
From: Tony Moody
Sent: Monday, 1 August 2022 3:15 PM
To: Planning Panels - Northern Beaches
Cc: Council Northernbeaches Mailbox
Subject: RE: Objection to Section 4.55 Modification Application, MOD2021/0983, PPTY: 231 Whale Beach Road, Whale Beach

Categories: NBLPP

ATTENTION: CHAIRPERSON AND PANEL MEMBERS OF THE NORTHERN BEACHES PLANNING PANEL

Dear Chairperson and Panel Members,

I refer to the abovementioned Section 4.55 Modification Application (Modification Application) seeking approval of the Northern Beaches Planning Panel to modify Condition No. 99 of Development Consent No. REV DA2021/0034 to allow an increase in patron numbers to the approved restaurant within Retail 1 located on the ground floor fronting Surf Road.

The subject site is known as 231 Whale Beach Road, Whale Beach.

I note that the current Condition No. 99 requires a maximum capacity of the approved restaurant to 64 patrons, comprising 44 indoor patrons and 20 outdoor patrons, plus 6 staff. Thus, there is a maximum total of 70 persons associated with the current approved restaurant.

The current Modification Application seeks to expand the maximum number to a total of 170 patrons, comprising 140 indoor patrons and 30 outdoor patrons, plus 18 staff. Thus, there is a total of 188 persons associated with the proposed modified restaurant.

Accordingly, the number of persons associated with the proposed modified restaurant represents an increase of 169% compared to the current approved restaurant.

I confirm that I have examined the documents, plans and reports associated with the above Modification Application. I have also viewed the documents, plans and reports relating to 2 previous applications over at the subject site.

I have also inspected the subject site and adjoining locality. I note that I have lived extensively in the Northern Beaches Area and I am fully aware of the subject site and adjoining locality.

It is my general practice to advise Panel Members of my qualifications and experience so that you are aware of my background. I am a Consultant Planner with 15 years' experience in 3 Local Government Councils, including 9 years as a Senior Development Control Planner. I hold a Bachelor of Town Planning Degree from the University of NSW and a Bachelor of Laws Degree (Hons) from the University of Technology, including a High Distinction in Environmental Studies. I have appeared as an Expert Planning Witness for 9 Councils in the Land and Environment Court (Court) and I have also appeared in numerous Appeals as a Court Appointed Expert.

For the reasons referred to below, I oppose the current Modification Application. Given the fact that I will be making a verbal presentation to the Members of the Planning Panel, I wish to provide the following summary of my points of objection:-

1.0 SUBJECT SITE AND ADJOINING LOCALITY

- I consider that the subject site and immediate neighbourhood evidence limitations and restrictions including, but not limited to, the following:-
 - i. The Council report before you acknowledges that “the topography and uniqueness of the area results in a **vulnerable** access due to the constraints of the road network”. **(emphasis added)**.
 - ii. The subject site experiences a fall of 12.62m from the north west corner of the subject site down to the south east corner of the subject site, with a slope of approximately 30%.
 - iii. The subject site is irregular shaped.
 - iv. The adjoining road is clearly a steep road, with part of the adjoining road containing a footpath on 1 side only.
- I have examined the submissions lodged in response to the Modification Application and many of these submission highlight concerns relating to safety, parking and traffic generation arising from the proposed significant expansion in the approved restaurant. I can also say that I agree with the concerns, particularly in terms of the steepness and curved nature of the adjoining road. The lack of a footpath along part of the road is also of significant concern.
- I note that the Council report advises that “traffic generated by the proposal will not result in road safety issues”, I consider that the objections of the local residents evidence the areas of concern, particularly when one also considers the traffic and parking associated with the use of the beach front.
- Whilst I note the opinion of Council Officers that there is not likely to be a traffic safety concern, I also note that the Court has in previous Appeals has adopted the opinion of local residents who intimately know the circumstances relating to traffic, parking and safety in a locality. For example Court judgements relating to proposed expansions in Scotts College, Bellevue Hill, evidenced the fact that there are appropriate circumstances in which the decision maker prefers the evidence of local residents, rather than an Applicant. Given the site constraints and the “vulnerable access”, I earnestly request the Members of the Planning Panel to inspect the subject site and the adjoining neighbourhood to form its opinion on the questions of access, traffic, and parking. Please refer to additional comments below.

2.0 INCREASE IN “DENSITY” AND INTENSITY OF APPROVED USE

- The Council report before you correctly notes that that the proposed modified development does not “seek to increase the approved built form or the floor area of retail 1”. The Council report further claims that “there is no increase in the density of the approved development”.
- With respect, I strongly disagree. The current proposed modified development significantly increases the number of patrons and staff associated with the proposed modified restaurant. The density and intensity of the approved use will substantially increase. The proposed increase in patrons and staff compared to the approved development is 169%, which by any measure is a very significant increase.
- A comparable example is where one has a meeting hall with a specified floor space, but is restricted to 100 persons. A second meeting hall of the same floor space is conditioned to be restricted to 200 persons. Clearly, the second hall of the same floor space, but with an expanded maximum number of attendees, will obviously generate increased impacts. This is a scenario that is now faced by local residents.
- Further in relation to the issue of capacity, there is no doubt that the proposed maximum number of patrons and staff associated with the proposed modified development of 188 persons represents a very significant increase compared to the previous café use on the subject site. Many of the submissions lodged by adjoining owners attest to the fact that the previous café use on the subject site was occupied for substantially reduced numbers than is currently proposed.
- Thus, the local residents and the adjoining locality will be faced with a significantly expanded restaurant, with associated impacts including, but not limited to, reduction in public car spaces currently used by beach users and the Surf Life Saving Club, Acoustic Impact and concerns relating to safety due to the steep and winding nature of the adjoining road.
- On the issue of intensity of use, I particularly note the fact that many of the submissions raise no objections or acceptance of the scale of the previous cafe use on the subject site and also the current approved use. In other words, many of the local residents accept the fact, and rightly so, that a restaurant of a local “**small scale**” nature, consistent with the zoning, is acceptable. I support such a

proposition. Many local residents, however, raise strong objection to a significant increase in the numbers of patrons and staff under approved restaurant under the current Modification Application and I raise a similar concern.

- I wish to stress that the subject site is zoned B1 Neighbourhood Centre which has an objective of providing “a range of **small-scale** retail/business and community uses that serve the needs of people who live and work in the surrounding neighbourhood”. (**emphasis added**). Furthermore, a second objective is to provide a “healthy, attractive, vibrant and safe neighbourhood centres”. I consider that a proposed restaurant of 188 persons including staff, does not represent a “small-scale” business, and would not merely attract locals. Simply put, it is of a scale now proposed which is not “in the surrounding neighbourhood”. The previous cafe use and even the current approved use could reasonably be considered to be “small scale”, but I strongly consider that the proposed expanded use is not of a small scale nature. Again, I consider the fact that there is no change to the floor area of the subject tenancy is not the primary criteria. I consider that the intensity and density of the proposed modified development relates to the proposed significant increase in the number of patrons and staff.

3.0 LACK OF ON-SITE PARKING FOR EXPANDED USE

- The Council report before you correctly notes that “Clause B6.3 of P21 DCP sets out the parking requirements for developments”. The carparking for restaurants and cafes is calculated on the Gross Lettable Floor Area (GLA), namely 1 space per 30sqm GLA. Traffic generation from the site is also determined on the basis of floor area with the RMS Guide to Traffic Generating Development specifying an evening peak trip rate of 5 trips per 100sqm of GLA”.
- The Council report is also correct in saying that “the subject modification does not increase the floor area of retail 1”. Thus, the Council report argues that there is no additional parking generating under the current Modification Application.
- I, however, say that the Planning Panel should consider the wider merits of the proposed development given the significant increase in expansion numbers of patrons and staff and the circumstances relating to a winding road, lack of footpath on part of the road and the adjoining parking and traffic demands for the beach users.
- In support of my position, I wish to note the following:-
 - i. In the judgement of the Court in the Presbyterian Church (NSW) Property Trust v Woollahra Municipal Council [2014] NSWLEC 1218 (Scotts College), then Senior Commissioner Moore (now Justice Moore) held that on paragraph 94 that “*on one hand, the mere fact that the proposal meets the requirements of a Development Control Plan does not automatically mean that Development Consent will be granted. However, on the other hand, if a proposal does not meet a Development Control Plan’s requirement, the Court may still grant consent, in appropriate cases, given a proper and genuine consideration of the Development Control Plan and having considered all other matters that are relevant under S79C of the Act*”. Thus, the fact that the proposed modified development complies with the DCP is not an automatic approval. As per the Court judgement above, one must give a “proper and genuine consideration of the Development Control Plan and having considered all other matters that are relevant under Section 79C of the Act”.
 - ii. As previously noted and confirmed by submissions by adjoining owners, the proposed number of patrons and staff in the proposed modified restaurant are significantly in excess of the numbers associated with the previous café use, and also significantly in excess of the approved restaurant use.
 - iii. The Council report before you refers to the RTA Guidelines. As you are aware, the RTA is the eminent authority in terms of Traffic Safety and Parking Guidelines. I note the RTA Guidelines require a “restaurant” to have carparking provision of 15 spaces per 100sqm gross floor area or, one space per 3 seats. As such, a significantly greater parking would be required under the RTA Guidelines.
 - iv. I also note the adjoining Warringah Development Control Plan adopts the RTA Guidelines.
 - v. I consider that the proposed modified restaurant in terms of patron numbers represent more than a “small scale” café/restaurant, but rather a much larger scale restaurant which will attract

persons outside of the immediate neighbourhood. Given the lack of public transport and the location of the proposed restaurant, I consider that patrons who are not within walking distance will utilise private cars, with associated use of the adjoining public car spaces in the immediate locality. For the reasons referred to in Section 5.0 below, I am concerned with the use of the adjoining public car spaces as a result of the proposed expanded restaurant.

4.0 USE OF PUBLIC BEACH PARKING SPACES FOR PRIVATE EXPANDED RESTAURANT USE

- The RTA Guidelines state that “adequate off-street parking is the main criterion in the assessment of parking areas provided for developments. Adequate provision of off-street parking discourages on-street parking, thereby maintaining the existing levels of service and safety of the road network”.
- I am concerned with the fact that a private commercial operation, of more than a small scale, will enjoy the benefits of public parking spaces in the immediate locality to the detriment of the public interest. I consider that a commercial operation should not gain the benefit of public car spaces to the detriment of the public interest for the following reasons:-
 - i. As noted above, the RTA advises that adequate off-street parking is the main criterion in the assessment of parking areas provided for developments. Adequate provision of off-street parking discourages on-street, thereby maintaining the existing levels of service and safety of the road network. The subject site does not provide adequate on-street parking for the proposed 170 seat restaurant.
 - ii. A proportion of café and retail patrons are likely to be beach users. Whilst this is correct, there is no quantifiable figure provided in the Applicant’s documentation as to the percentage of beach users who will also come to the proposed modified restaurant. I think it could be fairly said that the number of patrons that will attend the restaurant and who are not beach users will be more than a minor level, but the Applicant has not provided parking surveys to determine the percentage of beach users who are also likely to attend the restaurant.
 - iii. The Applicant’s Traffic and Parking Report includes parking surveys of the adjoining street system. I, however, raise a significant concern with the fact that the parking surveys are only over 2 days in the month of September. I strongly consider that such surveys are inadequate due to the month of the surveys (September) and the limited number of surveys. It cannot be said that the surveys represent a reasonable representation of available on-street parking, particularly in the warmer months which are the peak periods.
 - iv. The Council report before you raises no objections to the use by the patrons of the expanded restaurant of the adjoining public car spaces, given that “there is no restriction on this provided the relevant parking restrictions are complied with and access/parking for Emergency Services is not restricted. It is also note for the vast majority of the year parking within this locality, in particular the beach side carpark is readily available”. I strongly disagree. I am concerned that a private commercial operation will cause prejudice to the public interest by utilising public car spaces, particularly for beach users and also persons associated with the Surf Life Saving Club. Again, consistent with the RTA Guidelines, “adequate off-street parking is the main criterion in the assessment of parking areas provided for the developments”. In other words, each proposed development should satisfy its own parking requirements on-site. Clearly, the proposed development does not comply. Secondly, there are no parking surveys undertaken by the Applicant to confirm the comment in the report before you that, “the vast majority of the parking within this locality is readily available”.
 - v. The Council report before you also states that “on balance the demand for parking is not dissimilar to that associated with the existing building”. I disagree. As previously advised, the proposed expanded modified restaurant has a much greater number of patrons than is evident in the previous café use and the current approved restaurant.
 - vi. I am particularly concerned with the principle that a private commercial development will generate significant increase in parking, and seek to satisfy such additional parking on public assets, such as the public parking spaces, which currently are utilised predominantly by beach users and persons associated with the Surf Life Saving Club. I consider that such a scenario is inconsistent with the principle that each private development must satisfy its own carparking demand.

5.0 ADVERSE ACOUSTIC IMPACT

- In terms of Acoustic Impact, I must firstly stress that I do **not** have qualifications and experience in the field of Acoustics.
- One of my Clients raised a concern in relation to the adverse Acoustic Impact arising from the proposed restaurant use, particularly the proposed expanded outdoor terrace area. On this point, I note that the proposed modified restaurant increases the patrons using the outdoor terrace by 50% compared to the proposed current approved terrace.
- One of my Clients raised a concern about noise associated with the proposed use, particularly associated with the proposed outdoor terrace.
- I recommended to my Client that he appoint a qualified and experienced Acoustic Expert. As a result of my recommendation, my Client appointed, "Day Design Pty Ltd" and specifically William Wang, Senior Acoustical Engineer.
- I do not propose to expand on the comments of William Wang other than to briefly note that William Wang considers that the Acoustic Impact from the current Modification Application has not been adequately assessed and, if approved, is likely to cause an adverse impact on the Acoustic Amenity of the nearby receivers. I leave this Acoustic Report by William Wang for your consideration.

6.0 CONCLUSION

For the reasons referred to in this submission, I earnestly request that the current Modification Application not be approved and particularly note the following:-

- i. The proposed expanded modified restaurant has a level of patrons and staff significantly in excess of the previous café use and also the current approved use.
- ii. Whilst the proposed modified development technically complies with the DCP in terms of provision of on-site carparking, such compliance "does not automatically mean that Development Consent will be granted", as per the Court's judgement relating to a previous Scots College Appeal.
- iii. The circumstances relating to the subject site and adjoining locality exhibit limitations and constraints. To introduce a proposed expanded restaurant into this neighbourhood given these constraints is, in my opinion, undesirable.
- iv. The proposed expanded restaurant is **not** of a "small scale" as per the objectives of the Neighbourhood Business Zone. In contrast, the previous use and the current approved use could be reasonably argued to be of a small scale and are accepted by many in the local community, based on my review of the submissions.
- v. It is clearly the case that the proposed expanded restaurant has a patronage level which will result in a portion of the patrons utilising the adjoining public carparking spaces, including those along the beach front. For a private commercial development to satisfy its carparking demand by use of public car spaces is, in my opinion, contrary to the public interest to beach users and the adjoining Surf Life Saving Club.

My thanks to you for considering this submission.

Apologies for the length of this submission, but I considered it necessary to respond to the report before you.

Yours sincerely,

TONY MOODY

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