
From: Daniel Barber
Sent: 16/09/2024 4:40:07 PM
To: Council Northernbeaches Mailbox
Subject: SUBMISSION TO DEVELOPMENT APPLICATION DA2024/0946 – 80
UNDERCLIFF ROAD, FRESHWATER ('PILU AT FRESHWATER')
Attachments: SUBMISSION TO DEVELOPMENT APPLICATION DA2024.0946 – 80
UNDERCLIFF ROAD, FRESHWATER.pdf;



11 September 2024

Mr Ray Brownlee
Chief Executive Officer
Northern Beaches Council
PO Box 82
MANLY NSW 2095

Attention: Mr Jordan Davies

SUBMISSION TO DEVELOPMENT APPLICATION DA2024/0946 – 80 UNDERCLIFF ROAD, FRESHWATER ('PILU AT FRESHWATER')

Dear Jordan,

1. Introduction

This submission letter has been prepared by Paro Consulting on behalf of concerned residents, in relation to Development Application DA2024/0946 ('DA') for the property at 80 Undercliff Road, Freshwater also known as 'Pilu at Freshwater'. The purpose of this submission is to formally object to the application and request its refusal.

The proposed development significantly intensifies the use of the site and will have severe impacts on surrounding residents. The proposed development expands the approved development to include an additional use as a function centre and seeks to significantly increase the maximum occupancy, raising both permissibility and merit-based concerns.

2. Merit Issues

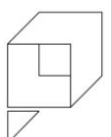
The merit issues identified with the DA are discussed below:

2.1. Characterisation of the Development

The application seeks to characterise the function centre use as ancillary to the primary use of the existing restaurant. However, according to the *Warringah Local Environmental Plan 2011*:

- **'Restaurant or café':** *"...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."*
- **'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."*

The proposal properly characterised is a separate use as a function centre. We say, the use as a function centre is not an ancillary but a separate and distinct use from the restaurant that is prohibited.



We refer to the recent judicial decision of Pain J in *Tweed Shire Council v Cooke* [2023] NSWLEC 73 where at [98] the judgment stated:

“Secondly, even if the concept of ancillary and incidental development could be relied upon, it is fundamentally flawed in the Respondents’ circumstances. The test of whether a purpose of development is incidental and subordinate to another purpose is whether the two purposes are not severable but are ‘inextricably linked’ such that they ordinarily occur together rather than are merely sometimes associated with each other as a matter of convenience: Scott’s Provisions Stores Pty Ltd v Sydney City Council (1958) 3 LGRA 191 (Scott’s) at 194-195. A purpose is ancillary only where a purpose of development is incidental and subordinate to another purpose, it is subsumed within that other purpose and it is ignored and treated as part of the other purpose for characterisation: Bonus Pty Ltd v Leichhardt Municipal Council (1954) 19 LGR 375, Foodbarn Pty Ltd v Solicitor-General (1975) 32 LGRA 157 (Foodbarn). If the Court found it necessary to apply the Scott’s test, the growing and harvesting of cannabis plants on one hand and the production of hemp oil on the other are severable, separate and independent purposes. The activities on the Development Site could easily cease at the harvesting of plants rather than continue to the macerating, soaking, straining, separating, bottling phases and beyond.”

The proposal for a function centre is not ‘incidental’ or ‘subordinate’ to the existing restaurant purpose. It is not inextricably linked nor subsumed within the restaurant purpose. It is a different use which will see the closure of the restaurant for up to 20 occasions per year. The entirety of the site will be used as a function centre and therefore will be the independent and dominant purpose of the site. The use of the function centre is severable from the restaurant as the use of the function centre will only occur when the restaurant is closed.

The use of the pavilion and outdoor space is proposed to be used exclusively for functions. The nature of this space, as a detached area away from the restaurant, is that of an independent use.

The application also seeks consent for an unlimited number of functions that do not exclusively occupy the whole of the Restaurant. The Plan of Management does not limit the number of function centre events that can be held in the pavilion, outdoor area and garden room which collectively allow for the independent use as a function centre that occupies a greater area than the use as a restaurant. The pavilion has an occupancy of 50 patrons and the outdoor area has an occupancy of up to 100 patrons compared to the existing maximum occupancy of the restaurant of 100 patrons. The application seeks an unlimited number of functions within the outdoor and pavilion that is equal or greater than the maximum occupancy of the restaurant.

2.2. Permissibility

Clause 15 (2) of the additional permitted use schedule states:

“Development for the purposes of restaurants or cafes is permitted with consent.”

The additional permitted use does not provide permissibility for a function centre. Accordingly, the function centre is a prohibited use and there is no power for Council to grant consent for the application.

As such, the function centre is a prohibited use, and the Council lacks the authority to grant consent.

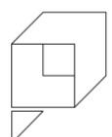
3. Merit Considerations

Parking

The proposed use as a function centre will increase parking demand significantly. The deed that was entered into by the landowner with Council does not offset carparking for all future development that ever happens on the site. The site has already had a significant extension since the date the deed was entered into.

The study that is included within the traffic report occurred on Saturday 13 May 2023 which is outside the time of peak demand for the use of the beach.

The proposed development is likely to worsen the current parking situation, particularly during the summer months when demand is at its peak. The beachside parking area is already often full, with cars extending all the way to Oliver Street on busy



days. As a result, local residents frequently struggle to find parking near their homes, affecting their ability to enjoy activities such as weekend BBQs. If this development proceeds, it could further impact residents' ability to park close to their homes and exacerbate existing parking challenges.

Hours of Operation

The proposed hours of operation for outdoor functions until midnight are inappropriate and excessive given the residential context and are likely to cause disturbances to neighbouring residents.

Insufficient Information

- Heritage Report: The provided report in support of the DA pertains to a different development.
- Statement of Environmental Effects: The SEE document is misleadingly focuses on restaurant use and fire upgrades, however the Plan of Management and supporting documentation is for a function centre. This use is not mentioned until page 14 in the consideration of permissibility. This is clearly misleading, and a reasonable person ought to know that that this is misleading. The author is in breach of section 10.6 of the *Environmental Planning and Assessment Act 1979* and has committed an offence. Clearly the intention of the title of the SEE is to minimise the number of submissions by being deceptive about the nature of the proposal.
- Traffic Report: The traffic report references another development application, and it is unclear if the author has considered the current proposal as the Statement of Environmental Effects is dated after the report. The traffic report conducted during an off-season period of parking demand, failing to address peak parking demand. A study of the availability of parking during the summer months on the weekend would show minimal parking available and insufficient capacity to accommodate the additional parking demand from the use as a function centre.
- Acoustic Report: The Acoustic Report incorrectly states that the proposal seeks to increase the number of patrons from 80 to 100 on page 16 when the SEE states on page 10 that the proposal is for a maximum of 130 patrons at any one time. Further, it assumes any amplified music will be only vocal and acoustic, which is an assumption that cannot be relied upon and which is not addressed in the Plan of Management.

4. Summary of Submission

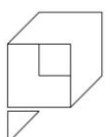
There is a permissibility barrier to approval of the development. Use of the site for functions is different to a restaurant or café. The function use is prohibited, and the DA should be withdrawn or refused as there is not power to grant consent.

The proposed development has significant and increased environmental impacts on the surrounding locality and specifically noise impacts on our client's property in particular. It facilitates the drinking of alcohol in a non-alcohol public park/open spaces area. It does not and cannot meet the parking demanded by the proposed use. This development is not in the public interest.

There are no merit reasons why the development should be approved.

We request to be informed of any amendments to the application and are available for further discussion or to arrange a site visit to illustrate the potential amenity impacts that would be exacerbated and created by the proposed development.

Should you have any questions, please contact me on 0422 983 710 or at daniel@paroconsulting.com.au should you wish to discuss the contents of this letter or to arrange an inspection.



Kind regards,



Daniel Barber

Director

B.Plan (Hons) M.ProDev CPP MPIA

Paro Consulting

