

REPORT TO APPLICATION DETERMINATION PANEL

Meeting held on 05 March 2015

1 / 55 Sorlie Road Frenchs Forest, 2 / 55 Sorlie Road Frenchs Forest - Modification of Development Consent DA2011/0378 granted for Internal fitout, change of use to business premises (Personal Weight Loss Consulting) and signs

APPLICATION FOR MODIFICATION ASSESSMENT REPORT

Application Number:	Mod2014/0284
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Responsible Officer:	Daniel Milliken
Land to be developed (Address):	Lot 3 SP 82357 , 1 / 55 Sorlie Road FRENCHS FOREST NSW 2086 Lot 4 SP 82357 , 2 / 55 Sorlie Road FRENCHS FOREST NSW 2086
Proposed Development:	Modification of Development Consent DA2011/0378 granted for Internal fitout, change of use to business premises (Personal Weight Loss Consulting) and signs
Zoning:	LEP - Land zoned B1 Neighbourhood Centre LEP - Land zoned B1 Neighbourhood Centre
Development Permissible:	No
Existing Use Rights:	Yes
Consent Authority:	Warringah Council Application Determination Panel
Land and Environment Court Action:	No
Owner:	Hyecorp Property Fund No. 5 Pty Ltd
Applicant:	Hyecorp Property Fund No. 5 Pty Ltd

Application lodged:	16/12/2014
Application Type:	Local
State Reporting Category:	Other
Notified:	08/01/2015 to 23/01/2015

Advertised:	Not Advertised in accordance with A.7 of WDCP
Submissions:	3
Recommendation:	Refusal

ASSESSMENT INTRODUCTION

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

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

SUMMARY OF ASSESSMENT ISSUES

Warringah Development Control Plan - D3 Noise

SITE DESCRIPTION

Property Description:	Lot 3 SP 82357 , 1 / 55 Sorlie Road FRENCHS FOREST NSW 2086 Lot 4 SP 82357 , 2 / 55 Sorlie Road FRENCHS FOREST NSW 2086
Detailed Site Description:	This application relates to two premises. The premises are legally described as Lot 3, SP 82357 and Lot 4, SP 82357, and are commonly known as Tenement 1 and 2, No.55 Sorlie Road, Frenchs Forest. No.55 Sorlie Road is bound by Sorlie Road to the north, Civic Drive to the south and Estelle Place to the east, and adjoins commercial buildings to the west. It is occupied by a mixed residential apartment and commercial building. The site, together with the adjacent commercial buildings to the west, are zoned B1 Neighbourhood Centre under WLEP 2011. The site is generally surrounded by residential dwellings. There is a northwest - southeast running public

reserve extending from the south-eastern corner of the intersection at Sorlie Road and Estelle Place to the south, and public open space located on the south-eastern corner of the intersection at Sorlie Road and Marcus Place.

The proposal relates to Tenement 1 and 2 which are located at the north-western corner of the building with frontages to Pringle Avenue to the north and the adjacent commercial buildings to the west. The premises are located below street level.

Map:



SITE HISTORY

Development Application No. DA2011/0378 was lodged for an Internal Fitout, Change of Use to Business Premises (Personal Weight Loss Consulting) and Associated Signage with proposed operating hours of 5.30am to 12.00pm and 3.00pm to 9.00pm Monday to Friday and 7.00am to 12.00pm on Saturday.

Council staff recommended conditions to restrict the business hours to 7.00am to 12.00pm, 3.00pm to 9.00pm Monday to Friday, and Saturday 7.00am to 12.00pm due to concerns in relation to noise impacts on surrounding residential amenity.

The application was reported to the Warringah Development Assessment Panel (WDAP) who determined that:

"That the recommendation of the Director Strategic and Development Services for approval in the report to WDAP dated 8 June 2011 Nos. 1-15 be adopted with an amendment to condition 11 as follows:-

Amend Condition 11 to read as follows;

11. Hours of Operation

The hours of operation are regulated as follows:

(a) The hours of operation must be restricted to between 7.00am and 12.00pm and 3.00pm and 9pm (inclusive) Monday to Friday, and 7.00am to 12.00pm (inclusive) Saturdays.

(b) Notwithstanding (a) above, the use may operate between 5.30am and 7.00am (inclusive) Monday to Friday for a trial period of 12 months from the issue of the Final Occupation Certificate. Council is to be informed in writing of the date of commencing the trial hours.

(c) A modification application may be lodged to continue the trading hours outlined in (b) above before the end of the trial period. Council's consideration of a proposed continuation and/or extension of the hours permitted by the trial will be based on, among other things, all legislative requirements, the performance of the operator in relation to the compliance with development consent conditions and any substantiated complaints received."

Consent was granted and commenced on 21 June 2011. A Complying Development Certificate was also issued for the fit-out in June 2011.

The trial period lapsed and the business continued to operate in accordance with the trial operating hours, which was contrary to the conditions of consent.

The current modification application is a belated application to regularise the current operating hours which start at 5.30am 6 days a week.

PROPOSED DEVELOPMENT IN DETAIL

The proposal seeks to amend condition 11 by deleting parts (b) and (c) and changing the permanent operating hours so that the condition reads as follows:

11. Hours of Operation

The hours of operation are regulated as follows:

The hours of operation must be restricted to between 5:30am and 12.00pm and 3.00pm and 9pm (inclusive) Monday to Friday, and 7.00am to 12.00pm (inclusive) Saturdays.

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

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

The relevant matters for consideration under the Environmental Planning and Assessment Act, 1979, are:
The application has been assessed in accordance with the requirements of the Environmental Planning

and Assessment Act 1979 and the associated Regulations. In this regard:

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

In this regard, the consideration of the application adopts the previous assessment detailed in the Assessment Report for DA2011/0378, in full, with amendments detailed and assessed as follows:

The relevant matters for consideration under Section 96(1A) of the Environmental Planning and Assessment Act, 1979, are:

Section 96(1A) - Other Modifications	Comments
A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:	
(a) it is satisfied that the proposed modification is of minimal environmental impact, and	Yes The modification, as proposed in this application, is considered to be of 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 consent was originally granted and before that consent as originally granted was modified (if at all), and	The development, as proposed, has been found to be such that Council is satisfied that the proposed works are substantially the same as those already approved under DA2011/0378.
(c) it has notified the application in accordance with: (i) the regulations, if the regulations so require, or (ii) a development control plan, if the consent authority is a council that has made a development control plan under section 72 that requires the notification or advertising of applications for modification of a development consent, and	The application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000, Warringah Local Environment Plan 2011 and Warringah Development Control Plan.
(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may	See discussion on "Public Exhibition" in this report.

Section 96(1A) - Other Modifications	Comments
be.	

Section 79C Assessment

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

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

Section 79C 'Matters for Consideration'	Comments
Section 79C (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on “Environmental Planning Instruments” in this report.
Section 79C (1) (a)(ii) – Provisions of any draft environmental planning instrument	None applicable.
Section 79C (1) (a)(iii) – Provisions of any development control plan	Warringah Development Control Plan applies to this proposal.
Section 79C (1) (a)(iia) – Provisions of any planning agreement	None applicable.
Section 79C (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation 2000)	<u>Division 8A</u> of the EP&A Regulation 2000 requires the consent authority to consider Prescribed conditions of development consent. These matters have been addressed via a condition in the original consent. <u>Clauses 54 and 109</u> of the EP&A Regulation 2000, Council requested additional information and has therefore considered the number of days taken in this assessment in light of this clause within the Regulations. No Additional information was requested. <u>Clause 92</u> of the EP&A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This matter has been addressed via a condition in the original consent. <u>Clauses 93 and/or 94</u> of the EP&A Regulation 2000 requires the consent authority to consider the upgrading of a building (including fire safety upgrade of development). This matter has been addressed via a condition in the original consent. <u>Clause 98</u> of the EP&A Regulation 2000 requires the consent

Section 79C 'Matters for Consideration'	Comments
	authority to consider the provisions of the Building Code of Australia (BCA). This matter has been addressed via a condition in the original consent.
Section 79C (1) (b) – the likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality	(i) The environmental impacts of the proposed development on the natural and built environment are addressed under the Warringah Development Control Plan section in this report. (ii) The proposed development will not have a detrimental social impact in the locality considering the character of the proposal. (iii) The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.
Section 79C (1) (c) – the suitability of the site for the development	The site is considered unsuitable for the proposed operating hours considering the use as a gym.
Section 79C (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs	See discussion on “Public Exhibition” in this report.
Section 79C (1) (e) – the public interest	This assessment has found the proposal to be contrary to the relevant requirement(s) of the Warringah Development Control Plan Part D3 Noise and will result in a development which will create an undesirable precedent such that it would undermine the desired future character of the area and be contrary to the expectations of the community. In this regard, the development, as proposed, is not considered to be in the public interest.

EXISTING USE RIGHTS

- **Does the existing use satisfy the definition of "existing use" under the Environmental planning and Assessment Act, 1979 (the 'Act')?**

Section 106 of the Act defines an existing use as meaning:

"(a) the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part, have the effect of prohibiting that use, and

(b) the use of a building, work or land:

- (i) for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and*
- (ii) that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse."*

This necessarily requires the following questions to be answered.

1. Was the use of the building, work or land a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or

Division 4 of this Part 4 of the Act, have the effect of prohibiting that use?

Comment:

The current use of the tenancy commenced as a lawful purpose on 21 June 2011 through DA2011/0378, prior to the coming into force of Warringah Local Environmental Plan 2011 on 9 December 2011.

2. Was the use of the tenancy granted development consent before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use?

Comment:

The current use of the tenancy commenced as a lawful purpose on 21 June 2011 through DA2011/0378, prior to the coming into force of Warringah Local Environmental Plan 2011 on 9 December 2011.

3. Has the use of the tenancy been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse?

Comment:

The use of the tenancy was carried out on 21 June 2011, which is within one year from the date on which the provision having the effect of prohibiting the use commenced.

- **What is “the land on which the existing use was carried out” for the purposes of cl 42(2) (b) of the Environmental Planning and Assessment Regulation 2000 (“the Regulation”)?**

Meagher JA in *Steedman v Baulkham Hills Shire Council* [No. 1] (1991) 87 LGERA 26 stated (at 27) the rule to be applied as follows: “that if the land is rightly regarded as a unit and it is found that part of its area was physically used for the purpose in question it follows that the land was used for that purpose”.

Comment:

Having regard to the above case law, it is noted that the whole of the area of the land was physically used for the purpose in question and therefore, it is considered that the land was used for that purpose and that existing use rights apply to the whole of the subject site.

- **What are the planning principles that should be adopted in dealing with an application to alter enlarge or rebuild and existing use?**

The judgement in *Fodor Investments v Hornsby Shire Council* (2005) NSWLEC 71, sets out the planning principles which should be applied in dealing with development applications seeking to carry out development on the basis of existing use rights.

The following four principles adopted by the court in this case will have general application in dealing with Development Applications that rely on existing use rights:

1. How do the bulk and scale (as expressed by height, floor space ratio and setbacks) of

the proposal relate to what is permissible on surrounding sites?

While planning controls, such as height, floor space ratio and setbacks do not apply to sites with existing use rights; they have relevance to the assessment of applications on such sites. This is because the controls apply to surrounding sites and indicate the kind of development that can be expected if and when surrounding sites are redeveloped. The relationship of new development to its existing and likely future context is a matter to be considered in all planning assessments.

Comment:

This modification is for a change to operating hours only.

2. What is the relevance of the building in which the existing use takes place?

Where the change of use is proposed within an existing building, the bulk and scale of that building are likely to be deemed acceptable, even if the building is out of scale with its surroundings, because it already exists. However, where the existing building is proposed for demolition, while its bulk is clearly an important consideration, there is no automatic entitlement to another building of the same floor space ratio, height or parking provision.

Comment:

This modification is for a change to operating hours only. No change to the building is proposed.

3. What are the impacts on adjoining land?

The impact on adjoining land should be assessed as it is assessed for all development. It is true that where, for example, a development control plan requires three hours of sunlight to be maintained in adjoining rear yards, the numerical control does not apply. However, the overshadowing impact on adjoining rear yards should be reasonable.

Comment:

This modification is for a change to operating hours only.

4. What is the internal amenity?

Internal amenity must be assessed as it is assessed for all development. Again, numerical requirements for sunlight access or private open space do not apply, but these and other aspects must be judged acceptable as a matter of good planning and design. None of the legal principles discussed above suggests that development on sites with existing use rights may have lower amenity than development generally.

Comment:

This modification is for a change to operating hours only.

Conclusion

The use has been approved under a previous EPI (WLEP 2000) and therefore, is a lawful use. Subsequently, the use can be retained under the current EPI (WLEP 2011).

NOTIFICATION & SUBMISSIONS RECEIVED

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

As a result of the public exhibition process council is in receipt of 3 submission/s from:

Name:	Address:
Ms Monica Myree O'Brien	7 / 55 Sorlie Road FRENCHS FOREST NSW 2086
Mr Bradley Jason Smith	7 / 55 Sorlie Road FRENCHS FOREST NSW 2086
Strata Partners	PO Box 3046 WILLOUGHBY NORTH NSW 2068

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

- Noise

The matters raised within the submissions are addressed as follows:

- Noise

The submissions raised concerns that the gym creates unreasonable noise especially prior to 7:00am.

Comment: This matter is discussed in detail under Part D3 Noise in this report. In summary, as the land is now zoned B1 Neighbourhood Centre (the use is now prohibited in this zone, however, it does benefit from existing use rights), residential units are located directly above the tenancy and the number of substantiated noise complaints, it is considered inappropriate for the use to maintain opening hours of 5:30am.

In this regard, it is recommended that the modification be refused and condition 11 be modified to delete parts (b) and (c) and return the operating hours to 7:00am to 12:00pm, 3:00pm to 9:00pm Monday to Friday and 7:00am to 12:00pm Saturday.

MEDIATION

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

REFERRALS

No referrals were sent in relation to this application

ENVIRONMENTAL PLANNING INSTRUMENTS (EPIs)*

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

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

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

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

Nil

Warringah Local Environment Plan 2011

Is the development permissible?	No
After consideration of the merits of the proposal, is the development consistent with:	
aims of the LEP?	Yes
zone objectives of the LEP?	Yes

Principal Development Standards

The modification seeks to amend the operating hours. No changes to any development standards are proposed and therefore no further assessment is required.

Warringah Development Control Plan

Built Form Controls

The modification seeks to amend the operating hours. No changes to any built form controls are proposed and therefore no further assessment is required.

Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
A.5 Objectives	Yes	Yes
D3 Noise	No	Yes

Detailed Assessment

D3 Noise

Merit consideration

The development is considered against the underlying Objectives of the Control as follows:

- *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 use was approved with permanent operating hours of 7:00am to 12:00pm, 3:00pm to 9:00pm Monday to Friday and 7:00am to 12:00pm Saturday. The notice of determination for DA2011/0378 also included conditions allowing early opening hours from 5:30am Monday to Friday for a trial period of 12 months. The condition stated:

"A modification application may be lodged to continue the trading hours outlined in (b) above before the end of the trial period. Council's consideration of a proposed continuation and/or extension of the hours permitted by the trial will be based on, among other things, all legislative requirements, the performance of the operator in relation to the compliance with development consent conditions and any substantiated complaints received."

Since the start of the early opening hours there have been a series of noise complaints from residents living above the tenancy directly relating to the use and to the noise produced during the hours before 7:00am. An acoustic report dated 11 September 2014 prepared by Renzo Tonn & Associates found that:

"Noise events produced by the gym currently exceed the criteria presented in Section 3 being an average LAmax level for any noise impulse not to exceed the LA90 background noise level by more than 5 dBA in Apartments 7 and 1. Ambient noise levels within apartment 4 between 6pm and 7pm were too high to gain accurate results."

However, the report did not measure noise levels during the early hours, only between 6pm and 7pm on Friday 8th August and is therefore of limited value. The report did include a number of recommendations to minimise noise, however, there is no guarantee that if the changes are made, the use will receive no further noise complaints.

Council has received copies of a number of submissions made to the NSW Government Fair Trade Department raising concerns in relation to noise generated by the use prior to 7am. Council has also received objections during the notification period raising concerns in relation to noise for this current modification.

As the land is now zoned B1 Neighbourhood Centre (the use is now prohibited in this zone, however, it does benefit from existing use rights), residential units are located directly above the tenancy and there has been a number of substantiated noise complaints as well as objections to the current modification, it is considered inappropriate for the use to maintain opening hours of 5:30am.

In this regard, it is recommended that the modification be refused and condition 11 be modified to delete parts (b) and (c) and return the operating hours to 7:00am to 12:00pm, 3:00pm to 9:00pm Monday to Friday and 7:00am to 12:00pm Saturday.

THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES

The proposal will not significantly effect threatened species, populations or ecological communities, or their habitats.

CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN

The proposal is consistent with the principles of Crime Prevention Through Environmental Design.

CONCLUSION

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

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

This assessment has taken into consideration the submitted plans, Statement of Environmental Effects, all other documentation supporting the application and public submissions, in this regard the application is not considered to be acceptable and is recommended for refusal.

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

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

It is considered that the proposed development does not satisfy the appropriate controls and that all processes and assessments have been satisfactorily addressed.

RECOMMENDATION

THAT Council , as the consent authority REFUSE Modification Application No. Mod2014/0284 for Modification of Development Consent DA2011/0378 granted for Internal fitout, change of use to business premises (Personal Weight Loss Consulting) and signs on land at Lot 3 SP 82357,1 / 55 Sorlie Road, FRENCHS FOREST, Lot 4 SP 82357,2 / 55 Sorlie Road, FRENCHS FOREST, subject to the reasons outlined as follows:

1. **Warringah Development Control Plan - D3 Noise**

Pursuant to Section 79C(1)(a)(iii) of the Environmental Planning and Assessment Act 1979, the proposed development is inconsistent with the provisions of Warringah Development Control Plan 2011 in that the development will result in unreasonable noise impacts on surrounding residential properties, which is contrary to the objectives of Part D3 - Noise of the WDCP 2011.

Part B That the Notice of Determination is to be amended to delete the references to the trial period and submission of a modification of consent as follows:

A. Modify Condition 11 - Hours of Operation to read as follows:

The hours of operation are regulated as follows:

The hours of operation must be restricted to between 7.00am and 12.00pm and 3.00pm and 9pm (inclusive) Monday to Friday, and 7.00am to 12.00pm (inclusive) Saturdays.

Reasons: To protect the amenity of the surrounding area.