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3 October 2022

General Manager
Northern Beaches Council
725 Pittwater Rd,
Dee Why, 2099, NSW

**Re: Statement of Modification - Development Application DA2020/0182
Lot 6 in DP30579, 45 Mitchell Road, Brookvale NSW 2100
Use of Premises as an Artisan Food and Drinks Premises and Construction of Signage**

Dear Sir,

Reference is made to DA2020/0182 approved for premises 45 Mitchell Road, Brookvale. It is noted that the application was activated, and a Final Occupation Certificate issued FOC2021/0081 on 25 January 2021.

The premises has run as an artisan food and drinks premises since the final occupation certificate was granted with the same operators "Dad and Dave's Brewing". The proposal is for a minor extension of the hours of operation as noted in the proposal and also an increase to patron numbers by 40 patrons, with a total maximum patron capacity of 140 for the entire site.

It is our professional opinion that the proposed modification is minor and does not change the merit assessment granted under DA2020/0182. It is important to note that there are no proposed building works, and the proposed modifications are consistent with hours of operation for similar uses approved in this industrial zone.

The application is supported by the following documents to support the proposed modifications:

- New Ground Floor Plan prepared by HAO Designs dated 9 August 2022
- Revised Operational Noise Emission Assessment prepared by Acoustic Dynamics dated 23 June 2022
- Revised Traffic and Parking Impact Assessment prepared by ML Traffic Engineers dated September 2022.

A thorough review of the immediate area and approvals for similar land uses has been undertaken. It is important for Council to acknowledge that the proposed hours of operation are consistent with recent approvals and the patron number are supported by relevant expert reports. The proposal to include an official outdoor area is consistent with the NSW State Governments push for safer outdoor dining areas due to covid. This application seeks to create a lawful area to ensure the business can operate within relevant guidelines and standards.

This Statement of Modification describes the proposed development having particular regard to the provisions of Section 4.15 of the EP&A Act 1979 and examines any potential environmental impacts with regard to the relevant sections of the Act, State policies and requirements of Northern Beaches Council's WDCP.

The conclusions of the Statement of Modification are that the proposed modification, is consistent with the relevant statutory planning instruments including the Warringah Local Environmental Plan 2011 and planning policies of the Warringah Development Control Plan.

Accordingly, the Section 4.55 Modification succeeds on its merits and should be approved by Council, as submitted.

Proposal

The proposed modification is for the amendment of Condition 1 – Approved Plans and Supporting Documentation and also Condition 30 – Hours of Operation and the inclusion of a new Condition 36, as outlined below.

Condition 1 Approved Plans and Supporting Documentation

Existing DA2020/0182

Condition 1 – Approved Plans and Supporting Documentation

1. **Approved Plans and Supporting Documentation**

The development must be carried out in compliance (except as amended by any other condition of consent) with the following:

a) Approved Plans

Architectural Plans - Endorsed with Council's stamp		
Drawing No.	Dated	Prepared By
DA01 - Rev B - Site and ground floor plan	25 May 2020	HAO Designs
DA02 - Rev A - First Floor Plan	6 February 2020	HAO Designs
DA03 - Rev A - Signage	6 February 2020	HAO Designs

Reports / Documentation – All recommendations and requirements contained within:		
Report No. / Page No. / Section No.	Dated	Prepared By
Operational Noise Emission Assessment	21 February 2020	Acoustic Dynamics
Operational Management Plan	Undated	Applicant
Traffic and Parking Impact Assessment	February 2020	ML Traffic Engineers

c) Any plans and / or documentation submitted to satisfy the Conditions of this consent.

d) The development is to be undertaken generally in accordance with the following:

Waste Management Plan		
Drawing No./Title.	Dated	Prepared By
Waste Management Plan	12/11/2019	Dave Dumay

In the event of any inconsistency between conditions of this consent and the drawings/documents referred to above, the conditions of this consent will prevail.

Reason: To ensure the work is carried out in accordance with the determination of Council and approved plans.

Proposed Amended Condition
Condition 1 – Approved Plans and Supporting Documentation

Architectural Plans – Endorsed with Councils stamp		
Drawing No.	Dated	Prepared by
01 Rev B – Ground Floor Plan	9 August 2022	HAO Designs
DA02- Rev A – First Floor Plan	6 February 2020	HAO Designs
DA03- Rev A - Signage	6 February 2020	HAO Designs

Reports / Documentation – All recommendations and requirements contained within:		
Report No. / Page No. / Section No.	Dated	Prepared by
Operational Noise Emission Assessment	23 June 2022	Acoustic Dynamics
Operation Management Plan	8 August 2022	Applicant
Traffic and Parking Impact Assessment	September 2022	ML Traffic Engineers

Condition 30 - Hours of Operation

Existing DA2020/0182

30. Hours of Operation

The hours of operation are to be restricted to:

Industrial operations for Brewery & Distillery

- 6:00 AM to 4:00 PM Monday to Friday
- 8:00 AM to 12:00 PM Saturday
- Closed Sunday

Tasting and Cellar Door

- 4:00 PM to 10:00 PM Monday to Friday
- 12.00pm to 10.00 PM Saturday and Sunday

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.

Proposed Amended Hours of Operation

30. Hours of Operation

The hours of operation are to be restricted to:

Industrial operations for Brewery & Distillery

- 6:00 am to 4:00 pm Monday to Friday

- 8:00 am to 12:00 pm Saturday
- Closed Sunday

Tasting and Cellar Door

- 4:00pm to 10:00pm Monday to Wednesday
- 4:00 pm to 12:00 am Thursday and Friday
- 12.00pm to 12.00 am Saturdays
- 12:00pm to 10:00pm Sunday and Public Holidays

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.

Proposed New Condition – 36 – Maximum Patron Capacity

Condition 36 – Maximum Patron Capacity

The capacity of the premises for the tasting/cellar door shall be restricted to:

- *Total maximum patron capacity – 140 patrons*

Statutory Provisions for Section 4.55 (2) Modification

It is submitted that the proposed modification falls within the definition of a Section 4.55 Modification of Consents – generally, Clause (2), being:

*(2) **Other modifications** 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

(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) 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

(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 that requires the notification or advertising of applications for modification of a development consent, and

(d) it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.

Subsections (1) and (1A) do not apply to such a modification.

(3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

(4) The modification of a development consent in accordance with this section is taken not to be the granting of development consent under this Part, but a reference in this or any other Act to a development consent includes a reference to a development consent as so modified.

(5) (Repealed)

Source: EP&A Act 1979, Section 4.55

The proposed modifications comprise an increase to the hours of operation and patron numbers which are considered to be of negligible significance and minor in nature. Therefore, the changes proposed to the approved development do not constitute a substantial change to the development as consented, or to such a degree that it would not be considered substantially the same development. The modifications as submitted, have been reviewed and it is concluded that these modifications are acceptable and do not result in any significant adverse impacts upon the amenity or privacy of the building, neighbourhood, nor significantly change the development as approved and notified to the public previously.

In support of this position, due consideration has been given to numerous decisions made by the NSW Land and Environment Court and by the NSW Court of Appeal involving applications made pursuant to Section 4.55 of the EP&A Act. In this regard, particular reference is made to the City of Sydney vs Ilenace Pty Ltd (1984) 3 NSWLR 414 and Moto Projects (No 2) Pty Ltd vs North Sydney Council (1999) 106 LGERA 298. In both these cases, it was established that the proposed modification would result in a building or development that would be “essentially or materially” the same as the currently approved development.

This position has been further reinforced by the Land and Environment Court of New South Wales, which has held that the question of substantially the same means ‘essentially or materially of having the same essence’ (Talbot J in Wolgon Action Group Incorporated versus Lithgow City Council in 2001 and Pearlman J in Schrodgers Australia Property Management Pty Ltd versus Shoalhaven City Council and Anor 1999).

A number of other cases have also been reviewed as part of the qualitative assessment of the application and it is submitted that the development the subject of this application is substantially the same as previously approved. The essential components of the principal end land use (i.e. artisan food and drinks premises) and physical characteristics of the approved building are not altered as a consequence of the proposed modification (i.e. building scale, materials, presentation to the street etc).

It is therefore submitted that the following outcomes are relevant to this proposed modification:

- This application for modification of a development consent does not alter the external appearance or built form of the subject premises.
- The built form outcome is indistinguishable in terms of overall bulk, scale and appearance of the development that has been previously approved.
- The amenity and streetscape outcomes of the original development consent are retained with no adverse impacts from the amendments in terms of amenity for privacy or visual impacts. The modification is supported by relevant expert consultant reports.
- The use of the land will remain for the purpose of a artisan food and drinks premises, as approved by Council.

Relevant Planning Controls

Warringah Local Environmental Plan 2011

Zone objectives and permissibility

The site is zoned IN1 General Industrial. The proposal falls within the definition of an “*artisan food and drink industry*”:

artisan food and drink industry *means a building or place the principal purpose of which is the making or manufacture of boutique, artisan or craft food or drink products only. It must also include at least one of the following—*

- (a) a retail area for the sale of the products,*
- (b) a restaurant or cafe,*
- (c) facilities for holding tastings, tours or workshops.*

Artisan food and drink industries are permissible with consent within the IN1 General Industrial zone.

The proposal is considered to be consistent with the relevant objectives of the zone (noting the existing approval granted by Council), as follows:

- The modification retains the existing local employment for the site.
- The modification has no adverse impacts on other land uses.
- The character of the area is maintained through the proposed modification. Reference is made to various recent approvals granted for artisan food and drinks premises in the Brookvale Industrial Precinct.

Warringah Development Control Plan

C3 Parking Facilities

Objectives

- To provide adequate off street carparking.*
- To site and design parking facilities (including garages) to have minimal visual impact on the street frontage or other public place.*
- To ensure that parking facilities (including garages) are designed so as not to dominate the street frontage or other public spaces.*

Comment: The proposal retains existing provisions for the site relating to parking. The proposed uses for the site have been split and relevant time periods included to ensure no conflict from the industry to the tasting/cellar door hours. The proposed modification is supported by an expert Traffic and Parking Assessment with the following conclusion provided in support of the application:

6. Conclusions

The traffic and parking assessment of the proposed showroom and tasting area development showed the following:

Car Parking

- *The proposed increase of patron's number of a showroom and tasting area is deficit of 10 car spaces short of meeting Council's car parking requirements, however the parking survey shows that there are sufficient vacant car spaces nearby to accommodate the additional car space for the showroom and tasting area customers*
- *Staff will use off-street parking on nearby properties at 31/9 Powells Road and 2/10 Chard Road which has access by Dad & Dave's Brewing*
- *Hours of operation of the tasting area is limited so that it operates outside of times of peak demand for on-street car parking*

Traffic

- *The proposed development is a modest net trip generator*
- *The expected trips from the proposed showroom and tasting area during the weekday PM and Saturday peak hours are modest and can be accommodated within the local road network and intersections.*
- *There are no traffic engineering reasons why a development consent for the proposed showroom and tasting area development at 45 Mitchell Road in Brookvale should be refused.*

D3 Noise

Objectives

- *To encourage innovative design solutions to improve the urban environment.*
- *To ensure that noise emission does not unreasonably diminish the amenity of the area or result in noise intrusion which would be unreasonable for occupants, users or visitors.*

Comment: The proposed modification is supported by a Revised Operational Noise Emission Assessment prepared by Acoustic Dynamics dated 23 June 2022. The proposal meets the relevant objectives with the assessment prepared by Acoustic Dynamics providing the following conclusion:

Acoustic Opinion

Further to the noise monitoring and measurements conducted, our review of the relevant acoustic criteria, requirements and our calculations, the proposed use and operation of the subject site is compliant with relevant noise emission criteria of the Northern Beaches Council, NSW EPA, the POEO Act 1997, and the OLG for the proposed hours of operation, following the incorporation of our recommendations and advice.

It is our opinion that the acoustic risks associated with the proposal can be adequately controlled and the amenity of neighbouring properties and residents can be satisfactorily protected.

Matters for Consideration Pursuant to Section 4.15 of the Environmental Planning & Assessment Act 1979

The following matters are to be taken into consideration when assessing an application pursuant to Section 4.15 of the *Environmental Planning and Assessment Act 1979* (as amended). Guidelines (in *italic*) to help identify the issues to be considered have been prepared by the Department of Planning and Environment. The relevant issues are:

(a) The provisions of:

(i) *The provision of any Environmental Planning Instrument*

Comment: The modification is permissible and consistent with the intent of the Warringah Local Environmental Plan and Development Control Plan as they are reasonably applied to the proposed works.

(ii) *Any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*

Comment: Not applicable.

(iii) *Any development control plan*

Comment: The proposal has been reviewed and assessed under Warringah Development Control Plan.

(iiia) *Any Planning Agreement that has been entered into under section 7.4 or any draft planning agreement that a developer has offered to enter into under Section 7.4, and*

Comment: Not applicable.

(iv) *The Regulations (to the extent that they prescribe matters for the purposes of this paragraph), and*

Comment: Complies – the proposal has been assessed under the relevant Regulations.

(v) *(repealed)*

(b) The likely impacts of that development, including environmental impacts on both the natural and built environments and social and economic impacts in the locality,

Context and Setting:

i. *What is the relationship to the region and local context in terms of:*

- *The scenic qualities and features of the landscape*
- *The character and amenity of the locality and streetscape*
- *The scale, bulk, height, mass, form, character, density and design of development in the locality*
- *The previous and existing land uses and activities in the locality*

Comment: The proposal is for a modification to an existing approved artisan food and drinks industry. The modification is supported by expert reports which support the proposal as submitted.

ii. *What are the potential impacts on adjacent properties in terms of:*

- *Relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)*
- *visual and acoustic privacy*
- *views and vistas*
- *edge conditions such as boundary treatments and fencing*

Comment: The proposal will have no adverse amenity impacts to neighbouring tenancies or properties. The development is surrounded by industrial land uses with no residential development in the immediate vicinity of

the site. The development proposes reasonable hours of operation (consistent with recent approvals granted for the same land use on other sites) and is a land use that is suitable for the locality.

Access, transport and traffic:

Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:

- *Travel Demand*
- *dependency on motor vehicles*
- *traffic generation and the capacity of the local and arterial road network*
- *public transport availability and use (including freight rail where relevant)*
- *conflicts within and between transport modes*
- *Traffic management schemes*
- *Vehicular parking spaces*

Comment: The proposal is supported by a Traffic and Parking Impact Assessment which supports the proposed modifications.

Public Domain

Comment: The proposed development will have no adverse impact on the public domain.

Utilities

Comment: Existing utility services will connect to service the premises.

Flora and Fauna

Comment: The proposal will not have an adverse impact to flora or fauna.

Waste Collection

Comment: Normal waste collection applies to the existing site.

Natural hazards

Comment: Not applicable to the proposed modifications.

Economic Impact in the locality

Comment: The proposed development will not have any significant impact on economic factors within the area.

Site Design and Internal Design

i) Is the development design sensitive to environmental considerations and site attributes including:

- *size, shape and design of allotments*
- *The proportion of site covered by buildings*
- *the position of buildings*
- *the size (bulk, height, mass), form, appearance and design of buildings*
- *the amount, location, design, use and management of private and communal open space*
- *Landscaping*

Comment: Not applicable – the proposed modification does not change the approved building and fit out.

ii) How would the development affect the health and safety of the occupants in terms of:

- *lighting, ventilation and insulation*
- *building fire risk – prevention and suppression*
- *building materials and finishes*
- *a common wall structure and design*
- *access and facilities for the disabled*
- *likely compliance with the Building Code of Australia*

Comment: The proposal can comply with the relevant standards pertaining to health, safety and BCA requirements and will not have any detrimental effect on the occupants.

Construction

i) What would be the impacts of construction activities in terms of:

- *The environmental planning issues listed above*
- *Site safety*

Comment: Not applicable.

(c) The suitability of the site for the development

- *Does the proposal fit in the locality*
- *Are the constraints posed by adjacent development prohibitive*
- *Would development lead to unmanageable transport demands and are there adequate transport facilities in the area*
- *Are utilities and services available to the site adequate for the development*
- *Are the site attributes conducive to development*

Comment: The site is located within the Brookvale locality. The adjacent development does not impose any unusual or impossible development constraints. The proposed development will not cause unmanageable levels of transport demand to the site and the development will have no adverse impact on acoustic amenity. The proposal is supported by expert consultant reports.

(d) Any submissions received in accordance with this act or regulations

Comment: No submissions are available at this time. It is also noted no submissions were provided against the original application.

(e) The public interest

Comment: The proposal is permissible and consistent with the intent of WLEP2011 and WDPC controls as they are reasonably applied. The development would not be contrary to the public interest. In our opinion, the development satisfies the planning regime applicable to development on this particular site, having regards to the considerations arising from its context.

The proposal is acceptable when assessed against the heads of consideration pursuant to Section 4.15 of the *Environmental Planning and Assessment Act, 1979* (as amended), and is appropriate for the granting of consent and accordingly, is in the public interest.



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Summary and Conclusion

The modification does not alter the merit-based assessment that generated the approval by Northern Beaches Council under DA2020/0182. The approval, if modified, will retain the essence of the original consent and is therefore considered to fall within the relevant tests for Section 4.55 of The Act. The application meets the requirements of a Section 4.55 (2) Modification, and therefore the consent authority can consider and grant consent to the application on the basis that the development will remain substantially the same as that originally approved by Northern Beaches Council.

Accordingly, the proposed modification 45 Mitchell Road, Brookvale, is acceptable from environmental, social, and planning perspectives and approval should therefore be granted by Council.

We trust that the information satisfies your requirements and if you have any further queries please do not hesitate in contacting me.

Kind Regards
Mathew Quattroville
Director
Four Towns Pty Ltd