



Land and Environment Court
New South Wales

Case Name:	Barrenjoey Boatshed Pty Ltd v Northern Beaches Council
Medium Neutral Citation:	[2024] NSWLEC 1844
Hearing Date(s):	Conciliation conference held on 27 September, 18 and 30 October, 3 and 19 December 2024
Date of Orders:	24 December 2024
Decision Date:	24 December 2024
Jurisdiction:	Class 1
Before:	Dixon SC
Decision:	The Court orders: (1) The appeal is upheld. (2) Modification Application MOD2023/0684 (as amended) for the extension of trading hours at 1191-1193 Barrenjoey Road, Palm Beach is approved subject to the conditions set out in Annexure A.
Catchwords:	APPEAL – modification application – extension of hours – conciliation conference – agreement between the parties – orders
Legislation Cited:	Environmental Planning and Assessment Act 1979, s 4.55 Land and Environment Court Act 1979, ss 17, 34 Environmental Planning and Assessment Regulation 2021, ss 38, 98 Fisheries Management Act 1994, s 201
Texts Cited:	Northern Beaches Community Participation Plan 2019
Category:	Principal judgment

Parties: Barrenjoey Boatshed Pty Ltd (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
S Phillips (Applicant)
C Gough (Solicitor)(Respondent)

Solicitors:
Matthews Dalton Lawyers (Applicant)
Storey & Gough (Respondent)

File Number(s): 2024/116996

Publication Restriction: Nil

JUDGMENT

1 On 15 December 2021 the Northern Beaches Planning Panel (the Panel) granted development consent to DA2021/0669 for the demolition and construction of a new restaurant (the Consent) at 1191 and 1193 Barrenjoey Road, Palm Beach, previously known as the Boat House, now called The Joey (the site).

2 The approved hours of operation of the restaurant are set out in Condition 96 of the Consent which provides as follows:

“96. Hours of Operation

The hours of operation outside of daylight saving are to be restricted to:

- Monday to Saturday – 7.00am to 4.00pm
- Sunday and Public Holidays – 7.00am to 4.00pm

The hours of operation during daylight saving are to be restricted to:

- Monday to Thursday – 7.00am to 4.00pm
- Friday and Saturday – 7.00am to 10.00pm
- Sunday – 7.00am to 4.00pm

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.”

3 On 20 December 2024 the Applicant, and operator of the restaurant, made application under s 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (EPA Act) to the Council to modify the Consent to allow an extension

of operating hours from 7am to 11pm Monday to Sunday inclusive (throughout the year) (Modification Application).

- 4 Despite a recommendation for approval the Northern Beaches Development Determination Panel (DDP) determined the Modification Application by way of refusal on 13 March 2024 .
- 5 On 28 March 2024 the Applicant appealed that decision to the Court.
- 6 On 27 September 2024 the Court arranged a conciliation conference under s 34(1) of the Land and Environment Court Act 1979 (LEC Act) between the parties. I presided over the conciliation conference.

Amendments to the DA

- 7 During the conference the Modification Application was amended to be brought under s 4.55(2) of the EPA Act - and supplemented with the following reports:
 - Statement of Modification prepared by Lance Doyle (Planner) dated December 2024;
 - an updated Environmental Noise Impact Assessment prepared by Adam Shearer dated 20 August 2024;
 - an Addendum Report dated 14 November 2024 (Updated Acoustic Reports), prepared in consultation with the Council and its experts; and
 - a revised Plan of Management, again prepared in consultation with the Council and its experts (Revised Plan of Management).(Amended Modification Application dated 20 December 2024).
- 8 As the amended application has resolved the contentions between the parties, they now propose resolution of the proceedings in accordance with the terms of their executed s 34 written agreement. The decision involves the Court exercising the function under section 4.55(2) of the EPA Act to uphold the application and approve the Modification Application (being the Revised Modification Application dated 20 December 2024).
- 9 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' agreement if the Court could have made that decision in the proper exercise of its functions.

- 10 The preconditions relevant to the exercise of the Court's power to make the agreed final orders were addressed in a jurisdictional statement annexed to the s 34 agreement. In that regard, I note the following:

Owner's consent

- 11 The Modification Application is made with the consent of the owner of the land, Crown Lands and Public Spaces ABN 20 770 707 468, as required by s 98(1)(b) of the Environmental Planning and Assessment Regulation 2021, with consent being provided in writing on 7 December 2023.

Notification

- 12 The Modification Application was notified from 16 January 2024 to 13 February 2024 in accordance with the Northern Beaches Community Participation Plan, and s 4.55(2)(c) of the EPA Act. Additionally, the submitters who objected to the original Modification Application were subsequently provided with further notification with respect to the Revised Plan of Management and the proposed amended conditions of consent.

Objections

- 13 The Council considers that the concerns raised in the submissions provided during both the initial notification as required by s 4.55(2)(d) of the EPA Act, and the further notification of the amended application have been satisfactorily resolved. The submissions resulted in extensive acoustic testing by the parties' respective experts and subsequently the adoption of the Revised Plan of Management and the amended conditions of consent which have been agreed between the parties. The Revised Plan of Management specifically enacts provisions to ensure stringent acoustic controls to minimise the risk of any amenity impacts on surrounding residential developments.

Environmental Planning and Assessment Act 1979 – Section 4.55

- 14 Section 4.55(2)(a) of the EPA Act requires that the proposed modification is substantially the same development as the development for which consent was originally granted.
- 15 The Modification Application seeks only to modify the operational hours of the restaurant at the premises. The Modification Application does not propose any

physical works to be carried out at the premises and does not otherwise propose any additional or different land use to the existing approved use as a restaurant.

- 16 Ancillary functions that are not independent uses can occur at the premises.
- 17 Yet, the modified conditions now restrict the number of patrons who may attend an ancillary function to a maximum of (140), and the number of ancillary functions that may be held in any week to (2). The Consent also requires the premises to remain open to the public as a restaurant during an ancillary function in accord with the POM.
- 18 As the Modification Application does not fundamentally alter the approved development and the use of the land as a restaurant, I am 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.

Integrated development

- 19 The Modification Application is Integrated Development therefore approval is required from the Department of Primary Industries (Fisheries) under the *Fisheries Management Act 1994*. The application was referred to the Department on 9 January 2024 pursuant to s 4.55(2)(b) of the EPA Act.
- 20 On 9 January 2024 the Department advised that a referral was not required under s 201 of the Fisheries Management Act 1994.

Conclusion and orders

- 21 After a consideration of the parties' written and oral submissions taken during the conciliation conference, and on the basis of documents filed with the s 34 agreement, I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions. Therefore, pursuant to s 34(3) of the LEC Act, and s 4.55(2) of the EPA Act, the Court approves the s 4.55(2) Modification Application subject to the conditions agreed by the parties.
- 22 The Court notes that:
 - (1) The Northern Beaches Council, as the relevant consent authority has agreed, under s 38 of the Environmental Planning and Assessment Regulation 2021, to the Applicant amending Modification Application

MOD2023/0684, the subject of these proceedings, as shown in the following amended plans and reports:

- Statement of Modification dated 20 December 2024 by Lance Doyle
- Addendum Acoustic Report 6953-5.2L dated 14 November 2024 by Day Design P/L
- Plan of Management dated 2 December 2024.

Referred to as the (the amended Modification Application).

- (2) On 20 December 2024 the Applicant filed with the Court a copy of the amended Modification Application.

23 The Court orders:

- (1) The appeal is upheld.
- (2) Modification Application MOD2023/0684 (as amended) for the extension of trading hours at 1191-1193 Barrenjoey Road, Palm Beach is granted development consent subject to the conditions set out in Annexure A.

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S Dixon

Senior Commissioner of the Court

Annexure A

Annexure B

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