

APPLICATION FOR MODIFICATION ASSESSMENT REPORT

Application Number:	Mod2021/0983
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Responsible Officer:	Anne-Marie Young
Land to be developed (Address):	Lot B DP 316404, 231 Whale Beach Road WHALE BEACH NSW 2107
Proposed Development:	Modification of Development Consent REV2021/0034 granted for demolition works and construction of a Mixed Use Development comprising Shop Top Housing and retail premises, with associated carparking, landscaping and strata subdivision
Zoning:	B1 Neighbourhood Centre
Development Permissible:	Yes
Existing Use Rights:	No
Consent Authority:	Northern Beaches Council
Delegation Level:	NBLPP
Land and Environment Court Action:	No
Owner:	Leslie Anthony Cassar Diana Nancy Cassar
Applicant:	Leslie Anthony Cassar

Application Lodged:	01/02/2022
Integrated Development:	No
Designated Development:	No
State Reporting Category:	Refer to Development Application
Notified:	16/02/2022 to 02/03/2022
Advertised:	Not Advertised
Submissions Received:	121
Clause 4.6 Variation:	Nil
Recommendation:	Approval

EXECUTIVE SUMMARY

This application seeks approval for a modification of Condition No. 99 of Development Consent No. DA2020/0422, approved under REV2021/0034, to allow an increase in patron numbers to the restaurant within Retail 1 located on the ground floor level fronting Surf Road. The condition was recommended by Council's Health Officer under REV2021/0034 and currently restricts the capacity of the restaurant to a total of 64 patrons, comprising 44 indoor patrons and 20 outdoor patrons, plus 6 staff. The proposal seeks consent for a total of 170 patrons, comprising 140 indoor patrons and 30 outdoor patrons, plus 18 staff.

The limit on the number of patrons in Condition 99, REV2021/0034 was based on the assessment of the original acoustic report submitted for Development Application, DA2020/0422 for demolition works and construction of a Mixed Use Development comprising Shop Top Housing comprising 5 residential apartments, 3 retail premises, basement car parking for 21 cars, associated carparking, landscaping and strata subdivision. The original application was refused by Northern Beaches Local Planning Panel (NBLPP) and a revised proposal was lodged under REV2021/0034 which satisfactorily addressed the issues raised in the original refusal. The review application was subsequently determined by way of approval by the NBLPP in December 2021.

The original proposal included restaurant uses on the Ground Floor Level (Surf Road) known as "Retail 1" and Level 3 (Whale Beach Road) known as "Retail 3". In order to minimise the acoustic and privacy impacts on neighbouring dwellings, the revised proposal increased the size of the restaurant on the Ground Floor Level (Retail 1) and changed the usage of the retail space on Level 3 to neighbourhood shops. The revised proposal did not include an updated acoustic report to reflect the changes of Retail 1 to a larger Restaurant, although a BCA report confirmed that a total of 188 patrons could be accommodated within Retail 1. As noted above, condition 99 of REV2021/0034 was based on the acoustic report for the original proposal DA2020/0422 as an updated acoustic report to reflect the amended retail / restaurant layout had not submitted.

The current modification application is supported by an acoustic report dated December 2021 which specifically assesses the use of Retail 1 as a larger Restaurant. The report makes recommendations to manage noise emissions from patron and staff based on the operation of this space as a restaurant. The recommendations include the need for an acoustic barrier to be erected along the southern boundary with No. 229 Whale Beach Road, no background music, and all windows of the indoor area to be closed. The application has been reviewed by Council's Environmental Health Unit, who raised no objections to the modification to condition 99 to increase patron capacity, subject to compliance with all the recommendations of the 2021 acoustic report. In addition, conditions are recommended to ensure the restaurant in Retail 1 is not used as a function centre, to limit the hours of use of the outdoor area and to require the submission of an Operational Management Plan for the restaurant.

There are no physical changes proposed to the approved development and no increase in the gross leasable retail / restaurant floor area. Importantly, it is noted that car parking requirements under the P21DCP are based on the Leasable Floor Area of the restaurant, and not the number of patrons, hence there are no additional parking spaces required to be provided onsite as a result of the proposed increase in patron numbers. This matter has been the subject of review by Council's Transport Officer and is supported.

A total of 120 submissions were received in response to the notification of the application, including 29 in support of the application and approximately 90 unique submissions raising objections to the application. The issues raised in objection have been reviewed and they do not warrant the refusal of the application or the reduction in the number of proposed patrons, although special conditions have been recommended to address a number of the concerns.

The application is referred to the NBLPP due to the number of submissions exceeding 10.

This report concludes with a recommendation that the NBLPP should grant **approval** to the application, subject to the standard and special conditions attached to this report.

PROPOSED DEVELOPMENT IN DETAIL

The application seeks to modify Condition No. 99 of DA2020/0442 which states as follows:

The capacity of the Ground Floor cafe/restaurant premises is limited to 44 indoor patrons, 20 outdoor patrons and 6 staff members.

Specifically, the application seeks approval to increase the capacity of the Ground Floor restaurant as follows:

- 140 indoor patrons - increased by 96
- 30 outdoor patrons - increased by 10
- 18 staff - increased by 12

The Statement of Environmental Effects (SEE) provides the following points of explanation:

- *The number of patrons in Condition 99 is based on the original Development Application acoustic report by JHA Engineering Revision B Dated 5/2/2020 which stated: based on Architectural drawings, the Ground Floor retail is assumed to have an operating capacity of 50 people internally (44 patrons and 6 staff members), 20 in the outdoor seating area.*
- *The modified plans for the Section 8.2 Review specifically provided a larger Retail 1 space on the ground floor (Surf Rd), and correspondingly a smaller Retail 2 (on Whale Beach Rd). The BCA report, which was provided with the Section 8.2 Review submission, clearly provides numbers for use as a restaurant of 170 patrons and 18 staff (total 188). This is based on Section F2.4 of the BCA.*
- *The original DA plans showed restaurant/café usage both on the Ground Floor (Surf Rd) and Level 3 (Whale Beach Rd). An important change for the Section 8.2 Review, to minimise the acoustic and privacy impacts on neighbouring dwellings, was to increase the size of the restaurant on the ground floor and change the usage of the retail space on Level 3 to neighbourhood shops. This was shown on the architectural plans and referenced in the submission report, town planning report, acoustic report and schedule of amendments. The increased size and capacity of the restaurant was deliberately relocated to the ground floor where it would have least impact.*
- *An Acoustic Letter of Support was provided with the Section 8.2 Review submission which provided overall support for the Section 8.2 Review amended proposal, which included the BCA report, and which clearly stipulates 170 patrons and 18 staff (total 188). Whilst the updated acoustic report did not specifically address the increase in patron numbers, the Review documentation was clear in that our submission is for a total of 170 patrons and 18 staff as stated in the BCA report. The acoustic letter of support was obviously to cover the new plans and not the original DA plans.*
- *We only became aware of this issue once the draft conditions of consent were released. There was not time to provide additional acoustic information and have it notified within the time limits of the Local Planning Meeting held on 1st December 2021. If we had been advised earlier that this condition was to be imposed, we could have provided additional clarifying documentation during the Review process.*

A search of Council's records confirms that the applicant's comments on the circumstances of applying condition 99 in the previous consent is correct.

The subject modification is supported by an amended Acoustic Report, which assesses the use of "Retail 1" on the Ground Floor Level fronting Surf Road as a restaurant/cafe as approved under REV2021/0034. No revised Traffic Assessment Report was submitted with this application.

It is noted that there are no physical changes to the building approved under REV2021/0034.

ASSESSMENT INTRODUCTION

The application has been assessed in accordance with the requirements of the Environmental Planning and Assessment Act 1979 and the associated Regulations. In this regard:

- An assessment report and recommendation has been prepared (the subject of this report) taking into account all relevant provisions of the Environmental Planning and Assessment Act 1979, and the associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon the subject site and adjoining, surrounding and nearby properties;
- Notification to adjoining and surrounding properties, advertisement (where required) and referral to relevant internal and external bodies in accordance with the Act, Regulations and relevant Development Control Plan;
- A review and consideration of all submissions made by the public and community interest groups in relation to the application;
- A review and consideration of all documentation provided with the application (up to the time of determination);
- A review and consideration of all referral comments provided by the relevant Council Officers, State Government Authorities/Agencies and Federal Government Authorities/Agencies on the proposal.

SUMMARY OF ASSESSMENT ISSUES

Pittwater 21 Development Control Plan - B6.3 Off-Street Vehicle Parking Requirements
 Pittwater 21 Development Control Plan - C1.6 Acoustic Privacy
 Pittwater 21 Development Control Plan - C2.12 Protection of Residential Amenity

SITE DESCRIPTION

Property Description:	Lot B DP 316404 , 231 Whale Beach Road WHALE BEACH NSW 2107
Detailed Site Description:	The site is irregularly shaped, with a 30.275m wide frontage to Whale Beach Road, a 20.175m wide frontage to Surf Road and a total area of 844.7m ² . The site currently contains a multi-level mixed-use development, with retail and business premises fronting Whale Beach Road and residential development fronting Surf Road. A double carport is located at the south-east corner of the site, with access to/from Surf Road. A single garage is located in the north-west corner of the site, with access to Whale Beach Road. The current buildings and a number of retaining walls are in a state of disrepair. The site does not contain any significant landscaping or natural features.

The site experiences a fall 12.62m from the north-west corner of the site down to the south-east corner of the site, with a slope of approximately 30%. An overland flow path runs along the southern side boundary of the site (and the northern boundary of the site to the south).

Whale Beach Road is a two-lane local road. The portion of the public road reserve immediately adjacent to the site is paved and currently features outdoor furniture and movable landscaping elements associated with an outdoor dining licence. A significant street tree is located within the road reserve. Time restricted parking is available along the frontage of the site, inclusive of a mail zone.

Surf Road is a two-lane local road that connects Whale Beach Road to the beach car park. The public road reserve immediately adjacent to the site is nominal, and contains retaining walls associated with the existing building at the site.

The site is zoned B1 Neighbourhood Centre and is surrounded by land zoned E4 Environmental Living. With the exception of Whale Beach Surf Club (two properties to the south), the area is characterised by dwelling houses.

Map:



SITE HISTORY

On 7 February 2019, a pre-lodgement meeting was held between the applicant and Council staff in relation to a Mixed-Use Development. The key advice provided in the pre-lodgement notes is summarised as follows:

"It is critical that retail premises be maintained on both the Surf Road and Whale Beach Road ground floor levels, in order to meet the definition of shop top housing. Given the very steep slope of the site, having residential dwellings on the eastern side of the development that are at or below the Whale Beach Road level, can be supported. Should a design be lodged with no retail fronting Whale Beach Road, Council would not be in a position to support that proposal..."

On 2 December 2020, Development Application No. **DA2020/0442** for demolition works and construction of a Mixed Use Development comprising Shop Top Housing comprising 5 residential apartments, 3 retail premises, basement car parking for 21 cars, associated carparking, landscaping and strata subdivision, was reported to the NBLPP with a recommendation for refusal. The NBLPP endorsed the recommendation and refused the application. The reasons for refusal are as follow:

1. *Pursuant to Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of State Environmental Planning Policy 65 - Design Quality of Residential Flat Development and its associated Apartment Design Guide.*
2. *Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 7.7 Geotechnical hazards of the Pittwater Local Environmental Plan 2014.*
3. *Pursuant to Section 4.15(1)(c) of the Environmental Planning and Assessment Act 1979, the proposed development is not consistent with the Desired Future Character of the location and is an over-development of the site.*
4. *Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause C1.3 View Sharing of the Pittwater 21 Development Control Plan.*
5. *Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause D12.1 Character as viewed from a public place of the Pittwater 21 Development Control Plan.*
6. *Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause D12.6 Side and rear building line of the Pittwater 21 Development Control Plan.*
7. *Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause D12.14 Scenic Protection Category One Areas of the Pittwater 21 Development Control Plan.*

Following the determination of DA2020/0442, several meetings were held between the applicant and Council staff in an attempt to find a solution to the above matters.

On 25 August 2021, Review of Determination Application No. **REV2021/0034** was lodged with Council, which sought a review of the refusal of DA2020/0824.

It is noted that the review application was accompanied by amended plans to reduce the bulk and scale of the development compared to the proposal that was refused, with larger landscaped setbacks to both side boundaries. The driveway and parking area were redesigned, and the height of the development presenting to Whale Beach Road was reduced and the volume of excavation minimised. The use of the Level 3 retail premise "Retail 3" was also changed from a cafe to a neighbourhood shop to provide better acoustic and privacy amenity to neighbouring properties in Whale Beach Road, and in turn the size of the Ground Floor Level restaurant was increased.

On 1 December 2021, REV2021/0034 was reported to the NBLPP with a recommendation for approval. The NBLPP endorsed the recommendation and approval for the Mixed-Use Development.

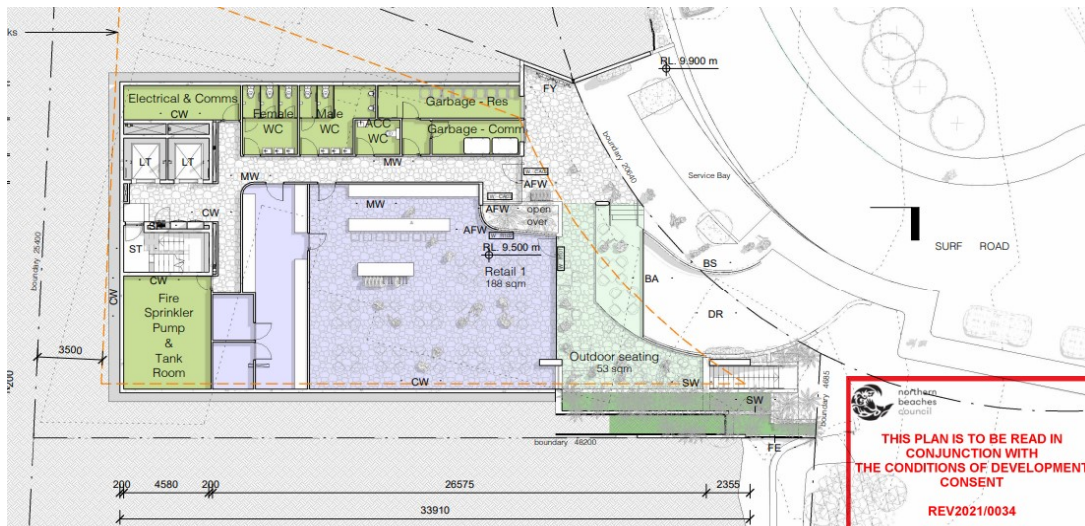
The proposal approved the following areas of retail floorspace:

Ground Floor Level

Retail 1 (fronting Surf Road)

Indoor 188sqm (amended from 153sqm in the original DA)

Outdoor 53sqm, refer to ground floor plan below.



Approved Retail 1 Ground Floor Plan REV2021/0034 (approved plans prepared by Richard Cole Architects)

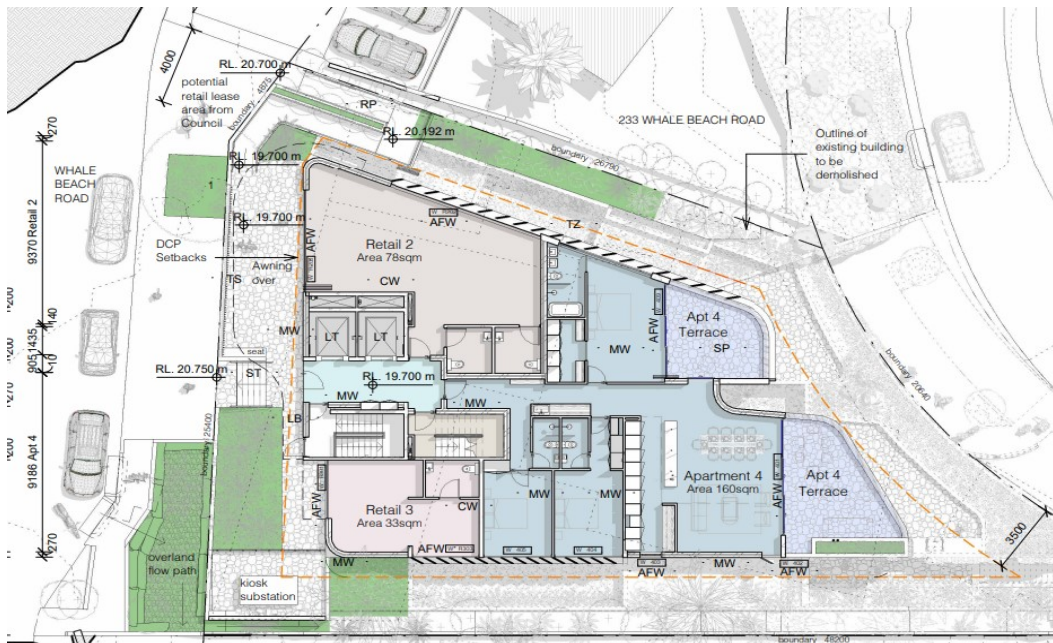
Level 3 Plan (presents as the ground floor level to Whale Beach Road)

Retail 2 - Shop fronting Whale Beach Road

Indoor 78sqm

Retail 3 - Shop (fronting Whale Beach Road)

Indoor 33sqm, refer to ground floor plan below



Approved Retail 2 and 3 - Level 3 Plan REV2021/0034 (approved plans prepared by Richard Cole Architects)

Architects)

Condition 1 "Approved Plans and Supporting Documentation" of REV2021/0034, included a requirement for compliance with the Acoustic Report, Rev B, dated 5 February 2020, prepared by JHA Services.

Condition 99 "Capacity of Ground Floor Cafe or Restaurant" requires:

The capacity of the Ground Floor cafe/restaurant premises is limited to 44 indoor patrons, 20 outdoor patrons and 6 staff members.

Reason: To ensure residential amenity is protected and maintained.

***Note:** As discussed above, Condition 1 and Condition 99 in REV2021/0034 was based on the recommendations of the Acoustic Report prepared for the original DA2020/0442, and not for the amended proposal and design approved under the Review of Determination.

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

The relevant matters for consideration under the Environmental Planning and Assessment Act, 1979, are:

The application has been assessed in accordance with the requirements of the Environmental Planning and Assessment Act 1979 and the associated Regulations. In this regard:

- An assessment report and recommendation has been prepared and is attached taking into all relevant provisions of the Environmental Planning and Assessment Act 1979 and associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon all lands whether nearby, adjoining or at a distance;
- Consideration was given to all documentation provided (up to the time of determination) by the applicant, persons who have made submissions regarding the application and any advice given by relevant Council / Government / Authority Officers on the proposal;

In this regard, the current application adopts the previous assessment detailed in the Assessment Report for REV2021/0034, in full, with amendments detailed and assessed as follows:

***Note:** Section 8.5(4) of the EPA Act states:

If a determination is changed on review, the changed determination replaces the earlier determination on the date the decision made on the review is registered on the NSW Planning Portal.

In this regard, the approval of REV2021/0034 replaces the earlier refusal of DA2020/0442, such that the Development Consent is now known as DA2020/0442.

The relevant matters for consideration under Section 4.55 (2) of the Environmental Planning and Assessment Act, 1979, are:

Section 4.55 (2) - Other Modifications	Comments
A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:	

Section 4.55 (2) - Other Modifications	Comments
<p>(a) it is 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 and before that consent as originally granted was modified (if at all), and</p>	<p>The development, as proposed, has been found to be substantially the same as that development approved under REV2021/0034 (and now known as DA2020/0442) for the following reasons:</p> <p>The modification seeks consent for the review of Condition 99 in respect of patron numbers associated with the use of Retail 1 as a Restaurant/Cafe.</p> <p>There is no physical change to the approved development in terms of the built form and numbers of apartments and commercial premises</p> <p>Therefore, the application is solely in relation to the intensity of use of the Ground Floor Level "Retail 1" Restaurant.</p>
<p>(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and</p>	<p>DA2020/0442 and REV2021/0034 did not require concurrence from the relevant Minister, public authority or approval body.</p>
<p>(c) it has notified the application in accordance with:</p> <p>(i) the regulations, if the regulations so require,</p> <p>or</p> <p>(ii) a development control plan, if the consent authority is a council that has made a development control plan under section 72 that requires the notification or advertising of applications for modification of a development consent, and</p>	<p>The application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000, and the Northern Beaches Community Participation Plan.</p>
<p>(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.</p>	<p>See discussion on "Notification & Submissions Received" in this report.</p>

Section 4.15 Assessment

In accordance with Section 4.55 (3) of the Environmental Planning and Assessment Act 1979, in determining a modification application made under this section, the consent authority must take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application.

The relevant matters for consideration under Section 4.15 of the Environmental Planning and Assessment Act, 1979, are:

Section 4.15 'Matters for Consideration'	Comments
Section 4.15 (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on “Environmental Planning Instruments” in this report.
Section 4.15 (1) (a)(ii) – Provisions of any draft environmental planning instrument	There are no current draft environmental planning instruments.
Section 4.15 (1) (a)(iii) – Provisions of any development control plan	Pittwater 21 Development Control Plan applies to this proposal.
Section 4.15 (1) (a)(iia) – Provisions of any planning agreement	None applicable.
Section 4.15 (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation 2000)	<p><u>Division 8A</u> of the EP&A Regulation 2000 requires the consent authority to consider Prescribed conditions of development consent. These matters have been addressed via a condition in the original consent.</p> <p><u>Clause 50(1A)</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer at lodgement of the development application. This documentation was submitted with the original application.</p> <p><u>Clauses 54 and 109</u> of the EP&A Regulation 2000 allow Council to request additional information. No additional information was requested in this case.</p> <p><u>Clause 92</u> of the EP&A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This matter has been addressed via a condition in the original consent.</p> <p><u>Clauses 93 and/or 94</u> of the EP&A Regulation 2000 requires the consent authority to consider the upgrading of a building (including fire safety upgrade of development). This clause is not relevant to this application.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This matter has been addressed via a condition in the original consent.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the</p>

Section 4.15 'Matters for Consideration'	Comments
	<p>consent authority to consider the provisions of the Building Code of Australia (BCA). This matter has been addressed via a condition in the original consent and the capacity of Retail 1 on the Ground Floor Level is a reason for the current application to increase the patron numbers.</p> <p><u>Clause 143A</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer prior to the issue of a Construction Certificate. This clause is not relevant to this application.</p>
<p>Section 4.15 (1) (b) – the likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality</p>	<p>(i) Environmental Impact The environmental impacts of the proposed development on the natural and built environment are addressed under the Pittwater 21 Development Control Plan section in this report.</p> <p>(ii) Social Impact The proposed development will not have a detrimental social impact in the locality considering the character of the proposal.</p> <p>(iii) Economic Impact The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.</p>
<p>Section 4.15 (1) (c) – the suitability of the site for the development</p>	<p>The site is considered suitable for the intensification of the proposed development, subject to compliance with the recommendations of the acoustic report and other conditions of consent.</p>
<p>Section 4.15 (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs</p>	<p>See discussion on “Notification & Submissions Received” in this report.</p>
<p>Section 4.15 (1) (e) – the public interest</p>	<p>The notification of the application resulted in a substantial number of submissions, the majority of which are in objection to the proposal. However, based on the assessment undertaken, no matters have arisen in the submissions that would justify the refusal of the application or significant amendment having regard to the public interest.</p>

EXISTING USE RIGHTS

Existing Use Rights are not applicable to this application.

BUSHFIRE PRONE LAND

The site is not classified as bush fire prone land.

NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited from 16/02/2022 to 02/03/2022 in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the Community Participation Plan.

As a result of the public exhibition process council is in receipt of 121 submission/s from:

Name:	Address:
Theodore Steven Chambers	44 Bynya Road PALM BEACH NSW 2108
Mr Jacqueline Susan Rees	1 Boanbong Road PALM BEACH NSW 2108
Ross Clarke	9 A Morella Road WHALE BEACH NSW 2107
Mr Jeremy Wade Cleaver	206 Whale Beach Road WHALE BEACH NSW 2107
Carla Barbara Wehbe	PO Box 495 PARRAMATTA NSW 2124
Mr Richard Frederick Gay	11 Surf Road WHALE BEACH NSW 2107
Mr John Warburton	106 Whale Beach Road WHALE BEACH NSW 2107
Sandy Tran	6 Milga Road AVALON BEACH NSW 2107
Oliver Gale	36 Whale Beach Road AVALON BEACH NSW 2107
Mr Bryan Christie Webster	13 Surf Road WHALE BEACH NSW 2107
Mrs Rae Marie Allen	8 Beauty Drive WHALE BEACH NSW 2107
Mr Andrew Francis Goldsmith	18 Norma Road PALM BEACH NSW 2108
Mrs Cara Jane Morgan	2185 Pittwater Road CHURCH POINT NSW 2105
Mrs Elizabeth Gole	172 Whale Beach Road WHALE BEACH NSW 2107
Mr Daniel Franklin Hofbauer	22 Gilliver Avenue VAUCLUSE NSW 2030
Mr Pedestrian Council Of Australia Limited	PO Box 500 NEUTRAL BAY NSW 2089
Mr Bruce Maitland Kennedy	8 Surf Road WHALE BEACH NSW 2107
Mrs Joanne Mary Kennedy	8 Surf Road WHALE BEACH NSW 2107
Mr Paul Westcott	31 Rayner Road WHALE BEACH NSW 2107
Andrew Morrow	5/21 Baden Road KURRABA POINT NSW 2089
Mr Harley Joseph Groot	12 Amelia Place NORTH NARRABEEN NSW 2101
Ms Fleur Annabell Miskell	843 Barrenjoey Road PALM BEACH NSW 2108
Annabelle Ewen	Address Unknown
Mr Catherine Naito	229 Whale Beach Road WHALE BEACH NSW 2107
Mr Vien Van Luong	200 Whale Beach Road WHALE BEACH NSW 2107
Alexandra Jane Latimer	28 Darley Street FORESTVILLE NSW 2087
Mrs Valda Jean Ewen	2 Iluka Road PALM BEACH NSW 2108
Mr Michael Brendon Ian Moss	133 Whale Beach Road AVALON BEACH NSW 2107
Mr Owen Leo Coughlan	868 Barrenjoey Road PALM BEACH NSW 2108
Mrs Barbara Geraldine Osborne	PO Box 407 NEUTRAL BAY NSW 2089
Ms Eve Maria Heaton Molyneux	26 The Strand WHALE BEACH NSW 2107
The Palm Beach & Whale Beach Association Inc	PO Box 2 PALM BEACH NSW 2108

Name:	Address:
Megan Hoare	Address Unknown
Ms Sheila Frances Rose	310 Whale Beach Road PALM BEACH NSW 2108
Ms Annette May Baggie	166 Whale Beach Road WHALE BEACH NSW 2107
Irene Read	309 - 311 Whale Beach Road PALM BEACH NSW 2108
Mark Azzopardi	Address Unknown
Steven Craig Smith	233 Whale Beach Road WHALE BEACH NSW 2107
Mr Robert Donald Mackinnon	16 Norma Road PALM BEACH NSW 2108
Mrs Virginia Lizelle Stack	5 Beatty Street BALGOWLAH HEIGHTS NSW 2093
Catherine Treweeke Lawyer	11A Avenue Road MOSMAN NSW 2088
Mr William Lindsay White	14 Crane Lodge Place PALM BEACH NSW 2108
Ben Stevenson	172 Plateau Road BILGOLA PLATEAU NSW 2107
Pauline Ryan	40/267 Miller Street NORTH SYDNEY NSW 2060
Leigh Brian Clapham	2 The Circle BILGOLA PLATEAU NSW 2107
Rosemary Edgell Bush	19 Thyra Road PALM BEACH NSW 2108
Belinda Mainprize	Address Unknown
Ms Molly Loloma Treweeke	41 Gurney Crescent SEAFORTH NSW 2092
Mr Roger Dominic Byrne	5 Robert Street FRESHWATER NSW 2096
John O'Neill	19 Raymond Road BILGOLA PLATEAU NSW 2107
Mr Anthony Francis Morrow	9 / 55 Darley Street East MONA VALE NSW 2103
Mr Gary Ian Zamel	62 Cabarita Road AVALON BEACH NSW 2107
Alberto Cubeddu	Address Unknown
Saad Khan	Address Unknown
Col Hughes	20 Eastbourne Road DARLING POINT NSW 2027
Sven Christian	1063 Barrenjoey Road PALM BEACH NSW 2108
Mr Simon Moore Greenaway	4 Ralston Road PALM BEACH NSW 2108
Mr Anthony Robert Falcone	49 Bynya Road PALM BEACH NSW 2108
Ms Rebekah Dorter	40 Trappers Way AVALON BEACH NSW 2107
Brita Benjamin	169 Whale Beach Road WHALE BEACH NSW 2107
Avalon Preservation Trust Incorporated as Avalon Preservation Association	24 Catalina Crescent AVALON BEACH NSW 2107
Mrs Kerry Robyn Coffey	5 Bynya Road PALM BEACH NSW 2108
Mr Philip Matthew Coffey	3 Allenby Lane CLONTARF NSW 2093
Paul Mirabelle	Address Unknown
Mrs Barbara Lyle Dowe	PO Box 194 CAMMERAY NSW 2062
Mr Nicholas Harry Wright	28 The Strand WHALE BEACH NSW 2107
Mr Ian Leslie Pardey	55 Cabarita Road AVALON BEACH NSW 2107
Mr John Kemp Sherlock	32 Morella Road WHALE BEACH NSW 2107
Ian Oliver Cook	180 Whale Beach Road WHALE BEACH NSW 2107
Mr John Leslie Nicholson	13 Morella Road WHALE BEACH NSW 2107
Mrs Dorothy Margaret Mary	158 A Whale Beach Road WHALE BEACH NSW 2107

Name:	Address:
Kamaker	
Mr Henry McErlean	13 Norma Road PALM BEACH NSW 2108
Mr Trevor Neil Holman	43 Norma Road PALM BEACH NSW 2108
Mr John Charles Gorman	17 Prince Edward Parade HUNTERS HILL NSW 2110
Mr Stephen David Benneyworth	31 Bynya Road PALM BEACH NSW 2108
Louise Margaret Samuels	163 Whale Beach Road WHALE BEACH NSW 2107
Mrs Leonor Isabel Gouldthorpe	2 Surf Road PALM BEACH NSW 2108
Mr Ian David Riley	42 McIntosh Street GORDON NSW 2072
Mark Edward Marriott	PO Box 657 AVALON BEACH NSW 2107
Margaret Collis	9 Bynya Road PALM BEACH NSW 2108
Mrs Joanne Elizabeth Benneyworth	31 Bynya Road PALM BEACH NSW 2108
Ms Lea Ann Cleary	182 Whale Beach Road WHALE BEACH NSW 2107
Luke Adams	86 Pacific Road PALM BEACH NSW 2108
Mr Anthony Scott Fitzgerald	48 Hillside Road NEWPORT NSW 2106
Mr Darren Paul Harvey	12 - 14 Rock Bath Road PALM BEACH NSW 2108
Keith Skinner	114 Whale Beach Road WHALE BEACH NSW 2107
Ms Fiona Leigh Champion	114 Whale Beach Road WHALE BEACH NSW 2107
Ms Judith Nan Rogley	196 Whale Beach Road WHALE BEACH NSW 2107
Ms Virginia Anne Pursell	47 Ferry Road GLEBE NSW 2037
Pine Baran	Address Unknown
Simon Morgan	211 Whale Beach Road WHALE BEACH NSW 2107
Mrs Margot Lyn Coleman	22 Bynya Road PALM BEACH NSW 2108
Mr Michael Urban Roger Crivelli	167 Whale Beach Road WHALE BEACH NSW 2107
Michael Charles Scruby	185 Whale Beach Road WHALE BEACH NSW 2107
Mr Ian William Lothringer	112 Whale Beach Road WHALE BEACH NSW 2107
Mr Stephen Colin Crawford	6 Bushrangers Hill NEWPORT NSW 2106
Joe Cross	Address Unknown
Mr Michael John Shehadie	15 Quinton Road MANLY NSW 2095
Mr Mark Hamish Lochtenberg	Po Box 416 MILSONS POINT NSW 1565
Bruce Hamer	16 Prince Alfred Parade NEWPORT NSW 2106
Mr Trevor John Harrison	6 Surf Road PALM BEACH NSW 2108
Mr Douglas Michael Maher	60 Bynya Road PALM BEACH NSW 2108
Withheld Dr Melissa Jane Lamb	PALM BEACH NSW 2108
Withheld Dr Melissa Jane Lamb	7 Pacific Road PALM BEACH NSW 2108
Emily Irene Ashton	104 Whale Beach Road WHALE BEACH NSW 2107
Mr Philip Foster Begg	7 Waratah Road PALM BEACH NSW 2108

Name:	Address:
Mr Jonathon Pratten	4 Malo Road WHALE BEACH NSW 2107
Mr Robyn Lee Jarvis	3 Queens Avenue VAUCLUSE NSW 2030
Whale Beach Surf Life Saving Club INC	C/- Whale Beach Deli 227 Whale Beach Road WHALE BEACH NSW 2107
Ms Jane Roberta Prior	74 Chisholm Avenue AVALON BEACH NSW 2107
Mrs Dorothy Judith Wolfe	209 Whale Beach Road WHALE BEACH NSW 2107
Joe Vandine	Address Unknown
Ms Prudence Abby Rydstrand	1100 Barrenjoey Road PALM BEACH NSW 2108
Duncan McLennan	Address Unknown
Ms Cara Maree McLennan	32 Norma Road PALM BEACH NSW 2108
Robert Blackman	Address Unknown
Lynne Morris Simonds	17 / 2 A Campbell Parade MANLY VALE NSW 2093
Mr Laurie Bombardiere	22 North Avalon Road AVALON BEACH NSW 2107
Ms John R Molyneux	Level 1 63 William Street DARLINGHURST NSW 2010
Jo Smith	Address Unknown
Mrs Lyndal Eliza Anne Kusely	PO Box 75 AVALON BEACH NSW 2107
Tony Moody Planning And Development Pty Ltd	1/17 Thurlow Street REDFERN NSW 2016

Submissions in Support

A total of twenty-nine (29) submissions have been received in support of the proposal. The letters of support note the following benefits of the application:

- the proposal will replace a run down, structurally unsound and visually unpleasant building
- excellent meeting spot for locals
- create new jobs / boost to the economy
- the new venue will provide a much-needed new cafe / restaurant for locals and visitors
- the modification does not seek to change the already approved development

Comment:

The points in support of the application are generally concurred with.

Submissions in Objection

Approximately ninety (90) unique submissions have been received objecting to the proposal.

***Note:** multiple submissions have been received from the same address which in accordance with the Community Participation Plan (CCP) are counted as one unique submission.

The following issues were raised in submissions which are not directly related to the proposed change and cannot be given any consideration in the subject application to modify Condition 99 in respect of

patron capacity in Retail 1 - Restaurant:

- bulk and size does not suit the landscape – building should not extend above the current building line.
- unfair for neighbours and the aesthetic of the area – reduce the height and bulk
- view loss
- lack of loading zones
- signage not appropriate
- pedestrian access
- waste storage and removal
- smell nuisance from restaurant
- Whale Beach is not a commercial area – the design does not align with the character
- access to Surf Road is dangerous
- no public transport to the site
- current building at 231 Whale Beach Road is crumbling and has apparent structural issues

The following issues are relevant to the subject modification application and are addressed as follows:

- **Noise**

The submissions raise concerns that the acoustic report is not accurate and the recommendations, including no background music and closed windows are not realistic and cannot be complied with. The noise from inside the restaurant will travel and impacts on neighbouring residents. Issue with patrons leaving at night have not been considered in the acoustic report.

Comment:

As detailed in the history section of this report, the review application, REV2021/0034, included modifications to the design of the proposed development including an increase in the floor area of retail 1 compared to the original DA. However, condition 99 of REV2021/0034, in respect of patron numbers to retail 1, was based on the original acoustic report submitted in support of DA2020/0442 as an updated acoustic report was not prepared to reflect the amended design.

The acoustic report, that accompanies the subject modification, correctly assesses the acoustic impacts associated with the larger retail 1 tenancy as a restaurant / cafe with a proposed patron capacity of 170 patrons and 18 staff (total 188) which is consistent with patron numbers permissible under the BCA. The report has been reviewed by Council's Health Unit who offer no objections to the proposal subject to compliance with the recommendations of the amended acoustic report in respect of retail 1 and the original acoustic report in respect of managing noise from the venue.

In order to ensure compliance with the acoustic report it is recommended that condition 99 be modified to include specific reference to the acoustic measures. Subject to compliance with the recommendations of the acoustic report it is not anticipated that noise will escape from within the venue and cause unreasonable acoustic impacts to neighbours. In the event that noise complaints arise during the future operation of the restaurant the amended condition will ensure that compliance action can be enforced.

In regards to potential acoustic issues associated with patrons departing the venue it is recommended that condition 74 be amended to require an Operational Plan of Management (POM) for the use of the restaurant at retail 1. The POM will be required to provide details on all

measures that will be taken to ensure amenity impacts, as a result of the operation of the premises, including measures to manage customers departing the restaurant to ensure that neighbouring amenity is protected.

It is considered that the amendment of condition 74 to require an additional POM is reasonable considering the increase in patron capacity from 70 to 188 to correctly relate to the floor plans and use approved under REV2020/0034. Detailed consideration of the operational management of a 188 patron capacity restaurant was not fully considered under the original application and new and modify conditions address the new planning issues associated with the 188 capacity of the ground level restaurant and the concerns raised in the submissions.

- **Character**

The submissions raise concerns that the increased capacity of ground floor retail results in a development that is not in scale or keeping with the local Whale Beach residential character. The restaurant is too large and no longer suitable in a residential area. The retail space will be used as a function centre which may host weddings, and the like, it is no longer a small scale beachside cafe.

Comment:

The subject site is located within a B1 Neighbourhood Centre zone which allows for a different typology and scale of development compared to the surrounding C4 Environmental Living Zone. Despite this the subject modification does not seek to increase the approved built form or the floor area of retail 1 as approved under REV2021/0034.

Restaurants and cafes are permissible land uses within the B1 zone and condition 3 specified the approved land use. Function centres are prohibited in the B1 zone and a condition is included in the recommendation requiring a modification to condition 3 to specify that the use of retail 1 as a function centre is not approved. As discussed above, the new and modify conditions are considered reasonable as they address the planning issues and concerns from neighbours in respect of the amended 188 capacity ground level restaurant which reflect the development approved under REV2020/0034.

The proposed modification of condition 99, in respect of patron numbers, will not result in a development that it no longer in character with the neighbourhood centre zone, subject to conditions.

- **Road and pedestrian safety issues**

The submissions raise concerns about road safety issues with the proposal resulting in additional traffic generation on local roads which are described as narrow and windy roads and already congested with construction vehicles. Whale Beach Road and Surf Road are both noted to be hazardous. Surf Road is the main pedestrian access to Whale Beach and there is no footpath to Surf Road. Footpaths on other local roads are too narrow forcing pedestrian to walk onto the road to on coming traffic. This issue will intensify with the increase in patron capacity. Lack of public transport to service the venue and limited access for buses to transport customers to and from the venue.

Comment:

It is acknowledged that the topography and uniqueness of the area results in a vulnerable access due to the constraints of the road network. However, Council's Transport Officer has no

objections to the proposal, and it is not anticipated that the additional traffic generated by the proposal will result in road safety issues. As noted throughout this report, the subject modification seeks consent to approve the patron numbers associated with the amended design approved under REV2021/0034 to essentially correct an error with the review consent that approved an acoustic report that was superseded with amended plans. There is no increase in the density of the approved development and therefore no change in the anticipated traffic generated in terms of its assessment against the applicable traffic generating requirements, refer to the comments from Council's Transport Engineer.

It is noted that the condition 17 of the approval (REV2021/0034) requires a Construction Traffic Management Plan (CTMP) which will address issues in respect of access to the site, impact on the street and local network, and may include restrictions in travel routes, lane closure times, and other measures during work. The CTMP will be designed to minimise the impact on the overall community.

The approved building has increased setbacks to both Whale Beach Road and Surf Road compared to the existing building and the approved development includes public domain upgrades including a footpath to connect to the public car park. Conditions are also included in the original consent requiring the installation and maintenance of a pedestrian warning system. The proposal, as approved with conditions, is not considered to result in an unsafe environment for pedestrians.

- **Parking**

The submissions raise concerns that the proposal has a lack of parking and it is not appropriate for customers to use public beach parking area which is required by the public and surf life crew and emergency services and often fully used during weekends, summer and public holidays. There is currently a lack of street parking and the proposal will increase current problems with illegal parking in the area and cars blocking private driveways. Whale Beach Road is not an RMS road and parking rates should not therefore be calculated on the basis of the floor area but the locality.

Comment:

Clause B6.3 of the P21 DCP sets out the car parking requirements for developments. Car parking, for restaurants and cafes, is calculated on the gross lettable floor area (GLA), namely 1 space per 30sqm GLA as opposed to patron numbers. 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 subject modification does not seek to increase the floor area of retail 1. As such, there is no requirement for additional parking under the subject modification to review patron numbers. It is noted that the detailed assessment report for REV2021/0034 provides a discussion on the car parking options considered under REV2021/0034 including car stackers and additional excavation and the redistribution of the proposed car parking. Given the constraints of the site the alternative options were not considered to be suitable, and it was determined that the amount of retail floor space is appropriate for the site with the proposed car parking being acceptable on merit. Council's Transport Engineer has reviewed the subject modification and offers no objections to the proposal.

In regards to concerns about customers parking in the public car park and any available on street spaces 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 noted that

for the vast majority of the year parking within the locality, in particular the beach side car park is readily available. It is appreciated that the area faces parking stress during the summer holidays, however the existing cafe has no on site parking, on balance the demand for parking is not dissimilar to that associated with the existing building.

- **Cumulative impact**

The submissions raise concern that cumulative impact from the proposed restaurant and existing venues, including Mobys and the Surf Club in relation to noise and parking issues. The area already has Moby's and the Surf Club as function centres and there is no need for another large venue.

Comment:

Restaurants / cafes are permissible within the B1 Neighbourhood Centre zone and the approved use is permissible. As noted above, a condition is recommended prohibiting the use of Retail 1 as a function centre. In this regard there will be no issues with respect to cumulative impacts of function centres and subject to compliance with the recommendations of the acoustic report there will be no unreasonable impacts on neighbouring amenity associated with the approved ground level restaurant.

- **Servicing**

The submissions raise concerns that the increase in patron numbers will result in a need for additional servicing, deliveries and waste collection which will result in increased noise and road safety impacts.

Comment:

As noted above, the proposal does not seek to increase the size of the retail floor area. The servicing needs for the development have already been considered under the review application and subject to conditions are deemed to be acceptable. Subject to compliance with the existing conditions it is not anticipated that the serving of the site will result in unreasonable amenity impacts.

- **Hours of operation**

The submissions raise concerns that the hours of operation of a licensed venue need to be reduced not increased. The previous cafe, now closed, operated from 7am to 3pm daily the increase in hours represents an intensification of use. The other proposed retail shops, No. 2 and 3, will also increase patron capacity and increase trading hours.

Comment:

The proposal does not seek to amend condition 92 which permits the hours of operation of all three retail tenancies to between 7.00am to 10.00pm daily. Condition 92 does not specifically refer to outdoor trading hours.

In assessing the Review application, condition 92 was based on the consideration of the original acoustic report, albeit for the superseded design, which referred to maximum capacity of 20 patrons outside. As such, given the proposal to increase the seating capacity to 30 patrons outside to reflect the approved design and the updated acoustic report it is considered reasonable to modify condition 92 to limit the outdoor trading to between 7.00am to 8.00pm

Sunday to Thursday and 7.00am to 9.00pm Friday to Saturday. This in turn will help address concerns from neighbours regarding amenity impacts associated with the use of the outdoor seating.

Retail 2 and 3 are intended to be used as shops, as such there is no patron capacity associated with these retail tenancies. In order to ensure this it is recommended that Condition 3 is modified to specify that the use of retail 1 and 2 is restricted to Neighbourhood shops, consistent with the retail use permissible within the B1 zone.

- **Anti-social behaviour**

The submissions raise concern about impacts from anti-social behaviour from customers, including intoxicated patrons being noisy and inappropriate to local residents, littering, noise from cars.

Comment:

Condition 74 requires the submission of a Plan of Management for the site to include space management strategies such as ensure site cleanliness, rapid repair of vandalism and graffiti. As discussed above, it is recommended that the condition be amended to require a POM for the restaurant which will require the applicant to submit details of management measures to address patrons departing the venue.

Anti-social behaviour associated with intoxicated persons will be further considered under a separate application for a liquor licence.

- **Public safety / public interest**

The submissions raise concerns that the increase in patron numbers may lead to public safety issues in relation to beach access, road and pedestrian safety and anti social behaviour from intoxicated customers. The proposal is not in the public interest.

Comment:

Issues in respect to public safety are considered under the responses to issues above relating to road safety, noise and the management of the restaurant. Subject to compliance with the conditions in the original consent (REV2021/0034) and those recommended in the subject modification it is not anticipated that the patron capacity of Retail 1 will have unreasonable impacts on public safety / interest.

- **Precedent**

The submissions raise a concern that the proposal could set a precedent for other similar developments.

Comment:

It is not expected that the approval of the subject application will result in a precedent of similar application. Notwithstanding this each application is assessed on its merits.

- **Procedural issues**

The submission raise concerns that there has been insufficient community consultation

on the application with only 6 properties notified. Further the extent of changes proposed in the application suggests that it requires a new DA

Comment:

The subject modification was notified to all those that made a submission to the previous application in addition to the neighbouring properties. The application seeks to review condition 99 of the approval and is substantially the same as the original application. As such, the application has correctly been lodged as a modification under Section 4.5(2) of the EPA Act 1979.

REFERRALS

Internal Referral Body	Comments
Building Assessment - Fire and Disability upgrades	<p>Supported, subject to conditions</p> <p>The application has been investigated with respects to aspects relevant to the Building Certification and Fire Safety Department. There are no objections to approval of the development subject to inclusion of the attached conditions of approval and consideration of the notes below.</p> <p>Note: The proposed development may not comply with some requirements of the BCA and the Premises Standards. Issues such as this however may be determined at Construction Certificate Stage.</p>
Environmental Health (Industrial)	<p>Supported, subject to conditions</p> <p><i>General Comments</i></p> <p>Environmental Health were requested to review the modification to REV2021/0034 for increasing the maximum patronage of the premise to 30 outdoor patrons, 140 indoor and 18 staff, and the potential acoustic impacts on the surrounding sensitive receivers. A review of Revision A of the Acoustic Report dated 7 December 2021 adequately models and addresses noise attenuation from the proposed Retail 1 ground floor. Existing attenuation imposed on the previous consent is sufficient to cater for the proposed modification.</p> <p>The intent of REV2021/0034 was to combine the proposed patronage from the food premises on the upper levels and combine them into the lower level. This was not reflected in the conditions of consent which is why the modification was lodged by the applicant.</p> <p>Based on the proposed information provided by the applicant, Environmental Health believes the proposal is adequate for its intended use.</p> <p>In order to facilitate the modification, some changes to conditions of consent will need to be completed to address the acoustic report and</p>

Internal Referral Body	Comments
	<p>increase in patron numbers.</p> <p>Condition 1 of the consent will need to include the "Acoustic Report, Revision A" dated 7 December 2021, under heading "Reports/Documentation - All recommendations and requirements contained within". The existing report referenced as "Acoustic Report, Revision B" dated 5 February 2020 must remain as revision B of the acoustic report encompasses considerations around mechanical ventilation and its attenuation, which was not specified in Revision A. Please note that condition 33 of the prior consent references Condition 1, any amendment to Condition 1 will need to be adequately referenced in Condition 33 to ensure Condition 33 references the correct condition after the amendments have been applied.</p> <p>Condition 99 of the original consent relating to Retail 1 will need to be amended to allow for 30 outdoor, 140 indoor and 18 staff (max. capacity of 188 persons).</p> <p><i>Recommendation</i></p> <p>Supported. Subject to amendments to conditions of consent listed above.</p>
Environmental Health (Food Premises, Skin Pen.)	<p>Supported, without conditions</p> <p><u>General Comments</u></p> <p>Environmental Health has been engaged to undertake the review of the modification of REV2021/0034 which relates to a change in maximum patronage in the retail 1 of 231 Whale Beach Road, Whale Beach.</p> <p>As part of this referral, Environmental Health reviewed the facilities proposed and their ability to cater for the future use as a food premise. From this review, we believe that the previous determination provides adequate conditions and referenced to adequate plans to facilitate a food business development on the site.</p> <p>We consider that no further conditions are required for the fit out of the premise and we support this proposal.</p> <p><u>Recommendation</u></p> <p>Supported - conditions not required for modification.</p>
Traffic Engineer	<p>Supported, without conditions</p> <p>The modification seeks to modify the wording of consent condition No.99 which limits patronage and staffing numbers in the ground floor cafe of the development</p> <p>The Pittwater DCP Parking requirement for restaurants and cafes is determined on the basis of leasable floor area rather than seating</p>

Internal Referral Body	Comments
	<p>capacity i.e 1 space per 30m² GLA, accordingly, amending condition 99 to allow for a capacity of 170 patrons and 18 staff members as opposed to the 66 patrons and 6 staff members referenced in the condition does not alter the parking requirements</p> <p>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 hour trip rate of 5 trips per 100m² of GLA. This rate was used by the applicant's traffic consultant to calculate the trip generation from the cafe and is accepted as appropriate.</p> <p>There are therefore no traffic engineering grounds upon which to refuse the proposed modification to consent condition No.99</p>

External Referral Body	Comments
Ausgrid: (SEPP Infra.)	Ausgrid have confirmed that a decision is not required.

ENVIRONMENTAL PLANNING INSTRUMENTS (EPIs)*

All, Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the merit assessment of this application.

In this regard, whilst all provisions of each Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the assessment, many provisions contained within the document are not relevant or are enacting, definitions and operational provisions which the proposal is considered to be acceptable against.

As such, an assessment is provided against the controls relevant to the merit consideration of the application hereunder.

State Environmental Planning Policies (SEPPs) and State Regional Environmental Plans (SREPs)

SEPP 65 - Design Quality of Residential Apartment Development

There is no change to the approved building and the with the exception of Principle 6 - Amenity of SEPP 65 and Part 4H Acoustic Privacy of the ADG the detailed SEPP 65 discussion in the assessment report for REV2021/0034 remains valid.

Principle 6 - Amenity requires:

Good design positively influences internal and external amenity for residents and neighbours. Achieving good amenity contributes to positive living environments and resident well being. Good amenity combines appropriate room dimensions and shapes, access to sunlight, natural ventilation, outlook, visual and acoustic privacy, storage, indoor and outdoor space, efficient layouts and service areas and ease of access for all age groups and degrees of mobility.

Comment:

Subject to compliance with the recommendations of the acoustic report and additional conditions in respect of hours of operation and the need for a Plan of Management the proposal will not result in

unreasonable impacts in acoustic privacy to neighbouring residents.

Part 4H Acoustic Privacy (ADG)

Part 4S Mixed Use (ADG)

Objective in Part 4H sets out requirements relating specifically to residential flat buildings. Objective 4S sets out requirements for mixed use developments including a need for retail uses on the ground level to help activate frontages. The proposal complies with this requirement and activates the frontage. As discussed above, subject to the recommended conditions the proposal complies with the requirements of clause 4S of the ADG.

Pittwater Local Environmental Plan 2014

Is the development permissible?	Yes
After consideration of the merits of the proposal, is the development consistent with:	
aims of the LEP?	Yes
zone objectives of the LEP?	Yes

Principal Development Standards

Development Standard	Requirement	Approved	Proposed	% Variation	Complies
Height of Buildings:	8.5m	8.5m	Unaltered 8.5m	N/A	Yes

Compliance Assessment

Clause	Compliance with Requirements
1.9A Suspension of covenants, agreements and instruments	Yes
7.2 Earthworks	Yes
7.7 Geotechnical hazards	Yes
7.10 Essential services	Yes

Pittwater 21 Development Control Plan

Built Form Controls

There is no change to the approved building therefore a n assessment of the P21 DCP Built Form Controls is not relevant to the subject modification

Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
A1.7 Considerations before consent is granted	Yes	Yes
A4.12 Palm Beach Locality	Yes	Yes
B2.6 Dwelling Density and Subdivision - Shop Top Housing	Yes	Yes

Clause	Compliance with Requirements	Consistency Aims/Objectives
B6.1 Access driveways and Works on the Public Road Reserve	Yes	Yes
B6.2 Internal Driveways	Yes	Yes
B6.3 Off-Street Vehicle Parking Requirements	No	Yes
B6.7 Transport and Traffic Management	Yes	Yes
B8.1 Construction and Demolition - Excavation and Landfill	Yes	Yes
B8.3 Construction and Demolition - Waste Minimisation	Yes	Yes
B8.4 Construction and Demolition - Site Fencing and Security	Yes	Yes
B8.5 Construction and Demolition - Works in the Public Domain	Yes	Yes
B8.6 Construction and Demolition - Traffic Management Plan	Yes	Yes
C1.2 Safety and Security	Yes	Yes
C1.3 View Sharing	Yes	Yes
C1.5 Visual Privacy	Yes	Yes
C1.6 Acoustic Privacy	Yes	Yes
C1.10 Building Facades	Yes	Yes
C1.12 Waste and Recycling Facilities	Yes	Yes
C1.13 Pollution Control	Yes	Yes
C1.15 Storage Facilities	Yes	Yes
C1.25 Plant, Equipment Boxes and Lift Over-Run	Yes	Yes
C2.2 Safety and Security	Yes	Yes
C2.3 Awnings	No	Yes
C2.5 View Sharing	Yes	Yes
C2.7 Building Facades	Yes	Yes
C2.8 Energy and Water Conservation	Yes	Yes
C2.9 Waste and Recycling Facilities	Yes	Yes
C2.10 Pollution Control	Yes	Yes
C2.12 Protection of Residential Amenity	Yes	Yes
C2.20 Public Road Reserve - Landscaping and Infrastructure	Yes	Yes
C2.21 Food Premises Design Standards	Yes	Yes
C2.22 Plant, Equipment Boxes and Lift Over-Run	Yes	Yes
D12.1 Character as viewed from a public place	Yes	Yes
D12.3 Building colours and materials	Yes	Yes
D12.5 Front building line	No	Yes
D12.6 Side and rear building line	No	Yes
D12.14 Scenic Protection Category One Areas	Yes	Yes

Detailed Assessment

B6.3 Off-Street Vehicle Parking Requirements

Retail, cafe and restaurant car parking is calculated at a rate of 1 per 30m² Gross Leasable Floor Area

(GLA) as opposed to patron capacity.

There is no change to the approved amount of retail floor space or the approved 14 car parking spaces, including 3 retail car parking spaces, approved under REV2021/0034. The approved car parking represented a shortfall of 8 space 7 being for the retail comment on the development. Council's Transport Engineer offers no objections to the proposal to increase the patron capacity. Refer to detailed discussion on car parking in the submissions and referrals sections of this report.

C1.6 Acoustic Privacy

Clause C1.6 requires:

Noise-sensitive rooms, such as bedrooms, should be located away from noise sources, including main roads, parking areas, living areas and communal and private open space areas and the like.

Walls and/or ceilings of dwellings that are attached to another dwelling/s shall have a noise transmission rating in accordance with Part F(5) of the Building Code of Australia. (Walls and ceilings of attached dwellings must also comply with the fire rating provisions of the Building Code of Australia).

Noise generating plants including pool/spa motors, air conditioning units and the like shall not produce noise levels that exceed 5dBA above the background noise when measured from the nearest property boundary.

Developments must comply in all respects with the Protection of the Environment Operations Act 1997, and other relevant legislation.

Comment:

The original acoustic report provides specific recommendations for the management of noise associated with plant. Council's Environmental Health Unit have no objections to the proposal subject to a condition that requires compliance with the recommendations of the original acoustic report in respect of plant.

The updated acoustic report provides details of recommendations to ensure that the operation of the restaurant associated with retail 1 complies in all respects with the Protection of the Environment Operations Act 1997, and other relevant legislation. Council's Health Unit have no objections to the proposal subject to a condition that requires compliance with the recommendations of the updated acoustic report.

C2.12 Protection of Residential Amenity

Clause C2.12 requires the protection of residential amenity in terms of visual privacy and solar access. The requirements of the control do not specifically refer to acoustic privacy.

Despite this it is anticipated that the increase in patron capacity will not have unreasonable impacts on neighbouring residential amenity subject to compliance with the recommendations of the amended acoustic report and the existing and amended conditions including the requirement for a POM (condition 74), and no music or amplified music (condition 95). Subject to these conditions the application meets the following outcomes of the control.

THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES

The proposal will not significantly affect threatened species, populations or ecological communities, or their habitats.

CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN

The proposal is consistent with the principles of Crime Prevention Through Environmental Design.

POLICY CONTROLS

Northern Beaches Section 7.12 Contributions Plan 2022

Section 7.12 contributions were levied on the Development Application.

CONCLUSION

The site has been inspected and the application assessed having regard to all documentation submitted by the applicant and the provisions of:

- Environmental Planning and Assessment Act 1979;
- Environmental Planning and Assessment Regulation 2000;
- All relevant and draft Environmental Planning Instruments;
- Pittwater Local Environment Plan;
- Pittwater Development Control Plan; and
- Codes and Policies of Council.

This assessment has taken into consideration the submitted plans, Statement of Environmental Effects, all other documentation supporting the application and public submissions, and does not result in any unreasonable impacts on surrounding, adjoining, adjacent and nearby properties subject to the conditions contained within the recommendation.

In consideration of the proposal and the merit consideration of the development, the proposal is considered to be:

- Consistent with the objectives of the DCP
- Consistent with the zone objectives of the LEP
- Consistent with the aims of the LEP
- Consistent with the objectives of the relevant EPIs
- Consistent with the objects of the Environmental Planning and Assessment Act 1979

Conclusions on Assessment

Condition 99 (Patron Capacity of Retail 1) of REV2021/0034 related to the superseded design in the original Development Application. The review application amended the design of the retail premises with no restaurant use to Level 3 retail and relocated the restaurant use to the Ground Floor Level "Retail 1". The review application was not supported by an updated acoustic report. The subject modification seeks approval for an increase in patron numbers associated with the amended location and design of the restaurant approved under REV2021/0034, which will correctly relate patron numbers for the new restaurant space, which is supported by a new acoustic report.

Noise Issues

Subject to compliance with the recommendation of the updated acoustic report, the proposal will not result in unreasonable acoustic privacy impacts on neighbouring residents. In order to address the issues raised in the submissions, additional conditions are recommended prohibiting the use of Retail 1 as a function centre, limiting the hours of use of the outdoor seating area and requiring an Operational Management Plan for the management of the restaurant.

Traffic, Parking and Road Safety Issues

The application does not involve an increase in the size, scale and density of the approved development in terms of floor area, rather it is the number of patrons being increased, therefore there will be no change in the anticipated traffic generated in terms of its assessment against the applicable traffic generating requirements. Carparking requirements are based on the relevant requirements under the P21DCP which is based on floor area of the restaurant, as opposed to patron numbers, therefore there is no requirement to increase the number of off-street parking spaces in response to the increased patronage. Council's Transport Engineer supports the proposed increased in patrons on this basis.

It is considered that the proposed development satisfies the appropriate controls and that all processes and assessments have been satisfactorily addressed.

RECOMMENDATION

THAT Northern Beaches Local Planning Panel as the consent authority grant approval to Modification Application No. Mod2021/0983 for Modification of Development Consent REV2021/0034 granted for demolition works and construction of a Mixed Use Development comprising Shop Top Housing and retail premises, with associated carparking, landscaping and strata subdivision on land at Lot B DP 316404,231 Whale Beach Road, WHALE BEACH, subject to the conditions printed below:

A. Add Condition No.1A - Modification of Consent - Approved Plans and supporting Documentation to read as follows:

The development must be carried out in compliance (except as amended by any other condition of consent) with the following:

Reports / Documentation – All recommendations and requirements contained within:		
Report No. / Page No. / Section No.	Dated	Prepared By
Acoustic Report Revision B Project No: 190351 only Part 5.1 - Roof top Mechanical Plan Recommendations	05.02.2020	JHA Services
Acoustic Report Revision A Project No: 190351 Part 5 Recommendations	07.12.2021	JHA Services
BCA Design Compliance Report	02.08.2021	Modern Building Certifiers

Reason: To ensure the work is carried out in accordance with the determination of Council and approved plans.

B. Amend Condition 3 - Approved Land Use to read as follows:

This consent authorises a mixed-use development, comprising shop top housing and additional retail premises.

Shop top Housing means one or more dwellings located above ground floor retail premises or business premises.

Retail Premises means a building or place used for the purpose of selling items by retail, or hiring or displaying items for the purpose of selling them or hiring them out, whether the items are goods or materials (or whether also sold by wholesale), and includes any of the following:

- (a) (Repealed)
- (b) cellar door premises,
- (c) **food and drink premises,**
- (d) garden centres,
- (e) hardware and building supplies,
- (f) kiosks,
- (g) landscaping material supplies,
- (h) markets,
- (i) plant nurseries,

- (j) *roadside stalls,*
- (k) *rural supplies,*
- (l) **shops,**
- (la) *specialised retail premises,*
- (m) *timber yards,*
- (n) *vehicle sales or hire premises,*

but does not include highway service centres, service stations, industrial retail outlets or restricted premises.

This consent authorises Retail 2 and Retail 3 on Level 3 (fronting Whale Beach Road) as a **Neighbourhood Shop** which is defined in the Pittwater LEP 2014 as:

Neighbourhood Shop means premises used for the purposes of selling general merchandise such as foodstuffs, personal care products, newspapers and the like to provide for the day-to-day needs of people who live or work in the local area, and may include ancillary services such as a post office, bank or dry cleaning, but does not include neighbourhood supermarkets or restricted premises.

Neighbourhood Shops are a type of shop which are classified as a type of retail premises.

This consent authorises Retail 1 on the Ground Floor Level (fronting Surf Road) as a **Restaurant / Café** which is defined in the Pittwater LEP 2014 as:

Restaurant / Café 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.

This consent does not give approval for the use of Retail 1 as a Function Centre.

Any variation to the approved land use and/occupancy of the building or any part of the building beyond the scope of the above definitions will require separate development consent.

Reason: To ensure compliance with the terms of this consent.

C. Modify Condition 74 - Operational Management Plan to read as follows:

A. An Operational Management Plan is to be prepared for the management of the development and adjacent road reserves identifying:

- i. Consistency with all 'on-going' conditions of consent over the life of the development
- ii. Outlining all required maintenance responsibilities for private infrastructure, including water management infrastructure and landscaping, and
- iii. Space management strategies including activity coordination, site cleanliness, rapid repair of vandalism and graffiti, and the maintenance of lighting and landscaping.

B. A separate Operational Management Plan is to be produced for the management of the Restaurant/Café in "Retail 1" on the Ground Floor Level, identifying:

- i. **Operational Details** - an overview of the organisation providing details of the number of staff, liquor licenses that apply to the restaurant and hours of operation.
- ii. **Noise** - identify noise sources including patrons leaving and entering the restaurant and how management intends to minimise impacts to neighbours of customers departing the restaurant, a statement outlining the premises compliance with acoustic recommendations, details on how

management will address complaints and noise control strategies, details on delivery and waste collection times.

iii. **Management Measures** - details on all measures that will be taken to ensure amenity impacts as a result of the operation of the premises are minimised. Details on all actions to respond to complaints, details on measures that will assist patrons using public transport or on demand services (eg. taxi, Uber (or the like) assistance or provision of a shuttle service).

The Operational Management Plan is to be submitted to the Principal Certifying Authority prior to the issue of the Occupation Certificate.

Reason: To ensure the on-going management of the site over the life of the development and protect residential amenity.

D. Modify Condition 92 - Hours of Operation to read as follows:

The hours of operation of the retail premises and internal areas of the restaurant/cafe are to be restricted to 7:00am to 10:00pm, seven days a week.

The hours of operation of the external areas of the restaurant/cafe are restricted to 7.00am to 8.00pm Sunday to Thursday, and 7.00am to 9.00pm Friday to Saturday.

Upon expiration of the approved hours, all service shall immediately cease, no patrons shall be permitted entry and all customers on the premises shall be required to leave the premises (internal and external areas) within the following 30 minutes.

Deliveries of goods and waste collection associated with the retail premises and restaurant/cafe must not occur between 7.00pm and 7.00am the following day.

Reason: To ensure the uses operate in accordance with the approved hours and the amenity of the surrounding locality is maintained.

E. Modify Condition 99 Capacity of Ground Level Cafe or Restaurant facing Surf Road to read as follows:

The seating capacity of the restaurant/café fronting Surf Road is limited to 140 indoors and 30 outdoors. The maximum number of staff is 18 at any one time (maximum capacity of 188 persons).

Reason: To ensure the patronage and staffing accords is appropriately limited and residential amenity is protected.

F. Add Condition 99 (A) Acoustic Recommendations to read as follows:

The following acoustic recommendations specified in Part 4 of the Acoustic Report, Revision A, dated December 2021, prepared by JHA Services shall be complied with at all times:

- (a) No background or live music in Retail 1.
- (b) A 1.8m high paling fence shall be erected along the southern boundary between the subject site and 229 Whale Beach Road. The paling fence shall have a minimum surface mass of 12kg/m and be constructed with an impervious material. The paling fence shall be continuous with no gaps and shall be close fitting to the ground. All bracing and structural support required to comply with loadings and building regulations shall be provided and reviewed by a structural engineer.
- (c) All windows of the indoor seating area are to remain closed.
- (d) The eastern facade of the indoor seating area is not to be operable/openable, except for patron/staff

ingress and egress. The facade, other external building elements and ventilation opening shall be designed to provide a minimum composite sound insulation of R_w30 .

Reason: To ensure acoustic measures are carried out and residential amenity is protected.