

SUBMISSION in response to a Notification of s96 Application No DA12/0170.11 – Amendment to Development Consent DA 12/0170 for alterations and additions to motel (staged) at Lot 1 Sec 4 DP 29748 No. 26 Tweed Coast Road; Lot 2 Sec 4 DP 29748 No. 28 Tweed Coast road; Lots 9-12 Sec 4 DP 31209 No.19-25 Cypress Crescent; Cabarita Beach.

Two Amendments have been proposed:

- 1) addition of an external tiled terrace addition to the northern apartment located on top of the approved lounge and function room outdoor roof with brick balustrade and full height privacy screen along the northern edge.
- 2) deletion of condition 113A (trial period of 12 months for the use of outdoor facilities including pool and BBQ from 7am to 10pm Monday to Sunday from commencement of use with a report brought back to Council at the conclusion of the trial period and reinstatement of Condition 111 to regulate hours of operation of aforementioned outdoor facilities from 7am to 10pm Monday to Sunday with no trial period.

1) Addition of tiled terrace to northern apartment

Following clarification from an officer of the Tweed Shire Council as it was not clear from our notification letter of 11 December, it is now our understanding that this modification application relates to a terrace on Level 1, and that this terrace has in fact already been constructed without Council approval.

We do not object to the tiling of this terrace or brick balustrade or acoustic privacy screens as it seems to us a reasonable application.

We do however, continue to object to any rooftop terrace or trafficable public area on the top of the complex, and reserve our right to object to that if in fact this modification application also relates to the rooftop of the building.

2) Deletion of condition 113A etc

Legal advice on power of Council to impose a trial period

The applicants have submitted to Council legal advice from Andrew Gough of Storey & Gough. In essence this advice, based on the contentions in the *1643 Pittwater Road Pty Ltd v Pittwater Council* [2004] NSWLEC 685, (“**the Pittwater Case**”) argues that the modification application DA/12/0170.4 of 24 March 2014 did not seek to modify or extend the hours of operation of the pool and outdoor area, and that therefore Tweed Shire council lacked the power to impose the 12 month trial period relating to the use of these facilities.

However Courts have more recently used the Pittwater case to establish that Councils do in fact have the power to amend existing conditions or insert new conditions that amend a development even where those amendments do not form part of the modification application. Courts have assessed that Councils are able to impose such conditions even where the amendments only **indirectly** relate to a planning matter. There must however be some nexus between any conditions imposed and the nature of the modification applications.

Recent cases have established that Councils do have this power particularly when residents' loss of amenity, and potential entertainment noise or nuisance are relevant. For example in an application involving alterations and additions and relocation of a tennis court and swimming pool, the NSW Land and Environment Court approved Council restrictions on the hours of use of the tennis court on the basis that during daylight hours there would be a visual impact from use of the court on a neighbour's study area (*Barton v Ku-ring-gai Council* [2006] NSWLEC.)

In another case involving a modification application to insert a window in a restaurant in a hotel, the Court approved noise amelioration conditions relating to two bars in the hotel that were situated in a distinctly separate part of the hotel. (*Jones v Mosman Municipal Council* [2006] NSWLEC 40.) The Court reasoned that the Council had the power to impose these restrictions because the combined noise of the restaurant and two bars would be increased as a result of the insertion of the window. In other cases, detailed managements plans, restrictions on trading hours, and trial periods have all been imposed by the Courts when considering similar modification applications. Consequently, the imposition of a 12 month trial period, whether or not there will be acoustic monitoring of the area as well, is a reasonable condition which Council in our view has the power to impose.

The 12 month trial period

In the Pittwater Case, it was not a trial 12 month period which the Council sought to impose but a sunset clause on a mining operation at the end of its mining/minerals lease and the Court ruled against this condition largely because of its severity. However the Tweed Shire Council's 12 month trial condition is not unreasonable, given the concerted and continuing objections by local residents, the change of use of the site and the intensity and scale of development on this site.

Residents' past submissions to the Council relating to the original development application for the Hideaway Motel (now the Halcyon Hotel) and various modification applications have been in response to the change of use of the site, the intensification of that use, residents' concerns about visual and acoustic privacy, and the further increased usage of some existing features of the site, in particular the pool area, and the resulting noise and loss of residents' amenities and privacy. The reason for Council's imposition of this condition is clear – to address the concerns of the local neighbourhood. The trial period actually directly relates to Council's attempts to ameliorate the issues arising under previous modification applications which residents have protested about, ie those relating to noise, environmental and other concerns.

The Council is seeking to give consideration to residents' concerns while Western Trust attempts to continue to expand its operations on this site.

In fact, we formally request the Council to impose this 12 month trial period of the entire site and in particular the outdoor areas, with regular acoustic readings by an independent body, as the property now has had a very significant change of use from motel to hotel with marketing underway for ongoing functions and weddings.

We are also concerned that the potential usage of the outdoor space is growing with every modification application, for example the latest plans show a pizza oven and BBQ grill area where a covered store area and fire pit was previously. It appears that the whole of the outdoor area will be used for dinners, functions and music, possibly every day from 7am to 10pm. This has the potential to disturb all residents in the area, day and night, especially those closely bordering on the property particularly when a group books the entire complex for a function or wedding and all guests are contributing to the noise level, especially with alcohol involved.

We are also concerned that the current construction of the top rooftop area is designed to enable its use for entertainment, whether with or without Council permission. We request that Council designate this area as 'non-trafficable for guests.'

10 January 2015