



Warringah Council

## S96(1A) APPLICATION TO MODIFY A DEVELOPMENT CONSENT ASSESSMENT REPORT

**Assessment Officer:** Nick England  
**Address / Property Description:** Lot B DP 329073 (No.80) Undercliff Road, Freshwater

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**Proposal:** Modification of consent (DA2007/0873) for the demolition of the existing brick storage shed and construction of a kiosk for use as a Café-Restaurant at Lot B DP 329073 (No.80) Undercliff Road, Freshwater  
**Development Application No:** MOD2008/0356  
**Plans Reference:** A00, A03, A04, A05 & A06  
**Applicant:** Sanctum Design Consultants  
**Owner:** Symaco Pty Ltd  
**Application Lodged:** 4 December 2008  
**Amended Plans:** Nil

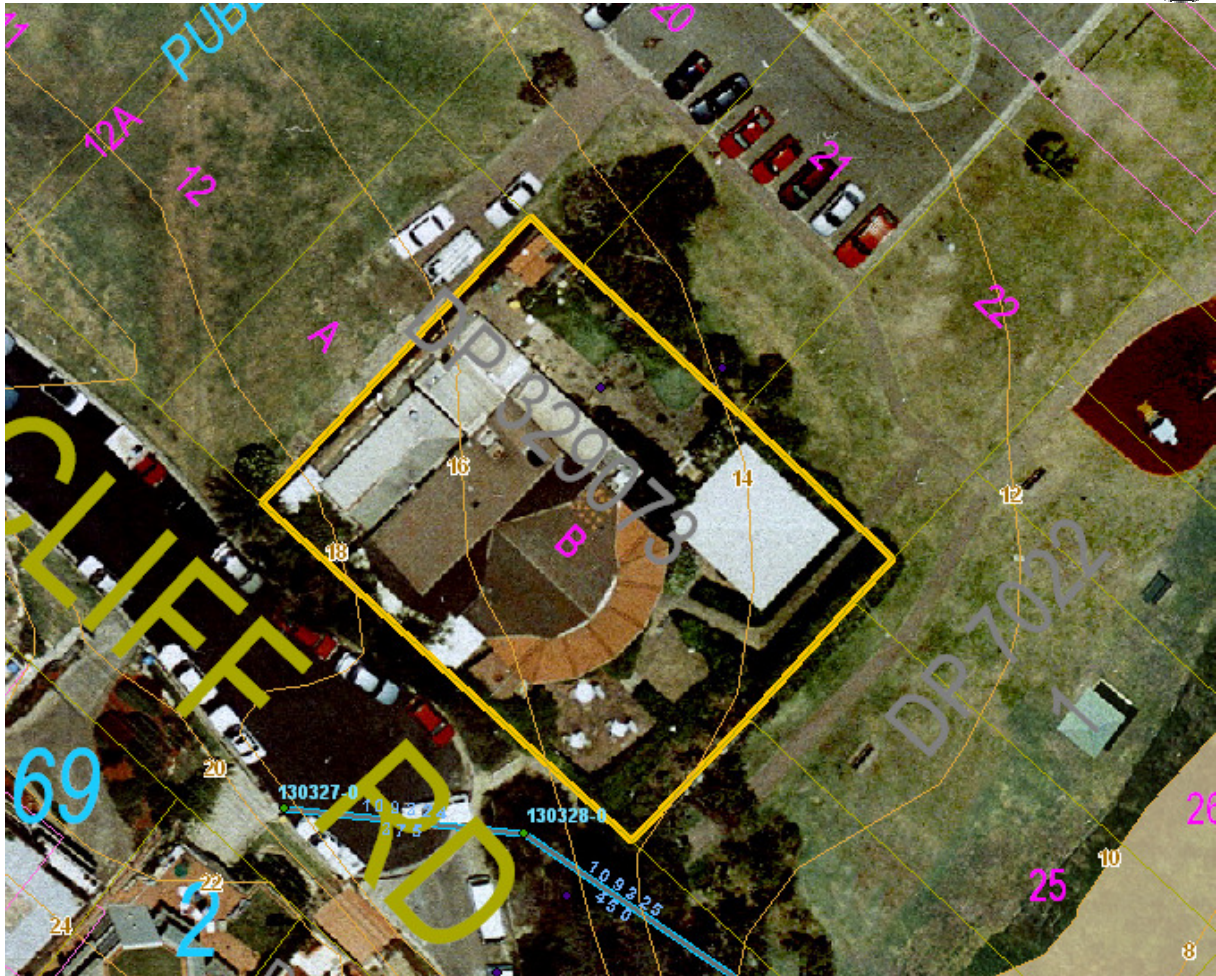
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**Locality:** H1 Freshwater Beach  
**Category:** Category 3 (restaurant)  
**Clause 20 Variations:** Not applicable to this development  
**Land and Environment Court Action:** NO  
**Referred to WDAP:** NO  
**Referred to ADP:** NO

### SUMMARY

**Submissions:** 15/01/2009 to 30/01/2009 (Notification Period) - 1  
Outside Notification Period(s) - Nil  
**Submission Issues:** Intensification of use; Clause 68; Illegal use of community land  
**Assessment Issues:** Environmental Health (Food Control)  
**Recommendation:** Section 96 Approval  
**Attachments:** Nil

**LOCALITY PLAN** (not to scale)



**Subject Site:** Lot B DP 329073 (No.80) Undercliff Road, Freshwater

**Notified Residences:** Under the provisions of the Warringah Development Control Plan the subject 96(1A) modification was notified to the adjoining property owners and occupiers and previous objectors. As such, there were **20** notification letters sent.

## SITE DESCRIPTION

The subject site (Lot B DP 329073) is located at No.80 Undercliff Road, Freshwater. The site is approximately 977.4m<sup>2</sup> in area and is located at the eastern junction of Undercliff Road on its southern boundary. The western, eastern and northern boundaries of the site are adjacent public open space which surrounds the environs of Freshwater Beach. To the north of the site is the Council car parking area at the junction of Moore Road. Detached residential and multi-unit dwellings exist to the south and west of the site.

Development on the site consists of a two-storey building, currently occupied by the “Pilu” licensed restaurant.



**Photograph 1:** Pilu Restuaurant as viewed from Undercliff Street.

## RELEVANT BACKGROUND

The consent subject to the proposed modification, being DA2007/0873 for “Demolition of the existing brick storage shed and construction of a kiosk for use as a Café-Restaurant” was considered at the IHAP meeting of 4 June 2008 and an operational determination (approval) issued by the Director of Planning & Development on 15 July 2008, after the applicant



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submitted further information to demonstrate compliance with Australian Standards for access. No previous modifications have been lodged.

The subject approval involved the demolition of existing brick shed and the erection of a “kiosk” building separate to the existing restaurant building. The kiosk has approximately 20m<sup>2</sup> of gross floor area and an attached deck approximately 17m<sup>2</sup> in area. The kiosk will act as a “restaurant” land use independently of the existing “Pilu” restaurant and will provide beverages and light refreshments, with a maximum seating capacity estimated at approximately 14 people. Operating hours for the kiosk were approved at seven (7) days a week, 7.00am to 5.00pm and a maximum of three (3) staff.

The kiosk as approved was to provide food products based on hot drinks (tea and coffee) and other pre-packaged and prepared foods and drinks. No food was to be prepared on-site.

The existing building was originally erected in 1908 and investigation of historical records indicates the building was likely to have been erected for the purpose of holiday accommodation and associated restaurant.

Past development consents (excluding the consent subject to the proposed modification) on the site consist of the following:

Consent No.	Date	Description
80/311	19.12.1980	“Restoration of the “Kiosk” for use for refreshment room purposes”
83/177	17.05.1983	“Establishment of outdoor dining area for existing restaurant”
98/212	09.07.1998	“Alterations and additions to existing restaurant”

None of these previous approvals have any significant relevance to the proposed modification, as these approvals relate to the main restaurant building and the proposed modification relates to a separate kiosk structure.

## PROPOSAL IN DETAIL

The modification to the existing consent consists of the following:

1. Amendment of the approved plans to include the inclusion of a hotplate (cooking) within the kiosk and inclusion of a small vent (300mm x 300mm) on the north-west elevation of the approved structure; and
2. Deletion of Condition No.39, which reads:

### **39. No Cooking on the Premises**

No cooking of food requiring the use of a stove, oven, hot plate, grill, fryers or the like is permitted on the premises.

*Reason: The application has provided no provision for mechanical ventilation.*



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## CONSIDERATION UNDER S96(1A) OF THE EPA ACT 1979

The subject application has been lodged pursuant to Section 96(1A) of the Environmental Planning and Assessment Act 1979. Section 96(1A) of the Environmental Planning and Assessment Act 1979 stipulates:

*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 proposed modification is of minimal environmental impact*

Comment: The modification will relate to a minor internal addition of a cooking hotplate and the installation of a vent on the north-west elevation of the approved building. These modifications are unlikely to generate significant impacts in regard to noise or emissions and as such are considered to have a minimal environmental impact.

*(b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and*

Comment: The proposed modifications essentially represent two additional features to the kiosk building, which are minor in nature and the deletion of a condition of consent which would have the effect of restricting these modifications.

The significant aspect of the proposed modification is that it will change the nature of the food products provided in the kiosk, which as approved were in the form of hot drinks (tea/coffee) and pre-packaged and prepared foods and drinks. The proposal would have the effect of including the preparation of food in addition to the provision of the other food and drink products. However the modification is not significant in that the approved use will nonetheless remain a "restaurant" and will not represent an increase in the intensity of the seating, staffing or operational hours of the kiosk. Additional conditions will be required to reflect the preparation of food, however an existing condition of consent (No.35) to comply with the Food Control Standards Code, reflects the fact that the use will remain a food premises for the purposes of this code.

In this regard, the proposed consent as modified represents substantially the same development as that originally approved.

*(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 any period prescribed by the regulations or provided by the development control plan, as the case may be.*

Comment: The application was notified in accordance with Part 1 of the Warringah Development Control Plan by letter dated 15 January 2009 to 20 properties and to





previous objectors. One (1) submission was received within the exhibition period, from the person(s) in the table below.

Submission Received	Address
Kevin & John Dyer	2 Reid Avenue NORTH CURL CURL NSW 2099

The issues raised in this submission are discussed below:

1. *The modification will change the whole nature of the intended use of this building.*

Comment: The kiosk as approved was essentially a food premises with associated seating for 14 people, to provide food for consumption on site or take-away. The inclusion of cooking facilities will broaden the range of food provided in the kiosk, however it will still remain a food premises with no increase in the intensity of the operation in respect to seating, floor-space, number of employees or hours of operation. In this regard, the “nature” of the kiosk will not substantially change from that use originally approved.

2. *The modification will represent a further intensification of the use on the site.*

Comment: As stated previously, the kiosk will remain essentially a food premises with no increase in the intensity of the operation in respect to seating, floor-space, number of employees or hours of operation. The potential impact of the additional cooking facilities (noise and odours) can be regulated by conditions of consent. In this regard, the “nature” of the kiosk will not substantially change from that use originally approved.

3. *The original assessment report stated that there would be no cooking carried out on the premises and representations made by the owner at the IHAP meeting of 4 June 2008 stated that no cooking would be undertaken on the premises.*

Comment: Whilst the original report stated that no cooking was to be undertaken in the proposed kiosk, this was generally a statement of fact. The fact that no cooking was to be undertaken in the kiosk was not intended, nor provided as justification for the approval of the original proposal. As stated previously, the premises with the intended modification will remain a “restaurant” as originally approved and will not substantially change any significant aspect of the premises.

## ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

Section 96(5) requires the consent authority to consider any relevant matters of Section 79C of the Environmental Planning and Assessment Act, 1979 in the assessment of an application to modify a development consent. These are provided below:

Section 79C 'Matters for Consideration'	Comments
Section 79C (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on “WLEP 2000” in this report.
Section 79C (1) (a)(ii) – Provisions of any draft environmental planning instrument	Refer to discussions on Draft Environmental Planning Instruments in the body of the report.
Section 79C (1) (a)(iii) – Provisions of any development control plan	The modification was notified in accordance with Part 1 of the Warringah Development Control Plan.



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Section 79C 'Matters for Consideration'	Comments
<b>Section 79C (1) (a)(iiia) - Provisions of any Planning Agreement or Draft Planning Agreement</b>	None applicable.
<b>Section 79C (1) (a)(iv) - Provisions of the regulations</b>	Clause 7 of the EPA Regulations 2000 requires the consent authority to consider the provisions of the Building Code of Australia. The existing conditions in the original consent will apply to the works proposed in the modification.
<b>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</b>	Considered under Section 96(1A)(a) above.
<b>Section 79C (1) (c) – The suitability of the site for the development</b>	Not applicable – considered under original approval.
<b>Section 79C (1) (d) – Any submissions made in accordance with the EPA Act or EPA Regs</b>	Considered under Section 96(1A)(c) & (d) above.
<b>Section 79C (1) (e) – The public interest</b>	Not applicable – considered under original approval.

## State Environmental Planning Policies

### SEPP Infrastructure

Clause 45 of SEPP Infrastructure requires all applications (including modifications) which propose works within 5m of any exposed overhead electricity power line to be referred to the relevant energy authority. The kiosk is not located within the requisite distance as the exposed power supply to the site is attached to the restaurant building on the Undercliff Street frontage. As such, the application does not require a referral. The modification complies in all other respects with the provisions of SEPP 65.

## STATUTORY CONTROLS

### Warringah Local Environmental Plan 2000

#### Desired Future Character

The subject site is located in the H1 Freshwater Beach Locality under Warringah Local Environmental Plan 2000. The Desired Future Character Statement for this locality is as follows:

*The Freshwater Beach locality will remain characterised by detached style housing in landscaped settings interspersed by existing apartment buildings and a range of complementary and compatible uses.*

*Future development will maintain the visual pattern and predominant scale of existing detached housing in the locality except for the Harbord Diggers Club. The streets will be characterised by landscaped front gardens and consistent from building setbacks.*

*Unless exemptions are made to the housing density standard in this locality statement, any subdivision of land is to be consistent with the predominant pattern, size and configuration of existing allotments in the locality.*

*The locality contains hillsides and elevated landforms, prominent coastal headlands and cliffs and remnant vegetation. These elements will be protected from development that would detract from their visual and natural qualities, presenting in some parts of the locality a constraint to further development.*



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*The Harbord Diggers Club will continue to cater for the recreational and leisure needs of the community. If the existing approved building and carparking areas are to be expanded, regard must be had to any approved and detailed masterplan for the site. Such a masterplan is to address issues such as views, visual impact, natural features, management of traffic and impact upon the amenity of the locality.*

*The locality will continue to be served by the existing local retail centre shown on the map. Future development in this centre will be in accordance with the general principles of development control provided in clause 39.*

Clause 12(3)(b) requires the consent authority to consider if the development is consistent with the Desired Future Character of the locality statement. The proposed modification is to an existing consent for Category 3 development, which under the original assessment was considered as a *restaurant* land use.

The modification is substantially the same as the approved development, which in turn was found by the then IHAP to be consistent with the Desired Future Character in the original assessment of the application. The extent of the proposed modifications are very minor and will not hinder the existing approvals consistency with the Desired Future Character.

The proposed modification is therefore considered consistent with the DFC Statement.

### **Clause 15 (Category Three Development)**

Clause 15 of the WLEP 2000 specifies that new Category 3 development requires the consideration of an independent public hearing, the function of which is taken up by the Warringah Development Assessment Panel (WDAP).

The Charter of the WDAP specifies that the only modifications which are required to be considered by the Panel are Section 96(2) modifications of which the original consent was provided by the Panel. The WDAP has assumed the role of the previous IHAP, which makes the modification potentially subject to the Charter.

As the proposed modification is considered to be a Section 96(1A) application, the proposal does not need to be referred to the WDAP and can be dealt with under delegated authority.

### **Built Form Controls for Locality**

The following table outlines compliance with the Built form Control of the above locality statement:

<b>Built Form Standard</b>	<b>Required</b>	<b>Approved / Proposed</b>	<b>Compliance Comment</b>	<b>Compliance</b>
Building Height: Natural ground to upper ceiling (metres)	Maximum 8.5m above natural ground level	<b>Approved:</b> 3.6m <b>Proposed:</b> No change		YES (consistent with approved development)
Housing Density	1 dwelling per 450m <sup>2</sup>	N/A		N/A
Front Setback	6.5m	No change (N/A)		N/A
Rear Setback	6.0m	<b>Approved:</b> 0.525m to building 0.850m to		YES (consistent with approved development)





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Built Form Standard	Required	Approved / Proposed	Compliance Comment	Compliance
		deck <b>Proposed:</b> No change		
Side Setback	0.9m	<b>Approved:</b> 0.74m <b>Proposed:</b> No change	The new vent on the north-west elevation will not increase the existing approved side setback	YES (consistent with approved development)
Side Boundary Envelope	5 metres projecting from 45 degrees	<b>Approved:</b> Proposal complies <b>Proposed:</b> No change		YES (consistent with approved development)
Landscaped Area	40% of site area	<b>Approved:</b> 22% of site area <b>Proposed:</b> No change		YES (consistent with approved development)

### GENERAL PRINCIPLES OF DEVELOPMENT CONTROL

The following applicable General Principles of Development Control as contained in Part 4 of Warringah Local Environmental Plan 2000 apply to the proposed modification:

General Principles	Applies	Comments	Complies
CL 43 Noise	YES	Mechanical ventilation will be required by an additional condition of development consent, as suggested by Council's Environmental Health Officers. This is required to distribute fumes generated by the new cook top.  The likely size of the unit required to undertake this function and the hours of operation of the approved kiosk (7.00am to 5.00pm) are such that it is unlikely to cause an adverse impact in regard to the generation of noise. An existing condition of consent (No.43) acts to restrict any adverse noise emissions from the approved use.	YES, subject to condition.
CL44 Pollutants	YES	Mechanical ventilation will be required by an additional condition of development consent, as suggested by Council's Environmental Health Officers. This will restrict the emission of any adverse fumes or odours emanating from the food premises.	YES, subject to condition.
CL 52 Development near park, bushland reserves and other public open spaces	YES	The subject site is bounded on the east, west and north by the Freshwater Beach Reserve. The proposed modification will not affect this area of public open space due to the very minor change to the external appearance and the inclusion of a cooktop is unlikely to create any additional impacts on the setting of this area of open space. A further condition of development consent will require that there is no adverse emission of noise, fumes or odours from the additional cooking facilities.	YES, subject to condition.
CL 68 Conservation of energy and water	YES	The additional cook top will generate additional demand for energy and may increase water use associated with cleaning of utensils associated with the cook top. As a proportion of the total energy and water use of the existing restaurant, the proposed modification is unlikely to cause an adverse impact in this regard.	YES
CL 79 Heritage Control	YES	The subject site contains an item of environmental	YES



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General Principles	Applies	Comments	Complies
		<p>heritage, being the two-storey building which houses the existing “Pilu” restaurant.</p> <p>The proposed external modifications to provide an external vent (300mm x 300mm) are unlikely to effect the physical setting abutting the heritage item.</p> <p>A condition of development consent recommended by Council’s Environmental Health Officers has recommended that a flue be provided from the vent, at least 1 metre above the ridge line of the existing building. This would result in a flue with a maximum height of RL 19.70 AHD or being 1.85m in height above the proposed vent. However advice sought from Council’s Heritage Advisor is that it would be undesirable to provide such a flue structure, given its potential for visual impact which in turn would adversely affect the setting of the heritage item, being the Pilu restaurant building.</p> <p>In this regard, the condition as recommended by the Environmental Health Officers is to be amended to read as the following:</p> <p><b>Mechanical Ventilation</b></p> <p><i>Mechanical ventilation is to be provided in accordance with Australian Standard AS1668. The discharge of any smoke, fumes, odours or particulates are to be captured in a manner that does not necessitate any external structure, including a flue. Details are to be provided prior to the issue of a Construction Certificate.</i></p> <p><b>Reason:</b> <i>To preserve community health and ensure compliance with acceptable standards and preserve the setting of the item of the environmental health.</i></p> <p>The application of this recommended condition would ensure that no adverse impact is caused on the heritage item. The proposed modification (subject to additional condition of consent) is consistent with the requirements of Clause 79.</p>	

**SCHEDULES**

No schedules are applicable.

**DRAFT ENVIRONMENTAL PLANNING INSTRUMENTS**

No draft environmental planning instruments are applicable.



## REFERRALS

### *Environmental Health*

The modification application was referred to Council's Environmental Health officers for comment, as the proposed modification relates to a food premises. No objection was raised to the proposal, subject to the application of a condition to require mechanical ventilation for the cook top to include the following condition:

Mechanical ventilation is to be discharged 1 metre above the ridge of the roof line in accordance with Australian Standard AS1668.

***Reason:*** *To preserve community health and ensure compliance with acceptable standards and preserve the setting of the item of the environmental health.*

As stated previously in the General Principles section of this report, concern was raised with the potential visual impact of a flue structure, which to comply with this condition would be at least 1.85m high (measured from the top of the proposed vent on the north-west elevation) and be of an indeterminate diameter. As previously stated, it is recommended that this condition be modified to require compliance with the relevant Australian Standard however no external flue is to be provided. Advice from Council's Environmental Health Officers is that there are existing solutions to capture any smoke / fumes / odours without resorting to the provision of a flue and the applicant has indicated that this is an acceptable solution. The amended condition is recommended as the following:

### ***Mechanical Ventilation***

*Mechanical ventilation is to be provided in accordance with Australian Standard AS1668. The discharge of any smoke, fumes, odours or particulates are to be captured in a manner that does not necessitate any external structure, including a flue. Details are to be provided prior to the issue of a Construction Certificate.*

***Reason:*** *To preserve community health and ensure compliance with acceptable standards and preserve the setting of the item of the environmental health.*

Further conditions to (a) require certification of mechanical ventilation prior to the release of the Occupation Certificate and (b) provide self-closing doors in the kiosk and storeroom is recommended, which are both considered reasonable to apply to the existing consent, given the extent of the proposed modification.

## CONCLUSION

The site has been inspected and the application assessed having regard to the provisions of Section 96(1A) of the Environmental Planning and Assessment Act, 1979.

The proposed modification, which essentially permits the cooking of food in a structure approved as a "restaurant" land use would have no adverse environmental impact and the modification is considered substantially the same development as that approved in consent DA2007/0873.



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It is considered that the proposed modification satisfies the appropriate controls and that all processes and assessments have been satisfactorily addressed. Accordingly, the proposal is recommended for approval.

### RECOMMENDATION (SECTION 96 APPROVAL)

That the Modification application No.MOD2008/0356 to Development Application No: 2007/0873 at Lots 0 DP 329073 (No.80) Undercliff Street, FRESHWATER be approved subject to the following modifications as described below:

A. Condition No.1 to read as follows:

The development is to be carried out in compliance with the following plans and documentation listed below and endorsed with Council's stamp, except where amended by other conditions of consent:

Drawing Number	Issue Number	Title	Dated	Prepared By
A02	SEC96-2	Site Plan & Area Calculations	24.11.08	Sanctum Design Consultants
A03	SEC96	Floor Plan	24.11.08	Sanctum Design Consultants
A04	SEC96	North East & North West Elevations	24.11.08	Sanctum Design Consultants
A05	SEC96	North East & North West Elevations	24.11.08	Sanctum Design Consultants
A06	SEC96	Section A-A	24.11.08	Sanctum Design Consultants
A07		North East Elevation	29-08-07	Sanctum Design Consultants
A08		North West & South East Elevations	09-07-08	Sanctum Design Consultants

No construction works (including excavation) shall be undertaken prior to the release of the Construction Certificate.

Note: Further information on Construction Certificates can be obtained by contacting Council's Call Centre on 9942 2111, Council's website or at the Planning and Assessment Counter.

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

B. Insertion of new Condition No.11(a) to read as follows:

#### **Mechanical Ventilation**

Mechanical ventilation is to be provided in accordance with Australian Standard AS1668. The discharge of any smoke, fumes, odours or particulates are to be captured in a manner that does not necessitate any external structure, including a flue. Details are to be provided prior to the issue of a Construction Certificate.



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**Reason:** To preserve community health and ensure compliance with acceptable standards and preserve the setting of the item of the environmental health.

C. Insertion of new Condition No.35(a) to read as follows:

**Mechanical Ventilation**

Prior to occupation certificate provide certification that the mechanical ventilation system complies with Australian Standard AS1668 and the requirements of Condition No.11(a).

**Reason:** To preserve community health and ensure compliance with acceptable standards.

D. Deletion of Condition No.39.

E. Insertion of new Condition No.39(a):

**Self Closing Doors**

The external doors to the storeroom and the kiosk must be fitted with self closing devices.

**Reason:** To prevent ingress of pests and comply with the Food Standards Code.

Signed

Date

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Nick England  
**Acting Team Leader / Planning & Development Assessment**

Signed

Date

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Rod Piggott  
**Team Leader / Planning & Development Assessment**