent: 6/03/2023 5:06:59 PM
Subject: RE: Submission on DA2022/2281
Attachments: Submission Letter to Council 3477-2673-3344 v.3.pdf;

Hi Phil,

Please see the attached submission.

We will be providing a peer review of the acoustic report to assist Council in its assessment.

On a side note, the Council's website tells you to email Council@northernbeaches.nsw.gov.au is the submission is after the exhibition period.

Please call if you need anything further.

Regards,

Glen Hugo

McKees Legal Solutions ~ accelerated Development Approvals

Suite G18 / 25 Solent Circuit, Baulkham Hills NSW 2153

PO Box 7909, BAULKHAM HILLS BC NSW 2153

TEL: (02) 9635 1100



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From: Phillip Lane <Phillip.Lane@northernbeaches.nsw.gov.au>

Sent: Wednesday, 22 February 2023 3:39 PM

To: Glen Hugo <glen@mckees.com.au>

Subject: RE: Submission on DA2022/2281

Hi Glen,

Thank you for your call yesterday and your email below.

The notification period will not be extended, however the Community Participation Plan (CPP) allows for consideration of late submissions, prior to the assessment report being completed.

Should you wish to make a submission after the notification period please do so as early as possible so that the submission is considered before the assessment report is completed.

Note I am awaiting on several referrals from internal and external stakeholders which all need to be completed

prior to the assessment report being completed.

Additionally, submissions will be accepted via Council's Website after the notification period has concluded. Please see the hyperlink below:-

<https://eservices.northernbeaches.nsw.gov.au/ePlanning/live/Public/XC.Track/SearchApplication.aspx?id=2226667>

Regards,

Phil Lane

Principal Planner

Development Assessment Team

t 02 8495 6506 m 0419 495 152

philip.lane@northernbeaches.nsw.gov.au

northernbeaches.nsw.gov.au



From: Glen Hugo <glen@mckees.com.au>

Sent: Tuesday, 21 February 2023 3:12 PM

To: Council Northernbeaches Mailbox <Council.Northernbeaches@northernbeaches.nsw.gov.au>

Cc: phil.lane@northernbeaches.nsw.gov.au

Subject: Submission on DA2022/2281

Hi Phil,

I have been engaged to prepare a submission on DA2022/2281 on behalf of a neighbour at 77 Undercliff Road Freshwater and need an extension on time.

I understand that current workloads of the DA team are such that this would not impact the assessment timeframes of the application.

Can I have a 1 week extension? I will email the response as the website will not allow a submission after the closing date.

Regards,

Glen Hugo

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Mr Ray Brownlee
Chief Executive Officer
Northern Beaches Council
PO Box 82
MANLY NSW 2095

Our Ref: GMC:GH:30388

6 March 2023

Attention Phil Lane

Dear Phil,

**Submission on Development Application
Property: 80 Undercliff Road, Freshwater**

We act on behalf of Tim Trumper and Elizabeth Wilkins of 77 Undercliff Road, Freshwater.

This proposed development application represents a significant intensification of the use on the site which will significantly increase the amenity impacts. The proposed development expands the approved development to include an additional use as a function centre and significantly increases the maximum occupancy.

The purpose of this submission is to object to and seek the refusal of DA2022/2281.

LEGAL ISSUE

Characterisation of the development

The application seeks to characterise the use as ancillary to the primary use of the existing restaurant. Restaurant or cafe is defined in the *Warringah Local Environmental Plan 2011* as:

“restaurant or cafe means 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, take away meals and drinks or entertainment are also provided, but does not include the preparation and serving of food and drink to people that occurs as part of—

- (a) an artisan food and drink industry, or
- (b) farm gate premises.”

The proposal properly characterised is a function centre which defined in the *Warringah Local Environmental Plan 2011* as:

“function centre means a building or place used for the holding of events, functions, conferences and the like, and includes convention centres, exhibition centres and reception centres, but does not include an entertainment facility.”

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Northern Beaches Council

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We say the use as a function centre is not an ancillary but a separate and distinct use that is prohibited.

Planning circular PS 13-001 contains several factors that the statement of environmental effects while referring failed to include relevant parts of the circular that referred to considering whether the use was independent or ancillary. They are addressed below:

“A component of a development may have features that are both ancillary and independent. If this is the case, consider the following:

• Is the component going to serve the dominant purpose of the development or is it independent”

As we understand, the proposal for a function centre will see the closure of the restaurant and therefore will be the independent and dominate purpose of the site. The DA seeks approval for 130 patrons for the purpose as a function centre. According to the plan of management the restaurant has a maximum capacity of 100 patrons meaning that the use as a function centre provides for the dominate purpose.

“• What is the amount of land to be used for a certain component, relative to the amount of land proposed to be used for other purposes? If the amount of land is relatively small, it is more likely to be ancillary.”

The use as a function centre takes up a substantial proportion of the site relative to the other purposes of the site well above the NCC threshold for consideration as an ancillary use.

“• Evidence of a purpose that is inconsistent with the dominant purpose is likely to undermine a claim that a component is ancillary. If the component is temporary, it is more likely to be ancillary; if it is regular (that is, will constitute an ongoing use for a long period of time), it is likely to be an independent use.”

The hours that the proposed use as a function centre is not clearly articulated in the application. The acoustic report suggests 7:00am and 10:00pm Monday to Sunday. The plan of management suggests that the wedding ceremonies would occur between 10:30am and 7pm. The use as a function centre is an ongoing use and as a result should be considered an independent use.

“• If the component goes beyond what is reasonably required in the circumstances for the development to implement the dominant purpose, it is likely to be an independent use (regardless of whether it has ancillary qualities).”

The impacts of the proposed use are significant on the residents of the surrounding properties and community using the beach and park. The impacts are significant in terms of the additional acoustic impacts and increased generation of carparking demand. The use as a function centre should therefore be considered an independent use.

“• Related components of a development are likely to have an ancillary relationship, although this is not necessarily determinative of such a relationship.”

It appears that the use as a restaurant and function centre will share the indoor space as well as the kitchen facilities. The outdoor area and marquee are exclusively for the use as a function centre.

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“• Physical proximity of the component to the rest of the development is likely to be evidence of an ancillary relationship, although again not necessarily determinative.”

In this case the area used for the purposes of a function centre occupies the outdoor areas of the front of the building and a detached marquee and this is evidence of a use that is independent and more than ancillary.

Permissibility

Clause 15 (2) of the additional permitted use schedule states:

“Development for the purposes of restaurants or cafes is permitted with consent.”

The additional permitted use does not provide permissibility for a function centre. Accordingly, function centre is a prohibited use and there is no power for Council to grant consent for the application.

MERIT CONSIDERTIONS

Noise impacts

The use as a function centre has had a significant impact on the acoustic privacy of our client. The noise from the frequent and long running outdoor weddings has dramatically impacted the amenity of our client's home. The noise impacts from patrons are clearly audible within his dwelling and the length and frequency is such that he is disturbed from concentrating when working at home. The acoustic report has not assessed the impacts to our client's property. The location of the noise measurement receiver is from a single property that is located where the impacts are significantly less due to the other sites being particularly screened from the noise source.

Our client has engaged an acoustic consultant to conduct a peer review of the Acoustic Report to assist Council in their assessment. We will provide the peer review as soon as practicable.

Parking

The proposed use as a function centre creates significant increased demand for carparking on the site. The application is not supported by a traffic report considering the increase impact and looking at carparking capacity within the locality.

The deed that was entered into by the landowner with Council does not offset carparking for all future development that ever happens on the site. The site has already had a significant extension since the date the deed was entered into.

The development significantly increases carparking generation during the day when carparking demand in the summer months is at its highest. The beachside carpark is often overcapacity in the summer months with parking at maximum capacity all the way to Oliver Street on peak days. Local residents are unable to have weekend BBQ's in the summer period due to visitors being unable to park in a reasonable proximity to their dwellings.

Unenforceability of plan of management

The proposed plan of management states that the maximum capacity is 130 patrons spread across 150 seats. Such a provision is unenforceable and has the effect of approving 150 patrons as Council will not be in apposition to enforce the 130-patron limit.

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Lack of heritage impact assessment

The building is a locally listed heritage item, and the unauthorised marquee obstructs and negatively impacts the heritage values of the site. Approving development for a use within an unauthorised structure that has not had a heritage impact assessment is tantamount to approving the structure. Council compliance team may be estopped from taking compliance action in relation to the unauthorised structure if consent for its use is given.

Management of patrons

The design of the marquee and its proximity to the park creates a lack of capacity to manage patrons from entering the alcohol-free area in the adjacent park. Patrons are encouraged to take wedding photos during functions in the alcohol free area in the adjacent park next to the venue and there is no capacity due to the location of the marquee for staff to prevent patrons from taking alcoholic drinks into the alcohol free zone. Our client has witnessed this occurring on multiple occasions with drunk patrons drinking directly adjacent to the children's playground. The venues capacity to regulate its responsibilities under the Liquor Act is impeded by the design as the marquee has a pathway that runs directly to the park with no capacity for staff to prevent patrons leaving the venue with drinks.

Hours of operation

As mentioned above the proposed hours of operation for the use as a function centre are inconsistent with the hours of operation sought in the statement of environmental effects. If a consent is granted for use as a function centre then the hours of operation need to be limited in days of the week and hours in order to provide for respite from the acoustic impacts to neighbours.

SUMMARY OF SUBMISSION

There is a legal barrier to approval of the development. Our function use is different to a restaurant or café. The function use is prohibited and the DA should be withdrawn or refused.

The development has unreasonable noise impacts on the surrounding locality and our client's property in particular. It facilitates the drinking of alcohol in a non-alcohol public park open spaces area. It does not and cannot meet the parking demanded by the proposed use.

There are no merit reasons why the development should be approved.

We request we be advised on any amendments to the application and would be happy to discuss this objection further or arrange for Council to attend on our client's property to understand the significance of the adverse amenity impacts that would be exacerbated and created by the proposed development.

Should you have any questions, please contact Glen Hugo to discuss.

Yours faithfully
MCKEES LEGAL SOLUTIONS



Northern Beaches Council

6 March 2023

Graham McKee
Principal

Encl.
