



Land and Environment Court

New South Wales

Case Name: Cassar v Northern Beaches Council

Medium Neutral Citation: [2024] NSWLEC 1171

Hearing Date(s): 19 March 2024

Date of Orders: 11 April 2024

Decision Date: 11 April 2024

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) Pursuant to s 39(2) of the Land and Environment Court Act 1979, exercising the function of Northern Beaches Council as consent authority under s 113(4) of the Environmental Planning and Assessment Regulation 2021, approves the application for an amendment to modification application MOD2021/0983 made on 19 March 2024 to rely on the amended Plan of Management prepared by SJB dated 14 March 2024 (the amended modification application) and architectural plan DA04 prepared by RCA.
(2) The Appeal is upheld.
(3) Development Consent REV2021/0034 is modified in the terms in Annexure A.
(4) Development Consent REV2021/0034 as modified by the Court is Annexure B.

Catchwords: MODIFICATION APPLICATION — whether the development is substantially the same – acoustic impacts – traffic impacts – weight given to public submissions

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.55, 8.2, 8.9
Land and Environment Court Act 1979, s 39

Environmental Planning and Assessment Regulation
2021, s 113
Pittwater Local Environmental Plan 2014, cl 2.2

Cases Cited: Arrange v Inner West Council [2019] NSWLEC 85
Bailey v Oberon Shire Council [2006] NSWLEC 815
Moto Projects (No 2) Pty Ltd v North Sydney Council
(1999) 106 LGERA 298; [1999] NSWLEC 280

Texts Cited: Pittwater 21 Development Control Plan 2004
RMS Guide to Traffic Generating Development,
October 2002

Category: Principal judgment

Parties: Leslie Cassar (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
J Smith (Applicant)
C Gough (Solicitor) (Respondent)

Solicitors:
Hones Lawyers (Applicant)
Storey & Gough (Respondent)

File Number(s): 2022/331015

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** Whale Beach is located in the upper Northern Beaches, just south of Palm Beach, facing the great expanse of the Pacific Ocean. The terrain is steep, and roads leading to the beachfront are narrow and winding.
- 2 At the bottom of the slope is a roadway known as The Strand that runs parallel to the beachfront; lined with mature pines and partially obscured by wind-driven sand.
- 3 The sole means of vehicular access to The Strand is via Surf Road which connects Whale Beach Road further up the slope.

- 4 An existing mixed use development stands on a site that has frontages to both Whale Beach Road and Surf Road, known as 231 Whale Beach Road.
- 5 On 6 May 2020, the owner of that land, being the Applicant in these proceedings, lodged Development Application No DA2020/0442 seeking consent for demolition of existing structures and the construction of shop top housing development, including a café/restaurant on the ground floor, and basement parking for 21 vehicles.
- 6 Development consent for that proposal was refused, and the Applicant sought a review of the development application (the Review Application) under s 8.2 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 7 Subsequent to the refusal, the Applicant provided Northern Beaches Council (the Respondent) with amended plans and other documents.
- 8 On 1 December 2021, the Review Application, REV2021/0034 was considered by the Northern Beaches Local Planning Panel, and consent was granted (the original consent). Relevantly, the original was for basement parking for 14 vehicles.
- 9 The consent permitted shop top housing, with basement carparking and three retail areas. Retail 1 is on the ground floor and faces the beachfront, comprising an indoor dining area, and an outdoor terrace. Retail 2 and retail 3 front Whale Beach Road on Level 3 of the development.
- 10 In the consent as originally granted in REV2021/0034, Condition 99 limits the number of patrons in Retail 1 in the following terms:

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.
- 11 On 1 February 2022, the Applicant lodged modification application MOD2021/0983 with the Respondent, seeking to modify the terms of Condition 99 as originally granted by REV2021/0034, to increase the number of patrons permitted in the restaurant on the ground floor, including internal and external areas, to a total of 170 patrons, comprising 140 indoor patrons, and 30 outdoor patrons, and 18 staff (Exhibit 1, folio 29).

- 12 The modification application relates to the number of patrons permitted to occupy the indoor and outdoor areas of Retail 1.
- 13 On 2 August 2022, the Northern Beach Local Planning Panel refused the modification application, and the Applicant filed an appeal under s 8.9 of the EPA Act in Class 1 of the Court's jurisdiction shortly thereafter, on 4 November 2022 (Exhibit B).
- 14 On 21 September 2023, the Applicant was granted leave to rely upon further amended plans and other documents as follows:
- (1) Acoustic Report for Development Application, prepared by JHA Services (Rev D) dated 13 September 2023;
 - (2) Traffic report letter, prepared by TEF Consulting, dated 22 August 2023;
 - (3) Plan of Management, prepared by SJB Planning (NSW) Pty Ltd dated 22 August 2023;
 - (4) Amended Statement of Environmental Effects, prepared by Richard Cole Architecture, dated 13 September 2023; and
 - (5) Amended ground floor architectural plan, prepared by Richard Cole Architecture Pty Ltd, Drawing No DA04 – Ground Floor Plan, Issue Y dated 4 July 2023.
- 15 At that time, I also note the Court, exercising its powers under s 39(2) of the *Land and Environment Court Act 1979* (LEC Act) approved the amendment of the modification application by those plans and documents at [14], in accordance with s 38 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation).
- 16 On 14 March 2024, the Applicant sought to amend the modification application by reducing the number of patrons permitted on weekdays and weekends, varying according to two periods of the year; and by describing certain management procedures in a Plan of Management to limit noise impact.
- 17 The number of patrons now proposed to be permitted to occupy Retail 1, is proposed to vary according to time and season, as follows:
- Warmer Months (October to March) - weekdays**
- Weekdays from morning – 11am; 150 patrons
- Weekdays from 11am – 5pm; 150 patrons
- Weekday nights from 5pm – 6pm; 130 patrons

Weekday nights from 6pm onwards; 130 patrons

Warmer Months (October to March) - weekends

Weekends from morning – 11am 80 patrons

Weekends from 11am – 5pm; 80 patrons

Weekend nights from 5pm – 6pm; 80 patrons

Weekend nights from 6pm onwards; 100 patrons

Cooler Months (April to September) - weekdays

Weekdays from morning – 11am; 150 patrons

Weekdays from 11am – 5pm; 150 patrons

Weekday nights from 5pm – 6pm; 150 patrons

Weekday nights from 6pm onwards; 150 patrons

Cooler Months (April to September) - weekends

Weekends from morning – 11am; 150 patrons

Weekends from 11am – 5pm; 80 patrons

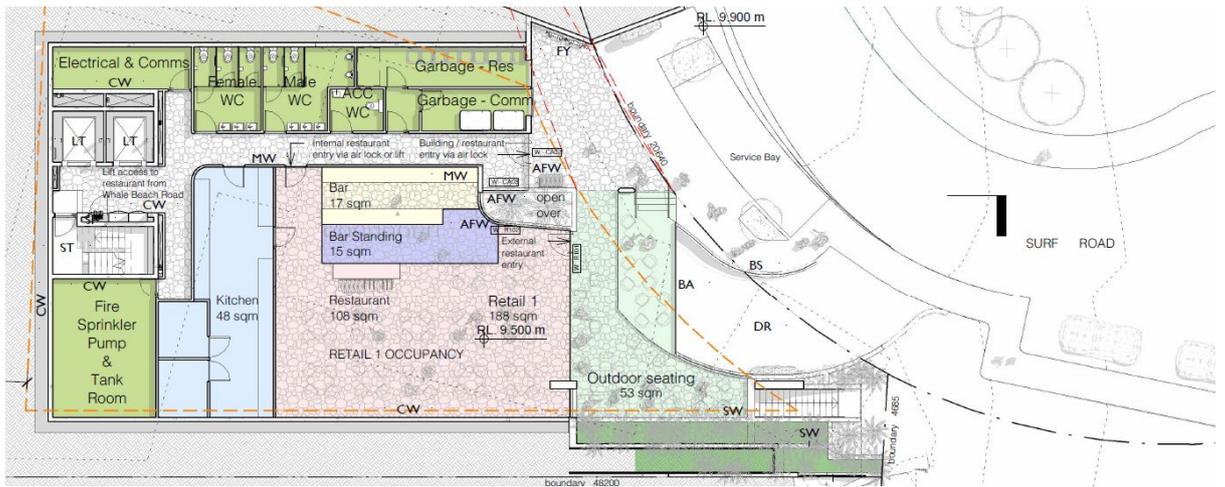
Weekend nights from 5pm – 6pm; 80 patrons

Weekend nights from 6pm onwards; 140 patrons

At all times the maximum number of patrons in the external areas will be limited to 20 patrons.

Up to 16 staff will be on-site at any one time.

- 18 On 15 March 2024, the Respondent wrote to residents to notify the terms of the proposed amendment to the modification application and advised the following:
- (1) The terms of agreed orders proposed by the parties.
 - (2) The date of the hearing.
 - (3) An opportunity to be heard at an onsite view.
 - (4) The proposed agreed conditions of consent.
- 19 At the commencement of the hearing, the Applicant was granted leave, unopposed, to rely upon the amended Plan of Management prepared by SJB dated 14 March 2024 (the amended modification application) citing the patron numbers at [17], and architectural plan DA04 prepared by RCA, re-produced in excerpt below:



Public submissions

20 The hearing commenced with an onsite view at which the Court, in the company of legal representatives and experts, heard oral submissions from six local residents (Exhibit 11) who expressed concern at the proposal that may be summarised as follows:

- (1) Traffic safety and insufficient parking
- (2) Acoustic impact
- (3) Anti-social behaviour
- (4) Loss of a neighbourhood shop
- (5) Adverse impact on the amenity of Whale Beach

21 Following those oral submissions, the Court was taken to the northern most extent of The Strand to view existing on-street parking conditions, and to the south of The Strand as far as a public stairway that connects The Strand to Whale Beach Road further up the hill from the beach.

The site and its context

22 The site is a steeply sloping, irregularly shaped allotment with a frontage to Whale Beach Road to the west, and to Surf Road to the north east. The curvature of Surf Road is such that the site has a direct view to the beachfront beyond over the intersection of Surf Road and The Strand.

23 The site is legally identified as Lot B DP in 316404, 231 Whale Beach Road, Whale Beach.

- 24 A multi-level, mixed-use development comprising retail and business premises occupies that portion of the site fronting Whale Beach Road, whereas residential development with a garage and double carport occupies that portion of the site fronting Surf Road.
- 25 Public parking occurs on the eastern side of The Strand, henceforth referred to as the Whale Beach Public Car Park.
- 26 An existing restaurant known as Moby Dicks occupies the site to the south of the subject site, located above the Whale Beach Surf Club.
- 27 The site itself is nominated E1 Local Centre zone on the relevant map under cl 2.2 of the Pittwater Local Environmental Plan 2014 (PLEP) and is surrounded by land zoned E4 Environmental Living to the north, south and west and RE1 Public Recreation to the east.
- 28 The objectives of the E1 zone are as follows:
- To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.
 - To encourage investment in local commercial development that generates employment opportunities and economic growth.
 - To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.
 - To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
 - To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse, and functional streets and public spaces.
 - To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment.

Expert evidence

- 29 The Court was assisted in its consideration of the matters as are relevant to the development the subject of the modification application by experts in the following discipline:
- (1) Acoustic engineering: Mr Jorge Reverter, on behalf of the Applicant, and Mr Stephen Gauld on behalf of the Respondent, who conferred in the preparation of a joint expert (Exhibit 4), and supplementary joint reports marked Exhibits 8 and 13.

- (2) Town planning: Mr Scott Barwick, on behalf of the Applicant, and Mr Jeff Mead on behalf of the Respondent, who conferred in the preparation of a joint expert report (Exhibit 3), and a supplementary joint report (Exhibit 7).
- (3) Traffic and parking: Mr Oleg Sannikov for the Applicant, and Mr Paul Corbett on behalf of the Respondent who conferred in the preparation of a joint expert report (Exhibit 5) and a supplementary joint report (Exhibit 9).

Whether the development is substantially the same

30 As the application before the Court is a modification application that is agreed to be other than one involving minimal environmental impact, is not a deemed refusal, and is not seeking to modify a consent granted by the Court, the provisions of s 4.55(2) and (3) of the EPA Act apply in the circumstances of this case.

31 Section 4.55(2) and (3) is in the following terms:

(2) **Other modifications** 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—

- (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
- (b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) 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
- (c) it has notified the application in accordance with—
 - (i) the regulations, if the regulations so require, or
 - (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and
- (d) it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.

Subsections (1) and (1A) do not apply to such a modification.

- 32 (3) In determining an application for modification of a consent 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 consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified. In considering whether the Court can be satisfied that the development to which the consent as proposed to be modified is substantially the same development as the development for which consent was originally granted, the Court has commonly held that it is insufficient to characterise development as substantially the same solely on the basis that the use is identical.
- 33 Instead, a comparative task is required. Such a task should involve a qualitative and quantitative appreciation of the development that is proposed to be modified, and the development for which consent was originally granted, including the circumstances in which development consent was granted.
- 34 Undertaking only a quantitative evaluation of the modification application, compared to the original consent, absent any qualitative assessment, will be legally flawed, for reasons the Applicant submits is best shown by Bignold J in *Moto Projects (No 2) Pty Ltd v North Sydney Council* (1999) 106 LGERA 298; [1999] NSWLEC 280, at [52].
- 35 Furthermore, the quantitative and qualitative comparison requires an understanding of the essential features or components of the originally approved and modified development in order to assess whether the modified development is substantially the same as the originally approved development (*Arrage v Inner West Council* [2019] NSWLEC 85, at [25]).
- 36 In the circumstances of this case, the essential features or components of the development as originally approved and as now proposed to be modified is the number of patrons permitted to occupy the indoor and outdoor areas of Retail 1.
- 37 The proposed increase in patron numbers has the potential to be materially distinct from the development as originally approved in two ways; firstly in the

acoustic impacts that arise, and secondly in respect of traffic and carparking implications for the local area.

Acoustic impacts

- 38 The Respondent initially contended that the increase in patron numbers will result in unacceptable noise impacts on adjoining and nearby residential properties contrary to Section C2.10 of the Pittwater 21 Development Control Plan (PDCP).
- 39 In broad terms, the acoustic experts consider two areas likely to be the source of noise impacts; the indoor dining area, and the outdoor dining terrace.
- 40 Mr Gauld describes the primary difference between the two experts being the sound power, or 'vocal effort' assumed by Mr Reverter in his Acoustic Report for Development Application Rev E (Acoustic Assessment) (Exhibit 4, Annexure C). As I understand it, the sound power or vocal effort may be thought of as the loudness with which someone speaks.
- 41 Mr Gauld considers the sound power level assumed by Mr Reverter to be 7dbA lower than it should be (Exhibit 4, par 153). When the sound power level that Mr Gauld considers correct is translated into Table 14 of the Acoustic Assessment, Mr Gauld believes the noise levels at an adjoining property, No 24 The Strand, exceed the relevant noise criteria by 4 dBA.
- 42 It is for this reason the Respondent initially contended that the assumptions and conclusions contained in the acoustic reports prepared by JHA cannot be relied on. However, in the supplementary joint report filed with the Court on 15 March 2024, the experts agree that a change in the number of patrons, together with management measures, have the effect of ameliorating the acoustic impacts that would have been imposed prior to such changes.
- 43 The acoustic experts prepared a further supplementary joint report (Exhibit 13) that sets out the following:
- (1) Mr Gauld's evidence is that a reduction of patrons using the outdoor terrace should reduce to 20 in order for the noise criteria to be achieved. As this is now proposed, the experts agree there will be no unacceptable impacts on residents from outdoor patrons.

- (2) The experts agree that a threshold is reached when 70 patrons occupy the indoor dining area and the noise criteria is met. However, when more than 70 patrons occupy the indoor dining area, the noise criteria is exceeded.
 - (3) Windows and a door separate the indoor and outdoor dining areas. The Acoustic Assessment proposes the windows to be double glazed, comprising a layer of 6.38mm laminated glass, a 16mm air gap, and a 10.38mm laminated layer, encapsulated in aluminium framing. The door is nominated to be 12.38mm laminated glass.
 - (4) The experts agree that when more than 70 patrons occupy the indoor dining area, the doors and windows facing east should be closed, used only event of emergency, in order to achieve the noise criteria. When this occurs, the passage to the north of the ground floor plan connecting the outdoor dining terrace to the indoor dining area will act as an airlock.
 - (5) Finally, the experts agree that amplified music, including background music, either indoor or outdoor, should not be permitted at any time if noise criteria is to be achieved.
- 44 The planning experts also agree that limiting use of Retail 1 to that of a café/restaurant, rather than a function centre, can be achieved in two ways;
- (1) Firstly, by prohibiting the use of amplification for music or for speeches, being two characteristics of a function that vary from a café/restaurant.
 - (2) Secondly, by requiring standing room at the bar to be limited to those awaiting a table, as distinct from that which is common at a hotel or pub.
- 45 The measures summarised above are contained in a Plan of Management prepared by SJB dated 14 March 2024 (Exhibit A, Tab 4B). Relevant sections of the Plan of Management are re-produced as follows:

“Part 1 – Purpose

The premises has a maximum capacity of patrons which varies seasonally in response to the availability in the locality of car parking. Generally, in the warmer summer months the maximum patron capacity is lower and in the cooler winter months, patron capacity is higher.

...

Part 3 – Hours of operation and capacity and management

...

Warmer Months (October to March) - weekdays

Weekdays from morning – 11am; 150 patrons

Weekdays from 11am – 5pm; 150 patrons

Weekday nights from 5pm – 6pm; 130 patrons

Weekday nights from 6pm onwards; 130 patrons

Warmer Months (October to March) - weekends

Weekends from morning – 11am 80 patrons

Weekends from 11am – 5pm; 80 patrons

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Weekday nights from 5pm – 6pm; 150 patrons

Weekday nights from 6pm onwards; 150 patrons

Cooler Months (April to September) - weekends

Weekends from morning – 11am; 150 patrons

Weekends from 11am – 5pm; 80 patrons

Weekend nights from 5pm – 6pm; 80 patrons

Weekend nights from 6pm onwards; 140 patrons

At all times the maximum number of patrons in the external areas will be limited to 20 patrons.

Up to 16 staff will be on-site at any one time.

The premises is approved as a café/restaurant. It is not to operate as a function centre. Any use of the premises for functions must be ancillary and incidental (subordinate and subservient) to the approved use as a café/restaurant.

Should group bookings be taken bookings of greater than 100 patrons will only be permitted on twelve occasions in any calendar year. Any such group booking is not to exceed the maximum specified patron capacity set out above for the applicable time of year.

...

Part 4 – Amenity of the neighbourhood

Management will take all reasonable actions to ensure the conduct of the business does not have a negative impact on the neighbourhood.

...

Staff shall ensure that the entry points and immediate vicinity are kept clean and tidy during the use of the premises.

(i) Staff shall take all reasonable steps to control the behaviour of patrons of the premises as they enter and leave and minimise disturbance from the outdoor dining area.

(ii) For the exit of patrons at the cessation of trading a staff member will be posted to the exit. The staff member will monitor guests leaving the premises and consistent with the terms of this Plan of Management will, if necessary,

ask guests to consider the amenity of surrounding residents and keep noise to a minimum.

External disposal of bottles/waste must be undertaken prior to 10pm, but not before 7am.

Amplified music will not be played within the premises.

...”

- 46 The original consent is also proposed to be modified by the imposition of Condition 99A to address the agreement of the acoustic experts in the following terms:

The following acoustic recommendations shall be complied with at all times:

(a) A 1.8m high lapped and capped 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.

(b) The eastern facade of the indoor seating area is not to be operable/openable, except for the eastern façade doors which may only be opened for patron/staff ingress and egress when there are 70 or less patrons in the indoor seating area, or in the case of emergencies.

(c) A sound absorptive ceiling to be installed to the outdoor seating area.

(d) Glazing composition of the glazed facade is a 6.38mm laminated/ 16mm airgap / 10.38mm laminated, which provides an approximate Weighted Sound Insulation Rating of RW43.

(e) Glazing for the access door is 12.38mm laminated, which provides an approximate Weighted Sound Insulation Rating of RW37.

(f) Signs shall be installed regarding noise levels when patron leave the premise.

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

- 47 I accept the consensus of the acoustic experts that the relevant noise criteria will be achieved by those measures contained in the Plan of Management, and the condition above.
- 48 At the close of proceedings, the Court granted the parties leave to file amended conditions of consent that would adopt the agreed position of the planning experts at [44(1)] such that neither amplified music, nor microphones are to be used.

49 As such, I accept a quantitative and qualitative assessment of the increase in patron numbers will not result in a material acoustic impact on neighbouring and nearby properties.

Traffic and parking impacts

50 The Respondent initially contended that the proposed modification would result in unacceptable road and pedestrian safety impacts in the area. Such impacts would be felt particularly in the Whale Beach public car park at those times of the year when on-street parking is at a premium.

51 Mr Sannikov's letter dated 22 August 2023 cites support from the Council traffic engineer who relied upon the RMS Guide to Traffic Generating Development to determine the evening peak trip generation rate of 5 trips/100m² of gross lettable floor area (GLFA).

52 Mr Sannikov also confirms additional parking demand surveys were carried out on sunny, warm days including Sunday 19 February 2023, between 10am-8pm, and on Friday 10 March 2023, between 5pm and 9.30pm being a period of peak demand for a restaurant.

53 The surveys identify spare parking capacity that is essentially verified by surveys undertaken by Mr Paul Corbett on behalf of the Respondent and for which, at the commencement of the hearing, the Respondent sought, and was granted, leave to rely upon by Notice of Motion under an Affidavit authored by Mr Christopher Gough. A Statement of Evidence prepared by its Traffic Expert, Mr Paul Corbett dated 1 March 2024 (Exhibit 10) contained these additional traffic surveys.

54 Mr Corbett's Statement of Evidence explains that he engaged an independent surveyor to undertake two surveys, described as follows:

- (1) On-street car parking surveys on 16 December 2023 between 11am-7pm), and Friday 26 January 2024 between 11am and 7pm, being the public holiday known as Australia Day (Annexure C).
- (2) Automatic Tube Counting surveys recording vehicle movements, including speed, along Whale Beach Road over 7 days from Wednesday 14 February 2024 onwards (Annexure D).

55 Mr Corbett also analysed historical patronage data for events held at Moby Dick's between 1 December 2022 and 1 April 2023, and 1 December 2023 and

1 February 2024, concluding it was reasonable to revise the peak parking demand (Annexure B) based on events of up to 125 people, and not 200 people as previously assumed (Exhibit 5, par 53), and on the basis that Moby Dick's does not typically operate during weekend lunchtime periods.

56 Mr Corbett summarises the parking availability he considers reasonable to assume at par 30 of his Statement of Evidence:

- (1) Weekend lunchtime peak period: 30 spaces available/vacant
- (2) Weekend evening peak period: 38 spaces available/vacant
- (3) Weekday (evening) peak period: 95 spaces available/vacant

57 In completing his analysis, Mr Corbett has also discounted certain areas in close proximity of the site from the on-street parking survey due to the steep topography of the area or constraints such as those streets without a footpath to provide safe access for patrons. The results of this analysis are best represented in an aerial image at Annexure C, re-produced below:



58 In his Statement of Evidence, Mr Corbett concludes that even allowing for the available parking spaces at [56], the increased patronage initially proposed by the modification application would result in only 40 car spaces being available to the general public in the area.

59 However, the experts agree (Exhibit 9, par 7) that the subsequent reduction in patron numbers proposed at [17], resolves traffic conflicts within the Whale Beach public car park and along Surf Road, and the footpath that forms part of the original consent does not result in any pedestrian safety concerns.

60 Furthermore, the experts now agree the number of parking spaces provided on site is sufficient to cater to the patron numbers, will not create unreasonable

additional pressure on availability of public parking in the area, and conforms to the provisions at Section B6.3 of the PDCP.

61 For completeness, Section B6.3 of the PDCP relevantly provides:

Outcomes

An adequate number of parking and service spaces that meets the demands generated by the development.

Functional parking that minimises rainwater runoff and adverse visual or environmental impacts while maximising pedestrian and vehicle safety.

Safe and convenient parking.

Controls

...

Shop Top Housing

The provision of parking is to be in accordance with the associated land use parking requirements i.e. parking must be provided at the requirement rate for the commercial floor space requirements if commercial floor space is proposed.

Location of patron parking for Retail and/or Commercial land use should not to be restricted or obstructed (for example behind roller doors).

...

<p>Restaurants and cafes</p>	<p>1 per 30m² GLA</p> <p>Parking spaces are to be accessible to the public. Time of operation and availability of adjacent car parking facilities either within or adjacent to the Commercial Centres may to be taken into account.</p> <p>Provision of accessible parking spaces for people with disabilities must be at the rate of 3% of the required car parking spaces or part thereof, or 1 space, whichever is greater.</p> <p>Adequate space for delivery vehicles and garbage collection is to be provided.</p>
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- 62 The agreement above is reached, in part, on the basis of two conditions of consent proposed in respect of traffic and parking. These are:
- (1) Condition 67 of the original consent is proposed to be modified to require a separate submission to the Council's Traffic Committee for signage to be installed that would regulate the use of four parking bays for which consent is granted such that the parking bays are used only as a Loading zone between the hours of 7am-10am, 7 days a week, and as a '5 minute zone (for set down and pick up of patrons) between the hours of 10am-10pm, 7 days per week.
 - (2) Condition 89A provides for a Green Travel Plan to promote the use of active and sustainable transport modes for staff and patrons.
- 63 Mr Corbett cites parking surveys undertaken by residents at par 35 of his Statement of Evidence showing parking is in high demand along The Strand, and that unlawful parking of vehicles regularly occurs.
- 64 The Court saw for itself examples vehicles parked unlawfully, drivers failing to observe stop signs and the like. On the basis of parking surveys undertaken by residents and experts it is clear that there is a high demand for parking along the beachfront, as is common in beachside areas of Sydney. With it, I have no doubt that aggression and dispute follows, as residents attest.
- 65 That said, the Applicant invites the Court to follow the observation in *Bailey v Oberon Shire Council* [2006] NSWLEC 815 that held, at [51], it is entirely improper for the Court to rely on an unlawful activity to sustain an objection and use such an objection to warrant the refusal of an otherwise unlawful application. I accept this position.
- 66 The Court accepts the evidence of the experts that the reduction in patron numbers, provision of signage to regulate the use of parking bays on Surf Road for loading and drop off/pick up, and limitations on large events within Retail 1 will not place an unreasonable impact on the area.
- 67 This is not to dismiss or diminish the genuinely held concerns of residents that parking is a source of stress and concern for those who live in the area.
- 68 However, I note the maximum patrons expected during the daytime from October to March, when parking demand is at its highest, is limited to 80 patrons.

- 69 The original consent considered parking arrangements for 64 patrons using Retail 1 to be acceptable. The development as proposed to be modified seeks an increase of 16 patrons at this peak period with the same number of car parking spaces provided in the basement.
- 70 I accept that the increase in patron numbers above that number for which consent was originally granted does not result in an unreasonable impact in terms of traffic, safety or parking in the area when the number of patrons is understood in terms of time and season, and when the parking surveys undertaken on behalf of the Applicant and the Respondent are read objectively.

Public submissions are considered

- 71 I will now consider topics raised in written and oral submissions that are not otherwise addressed above.
- 72 In doing so, I note the practice of the Court is to de-identify submissions so that the privacy of those making submissions is protected.
- 73 More than one submission expressed the difficulty that arises from dealing with anti-social behaviour as residents confront intoxicated patrons of premises in the area who consume alcohol and urinate on their properties. Broken glass in the public domain is also a feature which with residents are clearly fed up.
- 74 On the basis of the Plan of Management, excerpts of which are re-produced at [45], and those sections of the Plan of Management that deal with Complaints (Section 5), Behaviour of Patrons and the Responsible Service of Alcohol (Section 6), and Security and Safety (Section 7), I consider those steps taken to address the behaviour of patrons of the development the subject of this application to be adequate, noting the Plan of Management for this development cannot regulate the behaviour of those who are not patrons of the premises.
- 75 It was said that the development will result in the loss of a neighbourhood shop where daily essentials such as bread, milk and the like can be acquired. The Court is required to consider the development that is the subject of the particular application before it, and not a hypothetical development that could take, in someone's view, a more preferred form. In this case, the development

that is the subject of this modification application comprises three retail areas. Much has already been said about Retail 1. I note two additional retail areas are provided fronting Whale Beach Road that are nominated by Condition 3 of the agreed conditions of consent to be Neighbourhood Shops which is defined in the PLEP in the following terms:

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.

- 76 It was also said that the amenity of Whale Beach, enjoyed by residents and visitors of the area has been hard won through years of effort to retain those aspects of its character that provide such an amenity.
- 77 In this case, the Court is not considering the character, bulk and scale, setbacks, landscape treatment or vehicular access that were all aspects considered acceptable by the Respondent at the time consent was originally granted. Likewise, the original consent found the proposal a satisfactory response to the desired future character of the locality, and found the landscape treatment appropriate for the site (Exhibit 2, Tab 2).
- 78 The amenity to which the Court's focus is directed in the circumstances of this case is the impact, if any, on the acoustic and traffic and parking amenity of the area. One submitter identified an existing stressor being the collection of commercial waste from a location in the area "at 2am".
- 79 While there is no reason that the increase in patrons would necessarily impact on the time or means by which collection in the area is made, I note the terms of waste disposal in the Plan of Management at [45] is for disposal of bottles/waste to be undertaken prior to 10pm, but not before 7am.
- 80 Furthermore, while the terms of Condition 92 as originally approved already limit the delivery of goods and waste collection associated with the retail premises and restaurant/cafe to the period between 7.00pm and 7.00am, the condition is proposed to be modified for clarity to add the words "the following day" after "7.00am".

- 81 On the basis of my finding at [49] and [70], the Court finds the residential amenity enjoyed by the Whale Beach community is not diminished, but is protected and maintained.
- 82 On the same basis, and having considered those matters at s 4.15 of the EPA Act that are of relevance to the development as proposed to be modified, the reasons for the consent as originally granted, and the public submissions set out above, I am satisfied that the development to which the consent as modified relates is substantially the same development for which consent was originally granted, in accordance with s 4.55(2) of the EPA Act.

Conclusion

- 83 The Court notes that the Respondent notified those who had made submissions about the modification application of the proposed Consent Orders in accordance with the direction at par 99 of the Practice Note on Class 1 Development Appeals.

Orders

- 84 The Court orders that:
- (1) Pursuant to s 39(2) of the *Land and Environment Court Act 1979*, exercising the function of Northern Beaches Council as consent authority under s 113(4) of the Environmental Planning and Assessment Regulation 2021, approves the application for an amendment to modification application MOD2021/0983 made on 19 March 2024 to rely on the amended Plan of Management prepared by SJB dated 14 March 2024 (the amended modification application) and architectural plan DA04 prepared by RCA.
 - (2) The Appeal is upheld.
 - (3) Development Consent REV2021/0034 is modified in the terms in Annexure A.
 - (4) Development Consent REV2021/0034 as modified by the Court is Annexure B.

T Horton

Commissioner of the Court

331015.22 Annexure A

331015.22 Annexure B

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