
Sent: 18/08/2021 11:45:17 AM
Subject: Objection to DA2021/1311
Attachments: LtNorthernBeaches170821.pdf;

Andrew Darroch
Mersonn Pty Ltd
6/20 Wylde Street
Potts Point NSW 2011
m: 040609 7178

17 August 2021

Mr Nick Keeler
Planner
Northern Beaches Council
PO Box 82
Manly NSW 1655

DA2021/1311
Lot A DP 404349 1031 Barrenjoey Road, Palm Beach
Use of Premises as a café including change of hours

We refer to your notification letter dated 9 August 2021 regarding the development application for the use of the café and the extension of the hours to allow the use at night. We are the owners of 1030 Barrenjoey Road, which is located directly opposite the subject site, and we wish to object to the proposal for the reasons articulated below.

We have no objection to the operation of Coast (previously The Greedy Goat) during daytime hours and we have made every effort to support the current and previous owners during the hardship of the pandemic. However, we and the surrounding residents are strongly opposed to evening or nighttime operations given the severe amenity impacts on the surrounding properties.

Over the past 13 years, since our purchase of 1030 Barrenjoey Road, there have been a number of occasions when the premises have been used at night, unlawfully for functions. It has been our experience, and that of our neighbours, that the amenity impacts have been severe in terms of noise transmission where the evening and nighttime background noise levels are exceptionally low (30 – 35dBA).

I note that both my wife and I are consultant planners and have extensive statutory planning experience and that the majority of my work focuses on expert evidence in

the Land and Environment Court.

Existing Use Rights

I note at the outset that the subject site is zoned R2 Low Density Residential and the use of the premises as a restaurant or café is a prohibited use.

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, takeaway meals and drinks or entertainment are also provided.

Note—

Restaurants or cafes are a type of **food and drink premises**—see the definition of that term in this Dictionary.

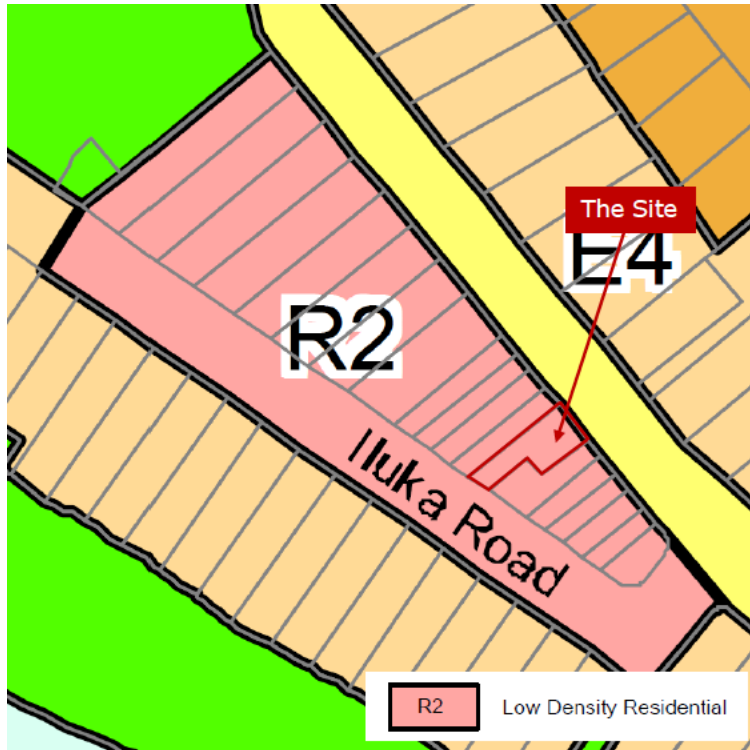
The applicants' Statement of Environmental effects acknowledges (p10) *that the current use of the site is not permissible in the R2 zone*; and asserts that the site has existing use rights under Clause 4.65 of the Act. However, the applicant fails to provide any information demonstrating that the use of the site was lawful immediately before the coming into force of the environmental planning instrument which had the effect of prohibiting the use.

We all know as planners, that the onus is on the applicant to provide the historical consents which would support the claim of existing use rights and to demonstrate that the existing use rights have not been abandoned at any time. Furthermore, the applicant has not demonstrated that the original consent is consistent with the use proposed under Clause 41 of the EPA Regulations.

Furthermore, the applicant has failed to acknowledge that the proposal breaches Clause 41 of the EPA Regulations in that there is a significant intensification of the use. We note that the unauthorized works have been carried out which have significantly expanded the outdoor terrace area to the south of the building and it is proposed under the current development application to enclose the terrace area in the proposal effectively increasing the floor space of the premises in breach of Clause 41 (2)(b) of the EPA Regulations.

I note that the decision in *Landmark Group Australia Pty Ltd v Sutherland Shire Council* [2016] NSWLEC 1577 would confirm this area as floor space under the standard definition.

We note that the application also seeks to use the footway seating as part of the proposed restaurant or café which comprises 50% of the available seating (the SEE notes the 4 seats internally or only for takeaway patrons). The applicant fails to deal with the footway seating in terms of existing use rights. Beyond the boundary of the site, the land is zoned SP2 as reflected in the zoning extract below.



The SP2 zone provides for:

Zone SP2 Infrastructure

1 Objectives of zone

- To provide for infrastructure and related uses.
- To prevent development that is not compatible with or that may detract from the provision of infrastructure.

2 Permitted without consent

Nil

3 Permitted with consent

Aquaculture; Building identification signs; Business identification signs; Environmental protection works; Roads; The purpose shown on the [Land Zoning Map](#), including any development that is ordinarily incidental or ancillary to development for that purpose

4 Prohibited

Any development not specified in item 2 or 3

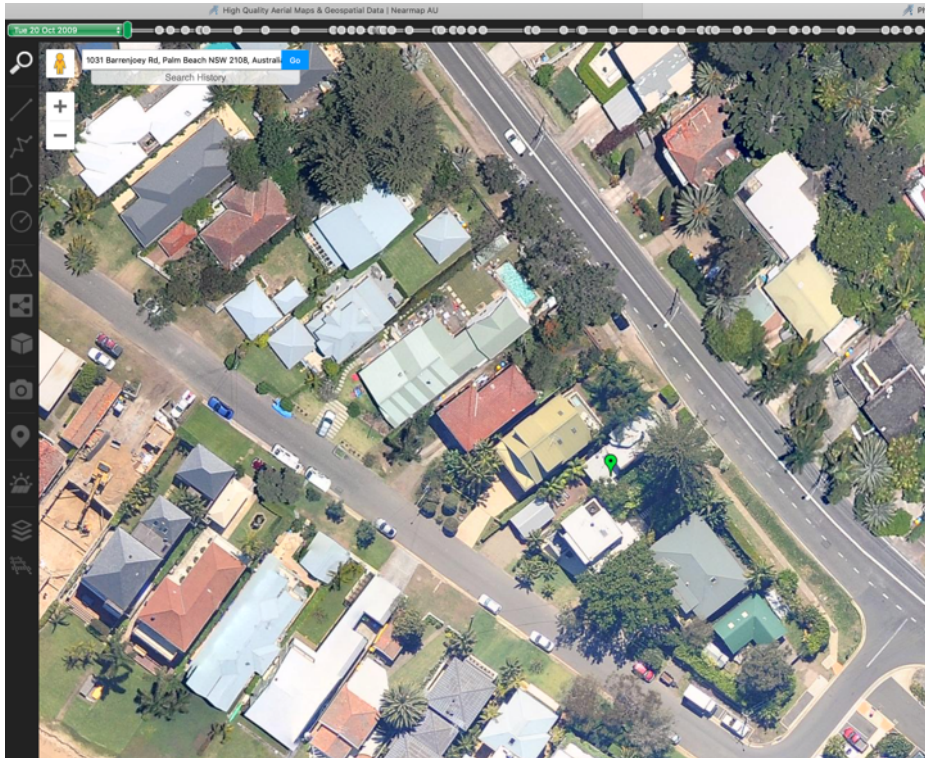
It is apparent that footway seating is not permissible in the SP2 zone and there is no historical consent for this use. Furthermore, there is a valid question as to how a footway license is granted in these circumstances. Clause 42 of the EPA Regulations expressly states:

- (2) The enlargement, expansion or intensification—
 - (a) must be for the existing use and for no other use, and
 - (b) **must be carried out only on the land on which the existing use was carried out immediately before the relevant date.**

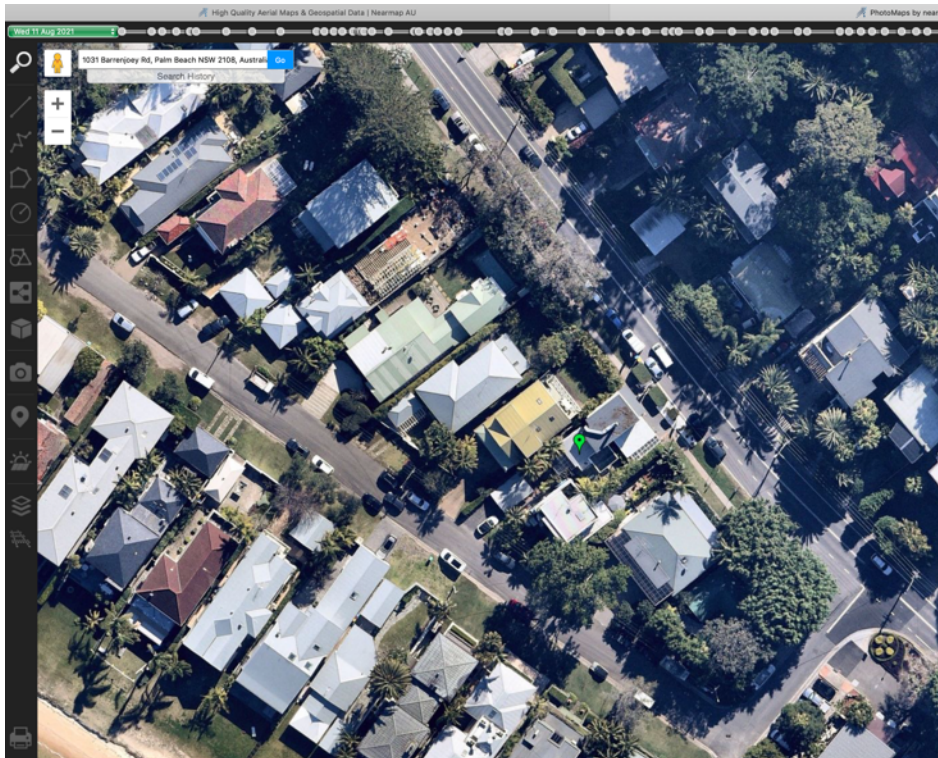
It is clear that the footway is not part of the subject site and 50% of the seating is not proposed to be on the land on which the existing use was carried out (if the applicant is able to demonstrate the consent).

The SEE acknowledges (p12) that Clause 41 (2)(d) of the EPA Regulations that the change in the existing use must not *involve a significant intensification of that existing use*. It is apparent that takeaway food premises which only operated during daytime hours changing use to a restaurant or café which includes nighttime operation would be a significant intensification of the use.

I have included below two aerial photographs from NearMaps which show the subject site in its surrounds in 2009 and in 2021. It is readily apparent from inspection of the photographs that the subject site in 2009 did not have the extensive deck to the south and did not have footpath seating.



NearMaps 2009



NearMaps 2021

/Volumes/Company Share/Mersonn/Projects/2021 Projects/221119 1031 Barrenjoey Road, Palm Beach/LtNorthernBeaches170821.docx
Mersonn Pty Ltd, ACN 121 190 994
20 Wylde Street, Potts Point, NSW, 2011
P: 0406097178 E: andrew@mersonn.com.au

Amenity Impacts

I note that the acoustic report prepared by Acoustic Dynamics and submitted with the application is wholly inadequate and should be peer reviewed by a competent Land and Environment Court Acoustic Expert such as Dr Steven Cooper of the Acoustic Group.

The report (p5) identifies the nearest receivers as:

- 3A Iluka Road;
- 1028 Barrenjoey Road;
- 1029 Barrenjoey Road; and
- 1027 Barrenjoey Road.

These properties are essentially on the flat portion of the surrounding lands and the noise transmission is in large part masked by fences and walls. The report fails to identify the surrounding properties, such as our property, at 1030 Barrenjoey Road which are located up slope are far more effected by noise transmission. We know that noise propagates upslope with far greater consequences.

We have included an aerial photograph from RPData with a 5m contour overlay and our property outlined in yellow. It is readily apparent that our property, and 1022, 1024, 1026 and 1032 are all located between 10m and 25m above the subject site. This means that the noise of patrons talking at night has uninterrupted impacts upon the properties upslope. All of these residents can verify this from the unlawful functions which have occurred at night at the premises and the impacts upon the dwellings.

It is also noted that the noise emanating from the premises at night is further exacerbated by “alcohol fueled conversations”. While the premises may not be licensed, it is our experience that the unlawful nighttime functions have provided BYO alcohol and the noise from the premises has been well above the 5dB above the 30 – 35dB background suggested by the acoustic report. I have personally measured the noise emanating from the unlawful functions at the premises using a sound level meter from our living room and bedroom and found it to exceed 60db which is well in excess of what has been modelled by Acoustic Dynamics.



RPData 2021

It would be appropriate to use empirical evidence and to measure the actual noise emanating from the unlawful nighttime functions using an independent Land and Environment Court Acoustic Expert to properly assess the impacts. The suggestion by Acoustic Dynamics that the proposal would be compliant and that the *worst-case would arise from the closing of car doors* (p14) is clearly incorrect, with no acoustic treatment recommended for the eastern elevation of the deck and no treatment for the outdoor seating area.

We also note that the acoustic report is inconsistent with the application before the Council which suggests that the premises is to operate 6:30am to 8:00pm Sunday to Thursday and 7:00am to 9:30pm Friday and Saturday.

We note that Council will have on file a similar existing use rights situation which occurred at Cranky Fins restaurant located at 1186 Barrenjoey Road. We would

recommend perusal of that file to fully understand the severe impacts experienced by the local residents.

We confirm that we have no objection to the operation of Coast during daytime hours and we will make every effort to continue to support the owners, but we and our neighbours are strongly opposed to evening or night time operations given the severe amenity impacts on the surrounding properties.

We trust that the above is to your satisfaction and in the event that you have any enquiries, please do not hesitate to contact the undersigned directly and we look forward to working with you on this project.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'A. Darroch', is placed on a light yellow rectangular background.

Andrew Darroch
Consultant Planner

A handwritten signature in black ink, appearing to read 'L. Reid', is placed on a white background.

Laura Reid
Consultant Planner

MERSONN PLANNING

Andrew Darroch

Consultant Planner

Andrew has over 30 years of experience in the planning profession, in both government and private practice with a focus on resolution of complex developments. Andrew has held senior planning positions in NSW local government at both North Sydney Council and South Sydney Council and is experienced in all facets of statutory and strategic planning, regularly providing senior level strategic advice to the NSW Department of Planning and Environment and local authorities as well as providing expert evidence to the NSW Land and Environment Court.

Andrew has participated in over 500 hearings in the NSW Land and Environment Court, NCAT, Supreme Court and Family Court as a Planning Expert on a wide variety of property development related matters, acting for both applicants, State and Local Government, as well as being Court Appointed Expert. Expert evidence has been given in relation to a wide range of development types, including, coal mines, quarries, viticulture, large scale industrial and residential subdivision, large scale tourist developments, hospitals, CBD high rise commercial and mixed use developments, hotels, residential flat buildings, multi-unit mixed use developments, seniors housing, child care, affordable housing and single dwelling houses. Andrew specializes in conciliating complex and controversial developments through the NSW Land and Environment Court S34 process and his training as an Accredited Mediator and extensive experience assists in achieving successful and timely outcomes.

Andrew has extensive experience in the preparation and negotiation of planning proposals across a large number of NSW local authorities.

Andrew has extensive experience and continues to practice as a consultant planner across Tasmania for complex developments acting for both applicants, State and Local Government.

Qualifications

- 1994 LEADR Mediation Accreditation
- 1992 Graduate Diploma in Urban Estate Management
- 1987 Master of City and Regional Planning
- 1985 Bachelor of Environmental Science

Professional Association

- Member of the Planning Institute of Australia.
- Member of Property Council of Australia
- Member of Environmental Planning Law Association

Career

- 2006 – Mersonn Pty Ltd.
Consultant Planner
- 1996 - 2006 City Plan Services Pty Ltd.
Director
- 1993 - 1996 North Sydney Council
Assistant Director (Assessments)
- 1990 - 1993 South Sydney City Council
Area Planning Manager
- 1988 - 1990 Todeschini and Japha
Consultant Planner
- 1987 - 1988 Cape Town City Council
Town Planner