

Item 3.**Modification Application: 18 Huntley Street, Alexandria - D/2022/716/A**

File No.: D/2022/716/A

Summary

Date of Submission: 1 January 2024, additional information and amended Plan of Management submitted on 5 May 2024

Applicant: Mr Kim Rothe

Owner: THE OWNERS - STRATA
PLAN NO 99110

Planning Consultant: MatsuPlanning Services

Cost of Works: Nil

Zoning: R1 General Residential

Proposal Summary: The application seeks consent for a Section 4.55(2) modification to the approved food and drink premises currently operating.

The proposal includes an amendment to:

- Condition (12) Plan of Management to allow for outdoor dining within the terrace area and introduce a maximum patron capacity of 30 patrons within the outdoor area and an increase of internal patron capacity from 20 to 30 persons and increase staff capacity from 5 to 12; and
- Condition (8) Trading Hours - Minor Development to allow outdoor dining between 7.00am and 8.00pm Monday to Sunday.

The application is referred to the Local Planning Panel for determination as greater than 25 submissions were received.

The application has been amended to address issues identified by Council during assessment, in particular:

- Acoustic Impacts;
- Management Impacts.

The application was amended on 5 May 2024 and addressed all concerns.

Summary Recommendation: The modification application is recommended for approval.

Development Controls:

- (i) Sydney Local Environmental Plan 2012
- (ii) Sydney Development Control Plan 2012

Attachments:

- A. Recommended Conditions of Consent
- B. Selected Drawings
- C. Acoustic Report
- D. Plan of Management
- E. Submissions

Recommendation

It is resolved that consent be granted to Modification Application Number D/2022/716/A 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, 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 complies with the relevant controls of the Sydney Local Environmental Plan 2012 and Sydney Development Control Plan 2012.
- (C) The proposed amendment represents an appropriate use of the outdoor space and results in a patron capacity that remains capable of being properly managed.
- (D) The proposed amendment includes the provision of several acoustic measures to ensure impacts are minimised to surrounding residents which are recommended to be implemented prior to the commencement of increasing patron numbers.

- (E) Based upon the material available to the Panel at the time of determining this application, the Panel is satisfied that:
 - (i) The development, as modified, is in the public interest because it is consistent with the objectives of the R1 General Residential zone and Sydney Development Control Plan 2012 and is consistent with the intended use of the site and the original approval.

Background

The Site and Surrounding Development

1. The site has a legal description of Lots 1-153 in SP 99110 and Lot 1 in DP 1227704, known as 18 Huntley Street, Alexandria. It is irregular in shape with area of approximately 5,590sqm. It has a primary street frontage to Huntley Street to the north and a secondary street frontage to Sydney Park Road to the south. The site is located close to the intersection of Sydney Park Road and Euston Road.
2. The site contains a multi storey residential flat building, known as Arkadia, with one commercial tenancy on the ground floor facing Huntley Street which is the subject to this application. Shop 153 is located on the ground floor within a prominent corner of the building on Huntley Street facing common open space. The commercial unit includes a terrace area around the perimeter of the tenancy which is used for outdoor dining. The premises contains a food and drink premises known as "Ellen".
3. The surrounding area is characterised by a mixture of land uses, primarily being residential to the north and west in the form of two storey terrace dwellings as well as apartments within the subject complex. To the east contains a mix of land uses including residential, light industries and bulky goods stores.
4. The site is not located within a heritage conservation area however borders the Cooper Estate heritage conservation area which covers sites along the northern side of Huntley Street.
5. The site is located within the Sydney Park Residential Edge locality and is not identified as being subject to flooding.
6. A site visit was carried out on 9 February 2024. Photos of the site and surrounds are provided below.



Figure 1: Aerial view of site and surrounds



Figure 2: Site viewed from Huntley Street



Figure 3: Approved internal setup of the premises.



Figure 4: Terrace with outdoor dining already operating

History Relevant to the Development Application

Development Applications

7. The following applications are relevant to the current proposal:
 - **D/2015/1718** – Deferred development consent was granted on 11 August 2016 for the demolition of existing structures, excavation, land remediation, realignment of the existing Sydney Water stormwater easement, construction of basement car parking, construction of a part six and part three storey residential flat building.
 - **CDC/7696/1**- A Complying Development Certificate was issued for the fit out of Shop 153 as a cafe. The approval related to the fit out only and was required to get development consent for the use as a food and drink premises (subject application).
 - **D/2022/716** - Development consent was granted on 15 November 2022 for the use of the tenancy as a food and drink premises for a maximum of 20 patrons, distributed inside and outside with trading hour of between 7.00am and 10.00pm Monday to Saturday and between 7.00am and 8.00pm Sunday.

Outdoor dining

8. The terrace that is subject to this application has been used for outdoor dining in accordance with Part 2, Division 1, Subdivision 20B of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 which permits outdoor dining on private land. The use of the outdoor area for dining is exempt development if the number of patrons does not exceed the maximum patron capacity approved under development consent. As per the Plan of Management in Condition 12, the maximum capacity of the café is 20 patrons.

Compliance Action

9. The site is subject to an ongoing compliance action which is still being investigated and is relevant to the subject application. On 14 March 2023 a complaint was registered with Council regarding operation within the café outside of the approved trading hours, which was investigated by Council Rangers and was not verified. Several other complaints were registered with Council during the course of several months, generally from residents above the tenancy. The City's Environmental Health Officer investigated and found the café was not complying with the acoustic requirements of the development consent.
10. An acoustic assessment undertaken by on behalf of residents determined noise generated by the café exceeded Council's noise criteria which was confirmed by the City's Environmental Health Officer. Following this, the café was instructed to undertake further own acoustic assessment and identify methods to reduce acoustic impacts on residents. An acoustic assessment was undertaken by the business and included several recommendations to reduce noise. Following an assessment by the City's Compliance Unit, the business was instructed to implement 6 out of the 7 recommendations, however this is yet to occur due to delays seeking fire safety advice and contractor availability. Therefore, the compliance matter remains ongoing.

Amendments

11. Following a preliminary assessment of the proposal a request for additional information was sent to the applicant on 22 February 2024 and included the following:

- (a) details of the type, design and location of acoustic panels and the location of amplified speakers to demonstrate background music levels can comply with the City Noise Entertainment condition;
 - (b) revised plans of management containing consistent information and details; and
 - (c) an acoustic assessment to assess the proposed intensity of use of the internal area and proposed use of the outdoor area. The report should demonstrate compliance with the relevant City of Sydney noise criteria and NSW noise criteria. The report is also to provide an assessment on noise generated by mechanical ventilation.
12. The applicant responded to the request on 5 May 2024, and submitted the following information:
- Acoustic Report
 - The acoustic report includes several recommendations to ensure the proposed increased patrons across the café (indoor and outdoor) is able to comply with the City's noise criteria. This includes the construction of a solid awning over the outdoor terrace space to reduce noise traveling to apartments above. Refer to "Discussion" section below.
 - Updated Plan of Management
 - Updated Statement of Environmental Effects

Proposed Development

13. The modifications requested are summarised below:
- Amendment to Condition (12) Plan of Management to refer to an amended Plan of Management prepared by WT Design Pty Ltd signed and dated 25/04/2024 which includes reference to:
 - provision of outdoor dining within the terrace area;
 - maximum outdoor patron capacity of 30 patrons at any one time;
 - increase the maximum indoor patron capacity from 20 to 30 patrons at any one time; and
 - increase the maximum number of staff at any one time from 5 to 12.
 - Amendment to Condition (8) Trading Hours - Minor Development as follows:
 - include outdoor dining trading hours of between 7.00am and 8.00pm Monday to Sunday.
14. Plans and elevations of the proposed development are provided below.



Figure 5: Site Plan showing the location of the proposed outdoor seating area within the designated terrace wrapping around the tenancy

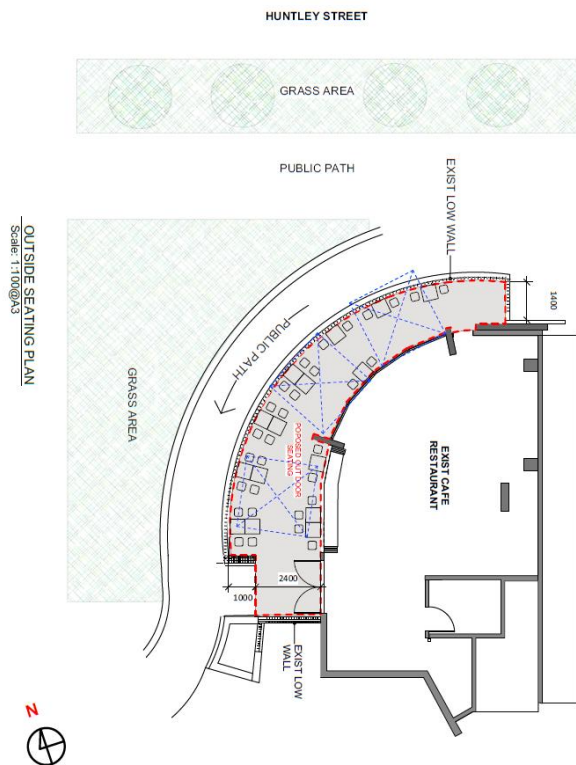


Figure 6: Proposed outdoor seating area



Figure 7: Perspective of the location of the outdoor seating within the development

Assessment

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

Local Environmental Plans

Sydney Local Environmental Plan 2012

16. 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 R1 General Residential zone. The proposed development is defined as food and drink premises and is permissible with consent in the zone. The proposal generally meets the objectives of the zone.

Part 4 Principal development standards

Provision	Compliance	Comment
4.3 Height of buildings	Yes	A maximum building height of part 12m and part 22m is permitted. The proposed modification does not seek to alter the height of the existing building.
4.4 Floor space ratio	Yes	A maximum floor space ratio of 2:1 is permitted. The proposed modification does not seek to alter the approved GFA of the tenancy.

Part 5 Miscellaneous provisions

Provision	Compliance	Comment
5.3 Development near zone boundaries	Yes	The site is located within R1 General Residential zone and borders SP2 Infrastructure zone along the southern boundary. The subject tenancy is positioned towards the northern boundary and the proposal does not seek physical changes to the building. The proposal will not have an impact on the SP2 zone.

Part 6 Local provisions – height and floor space

Provision	Compliance	Comment
Division 4 Design excellence		
6.21 Design excellence	Yes	The proposed modification does not seek physical changes to the tenancy or building and will not have an impact on the design integrity of the building. A solid awning recommended in the approved acoustic report to cover the outdoor terrace space will result in a change to corner of the facade. This awning should be lightweight in appearance. A recommended condition requires the awning to be approved via a separated development and constructed prior to an increase in numbers in the outdoor area. The condition requires the

Provision	Compliance	Comment
		awning to be designed in consultation with the original architects of the building.

Part 7 Local provisions – general

Provision	Compliance	Comment
Division 1 Car parking ancillary to other development		
7.7 Retail premises	Yes	The proposal does not seek to alter the approved GFA and does not seek to change car parking arrangements.
Division 4 Miscellaneous		
7.14 Acid Sulfate Soils	Yes	The site is located on land with class 3 Acid Sulfate Soils. The application does not propose works requiring the preparation of an Acid Sulfate Soils Management Plan.

Development Control Plans

Sydney Development Control Plan 2012

17. 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

18. The site is located within the Sydney Park Residential Edge locality. The proposed development is in keeping with the unique character and the design principles of the locality.

Section 3 – General Provisions

Provision	Compliance	Comment
3.12 Accessible Design	Yes	The proposed amendments do not seek physical works and will have no impact on accessibility arrangements within the site or premises. The existing ramp will continue to provide equitable access for all patrons.
3.14 Waste	Yes	The subject site has a dedicated waste area for use of the commercial space. The proposed increase

Provision	Compliance	Comment
		A condition has been recommended to ensure the proposed development complies with the relevant provisions of the City of Sydney Guidelines for Waste Management in New Development.
3.15 Late Night Trading Management	Yes	<p>The premises is not located within a designated Late Night Trading Area and the use is identified as a Category B premises.</p> <p>Under the provision, Category B premises are permitted indoor base hours of between 7.00am and 12 midnight and base outdoor dining trading hours of between 7.00am and 10.00pm.</p> <p>The approved indoor trading hours are between 7.00am and 10.00pm Monday to Saturday and between 7.00am and 8.00pm Sunday and comply with the base trading hours of the provision.</p> <p>The proposed outdoor trading hours of between 7.00am and 8.00pm Monday to Sunday comply with the provision.</p> <p>See "discussion" section below.</p>

Section 4 – Development Types

4.2 Residential Flat, Commercial and Mixed-Use Developments

Provision	Compliance	Comment
4.2.3 Amenity		
4.2.3.11 Acoustic privacy	Partial compliance	An Acoustic report has been submitted as discussed in the "Amendments" section above. Refer to "Discussion" section below. The proposed development is capable of complying with the condition subject to the acoustic report recommendations.

Discussion

Acoustic Impacts

19. As noted above and in the "Amendments" section, an acoustic assessment was provided. The acoustic report includes several recommendations to ensure the proposal is able to comply with the relevant acoustic requirements. This includes the following:
 - construction of a solid acoustic awning over the entire extent of the outdoor dining area (terrace);
 - upgrade of the ceiling within the tenancy to include 13mm suspended plasterboard ceiling;
 - the audio system to be controlled by a noise limiter;
 - installation of pads to the bottom of chairs and tables to reduce noise generating from the moving of furniture on the solid floor;
 - replace the existing suspension rods that are supporting the exhaust duct beneath the bedroom window on the first floor with a vibration-isolating hanger system; and
 - installation of a resilient layer between the building structure and the exhaust duct that penetrates the facade to reduce impacts to the apartment directly above.
20. The City's Environmental Health officer has reviewed the proposed acoustic recommendations and supports the conclusion of the report that these will result in a significant reduction in acoustic impacts to apartments above the tenancy and that compliance with the City's noise criteria will be achieved.
21. Conditions are recommended requiring compliance with the acoustic report and implementation of the recommended acoustic treatments prior to the increasing patron numbers.
22. As noted above a solid awning over the outdoor terrace area is recommended to ensure acoustic impacts to apartments above are minimised. This will also ensure that the noise generated by the proposed increased patrons across the tenancy (indoor and outdoor) is able to comply with the City's noise criteria. The construction of the awning did not form part of the proposed amendments and changes to the façade of the building will require consultation with the original Architect (DKO Architecture). Therefore, a condition is recommended requiring the lodgement of a separate development application to be lodged within six (6) months of the date of this amended consent for the construction of the awning. During this period over autumn and winter, a trial period of six (6) months is recommended for the proposed increased patron numbers (30 internal and 30 outdoor) to allow the business to operate with all other recommended acoustic measures in place. All other recommendations of the approved acoustic report are required to be implemented prior to the commencement of increased patrons. If, after the conclusion of the trial period, no development application has been lodged for the awning, patron and staff numbers will be required to decrease to the original capacity of 20 patrons.

23. The recommended pathway as outlined above, provides a staged approach to allow an adequate timeframe for the café operators to prepare a development application for the installation of the awning whilst providing assurance to residents that the full range of acoustic recommendations will be implemented to reduce potential noise impacts.

Trading Hours

24. The site is not located within a designated Late Night Trading area. Therefore, it is required to comply with the "All Other Area" trading hours as per Provision 3.15.4 of the Sydney Development Control Plan 2012.
25. The premises is identified as a Category B premises. Under the DCP Category B premises are allowed:
 - internal base hours of 7.00am and 10.00pm with possible extended hours on a trial basis until 12 Midnight; and
 - external base hours of 7.00am and 8.00pm with possible extended hours on a trial basis until 10.00pm.
26. The approved trading hours for the internal areas of the premises, approved under D/2022/716, are 7.00am to 10.00pm Monday to Saturday and 7.00am to 8.00pm Sunday.
27. The proposed hours for the outdoor dining area of between 7.00am and 8.00pm Monday to Sunday comply with the Provision.
28. Whilst it is understood the applicant has amended the proposed outdoor trading hours to between 7.00am and 4.00 pm in response to concerns with impacts to neighbours, given the original proposed hours of between 7.00am and 8.00pm comply with the DCP and acoustic recommendations are to be implemented, it is recommended hours be permitted until 8.00pm which is within the acoustic assessment and recommendations which shows the acoustic impacts can be managed.

Patron Capacity

29. The proposed increase of patrons within the internal area from 20 to 30 and the introduction of a maximum of 30 patrons within the outdoor dining area can be supported if the recommendations of the acoustic report are implemented. The proposed number remains relatively small and can be accommodated comfortably within the premises. As noted above, several conditions are recommended to ensure compliance with the submitted acoustic report, including the construction of a solid awning over the outdoor terrace and acoustic treatment to the ceiling within the tenancy.

Substantially the same development

30. The proposed modified development is substantially the same as the approved development for the following reasons:
 - (a) The development retains the same land use as the approved development, continuing the food and drink premises within the R1 General Residential zone.
 - (b) The modifications do not change the built form or layout of the tenancy.

- (c) The development, as modified, will continue to meet the key objectives of the overall site development (D/2015/1718), that is to provide a ground floor food and drink premises in conjunction with the residential flat building.
- (d) The modifications do not alter the approved developments level of compliance with the applicable environmental planning instruments and policies.
- (e) 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 subject to conditions and implementation of recommendations of the acoustic report.

Consultation

Internal Referrals

- 31. The application was discussed with Council's:
 - (a) Environmental Health.
- 32. See further details under the sub-heading "Acoustic Impacts" in the 'Discussion' section above.

Advertising and Notification

- 33. In accordance with the City of Sydney Community Participation Plan 2019, the proposed development was notified for a period of 14 days between 11 January 2024 and 26 January 2024. A total of 376 properties were notified and 66 submissions were received.
- 34. The submissions raised the following issues:
 - (a) **Issue:** The proposal will increase the traffic and impact parking in the area.
Response: The area is served by several streets allowing for on street parking opportunities. The increase from 20 to 60 patrons is not expected to result in a significant traffic impact in this high density mixed use location.
 - (b) **Issue:** The proposed increase in outdoor seating will result in increased noise impacts to residents above and within proximity of the café.
Response: The proposal complies with the outdoor trading hours permitted under provision 3.15 of the Sydney Development Control Plan. The proposed increase to outdoor seating is within the designated terrace area designed to provided outdoor dining as per the original approval of the residential building. An acoustic assessment has been undertaken and includes mitigation measures to reduce impacts to apartments directly above.

- (c) **Issue:** A Liquor Licence was granted and there is concern the proposed increase in patron numbers will result in increased disturbances to residents.

Response: The proposed increase in patrons will comply with the City's noise criteria when recommended acoustic treatments are implemented.

- (d) **Issue:** Approval might set the tone for an extension of the outdoor trading hours until 10pm in line with approved internal hours.

Response: The proposed trading hours comply with the base hours as set out in Provision 3.15.4 of the Sydney Development Control Plan 2012. An extension of these hours would require additional approval and acoustic assessments which will need to ensure compliance with the City's noise criteria.

- (e) **Issue:** The approval of the overall building did not include provisions for a food and drink premises in this location.

Response: The use of the tenancy as a food and drink premises was approved under D/2022/716 and this amendment does not seek to change the use. The original approval of the overall building included the provision for a commercial premises on the ground floor. Through design refinements the location of the tenancy was moved to the current location. A food and drink premises is a type of commercial premises under the definition in the Sydney Local Environmental Plan 2012.

- (f) **Issue:** The proposal will result in a depreciation of property values.

Response: Impacts on property values is not a planning considerations however the proposal is consistent with the intent of the development approval which included a ground floor commercial tenancy.

- (g) **Issue:** The existing café usually has a wait list with people occupying the communal space whilst they wait for their table. The proposal will mean this occurs during the night.

Response: Under the original approval of the café (D/2022/716) trading hours are approved until 10.00pm in accordance with the Sydney DCP. The proposed trading hours of the outdoor dining area does not exceed these approved hours and therefore should not result in a significant number of people waiting within the public area. The submitted POM includes mitigation measures to reduce noise impacts to residents from the use of thre café. .

- (h) **Issue:** The proposed modification would impact other cafes in the area.

Response: Impacts on other similar establishments are not a planning consideration. However, the proposed modification does not result in an unacceptable patron capacity amount and remains permissible within the R1 General Residential zone.

- (i) **Issue:** The proposal will result in increased pressure to the neighbourhood if allowed to trade at nighttime.

Response: The proposed modification does not seek to extend trading hours beyond the approved hours under the original consent.

- (j) **Issue:** The proposed modification is not substantially the same development.

Response: The proposed modification is considered to be substantially the same development as per Clause 4.55(2) of the Environmental Planning and Assessment Act 1979 as it seeks to retain the approved use of the tenancy as a food and drink premises, does not seek extensive physical works and simply seeks an increase to patron numbers.

- (k) **Issue:** The proposed modification will impact the amenity of the area and therefore does not comply with Clause 6.21 Design Excellence.

Response: The proposed modification seeks to increase patron capacity from 20 to 60 patrons for the indoor and outdoor space of the tenancy and will contribute to the food offering within the area. The proposed use of the terrace for outdoor dining is consistent with the design of the overall building which included the purpose-built commercial tenancy and an outdoor dining terrace.

- (l) **Issue:** Café currently not effectively managing patrons and this will be made worse through this modification.

Response: An updated Plan of Management (POM) has been submitted and approved as part of this modification and is required to be complied with. The POM provides measures that are adequate to manage the proposed increase in patrons. Breach of the POM and conditions of consent will result in possible compliance action from Council.

- (m) **Issue:** The operation of the café already results in rubbish being left around the café from patrons due to the lack of public rubbish bins in the area which will be made worse by the proposed amendments.

Response: An updated POM has been approved as part of this modification which includes the management of waste from the approved use. The POM includes measures to ensure rubbish is dealt with appropriately.

- (n) **Issue:** Staff and patrons smoke outside of the premises which impacts residents above.

Response: Staff and patrons are required to comply with the requirements of the Smoke-free Environmental Act 2000 and Smoke-free Environmental Regulation 2016.

- (o) **Issue:** The park adjacent to the café is used by residents of the apartments and those living in terraces nearby, sharing this with patrons of the café at all hours of the day ruins the community vibe.

Response: The communal open space in front of the premises was developed to be open to the street to allow for a variety of uses, including those attending the café.

- (p) **Issue:** The existing operations and layout of the café already result in noise impacts to residents, the proposed increase in outdoor seating and patron numbers will further exacerbate these impacts.

Issue: Inconsistent with the residential zone.

Response: The proposed modification does not seek to change the approved use of the tenancy as a food and drink premises. The use is permissible with consent under the R1 General Residential zone.

- (q) **Issue:** Opposed to the proposed modification to the approved trading hours of 8.00am to 3.00pm.

Response: The proposed modification does not seek to alter the approved internal areas of the premises which are between 7.00am and 10.00pm Monday to Saturday and between 8.00pm and 8.00am Sunday. The proposal seeks to allow outdoor dining until 8.00pm and increase patron numbers to allow 20 patrons inside and 30 patrons outside.

Financial Contributions

Contribution under Section 7.11 of the EP&A Act 1979

35. The proposed modification will not change the development contributions required under the approved development.

Contribution under Section 7.13 of the Sydney Local Environmental Plan 2012

36. The proposed modification will not change the affordable housing contributions required under the approved development.

Relevant Legislation

37. Environmental Planning and Assessment Act 1979.

Conclusion

38. The proposed amendment to D/2022/716 is recommended for approval as it complies with the relevant controls of the Sydney Local Environmental Plan 2012 and Sydney Development Control Plan 2012, remains consistent with the approved land use, which is permissible within the zone, will allow for the intended use of outdoor area for dining and, subject to conditions, will provide adequate acoustic mitigation measures to ensure impacts to residents is minimised.

ANDREW THOMAS

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