

**3.2****80 Evans Street, Freshwater - Harbord Diggers Club –  
Modification of DA2007/1179 to Delete Trial Period for Operation  
of Outdoor and Playground Areas****SECTION 96 MODIFICATION ASSESSMENT REPORT**

**Assessment Officer:** Phil Lane  
**Address / Property Description:** Lot 100, DP 1136132, 80 Evans Street Freshwater NSW  
2096 (Harbord Diggers Club)

**Proposal:** S96(1A) Modification of Development Consent No.  
2007/1179 to delete Condition No. 3 relating to the 12  
month Trial Period for the Hours of Operation of the  
Covered Outdoor and Playground Areas and to make  
permanent these hours.

**Modification of Consent  
Application No:** MOD2009/0049  
**Plans Reference:** No Plans were submitted as part of this application.  
**Applicant:** Mount Pritchard & District Community Club Ltd  
**Owner:** Mount Pritchard & District Community Club Ltd  
**Application Lodged:** 27/02/2009  
**Amended Plans:** No Plans were submitted as part of this application.

**Locality:** H1 Freshwater Beach  
**Category:** Category 2 (Registered Club)  
**Clause 20 Variations:** Not applicable to this development  
**Land and Environment Court  
Action:** NO  
**Referred to IHAP:** NO  
**Referred to ADP:** YES (2 unresolved objections and proposal involves  
amending a previous decision of the ADP)

**SUMMARY**

**Submissions:** Two (2) Submissions  
**Submission Issues:** Noise, hours of operation & alcohol free zone  
**Assessment Issues:** Noise, hours of operation & alcohol free zone  
**Recommendation:** Approval

## LOCALITY PLAN (not to scale)



**Subject Site:** Lot 100, DP 1136132, 80 Evans Street Freshwater

**Notified Residences:** Under the provisions of the applicable Development Control Plan the subject application has been notified to the adjoining property owners and occupiers. As such, there were **196** notification letters sent, which represents the persons originally notified of DA2007/1179.

### SITE DESCRIPTION

The site is legally described as Lot 100, DP 1136132, No. 80 Evans Street Freshwater. The site is currently occupied by the Harbord Diggers Club, a registered club which provides a range of services including licensed bar, restaurant/snack bar, conference rooms, sporting facilities and associated parking. The site of the Club is generally isolated from adjoining residential properties on the southern side of Evans Street and the western side of Carrington Parade, with the exception of the adjoining single detached dwelling at 4A Lumsdaine Drive (located to the north-west of the Club). The Club is located within close vicinity to the public open space of McKillop Park and Curl Curl Beach foreshore which is located to the east and north.

### RELEVANT BACKGROUND

**Development Consent DA 2007/1179** – This consent was granted for a covered timber deck, fencing, children's play equipment & shade covering, free standing umbrellas & rainwater tanks on 5 June 2008.

**Original Proposal in detail:** The proposed covered outdoor area and secured enclosure of the Children's Playground permits families to enjoy the new outdoor oriented activities while allowing a safe environment for children to play and be protected from the sun. The area allows for alcoholic beverages to be consumed externally from the main building and food to be eaten on what is the disused bowling green. The originally requested hours of use of these facilities were aligned with the existing operating hours of the Club:

Monday	9am to 2am
Tuesday	9am to 2am
Wednesday	9am to 2am
Thursday	9am to 4am
Friday	9am to 4am
Saturday	9am to 4am
Sunday	9am to 2am

The Development Application (2007/1179) was approved subject to trial period of 12 months for the hours of the use of the outdoor areas as follows:

### 3. ***Trial Period for Extended Hours Operations***

- (a) *A trial period of 12 months for the extended hours should be applied. If the applicant wishes to make the hours in Condition No. 24 permanent then the applicant must lodge an application under Section 96 of the Environmental Protection Act 1979 with appropriate supporting documentation on or before 5 June 2009.*
- (b) *The trial period hours referred to in Condition No. 24 remain in force until the Section 96 Application is finally determined subject to:*
  - (i) *A Class 1 appeal to the Land & Environment Court being commenced against any actual refusal of the Section 96 Application by the Council within 14 days from the date of that refusal, or*
  - (ii) *If the Council has not determined the Section 96 Application within 40 days of the lodgement of that application, a Class 1 appeal being commenced against the Council's deemed refusal of the application within 60 days of the date of the lodgement of the Section 96 application.*
  - (iii) *In the event that no Section 96 Application is lodged in accordance with the (a) and (b) above or the Section 96 Application is finally determined by refusal then the hours of operation revert to:*

#### ***Hours of operation***

*Monday – Sunday 9am to 6.00pm*

**Reason:** *Extension of operating hours may cause a noise nuisance to neighbours resulting in complaints to council. A review is to be conducted after the 12 month trial to assess whether the modified proposal should be approved*

### 24. ***Hours of operations (Trial Period)***

*The outdoor covered timber deck shall operate between the hours as follows:*

*Monday – Sunday 9am to 10.00pm*

*The children's playground shall operate between the hours as follows:*

*9.00am to 8.30pm*

**Reason:** *Hours to allow for reasonable trade while maintaining the amenity of the locality."*

It is noted that the proposed hours of use (as detailed above) were not supported, rather a restriction to cease the use of the outdoor areas at 10pm was considered appropriate to protect surrounding residential amenity and that finishing time was granted for a trial period of 12 months. That trial period will expire on 5 June 2009 and without further approval from Council will result in the hours of use being restricted to 6pm.



## PROPOSAL IN DETAIL

This modification application seeks to delete Condition No. 3 and amend Condition No. 24 to make permanent the current approved trial operating hours for the Covered Outdoor Area and Children's Playground Area.

## STATUTORY CONTROLS

- a) Environmental Planning and Assessment Act 1979
- b) Environmental Planning and Assessment Regulations 2000
- c) Warringah Local Environment Plan 2000
- d) Warringah Development Control Plan

## REFERRALS

### NSW Police Service

The NSW Police Service was notified of the application by email on 6 May 2009. In this regard, no complaints have been received in the last 12 months for the Harbord Diggers Club (both generally for the whole Club and specifically in relation to the use of the Outdoor Area and no objection to the subject application).

### Building Assessment and Compliance

Councils Customer Request Management (CRM) System records show that only one (1) complaint was received in the last 12 months for the Harbord Diggers Club which was specifically in relation to the use of the bowling greens and in conjunction with the use of the Outdoor Area.

## NOTIFICATION & SUBMISSIONS RECEIVED

The application was notified by letter dated 18/03/2009 to 196 surrounding properties. Two (2) submissions were received in response to the notification. Submissions were received from the following:

Submission Received	Address
Ann Duggan	4a Lumsdaine Drive, Freshwater
Ingrid Vanderwerff	confidential

The issues raised in the submissions are addressed as follows:

- i. **Noise Impacts & Extension of the Probation Period:** Two submissions were received in relation to noise generated over the Christmas period particularly in relation to patrons utilising the bowling greens located on the western side of the club. The in-use bowling greens, which are located to south of the approved outdoor area and playground, are located on the adjacent to Club building.

From the "Neighbour Complaint" records submitted by the applicant and from Councils own records, it is noted that only one (1) complaint was made in relation to the use of the outdoor area and the use of the bowling greens. It is noted that the complaint was received on the 19<sup>th</sup> December, 2008 which was the last Friday prior to Christmas Day. On that day, a number of Christmas Parties were booked on the outdoor areas to bowl and dine. Additionally, a high number of other patrons were enjoying the facility which is understandable given that a majority of people were breaking up for the holiday period. In this regard, it can be considered an "unusual event" and not representative of the normal conditions of use of the approved outdoor area.

The outdoor area approved under DA2007/1179 is additionally used by patrons for a smoker's area while consuming alcoholic beverages and by families for outdoor eating and children's play area. Conditions were imposed on the consent requiring the service of food and drinks to cease and the closing down of this area by 10.00pm as the protection of amenity of the residences surrounding the club was considered to be paramount. Additionally, it is noted that the use of the children's area has been ceasing at 8.30pm via the "Plan of Management" which accompanied the development application and which is enforced by management and security staff.

Given that the outdoor area has only been in operation for approximately 6 months, it is recommended that the trial period be extended for an additional 6 months. This will allow further monitoring of the outdoor area and playground area and to properly gauge the performance of these areas and the impacts on the amenity of the surrounding residential properties. The Plan of Management therefore can be further monitored and assessed for efficacy during this extended trial period.

A request from a respondent for the hours on Sunday through to Thursday to be reduced from 10pm to 8.30pm or 9pm is considered to be unwarranted given the singular complaint since the commencement of outdoor operations (as detailed previously). Therefore, the existing approved hours of operation for the outdoor area are recommended to be maintained till 10.00pm and the children's playground till 8.30pm as per the previous approval which are detailed in Conditions No. 3 and 24. This will ensure appropriate hours of operation are kept in place during a continuation of monitoring of the outdoor activities and reflects a responsible timeframe to assess these uses having regard to the proximity to the surrounding residential properties.

- ii. **Alcohol Free Zone:** A request for an "Alcohol Free Zone" surrounding the Club was requested from one of the respondents. In this regard, a Notice of Motion and the attendance of this respondent would be required at a Council meeting for the merits of whether an Alcohol Free Zone is warranted and to be properly examined by Council. It is noted that an Alcohol Free Zone can be granted under the Part 4 of the Local Government Act 1993 by Council, which, would be monitored and enforced by the NSW Police Service.

## **SECTION 96 OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979**

The subject application to modify Development Consent No. 2007/1179 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 (the Act) stipulates:

### ***'Modifications involving minimal environmental impact***

*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, and*
- (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*

- (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.*

The proposed development is considered to be of a minimal environmental impact for the following reasons;

- The modifications fall into the category of “minimal” environmental impact as the noise associated with Club patrons enjoying Club facilities does have the potential to cause an environmental impact, albeit a minimal one, as evidenced by the low level of complaints having been received in relation to the first 6 months of operation of the outdoor areas.
- The modification does not result in any external changes to the proposed development which might otherwise cause visual, streetscape or scenic impacts.

The development as modified, is considered to be substantially the same development as the development for which consent was originally granted. The proposed changes are to make the existing trial period, which ends on the 5<sup>th</sup> June, 2009 into a permanent arrangement.

From a review of available records and the public consultation carried out in association with the application, the amenity of neighbouring residential properties is unlikely to be significantly affected by the proposed modification (with regard to acoustic disturbance or visual privacy), provided the conditions of consent and Plan of management are complied with and implemented. Further, the visual appearance of the existing development, as seen from the neighbouring and the public domain will remain unchanged.

As discussed in the ‘Notification and Submissions’ section of this report, the application has been notified in accordance with the Environmental Planning and Assessment Regulation 2000 and Warringah Development Control Plan. Submissions have been received from two property owners. The issues raised in these submissions do not warrant the refusal of the application, as discussed under ‘Notification and Submissions Received’ in this report.

Accordingly, the proposed modifications may be assessed pursuant to Section 96(1A) of the Act.

### Section 79C Assessment

Section 96 of Environmental Planning and Assessment Act requires the consent authority to assess the relevant matters under Section 79C of the Act. Such matters are addressed as follows:

Section 79C 'Matters for Consideration'	Comments
<b>Section 79C (1) (a)(i) – Provisions of any environmental planning instrument</b>	See discussion on Warringah Local Environmental Plan 2000 in this report.
<b>Section 79C (1) (a)(iii) – Provisions of any development control plan</b>	Warringah Development Control Plan
<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>	(i) The environmental impacts of the proposed modification on the natural and built environment are addressed under the General Principles of Development Control in this report. In summary noise, safety and security have been addressed and it is recommended that a further monitoring period be established for the outdoor areas to properly assess/determine the performance of these components of the Club operations with respect to impacts on neighbouring amenity.

Section 79C 'Matters for Consideration'	Comments
	<p>(ii) The approved development provides a social/community benefit through the provision of a wider choice of recreation and social activities within the Club. However, the use of these facilities must be carefully balanced with the need to protect the broader community from excessive noise, lighting and anti-social behaviour. An extended trial period will allow for further monitoring of the use of the outdoor areas and allow for the Council and the Club to log complaints if any arise from the use of the existing bowling greens, outdoor covered area and playground area and facilitate a more comprehensive review.</p> <p>(iii) The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.</p>
<b>Section 79C (1) (c) – The suitability of the site for the development</b>	The site is considered suitable for the proposed modified development. The proximity of the Club allows for the public and members to utilise this area for outdoor eating, recreational facilities and family outings. The proposed Section 96 application seeks to continue this use while maintaining a reasonable environment for the adjoining residential properties.
<b>Section 79C (1) (d) – Any submissions made in accordance with the EPA Act or EPA Regs</b>	In regards to public submissions refer to the discussion on "Notification & Submissions" within this report.
<b>Section 79C (1) (e) – The public interest</b>	<p>The "wider" public interest is served by the continued maintenance of the site, and its ability to provide an appropriate landuse within this locality. The "localised" public interest relates to the protection of neighbours from external effects of development in accordance with Warringah Local Environmental Plan 2000.</p> <p>It is considered that an extended trial period will allow for a better assessment of the use and operations of this area of the Harbord Diggers Club. As such, the modification (as amended) is considered to be in the public interest.</p>

## STATUTORY CONTROLS

### 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:

#### *LOCALITY H1 – Freshwater Beach Locality*

*"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.*

*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."*

The approved development is identified as being ancillary to Category 2 - *Registered Club* development in this locality. The consistency of the previously approved development (use of a disused bowling green as an outdoor area and children's playground) was determined under the original development assessment. The current modification application does not alter that finding with respect to consistency with the Desired Future Character.

### Built Form Controls for Locality

Built form controls are not applicable to this application.

## GENERAL PRINCIPLES OF DEVELOPMENT CONTROL

The following General Principles of Development Control as contained in Part 4 of Warringah Local Environmental Plan 2000 are relevant to the assessment of the modification application:

General Principles	Applies	Comments	Complies
CL43 Noise	YES	<p>At the time of writing this report, the approved 12 month trial period for the hours of use of the outdoor eating and playground areas has been in full operation for period of 6 months, with the works enabling full scale use of this area for the approved purpose having been completed in November 2008 (Interim Occupation Certificate issued for the Outdoor Area). From the 196 notified landowners and occupiers, only 2 submissions were received which included issues in relation to noise, extension of the trial period and implementation of an alcohol free zone.</p> <p>Given that the full scale operation of the outdoor area has only been for short period of time (6 months), it is appropriate and responsible that an extended trial period be imposed for a further 6 months. This will allow the Club to continue to run its operations as per normal and maintain some recourse if the plan management is not adhered to during the extended trial period.</p> <p>It is noted that the original consent contained a condition (Condition 20) which stated that the use of the premises (the outdoor areas) shall not cause noise in excess of 5 dB(A) at the sites boundaries. There is no evidence that the use of the outdoor areas has breached this requirement, however, no noise monitoring was required under the terms of the consent. However, in the event that Council receives any complaints, such monitoring could be undertaken and appropriate action taken.</p>	YES, subject to conditions.
CL50 Safety & Security	YES	The use of these facilities must be carefully balanced with the need to protect the broader community from excessive noise, lighting and anti-social behaviour. An extended trial period will allow for further monitoring of the use of the outdoor area and allow for Council and the Club to log complaints (if any arise) from the use of the existing bowling greens, outdoor covered area and playground area.	YES

## MEDIATION

Has mediation been requested by the objectors?

NO

Has the applicant agreed to mediation?

N/A



## CONCLUSION

The site has been inspected and the application assessed having regard to the provisions of Section 96 and 79C of the Environmental Planning and Assessment Act, 1979, Warringah Local Environmental Plan 2000 and the relevant codes and policies of Council.

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, Warringah Local Environmental Plan 2000, Warringah Development Control Plan and the relevant codes and policies of Council.

The proposed modification seeks to delete Condition No. 3 which relates to the trial period (i.e. Hours of Operation) for the approved covered outdoor and playground areas located on the western side of the Harbord Diggers Club building. This condition was imposed to specifically address acoustic impacts and control anti-social behaviour in association with the use of the outdoor areas due the relatively close proximity of the outdoor areas to the adjoining residential development. The applicant wishes to make the hours approved under Condition 3 permanent and argues that there will be no adverse impact on the residential development.

As discussed in the body of this report, the applicant's request to delete Condition No. 3 cannot be supported on the basis that the trial period has only been in full operations for 6 months since the Interim Occupation Certificate was issued for use of this area in November 2008. Accordingly, it is recommended that Condition No. 3 be modified to extend the trial period for another 6 months, which will cover a full 12 months of use of the outdoor areas operating at full capability. This will provide for the applicant to trial the hours of operation for another 6 months and demonstrate and more comprehensively confirm that the acoustic performance is satisfactory or not.

The applicant will have the opportunity to lodge another S96 application upon the completion of the extended trial period. However, the assessment of any subsequent Section 96 application will require the applicant to demonstrate that the acoustic performance of the covered outdoor area and playground is satisfactory with respect to impacts on the surrounding residential properties.

Two (2) submissions were received on the grounds of acoustic impact and anti-social behaviour. The issues raised in these submissions are noted and have been addressed in the body of this report. In summary, the extension of the trial period for another 6 months will allow the opportunity to more fully demonstrate that the permanent hours of operation for the covered outdoor area and playground are appropriate and will not have an adverse impact on nearby residents.

Accordingly, it is recommended that the application be determined by way of approval, however, with amendments to Condition No. 3 rather than a deletion of the condition, as detailed below.

### **Modify Condition No. 3 - to read as follows:**

#### **3. Extended Trial Period for Hours of Operation**

- (a) The original Trial Period for the hours of operation of the outdoor areas is extended for a further 6 months from the date upon which this consent is modified under MOD2009/0049. If the applicant wishes to make the operating hours in Condition No. 24 permanent, then the applicant must lodge an application under Section 96 of the Environmental Planning and Assessment Act 1979, with appropriate supporting documentation on or before 5 December 2009.
- (b) The trial period hours referred to in Condition No. 24 remain in force until the further Section 96 Application is finally determined subject to:
  - (i) A Class 1 appeal to the Land & Environment Court being commenced against any actual refusal of the Section 96 Application by the Council within 14 days from the date of that refusal, or
  - (ii) If the Council has not determined the Section 96 Application within 40 days of the lodgement of that application, a Class 1 appeal being commenced against the Council's deemed refusal of the application within 60 days of the date of the lodgement of the Section 96 application.

- (iii) In the event that no Section 96 Application is lodged in accordance with the (a) and (b) above or the Section 96 Application is finally determined by refusal then the hours of operation revert to:

**Hours of operation**

Monday – Sunday 9am to 6.00pm

**Reason:** *Extension of operating hours may cause a noise nuisance to neighbours resulting in complaints to Council. A review is to be conducted after the extended 6 month trial to assess whether the modified proposal should be approved.*

It is considered that the proposed modification application (as amended) 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 Section 96 Application No. MOD2009/0049 to modify Development Consent No. DA2007/1179 granted for a Covered Timber Deck, Fencing, Children's Play Equipment & Shade Covering, Free Standing Umbrellas and Rainwater Tanks on land at Lot 100, DP 1136132, 80 Evans Street Freshwater (Harbord Diggers Club) be approved in accordance with the following:

**Modify Condition No. 3 - to read as follows:**

**3. Extended Trial Period for Hours of Operation**

- (a) The original Trial Period for the hours of operation of the outdoor areas is extended for a further 6 months from the date upon which this consent is modified under MOD2009/0049. If the applicant wishes to make the operating hours in Condition No. 24 permanent, then the applicant must lodge an application under Section 96 of the Environmental Planning and Assessment Act 1979, with appropriate supporting documentation on or before 5 December 2009.
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  - (ii) If the Council has not determined the Section 96 Application within 40 days of the lodgement of that application, a Class 1 appeal being commenced against the Council's deemed refusal of the application within 60 days of the date of the lodgement of the Section 96 application.
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