

APPLICATION FOR MODIFICATION ASSESSMENT REPORT

Application Number:	Mod2018/0034
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Responsible Officer:	Renee Ezzy
Land to be developed (Address):	Lot 1 DP 9900, 874 Pittwater Road DEE WHY NSW 2099
Proposed Development:	Modification of Development Consent DA2014/0731 granted for Use of premises for use as a gymnasium
Zoning:	Warringah LEP2011 - Land zoned B4 Mixed Use
Development Permissible:	Yes
Existing Use Rights:	No
Consent Authority:	Northern Beaches Council
Land and Environment Court Action:	No
Owner:	Sen & San Pty Ltd
Applicant:	Tony Ashcroft

Application lodged:	29/01/2018
Integrated Development:	No
Designated Development:	No
State Reporting Category:	Commercial/Retail/Office
Notified:	13/02/2018 to 01/03/2018
Advertised:	Not Advertised
Submissions Received:	2
Recommendation:	Approval

ASSESSMENT INTRODUCTION

The application has been assessed in accordance with the requirements of the Environmental Planning and Assessment Act 1979 and the associated Regulations. In this regard:

- An assessment report and recommendation has been prepared (the subject of this report) taking into account all relevant provisions of the Environmental Planning and Assessment Act 1979, and the associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon the subject site and adjoining, surrounding and nearby properties;
- Notification to adjoining and surrounding properties, advertisement (where required) and referral to relevant internal and external bodies in accordance with the Act, Regulations and relevant Development Control Plan;
- A review and consideration of all submissions made by the public and community interest groups in relation to the application;
- A review and consideration of all documentation provided with the application (up to the time of determination);

- A review and consideration of all referral comments provided by the relevant Council Officers, State Government Authorities/Agencies and Federal Government Authorities/Agencies on the proposal.

SUMMARY OF ASSESSMENT ISSUES

Warringah Development Control Plan - C3 Parking Facilities

SITE DESCRIPTION

Property Description:	Lot 1 DP 9900 , 874 Pittwater Road DEE WHY NSW 2099
Detailed Site Description:	<p>The site is legally known as Unit 2, Lot 1 in DP 9900, No. 874 Pittwater Road, Dee Why.</p> <p>The site is a corner allotment with street frontage to Pittwater Road and Oaks Avenue, Dee Why. The site is located within the B4 Mixed Use zone and accommodates an existing building with commercial/retail premises.</p> <p>Surrounding development consists of retail and commercial premises.</p>

Map:



SITE HISTORY

Development Application No. DA2014/0731 for a change of use of premises to a gymnasium was approved by Council on 19 August 2014.

Modification Application No. MOD2018/0034 to amend the hours of operation in Condition No. 6 of DA2014/0731 was lodged with Council on 29 January 2018. This application is the subject of this

assessment.

PROPOSED DEVELOPMENT IN DETAIL

The proposed modification seeks to amend Condition No. 6 Hours of Operation as follows:

Current condition:

6. Hours of Operation

The hours of operation are to be restricted to:

Monday to Sunday: 5.30am - 10.30pm

Upon expiration of the permitted hours, all service (and entertainment) shall immediately cease, no patrons shall be permitted entry and all customers on the premises shall be required to leave within the following 30 minutes.

Reason: Information to ensure that amenity of the surrounding locality is maintained. (DACPLG08)

Amend condition 6 to read:

6. Hours of Operation

The hours of operation are to be restricted to:

Monday to Sunday: 5.00am - 10.30pm

Upon expiration of the permitted hours, all service (and entertainment) shall immediately cease, no patrons shall be permitted entry and all customers on the premises shall be required to leave within the following 30 minutes.

Reason: Information to ensure that amenity of the surrounding locality is maintained. (DACPLG08)

In consideration of the application a review of (but not limited) documents as provided by the applicant in support of the application was taken into account detail provided within Attachment C.

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

The relevant matters for consideration under the Environmental Planning and Assessment Act, 1979, are:

The application has been assessed in accordance with the requirements of the Environmental Planning and Assessment Act 1979 and the associated Regulations. In this regard:

- An assessment report and recommendation has been prepared and is attached taking into all relevant provisions of the Environmental Planning and Assessment Act 1979 and associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon all lands whether nearby, adjoining or at a distance;
- Consideration was given to all documentation provided (up to the time of determination) by the applicant, persons who have made submissions regarding the application and any advice given by relevant Council / Government / Authority Officers on the proposal;

In this regard, the consideration of the application adopts the previous assessment detailed in the

Assessment Report for DA2014/0731, in full, with amendments detailed and assessed as follows:

The relevant matters for consideration under Section 96(2) of the Environmental Planning and Assessment Act, 1979, are:

Section 96(2) - Other Modifications	Comments
A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:	
(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and	The development, as proposed, has been found to be such that Council is satisfied that the proposed works are substantially the same as those already approved under DA2014/0731.
(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and	Development Application DA2014/0731 did not require concurrence from the relevant Minister, public authority or approval body.
(c) it has notified the application in accordance with: (i) the regulations, if the regulations so require, or (ii) a development control plan, if the consent authority is a council that has made a development control plan under section 72 that requires the notification or advertising of applications for modification of a development consent, and	The application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000, Warringah Local Environment Plan 2011 and Warringah Development Control Plan.
(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.	No submissions were received in relation to this application.

Section 79C Assessment

In accordance with Section 96(3) of the Environmental Planning and Assessment Act 1979, in determining an modification application made under Section 96 the consent authority must take into consideration such of the matters referred to in section 79C(1) as are of relevance to the development the subject of the application.

The relevant matters for consideration under Section 79C of the Environmental Planning and Assessment Act, 1979, are:

Section 79C 'Matters for Consideration'	Comments
Section 79C (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on “Environmental Planning Instruments” in this report.
Section 79C (1) (a)(ii) – Provisions of any draft environmental planning instrument	None applicable.
Section 79C (1) (a)(iii) – Provisions of any development control plan	Warringah Development Control Plan applies to this proposal.
Section 79C (1) (a)(iia) – Provisions of any planning agreement	None applicable.
Section 79C (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation 2000)	<p><u>Division 8A</u> of the EP&A Regulation 2000 requires the consent authority to consider Prescribed conditions of development consent. These matters have been addressed via a condition in the original consent.</p> <p><u>Clause 50(1A)</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer at lodgement of the development application. This clause is not relevant to this application.</p> <p><u>Clauses 54 and 109</u> of the EP&A Regulation 2000, Council requested additional information and has therefore considered the number of days taken in this assessment in light of this clause within the Regulations. No Additional information was requested.</p> <p><u>Clause 92</u> of the EP&A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This clause is not relevant to this application.</p> <p><u>Clauses 93 and/or 94</u> of the EP&A Regulation 2000 requires the consent authority to consider the upgrading of a building (including fire safety upgrade of development). This clause is not relevant to this application.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This Clause is not relevant to this application.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider the provisions of the Building Code of Australia (BCA). This matter has been addressed via a condition in the original consent.</p> <p><u>Clause 143A</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer prior to the issue of a Construction Certificate. This clause is not relevant to this</p>

Section 79C 'Matters for Consideration'	Comments
	application.
Section 79C (1) (b) – the likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality	(i) The environmental impacts of the proposed development on the natural and built environment are addressed under the Warringah Development Control Plan section in this report. (ii) The proposed development will not have a detrimental social impact in the locality considering the character of the proposal. (iii) The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.
Section 79C (1) (c) – the suitability of the site for the development	The site is considered suitable for the proposed development.
Section 79C (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs	See discussion on “Public Exhibition” in this report.
Section 79C (1) (e) – the public interest	No matters have arisen in this assessment that would justify the refusal of the application in the public interest.

EXISTING USE RIGHTS

Existing Use Rights are not applicable to this application.

NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the relevant Development Control Plan.

As a result of the public exhibition process council is in receipt of 2 submission/s from:

Name:	Address:
Mr Paul Apostolou	31 / 10 Oaks Avenue DEE WHY NSW 2099
Ms Adriana Sammartano	31 / 10 Oaks Avenue DEE WHY NSW 2099

The following issues were raised in the submissions and each have been addressed below:

- The original development application (DA2014/0731) was not advertised and as a result no residents were aware of the proposed gym. The Council should have approved the DA in 2014 with the condition of compelling the gym operator to soundproof the building in consideration of residents living in the adjacent buildings (along Oaks Avenue and Pittwater Road).*

Comment:

The original application was notified to 55 adjoining and surrounding neighbours. No submissions were received in response to the notification. The gym was approved as a small studio which operates primarily with a trainer working one on one with clients and some group classes of up to 15 clients. There was no requirement for the operator to provide additional soundproofing.

- *The gym sounds like a nightclub and Council is aware of the continual noise complaints that have been made since October 2014. The noise from the loud music commences at 5.30am Monday to Friday, (and 6.30am Saturdays and 8am on Sundays). Under NSW noise legislation, noise is restricted from Sunday to Thursday 10pm to 8am, and Friday, Saturday and days followed by a public holiday: 12am to 8am. WHY HAS COUNCIL NOT TAKEN ANY ACTION?*
- *The loud music continues in the evening on Monday to Friday from 5.30pm to 8pm. There is no respite from the noise ON ANY DAY even though Council has been aware of this issue since October 2014.*

Comment:

Following a complaint to Council, Council's Environmental Health Officer attended the site and carried out a formal noise assessment. The following was the outcome:

"I couldn't detect any noise from the F45 gym during the inspection. The traffic noise was the dominate background sound and even that wasn't at a level which in my opinion could cause discomfort.

Adrianna advised me that F45 music was playing during my inspection. I discuss the matter with Adrianna and advised her that for Council to have the ability to take action the music would have to be a lot louder and I gave her a few examples of cases of potential offensive noise.

We discussed the option of the community justice centre to set up a mediation with F45 and I also tentatively advised her to speak to a few different acoustic engineers to get information on how to sound proof her premises.

No evidence of offensive noise was observed from her premises. I recommend Council to take no further action on the matter.

Accordingly, this matter is not considered to hold determining weight.

- *The gym lied in its DA application (DA2014/0731) in 2014. There was no mention whatsoever of loud music and on page 18 of the Statement of Environmental Effects stated:
"The development will not create any noise emissions that would unreasonably diminish the amenity of adjoining tenants or nearby residents. In respect of operational matters, noise generated would be limited to the use of training equipment and a small, domestic sound system. Noise would not be audible in adjoining premises or on the public streets and therefore complies with D3 - noise." This is not true as photos from the gym's Facebook site shows a loud nightclub style sound system with various large speakers positioned throughout the gym. In fact, most Saturday mornings the loud music can be heard on Oaks Avenue.*

Comment:

The applicant as part of their application have submitted a Noise Impact Assessment for the premises. The report provides a number of recommendations which are to be implemented as part of this modification application. Subject to these requirements, the proposal is considered acceptable in terms of noise impacts.

- In November to December 2017, the gym ILLEGALLY commenced its operations at 4.30am on Monday to Friday and it took Council 5 WEEKS to have the operator comply with its DA approved hours of operation. THIS IS UNACCEPTABLE MANAGEMENT FROM THE

NORTHERN BEACHES COUNCIL.

Has the Council ever inspected the gym and observed the sound system it utilizes which is not the same as "...a small, domestic sound system..." described in the original DA in 2014? This type of sound system has no place in the midst of a residential area and Council should have taken action as soon as it received a complaint in 2014.

Comment:

This issue has been addressed in the new condition (Condition No. 7) imposed as part of this modification application.

MEDIATION

No requests for mediation have been made in relation to this application.

REFERRALS

Internal Referral Body	Comments														
Building Assessment - Fire and Disability upgrades	The application has been investigated with respects to aspects relevant to the Building Certification and Fire Safety Department. There are no objections to approval of the development.														
Environmental Health (Industrial)	<table border="1"> <tr> <td>Is the proposal for an industrial use?</td><td>YES</td></tr> <tr> <td>Was sufficient documentation provided appropriate for referral?</td><td>YES</td></tr> <tr> <td>Are the reports undertaken by a suitably qualified consultant?</td><td>YES</td></tr> <tr> <td>Have you reviewed the Statement of Environmental Effects, and consider ongoing use, such as: - Processes with emphasis on potential pollution (air, noise, water and land) - Hazardous Materials, liquids stored on site - Waste storage, disposal. - Mechanical ventilation</td><td>YES</td></tr> <tr> <td>Have you Consider impact of noise, hours of operation, location to nearest residential, location of equipment, times of deliveries, noise management plans, acoustic reports etc.</td><td>YES</td></tr> <tr> <td>If the proposal is a scheduled premises have you recommended that the DAO refer the proposal to OEH?</td><td>N/A</td></tr> <tr> <td colspan="2"> General Comments It appears the Mod application is as a result of a complaint concerning noise. I have made certain enquiries and believe the issue to be the bass or low frequency noise potentially going through the building rather than general use of the premises. </td></tr> </table>	Is the proposal for an industrial use?	YES	Was sufficient documentation provided appropriate for referral?	YES	Are the reports undertaken by a suitably qualified consultant?	YES	Have you reviewed the Statement of Environmental Effects, and consider ongoing use, such as: - Processes with emphasis on potential pollution (air, noise, water and land) - Hazardous Materials, liquids stored on site - Waste storage, disposal. - Mechanical ventilation	YES	Have you Consider impact of noise, hours of operation, location to nearest residential, location of equipment, times of deliveries, noise management plans, acoustic reports etc.	YES	If the proposal is a scheduled premises have you recommended that the DAO refer the proposal to OEH?	N/A	General Comments It appears the Mod application is as a result of a complaint concerning noise. I have made certain enquiries and believe the issue to be the bass or low frequency noise potentially going through the building rather than general use of the premises.	
Is the proposal for an industrial use?	YES														
Was sufficient documentation provided appropriate for referral?	YES														
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Have you Consider impact of noise, hours of operation, location to nearest residential, location of equipment, times of deliveries, noise management plans, acoustic reports etc.	YES														
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Internal Referral Body	Comments		
	<p>Additional residential premises can reasonably be expected adjacent to the Gym in the near future.</p> <p>The applicant has supplied as much information as reasonably possible and the use of the gym for extended hours is possible subject to conditions</p> <table border="1"> <tr> <td>Recommendation</td><td>APPROVAL - subject to conditions</td></tr> </table> <p>Comments completed by: Anthony Foy</p> <p>Date: 7.2.2018</p>	Recommendation	APPROVAL - subject to conditions
Recommendation	APPROVAL - subject to conditions		
Traffic Engineer	The application was referred to Council's Traffic Engineer who has raised no objections to the proposed change in hours. As the development does not seek to increase the number of patrons, the traffic assessment undertaken for the original application remains applicable to this application.		

External Referral Body	Comments
Ausgrid: (SEPP Infra.)	The proposal was referred to Ausgrid. No response has been received within the 21 day statutory period and therefore, it is assumed that no objections are raised and no conditions are recommended.
NSW Police - Local Command (CPTED)	The proposed change of operating hours was referred to the NSW Police Local Area Command. No objection has been received in relation to the proposed modification application.

ENVIRONMENTAL PLANNING INSTRUMENTS (EPIs)*

All, Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the merit assessment of this application.

In this regard, whilst all provisions of each Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the assessment, many provisions contained within the document are not relevant or are enacting, definitions and operational provisions which the proposal is considered to be acceptable against.

As such, an assessment is provided against the controls relevant to the merit consideration of the application hereunder.

State Environmental Planning Policies (SEPPs) and State Regional Environmental Plans (SREPs)

SEPP 55 - Remediation of Land

Clause 7 (1) (a) of SEPP 55 requires the Consent Authority to consider whether land is contaminated. Council records indicate that the subject site has been used for commercial purposes for a significant period of time with no prior land uses. In this regard it is considered that the site poses no risk of contamination and therefore, no further consideration is required under Clause 7 (1) (b) and (c) of SEPP 55 and the land is considered to be suitable for the commercial land use.

SEPP (Infrastructure) 2007

Ausgrid

Clause 45 of the SEPP requires the Consent Authority to consider any development application (or an application for modification of consent) for any development carried out:

- within or immediately adjacent to an easement for electricity purposes (whether or not the electricity infrastructure exists).
- immediately adjacent to an electricity substation.
- within 5.0m of an overhead power line.
- includes installation of a swimming pool any part of which is: within 30m of a structure supporting an overhead electricity transmission line and/or within 5.0m of an overhead electricity power line.

Comment:

The proposal was referred to Ausgrid. No response has been received within the 21 day statutory period and therefore, it is assumed that no objections are raised and no conditions are recommended.

Warringah Local Environmental Plan 2011

Is the development permissible?	Yes
After consideration of the merits of the proposal, is the development consistent with:	
aims of the LEP?	Yes
zone objectives of the LEP?	Yes

Principal Development Standards

Development Standard	Requirement	Approved	Proposed	% Variation	Complies
Height of Buildings:	24m	No change to existing	No change to approved	N/A	Yes

Compliance Assessment

Clause	Compliance with Requirements

Clause	Compliance with Requirements
4.3 Height of buildings	Yes
6.3 Flood planning	Yes
6.4 Development on sloping land	Yes

Warringah Development Control Plan

Built Form Controls

There are no physical building changes proposed, therefore there are no changes to the Built Form Controls.

Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
A.5 Objectives	Yes	Yes
C2 Traffic, Access and Safety	Yes	Yes
C3 Parking Facilities	Yes	Yes
C6 Building over or adjacent to Constructed Council Drainage Easements	Yes	Yes
C9 Waste Management	Yes	Yes
D3 Noise	Yes	Yes
Part G Special Area Controls	Yes	Yes

Detailed Assessment

C3 Parking Facilities

The proposed change of hours does not change the approved parking demand or requirements.

POLICY CONTROLS

Warringah Section 94A Development Contribution Plan

Section 94 contributions were levied on the Development Application.

CONCLUSION

The site has been inspected and the application assessed having regard to all documentation submitted by the applicant and the provisions of:

- Environmental Planning and Assessment Act 1979;
- Environmental Planning and Assessment Regulation 2000;
- All relevant and draft Environmental Planning Instruments;
- Warringah Local Environment Plan;
- Warringah Development Control Plan; and
- Codes and Policies of Council.

This assessment has taken into consideration the submitted plans, Statement of Environmental Effects, all other documentation supporting the application and public submissions, and does not result in any unreasonable impacts on surrounding, adjoining, adjacent and nearby properties subject to the conditions contained within the recommendation.

In consideration of the proposal and the merit consideration of the development, the proposal is considered to be:

- Consistent with the objectives of the DCP
- Consistent with the zone objectives of the LEP
- Consistent with the aims of the LEP
- Consistent with the objectives of the relevant EPIs
- Consistent with the objects of the Environmental Planning and Assessment Act 1979

It is considered that the proposed development satisfies the appropriate controls and that all processes and assessments have been satisfactorily addressed.

RECOMMENDATION

THAT Council as the consent authority grant approval to Modification Application No. Mod2018/0034 for Modification of Development Consent DA2014/0731 granted for Use of premises for use as a gymnasium on land at Lot 1 DP 9900,874 Pittwater Road, DEE WHY, subject to the conditions printed below:

A. Modify Condition 6. Hours of Operation to read as follows:

6. Hours of Operation

The hours of operation are to be restricted to:

Monday to Sunday: 5.00am - 10.30pm

Upon expiration of the permitted hours, all service (and entertainment) shall immediately cease

Reason: Information to ensure that amenity of the surrounding locality is maintained. (DACPLC

B. Add Condition 7. Noise Reduction Measures as follows

7. Noise Reduction Measures

The ongoing operation of the premises must ensure compliance with the following:

A. Compliance with the findings and recommendations contained in the report by Acoustic Log

- The external windows shall be closed during the proposed extended hours.
- No free weight is allowed to be dropped before 5:30am.
- PA is not allowed to be used before 5:30am.

B. Base levels in any music played being reduced to a minimum to reduce the potential of bas

C. Music or amplified announcements or operational noise not being audible in any residenti

Reason: To maintain the amenity of any adjacent residential property (DACHPGOG5)

In signing this report, I declare that I do not have a Conflict of Interest.

Signed

Renee Ezzy, Principal Planner

The application is determined under the delegated authority of:




Anna Williams, Manager Development Assessments






















ATTACHMENT A

No notification plan recorded.

ATTACHMENT B

Notification Document	Title	Date
 2018/092751	Notification Map	02/02/2018

ATTACHMENT C

Reference Number	Document	Date
 2018/083555	ASIC Current Company Extract	25/01/2018
 2018/083558	DA - Fee Quote	25/01/2018
 2018/083560	Report - Acoustic	25/01/2018
 2018/083559	Report - Statement of Environmental Effects	29/01/2018
 MOD2018/0034	874 Pittwater Road DEE WHY NSW 2099 - Section 96 Modifications - Section 96 (2) Environmental Impact	29/01/2018
 2018/083178	DA Acknowledgement Letter - Tony Ashcroft	29/01/2018
 2018/083548	Development Application Form	29/01/2018
 2018/083549	Applicant Details	29/01/2018
 2018/086384	Building Assessment - Fire and Disability upgrades - Assessment Referral - Mod2018/0034 - 874 Pittwater Road DEE WHY NSW 2099 - PR	31/01/2018
 2018/092316	Environmental Investigations (Industrial) - Assessment Referral - Mod2018/0034 - 874 Pittwater Road DEE WHY NSW 2099	31/01/2018
 2018/092500	ARP Map as previous DA2014/0731	02/02/2018
 2018/092516	DA Acknowledgement Letter (not integrated) - Tony Ashcroft	02/02/2018
 2018/092632	Notification Letter - 51	02/02/2018
 2018/092751	Notification Map	02/02/2018
 2018/191177	Emailing: Environmental Health Referral Response - industrial use.htm DRAFT comments MOD2018/0034 --i think addresses your issues	08/02/2018
 2018/177293	874 Pittwater Rd, Dee Why - F45 gym noise.	09/02/2018
 2018/106820	Building Assessment Referral Response	10/02/2018
 2018/139655	Online Submission - Apostolou	28/02/2018
 2018/139660	Online Submission - Sammartano	28/02/2018
 2018/173008	Notice of Determination	13/03/2018
 2018/173220	Objectors Approval Letter - 2	14/03/2018