

Item 3.**Section 4.55(2) Application: 64-68 Macleay Street, Elizabeth Bay - D/2010/763/G****File No.:** D/2010/763/G**Summary****Date of Submission:** 10 October 2023, further information was supplied 2 January 2024 and 12 February 2024.**Applicant:** Mr Stephen Choularton**Owner:** The Council of the City of Sydney**Cost of Works:** \$0.00**Zoning:** The site is located in the RE1 Public Recreation zone.
The proposal includes the continued use of a market, which is permissible with development consent in the zone.**Proposal Summary:** The application seeks to modify the consent for the market use at 64-68 Macleay Street, Elizabeth Bay to allow for its continued use for a further 5 years.

The proposed changes include modifications to condition 3(a) to continue use of Fitzroy Gardens for the Organic Food Market by an additional 5 years until 30 March 2029, operating between 7.00am and 3.30pm on Saturdays.

The application was publicly notified between 30 October 2023 and 14 November 2023. Three submissions objecting to the proposal were received. Issues raised include noise, traffic and damage to vegetation.

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

Summary Recommendation: The modification application is recommended for approval.

- Development Controls:**
- (i) Sydney Local Environmental Plan 2012
 - (ii) Sydney Development Control Plan 2012
 - (iii) SEPP (Biodiversity and Conservation) 2021

- Attachments:**
- A. Recommended Conditions of Consent
 - B. Selected Drawings
 - C. Plan of Management
 - D. Traffic Management Plan

Recommendation

It is resolved that consent be granted to Section 4.55 Application Number D/2010/763/G subject to the amendment of the conditions in Attachment A (with modifications shown in ***bold italics*** (additions) and ~~striketrough~~ (deletions)).

Reasons for Recommendation

The application is recommended for approval for the following reasons:

- (A) The development, as modified, is substantially the same development as that originally approved and is consistent with Section 4.55(2)(a) of the Environmental Planning and Assessment Act, 1979.
- (B) The proposal is consistent with the aims, objectives and relevant provisions of the Sydney Local Environmental Plan 2012 and the Sydney Development Control Plan 2012 for the reasons set out in the report.
- (C) The modified development is consistent with the objectives of the RE1 Public Recreation zone.
- (D) The development, as modified, is consistent with the reasons given for the development as originally approved in accordance with Section 4.55(3) of the Environmental Planning and Assessment Act, 1979.
- (E) The development, as modified, is in the public interest as it is consistent with the objectives of the RE1 Public Recreation zone to provide a range of recreational settings, activities and compatible land uses.

Background

The Site and Surrounding Development

1. The market is located within Fitzroy Gardens which has a legal description of Lot 1 in Deposited Plan 129261, Lot 1 in Deposited Plan 447466 and Lots 1 to 10 in Deposited Plan 456564, and is known as 64-68 Macleay Street, Elizabeth Bay. Fitzroy Gardens has an area of approximately 4,296.7 square metres, and has a primary street frontage to Macleay Street, and secondary street frontages to Elizabeth Bay Road and Baroda Street.
2. Fitzroy Gardens comprises a paved plaza hosting the landmark El Alamein Fountain, an enclosed playground and landscaped gardens.
3. The surrounding area is characterised by a mixture of land uses, primarily being residential and commercial.
4. Fitzroy Gardens is a local heritage item (I593) known as 'Fitzroy Gardens including landscaping' and the El Alamein Fountain is a state heritage item (I593A) known as 'El Alamein Fountain'. The items are located in the Potts Point (C51) heritage conservation area.
5. The site is located within the Kings Cross locality and is not identified as being subject to flooding.
6. A site visit was carried out on 10 November 2023. Photos of the site and surrounds are provided below.



Figure 1: Aerial view of site (yellow) and surrounds.



Figure 2: View of heritage listed Fitzroy Gardens and El Alamein Fountain facing south from within the site.



Figure 3: The site viewed from Macleay Street.



Figure 4: Off street parking adjacent to the site viewed from Baroda Street.

History Relevant to the Development Application

Development Applications

7. The following applications are relevant to the current proposal:
 - **D/2010/763** – Development consent was granted on 16 July 2010 for use of Fitzroy Gardens for an Organic Food Market with hours of operation between 7.00am and 2.00pm, every Saturday for a period of 1 year.
 - **D/2010/763/A** – A Section 4.55(1A) modification application was approved on 25 August 2010 to amend condition 2 to extend hours from 2.00pm to 3.30pm, deletion of requirements for a waste management plan, management of sharps, and amendments to sanitary facilities.
 - **D/2010/763/B** – A Section 4.55(2) modification application was approved on 21 December 2011 to amend condition 3 to extend the use of the markets for 3 years until 21 December 2014 and amend condition 21(f) relating to provision of refrigeration for food stalls that display or sell potentially hazardous foods.

- **D/2010/763/C** - A Section 4.55 (2) modification application was approved on 29 May 2012 to amend condition 10, 11 and 12 relating to amplified noise and compliance with the City's busking policy.
- **RD/2010/763/A** - A Section 82A Review was granted on 01 August 2012 for the provision of cool rooms within every 20 metres from a stall and deleted the requirement for compliance with the Busking Policy.
- **D/2010/763/D** - A Section 4.55(1A) modification application was approved on 30 November 2012 to amend condition 2 for extended trading hours of the markets once a year to coincide with the annual Kings Cross festival.
- **D/2010/763/E** - A Section 4.55(2) modification application was approved on 14 March 2016 to extend the approved period for the markets for 3 years until March 2019.
- **D/2010/763/F** - A Section 4.55(2) modification application was approved on 12 February 2019 to continue the use of Fitzroy Gardens for an Organic Food Market by an additional 5 years until 31 March 2024, operating between 7.00am and 3.30pm on Saturdays.

Compliance Action

8. The site is not subject to any ongoing compliance action.

Amendments

9. Following a preliminary assessment of the proposed development by Council officers, a request for additional information was sent to the applicant on 13 December 2023. Further information was requested regarding updates to the Plan of Management and Site Plan.
10. The applicant responded to the request on 2 January 2024, and submitted an updated Plan of Management, Traffic Management Plan and amended Site Plan.
11. A further request for information was sent to the applicant on 31 January 2024. Further information was requested regarding updates to the Traffic Management Plan.
12. The applicant responded to the request on 12 February 2024, and submitted an updated Traffic Management Plan.

Proposed Development

13. The modification application seeks consent for the following:
 - Modification of condition 3(a) to continue the use of Fitzroy Gardens for and organic food markets for an additional 5 years until 30 March 2029.
 - Modification of condition 7 to refer to the updated Plan of Management.
14. No changes are proposed to the following operational aspects of the markets:

- Hours of operation between 7.00am and 3.30pm (including bump-in/out), every Saturday
- Location of stalls
- Nature of market use, being a primary food-based market
- No amplified music.

15. The proposed site plan for the market is shown below.

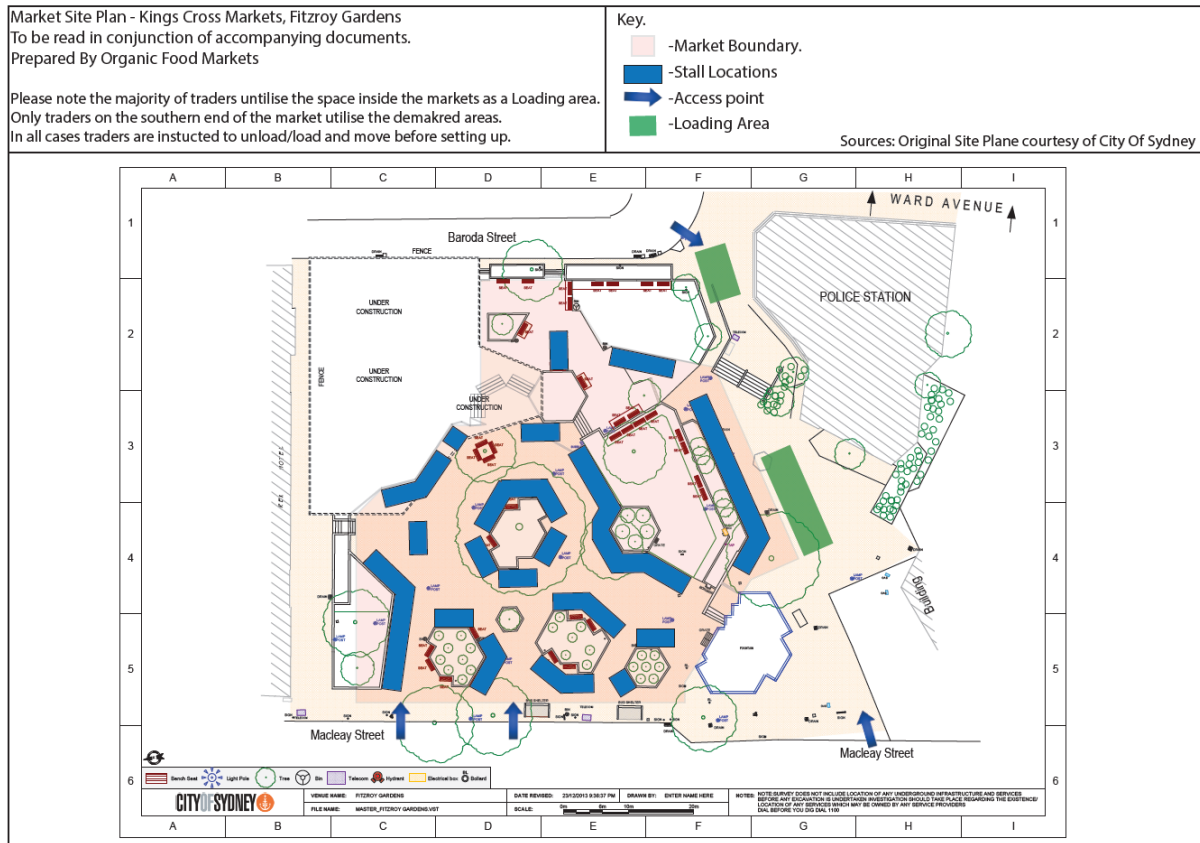


Figure 4: Proposed site plan (overview)

Assessment

16. The proposed development has been assessed under Section 4.15 of the Environmental Planning and Assessment Act 1979 (EP&A Act).

Heritage Act 1977

17. As The El Alamein Fountain located within Fitzroy Gardens is listed on the on the State Heritage Register (item I593A) under the Heritage Act 1977.

18. The original development application was not Integrated Development. The proposed modified development is substantially the same as the approved development as such a referral to the Heritage office is not required.

19. Further, it is noted that the proposed use of the site does not involve any works and does not involve the placement of any stalls or temporary structures on or abutting the item.

State Environmental Planning Policies

Sydney Environmental Planning Policy (Biodiversity and Conservation) 2021 - Chapter 6 Water catchments

20. The site is located within the designated hydrological catchment of Sydney Harbour and is subject to the provisions of Chapter 6 of the above SEPP. In deciding whether to grant development consent to development on land in a regulated catchment, the consent authority must consider the controls set out in Division 2.
21. The site is within the Sydney Harbour Catchment and eventually drains into Sydney Harbour. However, the site is not located in the Foreshores Waterways Area or adjacent to a waterway and therefore, with the exception of the control of improved water quality and quantity, the controls set out in Division 2 of the SEPP are not applicable to the proposed development.

Local Environmental Plans

Sydney Local Environmental Plan 2012

22. An assessment of the proposed development against the relevant provisions of the Sydney Local Environmental Plan 2012 is provided in the following sections.

Part 2 Permitted or prohibited development

Provision	Compliance	Comment
2.3 Zone objectives and Land Use Table	Yes	The site is located in the RE1 Public Recreation zone. The proposal includes modifications to a market, which is permissible with development consent in the zone. The proposal generally meets the objectives of the zone.

Part 5 Miscellaneous provisions

Provision	Compliance	Comment
5.10 Heritage conservation	Yes	The site contains two heritage items identified as local heritage item (I593) known as 'Fitzroy Gardens including landscaping' and state heritage item (I593A) known as 'El Alamein Fountain'.

Provision	Compliance	Comment
		<p>The items are located in the Potts Point (C51) heritage conservation area.</p> <p>The market is composed of temporary non-structural stalls and the modified development does not include any permanent physical works. The modified development will not result in any detrimental impacts to the heritage significance of the heritage conservation area and heritage items.</p>

Development Control Plans

Sydney Development Control Plan 2012

23. An assessment of the proposed development against the relevant provisions within the Sydney Development Control Plan 2012 is provided in the following sections.

Section 2 – Locality Statements

24. The site is located within the Kings Cross locality. The proposed modified development is in keeping with the unique character and the design principles of the locality.

Section 3 – General Provisions

Provision	Compliance	Comment
3.9 Heritage	Yes	Refer to assessment of LEP section 5.10 above.
3.11 Transport and Parking	Yes	<p>The modified development does not include any permanent physical works and will not result in any significant increase to traffic and parking.</p> <p>See further details under the Referral heading below in this report.</p>
3.12 Accessible Design	Yes	The subject site is a public place which provides equitable access. The modified development will not result in any permanent changes to the public domain and the market will maintain equitable access.
3.14 Waste	Yes	The modified development does not include any permanent physical works and will not result in any significant increase to waste.

Discussion

Substantially the same development

25. The proposed modified development is substantially the same as the approved development for the following reasons:
- (a) It does not give rise to any new environmental impacts compared to the approved development in terms of relevant matters for consideration at Section 4.15 of the Environmental Planning and Assessment Act, 1979.
 - (b) The modified development retains the same land use as the approved development, continuing the organic food market within the RE1 Public Recreation zone.
 - (c) The modified development does not change the layout of the organic food market.
 - (d) The modified development does not give rise to any additional unreasonable heritage impacts.
 - (e) The modified development does not alter the approved development's level of compliance with the applicable environmental planning instruments and policies.

Consideration of the reasons for the giving of the original consent

26. The proposed modified development is consistent with the original reasons given by the City of Sydney for the granting of consent to development application D/2010/763 in accordance with Section 4.55(3) of the Environmental Planning and Assessment Act, 1979:
- (a) The development, as proposed to be modified, continues to be consistent with the objectives of the RE1 Public Recreation zone as it will provide a range of recreational settings, activities and compatible land uses.
 - (b) The modified development continues to conserve the heritage significance of the heritage items on the site in accordance with clause 5.10 of the Sydney Local Environmental Plan.

Consultation

Internal Referrals

27. The application was discussed with Council's Environmental Health Unit and City Transport and Access Unit.
28. The Environmental Health Unit provided comments on 19 December 2023, and advised that the premise has successfully operated for a number of years and has not detrimentally impacted on the amenity of the surrounding area and is supported subject to updated conditions. Where appropriate, these updated conditions are included in the Notice of Determination.

29. The Council's Transport and Access Unit provided comments on 30 January 2023, and advised that subject to an additional traffic controller at the Baroda Street access point, any traffic-related issues could be addressed if all the traders adhere to the Traffic Management Plan. Transport and Access advised that the proposal is acceptable subject to conditions. A new condition is recommended requiring compliance with the submitted Traffic Management Plan.

External Referrals

NSW Police

30. The application was referred to NSW Police for comment.
31. No response was received.

Advertising and Notification

32. In accordance with the City of Sydney Community Participation Plan 2019, the proposed development was notified for a period of 14 days between 30 October 2023 and 14 November 2023.
33. A total of 657 properties were notified and three submissions were received during the notification period.
34. Submissions can be viewed at:
<https://eplanning.cityofsydney.nsw.gov.au/Common/Integration/FileDownload.ashx?id=!!YatiFjowDvcTjrP4l4hUQIFSSZxp1rfm0pMJpg%3d%3dGcfXEXgfzsA%3d&ext=PDF&filesize=138652&modified=2023-11-20T00:00:36Z>
35. The submissions raised the following issues:
- (a) **Issue:** The markets are very impactful in terms of noise on neighbours, in particular amplified music.
- Response:** The market has operated for a number of years without any significant compliance issues. Existing conditions relating to amplified music and spruiking form part of the consent and the stall holders and operator are required to comply with the conditions of consent. In an event of non-compliance with the condition, Council's Rangers can be contacted to investigate the issue.
- (b) **Issue:** The traffic associated with the market is extremely impactful to pedestrian and visitors to the area.
- Response:** The traffic and parking arrangements have been reviewed by the City's Transport Specialist, who advised that the traffic concerns are associated with the bump-in and bump-out operations, and that the issues can be addressed effectively if all the market traders adhere to the Traffic Management Plan. A Traffic Management Plan condition is recommended requiring the stall holders and operators to comply with the conditions of consent to ensure that the amenity of the public is not disrupted. In an event of non-compliance with the condition, Council's Rangers can be contacted to investigate the issue.

- (c) **Issue:** The market impacts the grass areas of Fitzroy Gardens which detrimentally impacts the enjoyment for the public outside market hours.

Response: The updated site plan identifies that no market stalls will be positioned on the grass areas within Fitzroy Gardens. Further to this, the updated Plan of Management clearly states that vehicles should not be allowed to drive on any grassed areas nor should tents or equipment/boxes encroach on these areas. Existing conditions relating to the Plan of Management form part of the consent and the stall holders and operator are required to comply with the conditions of consent.

Financial Contributions

36. The modified development is not subject to any financial contributions.

Relevant Legislation

37. Environmental Planning and Assessment Act 1979.
38. Heritage Act 1977.

Conclusion

39. The proposal seeks approval for the continued use of an organic food market for a further 5 years.
40. The proposed modification will not result in any adverse impacts on both the natural and built environment and the locality and is suitable for the site, subject to appropriate conditions of consent.
41. The development, as modified is considered to be substantially the same as that originally approved.
42. The proposed modification generally satisfies the relevant provisions of the applicable planning instruments including the Sydney Local Environmental Plan 2012 and the Sydney Development Control Plan 2012.
43. The proposed modification is in the public interest and is recommended for approval, subject to conditions.

ANDREW THOMAS

Executive Manager Planning and Development

Emily Cartwright, Planner