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**Sent:** 2/03/2022 3:19:26 PM  
**Subject:** Submission on Modification of Development Consent Mod2022/0007 Attn: Nick Keeler - Urgent  
**Attachments:** Letter to Council - Planner - NK.pdf;

Mr Keeler,

Please see attached our letter of today's date for your urgent attention.

Regards,

Ryan Watts

Solicitor Director

[ryan.watts@slaterandelias.com.au](mailto:ryan.watts@slaterandelias.com.au)

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Our Ref: RTW:5184  
Your Ref:

Solicitor Director: Ryan Timothy Watts BBA LL.B

2 March 2022

Mr Nick Keeler  
Building Planner  
Norther Beaches Council  
**By email only:** [Council@northernbeaches.nsw.gov.au](mailto:Council@northernbeaches.nsw.gov.au)

Dear Mr Keeler,

**RE: Submission on Modification of Development Consent  
Mod2022/0007**  
**Ppty: Coast Café, 1031 Barrenjoey Road, Palm Beach (Cafe)**

We act for the Residents of Barrenjoey Road Committee (**Committee**) and refer to your telephone discussion with the writer on 23 February 2022.

As discussed, the Committee is made up, by a group of concerned residents in the immediate area surrounding the Café these residents' properties include the following:

- 1026 Barrenjoey Road, Palm Beach;
- 3 Iluka Road, Palm Beach;
- 3A Iluka Road, Palm Beach;
- 1024 Barrenjoey Road, Palm Beach;
- 1028 Barrenjoey Road, Palm Beach; and
- 1 Iluka Road / 1029 Barrenjoey Road, Palm Beach.

The Committee understands that the Café has obtained Development Approval No. DA2021/1311 (**DA**) and seeks to modify the DA under Mod2022/0007 (**DA Modification**) and obtain a Building Information Certificate No. BC2021/0177 (**BC**).

We are instructed:

1. On 7 October 2020, the owner of 1031 Barrenjoey Road, Palm Beach obtained TA2020/0565 (**TA**) to remove a large Araucaria heterophylla (**Norfolk Pine**). After the owner removed the Norfolk Pine, the conditions of the TA required the owner to:
  - "a) All replacement trees must be a minimum pot size of 25L at planting;*
  - b) All replacement trees must be of a species that will attain a minimum height of six (6) metres at maturity within six (6) years of planting;*
  - c) All replacement trees must be maintained until the (sic) reach six (6) metres in heights;*

*d) If any replacement tree dies prior to reaching six (6) metres in height that tree is to be replaced; and*  
*e) The replacement trees shall be planted within three (3) months of the approved trees removal."*

2. To the date of this letter, no suitable native species from the Council's Plants and Trees List, which would 'attain a minimum height of six (6) metres at maturity within six (6) years of planting' has been planted on the property.
3. The removal of the Norfolk Pine has had a twofold impact on the local amenity:
  - i. Removed the large Norfolk Pines ability to attenuate sound created by the Café; and
  - ii. The Increased area of the Café enabled the Café to extend the existing deck and pergola to the boundary of 1029 Barrenjoey Road, Palm Beach of **(Unauthorised Works)**.
4. The Unauthorised Works have been constructed and operational from or earlier than 3 April 2021, as Mr Giacomazzi advised the Council of by email on the same date. Mr Giacomazzi further advised the Council that the Café was hosting dinners and events in contravention of the Café's approved trading hours.
5. On 19 April 2021, the Council notified Mr Giacomazzi by email that the "*Council will be monitoring the situation in the future to ensure compliance*" and further requested that Mr Giacomazzi provide "*photos of the newly built awning from your side of the fence*".
6. On 19 April 2021, Mr Giacomazzi provided photographic evidence of the Unauthorised Works.
7. As the Council is aware, the Unauthorised Works are built to the boundary of 1029 Barrenjoey Road Palm Beach Mr Giacomazzi Property, without any set back and encroach on Mr Giacomazzi Property. Mr Giacomazzi advises that the location and construction of the Unauthorised Works continue to impact his quiet use and enjoyment of his land. In your DA Assessment Report you reached a similar conclusion as you stated "*Due to the proximity of the unauthorised deck to the southeast boundary and the ability to seat more patrons in this area, the amenity impact to the adjacent property is considered to be unreasonable*".
8. Due to the construction of the Unauthorised Works, the works amplify the noise created by the Café, and reverberate this noise throughout the neighbourhood and adjacent properties. The Council will note that residential properties surround the Café, with the closest commercial premises being almost 200 metres away. This means that the commercial noise emanating from the Café has a greater impact on the local amenity, than it would otherwise have, if the Café was situated in an area zoned Mixed-Use. Whilst the Café is permitted to operate without acoustically insulating the Unauthorised Works the Café continues to adversely impact and disrupt the nearby residents as extensively described by the 27 objections received by Council on the DA. These objections are publicly available on the Council website.

9. The DA stipulates several conditions which must be met before Construction Certification (CC) and an Occupation Certificate (OC) can be obtained, the relevant conditions are as follows:

**“9. Garbage Area**

*A garbage area must be provided for the development. Such area is not to be located within the outside dining area, nor within direct view from a public place. The garbage area is to be fully separate from food deliveries and food handling areas.*

*The garbage area must be constructed so it is easy to clean, prevents the ingress or harbourage of vermin and where spills or wastewater will not be able to be directed to stormwater drains. The waste area must be able to accommodate the storage of waste oil containers and recyclable materials.*

*Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of a Construction Certificate.*

*Reason: Health and safety.*

**12. Survey Certificate**

*A survey certificate is to be prepared by a Registered Surveyor at completion of all works to the roof, deck and acoustic screen demonstrating that the roof, deck and acoustic structures do not extend into the adjoining property at 1029 Barrenjoey Rd, Palm Beach. The survey certificate is to be submitted to the Principal Certifying Authority prior to the issue of any Occupation Certificate.*

*Reason: To establish that there is no encroachment onto the adjoining property.*

**13. Compliance with acoustic report**

*An acoustic assessment is to be undertaken by a suitably qualified professional such as an acoustic engineer to determine acoustic treatments are in accordance with the recommendations within Section 5 of the Acoustic Report prepared by Acoustic Dynamics dated 21 July 2021 (Reference 51261R001.MW.210622). Any design recommendations made by the consultant must be implemented prior to issuing the Occupational Certificate in order to achieve compliance with noted conditions of this consent. Details demonstrating compliance are to be submitted to the satisfaction of the Principal Certifying Authority.*

*Reason: To maintain amenity of the surrounding area.”*

10. Section 5 of the Acoustic Report prepared by Acoustic Dynamics dated 21 July 2021 relevantly states:
- *On the south western and south eastern extremities of the deck and toilet area, a full height acoustic barrier is required;*
  - *the inside of the acoustic barrier and the underside of the deck area roof is required to have acoustic insulation reacted to a minimum of 75% of the area; and*
  - *Acoustic Dynamics advises that the absorptive lining could be a product such as Stratocell whisper sound absorbing polyethylene foam, or weather resistant*

*durable 11kg/m,50mm thick polyester acoustic insulation (CSR Martini or equivalent).*

11. As the Café has already completed the Unauthorised Works it will be unable to obtain a Construction Certification (CC) due to *Section 6.8(2)* of the *Environmental Planning and Assessment Act 1979 (EP&A)*. Consequently, the Café will be unable to obtain an OC pursuant to *Section 6.10(2)* of *EP&A*. Therefore, the Café may be unable to comply with the conditions of the DA.
12. In the alternate, if the Café is able to obtain a CC, the Café will have 5 years to comply with the conditions of the DA until it and the CC lapses, and therefore the Café may not be compelled to complete the DA works.
13. As evidenced by the DA conditions referenced above, the Councils Local Planning Panel (LPP) was sufficiently concerned by the construction of the Unauthorised Works that it imposed DA conditions to reduce the Café's 'amenity of the surrounding area' and 'encroachment onto the adjoining property'.
14. Therefore, the Café may elect to continue to operate in breach of the DA or its requirement for extended period of time, unless the Council chooses to impose time limits on compliance with the above and other DA conditions. The ongoing operation of the Café, without it undertaking the DA works will continue to adversely impact the local amenity. The Committee requests a copy of any statement of reasons the LLP drafted for decision to approve the DA.
15. The Committee notes that the Café's DA Modification seeks the to modify the location of the Acoustic Wall and leave the existing unauthorised pergola in its current location.
16. The Café submits the following reasons in support of the DA modification:
  - i. The relocated screen will mean the garden bed serves no purpose at all;
  - ii. It will not be able to be enjoyed or viewed by the southerly neighbours nor the dining patrons; and
  - iii. undesirable from a health perspective and for aesthetic reasons.
17. The Committee submits the following reasons why the DA Modification should be refused:
  - i. DA Modification is not supported by an acoustic report nor does the proposed modification meet the requirements of Cafés existing DA Acoustic Report referred to above;
  - ii. The location of the Pergola currently encroaches on the boundary of 1029 Barrenjoey Road Palm Beach and does not provide any acoustic benefit to 1029 Barrenjoey Road as the Café contends;
  - iii. The alleged 'dense planting' is made up of bamboo which Mr Giacomazzi advises, provides little to no acoustic barrier to the operation of the Café. Furthermore, the use of the Unauthorised Works inhibits Mr Giacomazzi ability to enjoy his background, as evidenced by Mr Giacomazzi submissions to Council. These submissions remain unchanged.

- iv. The Café's submission that the photographs of the Unauthorised Works '*illustrate the absurdity of providing an acoustic screen in the location suggested by Condition 5*' is illogical, given that this is merely assertion unsupported by any acoustic report and the impact of the Unauthorised Works is extensively described by the 27 submissions on the DA.
- v. The translucent panels of the unauthorised pergola will likely have to be replaced to meet the above acoustic requirements to install acoustic insulation to cover a minimum of 75% of the enclosed deck and pergola area.
- vi. The garden and the acoustic wall will create a physical barrier and set back from the boundary of 1029 Barrenjoey Road;
- vii. The garden will have a width of 1 metre and therefore it will be easily serviceable by the Café; and
- viii. The Committee is unaware of any basis from a health perspective nor does the Café give any reasons to support this assertion that the DA Modification should be approved.

18. The Committee further notes that the Council should not approve the DA Modification as the unauthorised pergola has no set back from the Boundary of 1029 Barrenjoey Road and encroaches on the Boundary of this property.

19. The Committee is concerned that based on the Café operation with the Unauthorised Works area over the past 10 months, that without any enforcement action by Building Control that the Café will continue to operate in noncompliance of the DA for an extended period of time.

20. The Committee also requests that any footpath approval the Council may be minded to grant, that the Council impose conditions on same to ensure that the Cafés use of the Footpath does not inhibited or obstruct the publics use of the Footpath and that the Café be required to clearly identify the licensed area. As the Café has obstructed the public footpath on previous occasions as evidenced by Mr Giacomazzi email dated 3 April 2021.

21. The Council should also note that Café has recently advertised by way of a notice of intention dated 15 February 2022, that it will be applying for a On-Premise Licence with a Primary Service Authorisation. The Committee expects that if this application is approved, that it will further exacerbate the Café's adverse impact on the local amenity.

Based on the above, the Committee requests that the Council:

- Enforce the conditions of the TA2020/0565;
- Impose enforceable time limits on the compliance with the conditions of the DA and/or as a practical step, ensure that the Café does not use the Unauthorised Works unless and until the conditions of the DA are met; and
- Refuse the DA Modification.

If the Council wishes to discuss the matter or requires any further information, please do not hesitate to get in contact with the writer.

Yours faithfully,  
Slater & Elias Lawyers Pty Ltd

A handwritten signature in black ink, reading "Ryan Watts". The signature is written in a cursive style with a large initial 'R' and 'W'.

RYAN WATTS  
Solicitor Director