
From: DYPXCPWEB@northernbeaches.nsw.gov.au
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22/02/2023

MR Kevin Dyer
1 / 37 Moore RD
FRESHWATER NSW 2096
[REDACTED]

RE: DA2022/2281 - 80 Undercliff Road FRESHWATER NSW 2096

19 February 2023 Kevin Dyer
1/37 Moore Road
Freshwater NSW 2096

Chief Executive Officer
Northern Beaches Council
725 Pittwater Road
Dee Why NSW 2099

Attn: Phil Lane

Dear CEO

Re: DA 2022/2281 - Use of unlawful structure as function centre, increase in patron numbers and extended hours of operation | 80 Undercliff Road, Freshwater

I live at unit 1 of 37 Moore Road, Freshwater.

I make this submission with respect to the development application DA 2022/2281 (DA).

Proposed Development

The development proposed in the DA is to seek development consent to use the unlawful structure that has been erected in the front section of the curtilage of the heritage listed property at 80 Undercliff Road, Freshwater (Premises).

The proposed use of the unlawful structure is as a function centre, a use that is prohibited at the Premises, which is zoned RE2: Private Recreation.

The DA also proposes to increase the number of patrons to 50 patrons in the unlawful structure, and 100 patrons indoor. The DA says that there will not be more than 130 patrons at the Premises at any one time, but does not include the operations of the licenced café that also operates at the Premises.

The DA also proposes to increase the hours of operation from 5am to 12am Monday to Saturday, and 10am to 10pm Sunday.

Premises

The Premises is located within a public reserve and it does not provide any parking on site for its patrons. The Premises relies upon public parking located within the public carpark at the end of Moore Road. This public car park has 46 time limited parking spaces. During heavy public use periods in the summer this carpark will often be full before 8am.

The Premises are listed as an item of environmental heritage - "Freshwater" Restaurant (I76) in schedule 5 to the Warringah Local Environmental Plan 2011 (WLEP).

The State Heritage Inventory for the "Freshwater" Restaurant says in the Statement of Significance that it is:

"A building with great social and historical significance as an early meeting place & recreation venue for the first settlers in Freshwater. Representative of the federation style, with high integrity. Prominent local landmark located above Freshwater Beach."

The physical description of the heritage item is a:

"Two storey building of residential form. Timber weatherboard walls and tiled multi-gabled roof. Gables contain a variety of detail from timber shingles & timber battened trim to a variety of window types. Wide segmented veranda, infilled with glazing."

Reasons for refusal of the DA

There are a number of reasons as to why this development application should be refused:

1. There has been no assessment of the unlawful structure remaining on the Premises, particularly as it relates to the heritage significance of "Freshwater" Restaurant.
 - 1.1 The DA seeks development consent to use a building that has been erected on the land without undertaking an assessment of the heritage significance of the erection of that structure on the heritage item.
 - 1.2 The unlawful structure is the "Pilu Pavilion" which is located in the northwest portion of the Premises, and which has the greatest impact upon how the heritage item is viewed from the public domain.
 - 1.3 Secondly, there appears to be another white tent like structure that has been identified as the "wedding ceremony umbrella". This does not appear to have been approved, and it is highly visible from the public domain. This is also proposed to be used as part of the proposed "function centre" use as part of the holding of wedding ceremonies on the Premises.
 - 1.4 No assessment of these structures, and their use has been undertaken as part of the DA.
 - 1.5 This is contrary to cl 5.10(4) of the WLEP. Council cannot determine the DA until such time as it has considered the effect of the proposed development on the heritage significance of the item or area concerned.
 - 1.6 Given the historical significance of the item, and the intrusive aspect of the structures proposed to be used as part of the proposed "function centre" use, the failure to provide any form of a heritage assessment is significant.
 - 1.7 On this basis alone the DA should be refused.
2. The proposed development is a prohibited use within the RE2 Private Recreation Zone.
 - 2.1 The proposed use of the unlawful structure is for the purpose of a function centre. This use is defined in the WLEP as:

"function centre means a building or place used for the holding of events, functions, conferences and the like, and includes convention centres, exhibition centres and reception centres, but does not include an entertainment facility"
 - 2.2 Development for the purposes of a "function centre" is prohibited on the Premises.
 - 2.3 Development for the following purpose is permissible in the Zone RE2:

"Aquaculture; Building identification signs; Business identification signs; Community facilities; Emergency services facilities; Environmental facilities; Environmental protection works; Kiosks; Recreation areas; Recreation facilities (indoor); Recreation facilities (outdoor); Roads"

2.4 Development for any other purpose is prohibited within the RE2 Zone.

2.5 In schedule 1 to the WLEP, cl 15 provides additional development for the purposes of restaurants or cafes is permitted with consent.

2.6 The Applicant says that the proposed use of the unlawful structure as a "function centre" is ancillary to the use of the Premises as a "restaurant or café".

2.7 In *Westpoint Corporation Pty Ltd v Rockdale City Council* (2000) 109 LGERA 398 at 403: "Categorisation of a proposed development conventionally is undertaken by reference to defined terms or purposes in the relevant environmental instrument principally to determine whether the proposed development is for a permissible purpose. Unless a proposed development is shown to be for a permissible purpose of development, it is axiomatic that a valid development consent cannot in law be granted to that application."

2.8 The Dictionary to the WLEP provides the following definition of a "restaurant or café"; "restaurant or cafe means a building or place the principal purpose of which is the preparation and serving, on a retail basis, of food and drink to people for consumption on the premises, whether or not liquor, take away meals and drinks or entertainment are also provided, but does not include the preparation and serving of food and drink to people that occurs as part of-

- (a) an artisan food and drink industry, or
- (b) farm gate premises.

Note-

Restaurants or cafes are a type of food and drink premises-see the definition of that term in this Dictionary."

2.9 The dictionary to the WLEP defines "food and drink" premises to mean:

"food and drink premises means premises that are used for the preparation and retail sale of food or drink (or both) for immediate consumption on or off the premises, and includes any of the following-

- (a) a restaurant or cafe,
- (b) take away food and drink premises,
- (c) a pub,
- (d) a small bar.

Note-

Food and drink premises are a type of retail premises-see the definition of that term in this Dictionary."

2.10 Development for the purpose of a "function centre" is a separate and distinct genus of use to that of a "restaurant", which is a kind of "food and drink premises" which is a kind of "retail premises". The holding of events or functions is not a kind of retail use. Instead, it is a use for the purpose of the holding of events, functions and conferences and the like.

2.11 The fact that the "restaurant or café" might provide food or drink to the function, conference or event being held on part or the whole of the Premises does not make that separate use subordinate or ancillary to the permissible use. It is a separate and distinct use of the Premises which is for a purpose that is prohibited on the land.

2.12 The mere fact that people may be celebrating an event (such as a wedding, a wedding anniversary, or a birthday) at the restaurant or café does not make the holding of events, functions or conferences permissible on the Premises.

2.13 In the case of *Chamwell Pty Limited v Strathfield Council* [2007] NSWLEC 114

(*Chamwell*), Preston CJ held that when characterising the use of land for a particular purpose, one considers the nature of the use. In this case, the applicant argued that access roads into the supermarket were for the purpose of a road, which was a permissible use within the zoning table applicable to that land. Development for the purposes of a shop was prohibited on the land upon which these access roads were proposed to be located.

2.14 In Chamwell, Preston CJ found that the nature of the use of the access road was, as a matter of fact, being used for the subordinate purpose of the supermarket.

2.15 In the case of the development proposed under the DA, parts or all of the land contained with the Premises is proposed to be used for the purpose of a "function centre" which is a separate and distinct kind of development from that of a "restaurant or café".

2.16 This is evidenced by the fact that the restaurant component of the business will be closed during some functions, and the fact that it is intended to operate separately to the restaurant business during some functions - per the applicant's Statement of Environmental Effects.

2.17 The holding of a wedding ceremony is using the land for the purpose of holding an event. The use of the whole or part of the Premises to provide catering to these events and functions is a separate and distinct use of the Premises which is by its nature, the use of the land for the purpose of a "function centre". Similarly, use of the Premises for a reception associated with events held on the Premises would not be for the purpose of a "restaurant or café" as this is not the retail sale of food or drink on the Premises.

2.18 In addition, there are other structures, which do not appear to have development consent for the erection of the structure, which will be used solely for the purpose of events, being the "Wedding Ceremony Umbrella", which is located on the south eastern part of the Premises. This structure is not used for any other purpose that could be related to the operation of the Premises as a "restaurant or café".

3. There is a significant shortfall in the required parking for the proposed development.

3.1 Part C3 of the Warringah Development Control Plan (WDCCP) refers to the parking requirements at Appendix 1 in Part H of the WDCCP.

3.2 The relevant parking control for a Restaurant is:

"Whichever is the greater of:

15 spaces per 100 m² GFA, or

1 space per 3 seats.

The above rate may be reduced if there is, in the consent authority's opinion, suitable available parking in the vicinity during the operating hours of the proposed development."

3.3 No traffic study has been conducted to support the shortfall in parking required as part of the proposed development. Notwithstanding this, it is my observation that during peak times of the year over summer, the carpark is full from 8am to sunset. There would not be suitable available parking in the vicinity during the operating hours of the proposed development.

3.4 The proposed development is for 130 patrons on the Premises at any one time, which would result in a requirement for 44 parking spaces based upon the stated number of patrons.

3.5 The Applicant states that they have a credit of 28 parking spaces from a previous development consent. I have not been able to view this development consent to confirm this statement, however assuming this is correct, this would leave a shortfall of 16 parking spaces for the proposed development.

3.6 If the Applicant seeks to rely upon some kind of "existing use" that somehow permits unlimited number of patrons (which never would have been the case as it was likely that the consent was accompanied by plans which showed the proposed number of tables or seats, or the application would have had the proposed number of patrons written on it), it is up to the Applicant to make good on this claim to satisfy that the consent authority.

3.7 In any event, this is a new development application that seeks consent for a new purpose and which seeks to increase the number of patrons permitted to occupy the Premises, and that seeks to increase the permitted hours of operation. It must be assessed upon its merits, and against the controls that are applicable to the proposed development today.

3.8 It is not an amending development application, and it is not a development application that purports to rely upon any "existing use" within the meaning of the EP&A Act. As such, any

reliance upon previous development consents should be disregarded.

3.9 There are only 46 parking spaces in the public parking adjoining the Premises at the end of Moore Road, if the Applicant were to rely upon this parking for their development, they would use all but 2 of the parking spaces available to the public.

3.10 This is notwithstanding that the fact that the extension to the kiosk approved under DA 2015/1048 approved seating for 34 additional patrons (based upon the seats shown in the approved plans), with a parking requirement of 12 spaces. However, this was not provided as part of that development consent. This means the total parking demand on the Premises would be 154 patrons at any one time with a total demand of 52 parking spaces. This is well in excess of the amount of available parking available in the vicinity of the Premises.

3.11 Essentially, the Premises would be using all of the public parking adjoining the Premises, and it would still have a shortfall in the amount of required parking.

3.12 Given that it is common for there to be a significant shortage in parking during peak parts of the season in the public carpark, the proposed development should be refused unless additional parking is provided as part of the proposal. It is not clear to me how this could be provided.

4. The Plan of Management does not comply with the Court's planning principle

4.1 The Plan of Management provided with the DA does not satisfy the Land and Environment Court's planning principle as identified in *Renaldo Plus 3 Pty Limited v Hurstville City Council* [2005] NSWLEC 315 (*Renaldo*).

4.2 In *Renaldo*, at [53] to [54], Brown C said:

"53 Management Plans (or similarly named documents) provide further details on the operation of a particular use that may not necessarily be appropriate as conditions of consent.

Management Plans are a well known concept in environmental law (*Transport Action Group Against Motorways Inc v Roads & Traffic Authority* [1999] NSWCA 196 at par 122) and can be used in a range of different circumstances. Often, and is the case in this application, the contents of a Management Plan are critical to the decision of whether a development application should be approved or refused.

54 In considering whether a Management Plan is appropriate for a particular use and situation, the following questions should be considered:

1. Do the requirements in the Management Plan relate to the proposed use and complement any conditions of approval?
2. Do the requirements in the Management Plan require people to act in a manner that would be unlikely or unreasonable in the circumstances of the case?
3. Can the source of any breaches of the Management Plan be readily identified to allow for any enforcement action?
4. Do the requirements in the Management Plan require absolute compliance to achieve an acceptable outcome?
5. Can the people the subject of the Management Plan be reasonably expected to know of its requirements?
6. Is the Management Plan to be enforced as a condition of consent?
7. Does the Management Plan contain complaint management procedures?
8. Is there a procedure for updating and changing the Management Plan, including the advertising of any changes?

4.3 I address each of the abovementioned planning principles identified by the Court in *Renaldo* below.

Do the requirements in the Management Plan relate to the proposed use and complement any conditions of approval?

4.4 Yes. The Plan of Management provided with the DA has been proposed to address two issues:

4.4.1 The number of patrons using the Premises at any one time.

4.4.2 Managing acoustic impacts of use of the unlawful structure and outdoor areas for the

holding of events and functions.

4.5 I am not aware of any proposed conditions of consent, however it appears that some of the acoustic requirements are inconsistent with the use of the proposed unlawful structures given that the acoustic controls require that doors and windows are to be closed between 10pm and 7am.

Do the requirements in the Management Plan require people to act in a manner that would be unlikely or unreasonable in the circumstances of the case?

4.6 The Plan of Management requires:

4.6.1 that amplifiers for voice and music must be limited to 90dBA Sound Power, but does not explain how this will be measured or enforced;

4.6.2 that amplified background music is permitted in the indoor restaurant and pavilion areas to a maximum of 65dBA as a sound pressure level, but again does not explain how this will be measured or enforced;

4.6.3 all doors and windows are to remain shut after 10:00pm and not opened before 7:00am, it is noted that there are no doors and windows in the external areas, this would suggest that these areas could not be used at these times;

4.6.4 low level background music is permitted to be played with windows open before 10:00pm, no levels are provided, and it does not explain how this would be measured and enforced;

4.6.5 signs will be displayed at all exits reminding patrons to be mindful of noise when leaving the premise, it is not clear how this would be effective to manage noise. It is usually expected that if this is an issue which is essential as to whether impacts from the operation of the Premises can be managed, that there should be security staff present at these exit points to manage the behaviour of patrons.

4.7 All of the above suggest that the Plan of Management requires people to behave in a manner that would be unlikely or unreasonable in the circumstances of the case. This is important, as the Acoustic Report relies upon the management of noise to make the proposed development comply with the required noise controls for development in residential areas during shoulder and night time hours of operation.

Can the source of any breaches of the Management Plan be readily identified to allow for any enforcement action?

4.8 Given that some of these potential breaches are from the requirement that certain aspects of the use are limited to a set dBA. There are no measurement and enforcement controls that relate to this. This is important given that the DA relies upon these acoustic management measures being strictly enforced.

Do the requirements in the Management Plan require absolute compliance to achieve an acceptable outcome?

4.9 Yes. In this case, the potential impacts relate largely to noise impacts. It requires the management of noise to a set level, and that doors and windows remain closed at certain times.

Can the people the subject of the Management Plan be reasonably expected to know of its requirements?

4.10 No. The Plan of Management applies in some cases to third party entertainers, or ceremony officiators who would be bringing in their own equipment. The Plan of Management does not explain how they will be made aware of the requirements, and how these requirements will be enforced.

Is the Management Plan to be enforced as a condition of consent?

4.11 We assume that it would have to be so as to make the acoustic impacts acceptable, per the Acoustic Report.

Does the Management Plan contain complaint management procedures?

4.12 Yes, it does. However, the complain management process is unclear, and it is also unclear as to how it would be resolved in the event that the complainant was not satisfied that

their complaint had been appropriately managed and dealt with.

4.13 Further, there does not appear to be any process for management of complaints relating to repeated purported breaches of the requirements of the Management Plan.

4.14 It is recommended that in circumstances where there are more than 5 complaints received in relation to activities in a calendar year, that a report is required to be provided to Council along with the proposed report outlining how the complaints were resolved, or will be resolved in the future.

Is there a procedure for updating and changing the Management Plan, including the advertising of any changes?

4.15 No there is not. There should be a condition that requires that an annual report prepared by a suitably qualified independent consultant be provided to Council outlining the operator's compliance with the requirements of the Management Plan, along with any recommendations as to how the plan should be amended, provided to Council, and uploaded to the operator's website.

For the abovementioned reasons, I consider that Council does not have power to determine the application by way of approval and the application should be refused.

Yours sincerely

Kevin Dyer