

**Item 8.****Development Application - 122-124 Flinders Street, Darlinghurst - D/2019/1176**

File No.: D/2019/1176

**Summary****Date of Submission:** 23 October 2019**Applicant:** James Thorpe**Architect/Designer:** N/A**Developer:** N/A**Owner:** City of Sydney Council**Cost of Works:** \$0**Zoning:** The site is located within the B4 Mixed Use zone. The development is permissible with consent.**Proposal Summary:** Development application for the use of public footway on South Dowling Street for outdoor seating in association with licensed premises 'The Taphouse'. The proposed outdoor seating area comprises 20.8 square metres of area. Proposed hours of use are between 12.00 midday – 9.30pm, Monday to Sunday inclusive.

An associated footway application FA/2019/184 under Section 125 of the Roads Act is under concurrent assessment.

The application is referred to the Local Planning Panel for determination as the City of Sydney is the land owner of the footway.

The site is currently a licensed Hotel (known as the Taphouse). No increase in patron capacity is proposed for the outdoor seating area.

The application was exhibited for a period of 14 days from 28 October 2019 to 12 November 2019. Two submissions were received objecting to the proposal.

The issues raised in the submission include impacts on nearby residential dwellings, pedestrian footway access, privatisation of the public footway, reasonableness, noise and litter.

**Summary Recommendation:** The development application is recommended for approval, subject to conditions.

**Development Controls:**

- (i) Sydney Local Environmental Plan 2012 (Gazetted 14 December 2012, as amended)
- (ii) Sydney Development Control Plan 2012 (in force on 14 December 2012, as amended)

**Attachments:**

- A. Recommended Conditions of Consent
- B. Selected Drawings

**Recommendation**

Consent be granted to Development Application No. D/2019/1176 subject to the conditions set out in Attachment A to the subject report.

**Reasons for Recommendation**

The application is recommended for approval for the following reasons:

- (A) The development subject to conditions is consistent with the objectives of the Sydney LEP 2012, Sydney DCP 2012 and the City of Sydney Outdoor Dining Policy and Guidelines 2016;
- (B) The proposal will not have any significant detrimental effect relating to environmental, social or economic impacts on the locality, subject to conditions.

## Background

### The Site and Surrounding Development

1. A site visit was carried out by staff on 1 November 2019.
2. The subject site contains the licensed hotel known as The Local Taphouse, which operates under a Hotel liquor license as a pub and restaurant.
3. The Local Taphouse is a two-storey building with roof terrace.
4. The City of Sydney owns the public footway surrounding the hotel.
5. The site is an irregular shaped allotment, with an area of approximately 250sqm. The site is located at the intersection of Flinders and South Dowling Streets. Both Flinders and South Dowling Streets are identified as 'classified roads'.
6. The immediate surrounding area is characterised by residential terraces along South Dowling Street and a mix of residential terraces and commercial premises along Flinders Street.
7. The site is identified as a local heritage item and is located within the Paddington Urban Conservation Area (CA39).
8. Photos of the site and surrounds are provided below:



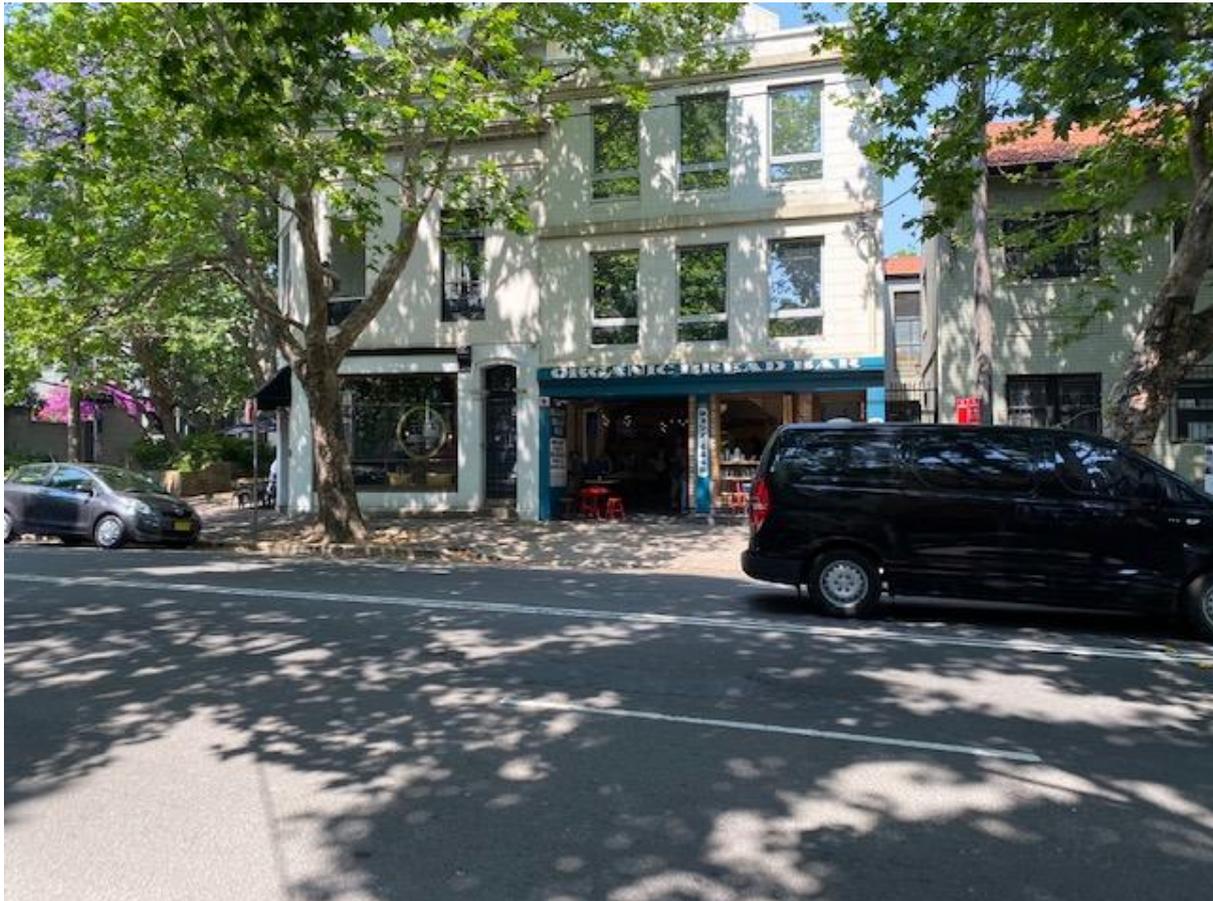
**Figure 1:** Aerial image of subject site and surrounding area



**Figure 2:** Site viewed from South Dowling Street



**Figure 3:** Looking south along South Dowling Street - view of approximate location of outdoor seating area



**Figure 4:** Looking east across South Dowling Street from the subject site

### **Proposal**

9. Approval is sought for the use of 20.8sqm of the footway for tables and chairs providing seating for 14 pub patrons. The proposed hours of operation for the outdoor seating area are 10.00am - 9.30pm daily.
10. Development consent is required for the use of the footway for outdoor seating associated with a pub.
11. Plans of the proposed development are provided below in Figure 5.

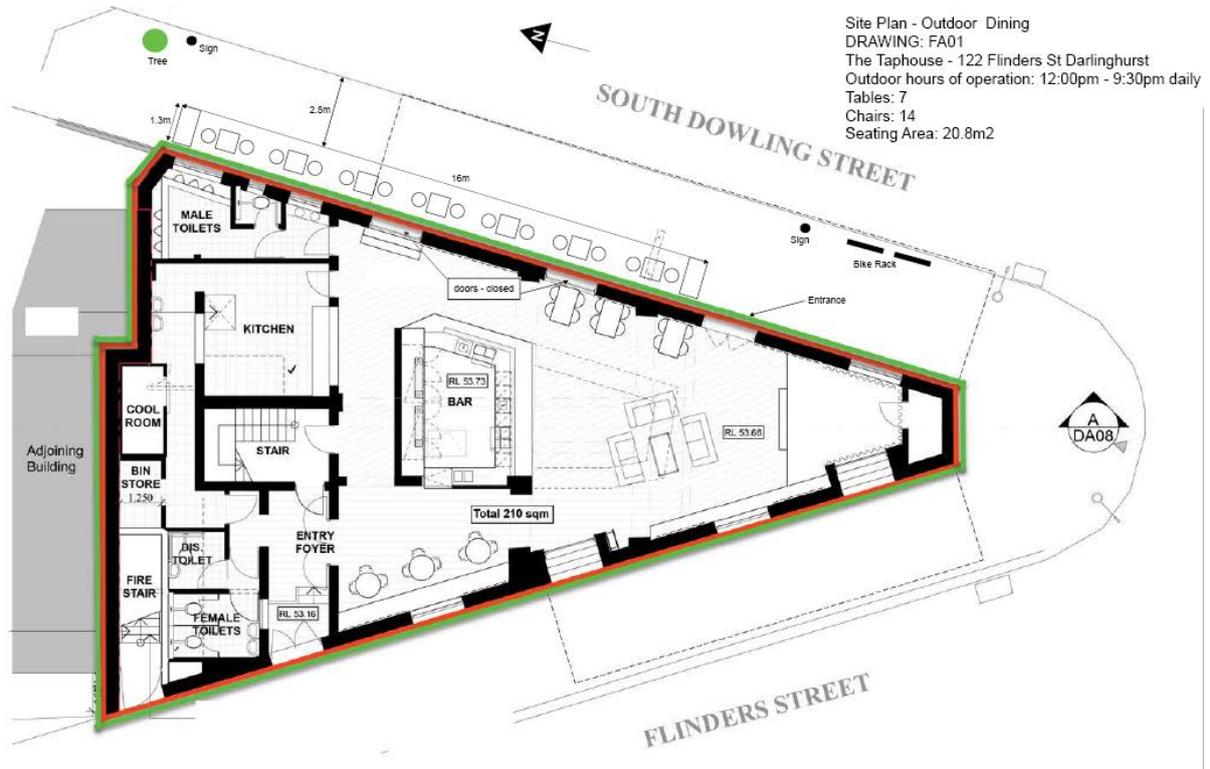


Figure 5: Proposed outdoor dining plan

### History Relevant to the Development Application

12. On 14 October 1998, development application DU/1998/500 was approved for alterations and additions to the hotel including construction of additional floor area on the roof top area for a restaurant. The approved hours for the ground and first floors were between 10.00am - 12 midnight Monday to Wednesday, and 10.00am - 1.00am Thursday to Saturday and between 10.00am and 11.00pm on Sunday. The approved hours for the second floor were 11.00am -10.30pm Sunday to Thursday and 11.00am-11.30pm Friday and Saturday.
13. On 22 October 2008, development application D/2008/1414 was approved for internal refurbishment works.
14. On 5 December 2008, development application D/2008/1415 was refused for the installation of acoustic screens and bar at the roof top level and use of the rooftop by patrons of the hotel.
15. On 20 July 2009, a Section 82A review RD/2008/1415/A was lodged to review the refusal of development application D/2008/1415 to allow the extension and use of the roof top level as an outdoor bar. On 25 November 2009, the Small Permits Appeal Panel approved the extension to the roof of 'The Local Taphouse' for an outdoor roof terrace with hours of operation between 10.00am - 10.00pm Monday to Saturdays, and 10.00am - 9.00pm Sundays.
16. On 16 August 2010, Section 4.55 modification D/2008/1415/A was approved to delete Conditions 1 and 18(b) of development consent relating to design of roof top terrace and the provision of entertainment associated with the use.

17. On 23 July 2012, development application D/2012/652 was refused for the use existing rooftop terrace at licensed hotel known as 'The Local Taphouse' between hours of operation 10.00am and 12.00 midnight, Monday to Saturday and 10.00am and 10.00pm on Sunday.
18. On 13 December 2012, a Section 82A review RD/2012/652/A was lodged to review the refusal of development application D/2012/652 to use rooftop between 10.00am and 12.00 midnight, Monday to Saturday, 10.00am to 10.00pm Sunday. The Section 82A review was withdrawn on 9 January 2013.

### **Economic/Social/Environmental Impacts**

19. The application is assessed under Section 4.15 of the Environmental Planning and Assessment Act 1979, including consideration of the following matters:
  - (a) Environmental Planning Instruments and DCPs.

### **State Environmental Planning Policy (Infrastructure) 2007**

20. The provisions of SEPP (Infrastructure) 2007 is considered in the assessment of the development application.
21. The application is subject to Clause 101 of the SEPP as the site has frontage to Flinders and South Dowling Streets, which are both classified roads.
22. On 11 December 2019, Roads and Maritime issued their concurrence to the use of the footway for outdoor seating subject to conditions.

### **Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (Deemed SEPP)**

23. The site is located within the designated hydrological catchment of Sydney Harbour and is subject to the provisions of the above SREP.
24. The Sydney Harbour Catchment Planning Principles must be considered in the carrying out of development within the catchment. The key relevant principles include:
  - (a) protect and improve hydrological, ecological and geomorphologic processes;
  - (b) consider cumulative impacts of development within the catchment;
  - (c) improve water quality of urban runoff and reduce quantity and frequency of urban run-off; and
  - (d) protect and rehabilitate riparian corridors and remnant vegetation.
25. The development is consistent with the controls contained with the deemed SEPP.

### **Roads Act 1993**

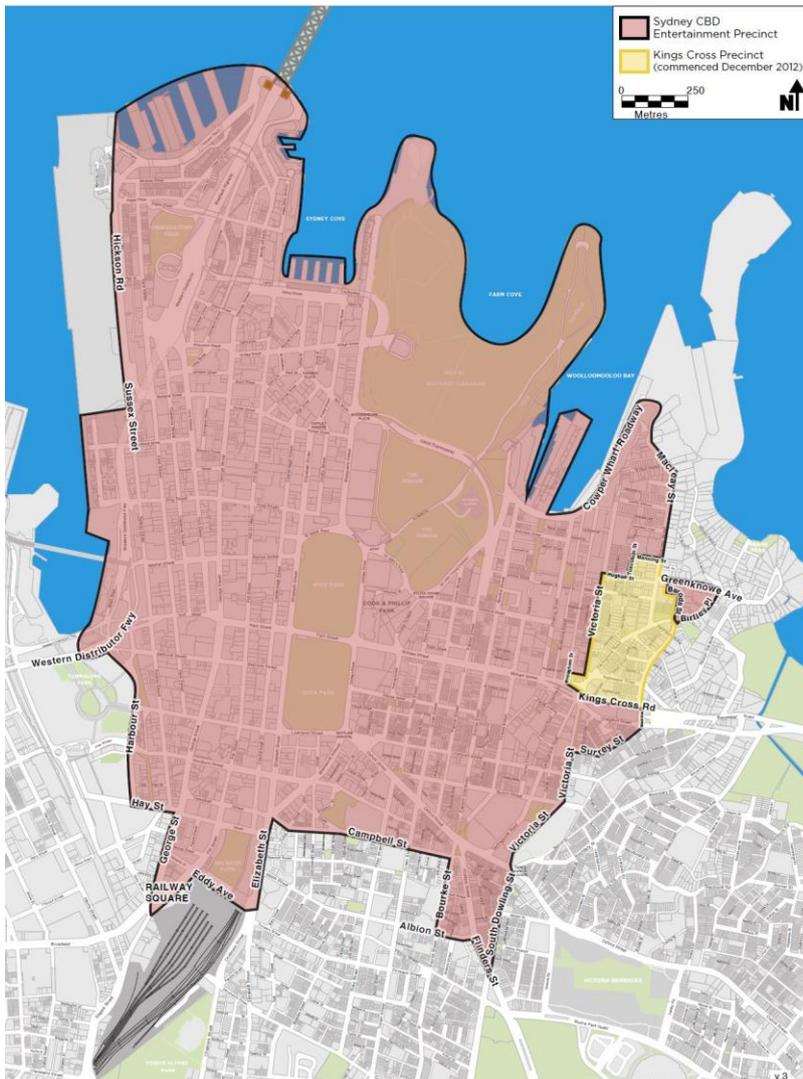
26. The proposal is consistent with the requirements for footway restaurants under the Roads Act, 1993. Subject to conditions, the provision of outdoor seating will not result in unacceptable impacts on adjoining roadway uses or the public domain.

### Smoke Free Environment Act 2000

27. Under the Smoke-Free Environment Act 2000 and associated regulations, smoking is not permitted in outdoor areas used for dining.
28. As approvals under Section 125 of the Roads Act 1993 relate specifically to the use of footways for restaurant purposes, footway dining areas approved under that legislation must be available for dining and cannot be used for smoking.

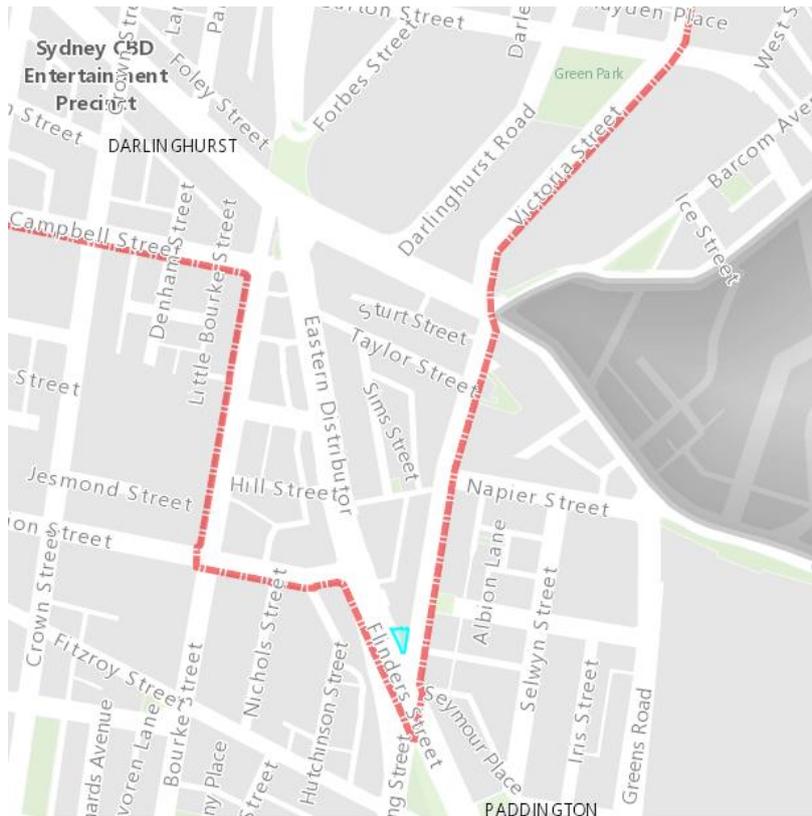
### Liquor Act 2007 (Liquor Freeze)

29. The site is within the Sydney CBD Entertainment Precinct Liquor Freeze area (refer Liquor Freeze Map at Figures 6 & 7 below).



**Figure 6:** Sydney CBD Entertainment Precinct Liquor Freeze Area Map

30. Under Part 4 Division 1A Clause 47G of the Liquor Act 2007 states that the Office of Liquor, Gaming and Racing (OLGR) cannot approve any extension to liquor license boundaries for hotel licences within a liquor freeze precinct if it is likely to result in an increase to the patron capacity of that premises.



**Figure 7:** Subject site highlighted within the Liquor Freeze boundary

31. The proposed outdoor seating is associated with a pub that is affected by the liquor freeze. No increase to the overall capacity of the venue is sought. This is consistent with the intent of the liquor freeze.
32. The proposed outdoor seating area will not increase the capacity of the ground floor area or the venue as a whole. A condition is recommended requiring the ground floor patron capacity including the use of the footway not exceeding the maximum of number of patrons stipulated in the pub Liquor Licence.

### **Sydney Local Environmental Plan 2012**

33. The site is located within the B4 Mixed Use zone. The proposed outdoor seating area is associated with a food and drink premises is consistent with the zone objectives to provide a mixture of compatible land uses and is permissible with consent.
34. The relevant matters under Sydney Local Environmental Plan 2012 for the proposal are outlined below.

## Compliance Tables

Development Control	Compliance	Comment
5.10 Heritage conservation	Yes	<p>The subject site is a heritage item (I299 Palace Hotel including interior) and is located within a heritage conservation area.</p> <p>The application proposes using the footway and does not include any physical works. It will therefore not result in adverse impacts on the significance of the heritage item or conservation area.</p>

**Sydney Development Control Plan 2012**

35. The relevant matters under Sydney Development Control Plan 2012 for the proposal are outlined below.

**2. Locality Statements – Flinders**

The subject site is located in the Flinders Locality. The proposed use of the outdoor seating area is in keeping with the unique character of the area and design principles in that it will reflect the character of Darlinghurst as having vibrant local businesses supporting the local economy and provides a range of day-time and night-time activities.

3. General Provisions	Compliance	Comment
3.2 Defining the Public Domain	Yes	The proposal will enhance the public domain by activating the footway. The proposed outdoor seating area will not obstruct pedestrian access along the public footway.
3.5 Urban Ecology	Yes	The proposed outdoor seating area will not impact on nearby trees or the local urban ecology.
3.9 Heritage	Yes	<p>The existing building is locally listed heritage item.</p> <p>The proposal does not include any physical works, and will therefore not result in any adverse impact on the significance of the heritage item.</p>

<b>3. General Provisions</b>	<b>Compliance</b>	<b>Comment</b>
3.14 Waste	Yes	A condition is recommended for the proposal to comply with the relevant provisions of the City of Sydney Guidelines for Waste Management in New Development.
3.15 Late Night Trading Management	Yes	See discussion under the heading 'Late Night Trading' in the Issues section.

## Issues

### Late Night Trading

36. The site is not located in a late night trading area.
37. The outdoor seating area is associated with a pub which is defined as a Category A - High Impact Premises.
38. The DCP states that base hours for outdoor trading associated with a Category A premises not located in a late night trading area are as follows:

	<b>DCP (Category A)</b>	<b>Proposed</b>
<b>Outdoor base</b>	Base - 10am to 8pm	12midday to 9.30pm
<b>Outdoor extended</b>	Extended - 10am to 10pm	12midday to 9.30pm

39. The proposed trading hours are beyond the base hours permitted in the evening by 1.5 hours, concluding at 9.30pm.
40. Any hours beyond base hours are subject to a trial period. Extended trading hours beyond base hours may be permitted at the initial application stage, where Council has determined that the premises will be well managed in accordance with an approved Plan of Management.
41. In this context, an extension of evening hours from 8.00pm until 9.30pm for a 1 year trial period is reasonable in this instance as:
- A search of Council records indicates that one noise complaint was received in the last year and the matter was resolved by the Manager of the hotel without further action.
  - The application is supported by a Plan of Management. The Plan indicates the premises is capable of demonstrating good management practices consistent with the requirements of the DCP.

42. Upon conclusion of the trial period, the applicant may apply for a further trial period. Consideration of any application for a further trial period will depend on the management of the premises within the initial trial period and any complaints received. If Council determines that a trial period was unsatisfactory then trading hours will revert back to base trading hours.

#### **City of Sydney Outdoor Dining Guidelines**

43. The City of Sydney Outdoor Dining Guidelines set out the requirements for outdoor dining areas, to ensure no harm to pedestrians and to ensure efficient vehicle circulation and safety.
44. The guidelines specify that a minimum clear path of travel of 2.0m in order to provide unobstructed and clear pedestrian access.
45. The plans demonstrate that a 2.5m clear path of travel. This is acceptable.

#### **Other Impacts of the Development**

46. The proposal is not considered to have any significant detrimental effect relating to environmental, social or economic impacts on the locality, subject to recommended conditions.

#### **Suitability of the site for the Development**

47. The proposal is in keeping with the overall function of the site. The premises are in commercial/residential surroundings and amongst similar uses to that proposed.

#### **Internal Referrals**

48. The conditions of other sections of Council are included in the recommended conditions.

#### **External Referrals**

#### **Roads and Maritime Services (RMS)**

49. The application was referred to RMS as the proposed footway area fronts a classified road (i.e. South Dowling Street).
50. RMS provided its concurrence on 11 December 2019 subject to standard conditions, which are provided in Attachment A.

#### **NSW Police**

51. The application was referred to the NSW Police and they raised no objection to the proposal.

## Notification, Advertising and Delegation

52. In accordance with Schedule 1 the Sydney DCP 2012, the proposed development requires notification. As such the application was notified for 14 days between 28 October 2019 and 12 November 2019. As a result of this notification a total of 93 properties were notified and there were 2 submission(s) received raising the following issues:

### Impacts on pedestrian movement

- (a) The Taphouse is in a fairly high traffic area – this includes a lot of foot traffic, particularly after events in the Moore Park area. If the application were approved, all of that foot traffic would be forced to the other side of the road, directly outside living and sleeping areas of residents on the street. This coupled with the additional noise from patrons on the street area would result in further disturbances to residents.

**Response** - The outdoor seating area is limited in size and it is not considered that 14 seated patrons within the footway would result in unacceptable amenity impacts to surrounding neighbours. The proposed outdoor seating plan shows a 2.5m clear unobstructed path of travel is maintained for pedestrian access.

The application is supported by a Plan of Management which requires the outdoor seating area to be managed in accordance with the Plan of Management (POM). Well managed outdoor seating areas can contribute in a positive way to the character of the City. The POM includes measures to prevent unreasonable noise impacts to surrounding neighbours and also states that all tables and chairs are to be removed from the footway at 9.30pm and stored within the premises.

### Request for a Trial Consent

- (b) If Council supports the application, it should be for a maximum initial 12 month trial period with strict requirements to:
- (i) monitor the impact of the approval on residents;
  - (ii) provide the register of complaints to council and make it available for inspection at all times; and
  - (iii) include a more comprehensive plan on how management will deal with rowdy patrons who may not respond appropriately when asked to leave the premises.

**Response** - The proposal is considered to be satisfactory on its merits when assessed against the relevant planning controls. The Plan of Management (POM) submitted with the application includes measures that specifically relate to noise management, complaints handling, handling of rowdy patrons etc. The management of the outdoor seating is subject to an assessment against the relevant planning controls as set out in this report. In this context, the use of the footway for outdoor seating is acceptable and can be adequately managed. The operating hours of the outdoor seating area are recommended to be approved subject to a trial period. Any hours above base operating hours are subject to a trial period. If Council determines that a trial period has been unsatisfactory then operating hours will revert base hours.

#### Amenity and litter impacts

- (c) Noise levels and drunken behaviour of the patrons at The Taphouse are already high especially on the weekends and the use of the footway only relocates the problem and is only going to cause more problems for neighbours regarding noise levels and broken glass and discarded napkins is only going to increase.

**Response** - As mentioned above, the application is supported by a Plan of Management which requires the outdoor seating area to be managed in accordance with the Plan of Management (POM). The POM sets out appropriate measures to adequately manage and maintain the footway area. The outdoor area is limited in size, and it is not considered that 14 patrons on the footway would result in unacceptable noise impacts. Subject to conditions and management measures in the POM it is not considered that there will be any unacceptable impacts to neighbouring properties.

#### Inconsistency with character of the area

- (d) Inconsistency with the character of the area. Concern is raised that the proposal is inconsistent with the residential character of the area.

**Response** - The subject site is located within a B4 Mixed Use Zone. The zone objectives include the requirement to provide for a mixture of compatible land uses. The pub and residential dwellings have coexisted for years. The submitted Plan of Management and recommended Trial Period provide certainty that the proposal remains compatible with residential character of the area.

#### Public Interest

53. The proposal will have no detrimental effect on the public interest, subject to appropriate recommended conditions.

#### S7.11 Contribution

54. The development is not subject to a S7.11 contribution.

#### Relevant Legislation

55. Environmental Planning and Assessment Act 1979.  
56. Heritage Act 1977.  
57. Liquor Act 2007.

## **Conclusion**

58. The subject application seeks consent to use 20.8sqm of the public footway for outdoor seating.
59. The proposed development generally complies with the objectives and provisions of the Sydney LEP 2012 and Sydney DCP 2012 for the site.
60. RMS have granted their concurrence given the footway seating is located on a classified road.
61. The proposed use of the footway for outdoor seating is limited in size and subject to conditions will not cause any unreasonable impacts or harm to the surrounding environment.
62. The development is recommended to be approved, subject to conditions included in Attachment A.

## **ANDREW THOMAS**

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Vanessa Cagliostro, Senior Planner