

3 October 2024

The General Manager
Canterbury-Bankstown Council
PO BOX 8
Bankstown NSW 1885

Attention: Planning Department

Dear Sir/Madam,

**RE: STATEMENT OF ENVIRONMENTAL EFFECTS
SECTION 4.55(2) MODIFICATION – DA-1448/2023
CHANGE OF USE TO FOOD AND DRINK PREMISES
156 WILLIAM STREET, EARLWOOD**

This Statement of Environmental Effects (SEE) has been prepared in support of a Section 4.55(2) Modification to DA-1448/2023 which was approved on 7 March 2024. The approved development was for the 'change of use of first floor to part of commercial tenancy (previously residential)' at 156 William Street, Earlwood.

The proposed modification is to extend the change of use to incorporate the rear of the ground floor as commercial.

This SEE has been prepared based on the following documents:

- Architectural Plans prepared by Hillside Architects.
- BCA Compliance Assessment Report (Fire Safety Upgrade) prepared by Absolute BCA & Accessibility Consulting.
- Waste Servicing Agreement with J.J. Richards & Sons.

The Site

The subject site is commonly known as 156 William Street, Earlwood and is legally defined as Lot 1 in Deposited Plan 603514. The site is a corner allotment with a primary street frontage to William Street and a secondary street frontage to Main Street. The site is approximately 163m².

The site contains a two storey building currently operated as a food and drink premises "Gyradiko Kitchen" with a single car space at the rear and an ancillary structure attached to the rear of the building. The land sits within a modest strip of business zoning with residential to the south along Main Street. Refer to Figure 1 Site Location Map and Figure 2 for streetview imagery.

■ **Sydney Office**
Suite 15, Level 1
469-475 Parramatta Rd
Leichhardt NSW 2040

■ **Brisbane Office**
3A Cambridge Street
West End QLD 4101

t. 02 9569 1100
f. 02 9569 1103
e. gat@gatassoc.com.au
w. www.gatassoc.com.au



Figure 1: Site Location Map (Source: SIX Maps)



Figure 2: View of the site from the corner of William and Main Streets (Source: Google Maps)



Figure 3: View of the site from Main Street (Source: Google Maps)

Development History

The table below covers the relevant development history associated with the site and its use as a food and drink premises which have led to the current application.

Application Number	Description	Determination
DA-5211/1190	Take away seafood shop	Approved – 19/11/1990
DA-965/2020	New awning to existing commercial premises	Approved – 23/12/2020
BC-21/2021	Unauthorised ground floor coolroom	Withdrawn – 31/07/2023
BC-45/2023	Internal fit-out including stainless steel bench and a mechanical exhaust canopy connected to the existing exhaust system	Withdrawn – 31/07/2023
BC-114/2023	Alterations to existing commercial premises (food premises) and addition of a detached coolroom and associated awning	Refused – 15/07/2023
DA-1448/2023	Change of use of first floor to part of commercial tenancy (previously residential)	Approved – 07/03/2024

As indicated above, the site is currently attempting to resolve unauthorised works.

It is understood that BC-21/2021 and BC-45/2023 were withdrawn at the request of Council to consolidate the Building Information Certificates, which became BC-114/2023. DA-1448/2023 was submitted during the assessment of BC-114/2023 in an attempt to resolve the approved land use as the first floor was previously residential. While DA-1148/2023 was approved by Council, resolving the use of the first floor for food and drink premises, BC-114/2023 was refused largely due to insufficient information and inaction on requests for additional information.

Following the refusal of BC-114/2023, an Order was issued on the site on 24 July 2024 relating to the use of the ground floor room at the rear of the main building which was being used for the purposes of food preparation and food storage. Council advised that there was no record of an approval for commercial use at the rear of the ground floor. Consequently, this application is being submitted to resolve this inconsistency.

Due to the refusal of BC-114/2023, there remain outstanding issues due to the unauthorised works including non-compliances with the National Construction Code. A separate Building Information Certificate is being worked on and will be submitted as soon as possible.

Proposal

The application before Council seeks to modify development consent DA-1448/2023 to convert the rear of the ground floor to commercial to align with the remainder of the building being used as a food and drink premises.

The ultimate outcome that is sought following the approval of this application will be the entire building being approved for the currently operating food and drink premises.

Internally, it is sought that the approval will permit the use of the building for the following:

Ground Floor

- The front room will be the customer foyer and primary cooking area.
- The central room will be a food preparation area.
- The rear room will be a storage and washing up area.
- The rear of the ground floor on the site will comprise a cool room and, at the very rear, a car space with waste/bin and oil barrel storage.

First Floor

- The entirety of the first floor will be used for storage with a bathroom.

The architectural plans have noted for Council's reference works that will be undertaken as part of the forthcoming Building Information Certificate to resolve the unauthorised works and compliance with the National Construction Code. These are not works sought are this application. The plans are simply illustrative of the intended layout post forthcoming BIC and to demonstrate how the site as a fully commercial use will present.

Reason for the Modification

The purpose of the modification is to resolve the inconsistency that has arisen from DA-1448/2023 whereby previous applications and/or Council have not sought or granted consent to a change of use application leaving a portion of the ground floor as commercial. The issue was brought to light in an Order issued for the property and therefore must be resolved.

There is no feasible dwelling on the site in the current built form. Consequently, the change of use to a fully commercial development is sought.

PLANNING ASSESSMENT

Section 4.55 Modification of Consent—Generally of the Environmental Planning and Assessment Act 1979

Section 4.55(2) of the Environmental Planning and Assessment Act 1979 permits the modification of development consents in accordance with the below:

“(2) Other modifications A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—

- (a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and
- (b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and
- (c) it has notified the application in accordance with—
 - i. the regulations, if the regulations so require, or
 - ii. a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and
- (d) it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.

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

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

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

(5) (Repealed)”

In order to have the ability to modify a development consent under Section 4.55(2) of the Environmental Planning and Assessment Act 1979, Council must be satisfied that the development as modified would be *substantially the same* as the development for which the development consent was originally granted. The planning merits of the modification are not relevant to the determination of the threshold question of whether the development to which the consent relates would be *substantially the same* development as the development for which consent was originally granted.

In this regard, Council must apply the “*substantially the same development test*” to any Section 4.55 Application lodged. Case law in **Vacik Pty Ltd v Penrith City Council** (Stein J, 10242 of 1991, 24 February 1992) stated this test in the following terms:

“... ‘substantially’ when used in the section means essentially or materially or having the same essence”.

In relation to determining whether the proposed modified development is “*essentially or materially*” the same as the approved development. Justice Bignold in **Moto Projects No. 2 Pty Ltd v North Sydney Council** (1999) 106 LGERA 298 at 309, states:

“The relevant satisfaction required by s 96(2) (a) to be found to exist in order that the modification power be available involves an ultimate finding of fact based upon the primary

facts found. I must be satisfied that the modified development is substantially the same as the originally approved development.

The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is “essentially or materially” the same as the (currently) approved development.

The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared....”

In light of the above, the test is whether the Section 4.55 proposal is “essential or materially” the same as the development that was initially approved by Council. A method of undertaking this assessment is a comparison between the development as approved and the development as proposed to be modified taking into account quantitative and qualitative aspects.

It is the submission of this report that the characteristics of the development are quantitatively and qualitatively the same. The reasons for this are as follows:

- The modification seeks to change the use from residential to commercial, identical to DA-1448/2023.
- There is no change to the building envelope.
- There is no change to floor area.
- There is no change to car parking.
- There is no change to the presentation of the development.
- There is no change to the environmental impacts of the development, e.g. visual and acoustic privacy, overshadowing, or visual bulk.

As there is no functional residential use of the site in the current context, the modification to remove any aspect of residential approved on this is a rectification of an issue from the previous application. The purpose remains the same – to allow the current food and drink premises to operate on the land.

In consideration of the above, it is concluded that the proposal is substantially the same as the development that was approved initially and therefore satisfies the relevant test under Section 4.55(2) of the Environmental Planning and Assessment Act 1979.

Section 4.55(3) requires the consent authority to consider the matters referred to in section 4.15(1) of the Act as relevant to the development of the modification application. This assessment occurs below.

Section 4.15 Evaluation of the Environmental Planning and Assessment Act 1979

(1) Matters for consideration – general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development, the subject of the development application.

(a) *The provisions of:*

(i) *any environmental planning instrument*

State Environmental Planning Policy (Resilience and Hazards) 2021

Chapter 4 Remediation of Land of State Environmental Planning Policy (Resilience and Hazards) 2021 requires Council to consider whether the land is contaminated before granting consent to the carrying out of any development on that land.

Should the land be contaminated Council must be satisfied that the land is suitable in a contaminated state for the proposed use. If the land requires remediation to be undertaken to make the land suitable for the proposed use, Council must be satisfied that the land will be remediated before the land is used for that purpose.

The site is currently being used for commercial premises and is sought to be formalised entirely for the current use, a food and drink premises. There have been no activities on the site since the approval of DA-1148/2023 which permitted the change of use of the first floor to commercial premises that would give rise to potential contamination considerations.

In accordance with State Environmental Planning Policy (Resilience and Hazards) 2021, Council can conclude that no further assessment of contamination is necessary.

Canterbury-Bankstown Local Environmental Plan 2023

Land Zoning

The site is zoned B1 Neighbourhood Centre under Canterbury-Bankstown Local Environmental Plan (LEP) 2023. Refer to Figure 4 below.



Figure 4: Land Zoning Map (Source: NSW Planning Portal Digital EPI Viewer)

The proposed development involves a change of use to a food and drink premises. The land use table for the B1 Neighbourhood Centre zone is quoted below.

2 Permitted without consent

Home occupations

3 Permitted with consent

Boarding houses; Building identification signs; Business identification signs; Business premises; Car parks; Centre-based child care facilities; Community facilities; Early education and care facilities; Environmental facilities; Environmental protection works; Flood mitigation works; Food and drink premises; Home businesses; Information and education facilities; Kiosks; Markets; Medical centres; Mortuaries; Neighbourhood shops; Neighbourhood supermarkets; Office premises; Oyster aquaculture; Places of public worship; Recreation areas; Recreation facilities (indoor); Respite day care centres; Roads; Service stations; Shops; Shop top housing; Specialised retail premises; Tank-based aquaculture; Veterinary hospitals

4 Prohibited

Pond-based aquaculture; Any other development not specified in item 2 or 3

Noting the underline emphasis above, a food and drink premises is permissible with consent in the zone.

The objectives of the zone are:

- *To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.*
- *To provide for certain residential uses that are compatible with the mix of uses in neighbourhood centres.*
- *To promote a high standard of urban design and local amenity.*

The following is stated in response:

- The change of use application to approve the full site as a food and drink premises will permit a small-scale retail activity on the land that serves the needs of the people who live or work in the surrounding neighbourhood.
- The proposal does not involve residential use and does not restrict surrounding that for that purpose.
- The proposal is for change of use only.

Given the above, the proposal aligns with the zone objectives.

Other Provisions

It is noted that no other provisions of the Canterbury-Bankstown LEP 2023 are relevant to the proposal.

(ii) *any proposed instrument*

No proposed instruments affect the assessment of this application.

(iii) *any development control plan*

Canterbury-Bankstown Development Control Plan 2023

Chapter 3.2 – Parking

The site currently contains provision for one (1) off-street parking space. There is no change sought to the provision of car parking.

Under control 2.6, the off-street parking requirements will not apply to the application as it involves a change of use to a food and drink premises within Zone B1 and the new use does not increase the GFA of the building and will not contravene any condition of the most recent development consent that applies (DA-1148/2023) relating to car parking and vehicular movement.

No bicycle spaces are currently present on the site nor are any proposed. Should Council deem it necessary for there to be provision of bicycle spaces on this site, these can be conditioned to be facilitated at the rear of the site for staff.

Chapter 3.3 – Waste Management

Waste is currently stored at the rear of the site adjacent to the car spaces and is collected by a private contractor. A record of the waste agreement with the private waste contractor has been submitted with the application for Council's reference.

It is noted that the refusal of BIC-114/2023 noted some matters to be resolved for the waste storage location. These will form part of the forthcoming Building Information Certificate.

Chapter 10.4 – Non-Residential Land Uses

Section 6 – Site Facilities

The change of use modification application serves to resolve the land use inconsistency on the site. The forthcoming Building Information Certificate will address current inconsistencies with the relevant food standards in accordance with the requirements of control 6.6.

The architectural plans submitted illustrate intended final fit-out following this application and the Building Information Certificate.

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

There are no planning agreements associated with this application.

(iv) *any matters prescribed by the regulations*

The proposal is not in conflict with any matters prescribed by the Regulations.

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

(i) *Impact on the natural environment:*

(ii) *Impact on the built environment:*

There are no impacts on the natural or built environment by the change of use modification application, as it relates to existing structures and involves no vegetation removal.

(iii) Social and Economic impacts in the locality:

The change of use will have a positive social and economic impact on the area, allowing for the current food and drink premises to operate fully on the site and serve the local community including through employment opportunities.

(c) the suitability of the site for development

The land is appropriately zoned to permit the change of use and meets the long term objectives of the zone under the Canterbury-Bankstown LEP 2023.

(d) any submissions made in accordance with this Act or the regulations

No submissions have been received at this time.

(e) the public interest

The public interest will be served by the approval of the application as it will for the current business to operate fully across the site, ensuring the longevity of the operation.

It is considered that the proposed development is conducive to Council's policies and does not result in any unreasonable impacts.

Under the circumstances of this case, it is considered that the proposed change of use is acceptable and should be supported by Council.

Conclusion

The proposed Section 4.55(2) to DA-1448/2023 serves to rectify a discrepancy that has a portion of the ground floor remaining as approved for residential while the remainder of the ground and first floor have been approved for commercial purposes. The modification to the previous change of use application is the most expedient resolution to the matter. This SEE has considered the relevant planning controls and is demonstrated to be permissible with consent and acceptable following assessment of those key relevant planning controls. It is sought that Council approve the application.

Kind regards

Darren Laybutt
Senior Town Planner
GAT & Associates
Plan 5033