

COUNCIL ASSESSMENT REPORT – MODIFICATION APPLICATION

HUNTER AND CENTRAL COAST REGIONAL PLANNING PANEL

PANEL REFERENCE & DA NUMBER	PPSHCC-296 MA2022/0433
PROPOSAL	This modification application seeks to amend condition no. 76 of DA2019/01150 to allow the use of the outdoor terrace (associated with the Rooftop Bar) between 10:00pm and 12:00 midnight, Monday to Saturday.
ADDRESS	185 Hunter Street, Newcastle
APPLICANT	URBIS PTY LTD
OWNER	EAST END STAGE 1 PTY LTD
MOD LODGEMENT DATE	1 December 2022
ORIGINAL DA DETERMINATION DATE	16 April 2020
APPLICATION TYPE	Modification Application under Section 4.55(2)
REGIONALLY SIGNIFICANT CRITERIA	<p>Section 275 of the <i>Environmental Planning and Assessment Regulation 2021</i> states that a council must not determine an application to modify a development consent under the Act, Section 4.55(2), on behalf of a regional planning panel, if the application is of a kind specified in the <i>Instruction on Functions Exercisable by Council on Behalf of Sydney District or Regional Planning Panels—Applications to Modify Development Consents</i> published on the NSW Planning Portal on 30 June 2020.</p> <p>Council is not able to determine an application under Section 4.55(2) of the Act, to modify a development consent granted by a Regional Panel, if the application proposes an amendment to a condition of consent that was amended by the Panel.</p>
CIV	Nil
CLAUSE 4.6 REQUESTS	Not applicable to this Modification Application
TOTAL & UNIQUE SUBMISSIONS KEY ISSUES IN SUBMISSIONS	The amended application was placed on public exhibition from 10 April - 29 April 2024 and four unique submissions were received objecting to the proposal. The issues raised in the public submissions are considered further in this report.

DOCUMENTS SUBMITTED FOR CONSIDERATION	<ul style="list-style-type: none"> • Attachment A - Draft Conditions of Consent • Attachment B - Amended Rooftop Bar Noise Assessment, dated 16 January 2024. • Attachment C - Amended Level 06 Floor Plan, dated 28 March 2024. • Attachment D - Amended Elevation Plan, dated 28 March 2024.
SPECIAL INFRASTRUCTURE CONTRIBUTIONS (S7.24)	Not Applicable
RECOMMENDATION	Approval, subject to conditions of consent in addition to a 12-month trial period for the use of the outdoor terrace associated with the rooftop bar between 10:00pm and 12:00 midnight Monday to Saturday.
DRAFT CONDITIONS TO APPLICANT	The draft conditions will be sent to the applicant after the report has been submitted to the Panel.
SCHEDULED MEETING DATE	19 August 2024
PREPARED BY	W. Toose, Principal Development Officer (Planning)
DATE OF REPORT	12 August 2024

EXECUTIVE SUMMARY

The modification application (MA2022/0433) has been lodged pursuant to section 4.55(2) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and proposes to amend the consent granted under DA2019/01150 approved by the Panel on 16 April 2020. Specifically, consent is sought to amend condition no. 76 of development consent DA2019/01150 to extend the approved hours of operation to enable use of the outdoor terrace (associated with the Rooftop Bar) to 12:00 midnight, Monday to Saturday. The hours of operation approved for use of the outdoor terrace under DA2019/01150 are between 7:00am and 10:00pm, seven days per week. The approved hours of the Rooftop Bar, excluding the outdoor terrace, is to midnight.

Several public submissions have been submitted to CN since the lodgment of the modification application. The submissions have raised a variety of issues, all of which have been considered and evaluated during the assessment of the proposed modification. In response to concerns raised within submissions, and matters identified by CN during the assessment, the Applicant provided additional information and amended the proposal including the construction of an acoustic barrier and awning. The current application was renotified from 10 April to 29 April 2024 and four submissions were received. The issues raised in the public submissions during this notification period are considered further in this report.

A Panel Briefing was held on 18 June 2024. The Panel noted the following:

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- *The roof-top bar currently trades until midnight whilst the outdoor terrace is restricted to 10pm. The modification seeks to permit use of the outdoor terrace to midnight 6 days a week from Monday to Saturday inclusive.*
 - *The outdoor terrace has a capacity of approximately 30 people.*
 - *The submitted acoustic report has been updated and provides solutions to manage noise impacts with various physical acoustic measures proposed.*
 - *The terrace is in close proximity to residential balconies/living areas.*
 - *NSW Police have objected to the proposed modification.*
 - *The proposal has been notified three times with a reduction in submitters now objecting to the proposal.*

Several key issues were also discussed at this briefing, including the need for clarification in relation to:

- *The actual residential level that was used to measure / test acoustic impacts; and*
- *The Council could consider the possible use of trials / time limited consents in the event that they are supportive of the application.*

The key issues identified in the assessment of the modification application include acoustic impacts and disturbance to the amenity of surrounding residents. A thorough assessment of the proposed modification has been completed and it has been determined that the proposed modification can be supported, subject to the recommended Draft Schedule of Conditions, which include a 12-month trial period to the use of the outdoor terrace between 10:00pm and 12:00 midnight, Monday to Saturday.

Details of the assessment are contained in the assessment report below.

1. THE SITE AND LOCALITY

1.1 The Site

The site is commonly known as the "QT Hotel" and occupies the heritage listed, "Former David Jones" building fronting Hunter Street Mall. The approved hotel consists of 104 guest rooms, reception on Hunter Street, ground floor restaurant, ground floor hotel bar, ground floor sports bar/gaming lounge and roof terrace bar together with associated service and plant areas. Pedestrian access to and from the hotel reception is available directly from Hunter Street 24 hours per day, seven days per week.

The Rooftop bar on Level 6 of the QT Hotel includes an outdoor terrace, which is the subject of this modification application.

1.2 The Locality

The surrounding land is described as:

- North - development along the northern side of the Hunter Street Mall is a mix of two, three, and four storey buildings with retail at ground and typically commercial office space above and includes two heritage buildings at 160 and 170 Hunter Street.

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- West - Perkins Street forms the eastern boundary of the site. On the western side of Perkins Street is a mix of commercial development of various scales and building forms. Uses comprise the Crown and Anchor Hotel, retail shops and offices and the former Victoria Theatre. The streetscape presents a mixture of scale and form.
 - South - The southern boundary of the site is King Street. On the opposite side of King Street, between Wolfe and Perkins Streets, is development of 2-6 storey commercial and residential development. Further to the south-east is Cathedral Park, the Christ Church Cathedral and the Newcastle Club above large sandstone retaining walls and steeply rising topography.

On 16 April 2020, development consent DA2019/01150 was granted by the Hunter Central Coast Regional Planning Panel (HCCRPP) for "Tourist and Visitor accommodation". This application was for the adaptive reuse of the heritage listed former David Jones building which is located on the site subject, and which forms part of the Stage 1 approval associated with concept approval for the 'East End Development'.

In supporting the application, the HCCRPP noted the following:

- The roof top terrace is supported in this location, subject to strict conditions on acoustic measures and management of the area. The Panel considered the visual privacy relationship between the eastern edge of the bar and the recessed balconies of immediately adjoining approved residential balconies and were satisfied on the design resolution within the proposal.
- Includes an appropriate use as an adaptive reuse of the heritage buildings and may enhance appreciation by a wider audience. It is permitted within the zone, contributes to zone and precinct objectives and will further enhance economic revitalisation of the East End precinct. It will strengthen the vitality of the area as a boutique retail, entertainment and residential destination and diversify the precinct as a destination for activities including dining, entertainment, nightlife and events, contributing to increased vitality, whilst promoting tourism and employment in proximity to public transport linkages and other city centre amenities and activities.

2. THE PROPOSAL AND BACKGROUND

2.1 The Proposed Modification

Condition no.76 of DA2019/01150 restricts the hours and use of operation of the outdoor terrace associated with the rooftop bar to between 7:00am and 10:00pm, 7 days per week.

This modification application seeks to amend this condition to allow the use of the outdoor terrace until 12:00 midnight, Monday to Saturday.

On the 1 December CN received a Section 4.55(1A) modification application, CN did not agree with the applicants position that the application was of 'minimal environmental impact' and advised the applicant to amend accordingly. On 30 March 2023, the Applicant formally requested the application be amended to be assessed as a section 4.55(2) modification application.

Several public submissions have been received objecting to the development throughout the assessment process. The objections primarily relate to acoustic impacts and disturbance to

the amenity of surrounding residents.

2.2 Background

On 16 April 2020, DA2019/01150 development consent was granted by the HCCRPP for tourist and visitor accommodation. This application was for the adaptive reuse of the heritage listed former David Jones building ('Building B') which is located on the site subject, and which forms part of the Stage 1 approval associated with concept approval for the 'East End Development'.

The QT Hotel opened in early 2022 and has a rooftop bar and outdoor terrace which is the subject of this modification.

The proposed modification application was lodged on 1 December 2022. A chronology of the modification application since lodgment is outlined below in **Table 1** including the Panel's involvement with the application:

Table 1: Chronology of the Modification Application

Date	Event
1 December 2022	Application lodged.
7 December - 21 December 2022	Public notification of modification application. Note: This notification period was formally amended by CN due to ensure that the strata plans of surrounding properties were captured in the notification.
6 January - 25 January 2023	Re-notification of modification application. Note: This re-notification included all previous properties, plus the additional properties. Any person who had previously provided a submission was not required to re-submit their submission.
30 March 2023	A request for further information was issued to the applicant. CN raised several concerns regarding the potential maximum noise levels associated with the proposal, due to the outdoor area's proximity to residential receivers. The information requested included: <ul style="list-style-type: none">– A sleep disturbance assessment was requested to be undertaken as the application proposes to operate within night-time hours.– Confirmation of the proposal being lodged as a s.4.55(2) application.– An amended Plan of Management (PoM) to reflect the proposed hours of use for the outdoor terrace.
30 March 2023	Additional information received in response to CN's request for information dated 23 March 2023.
2 May 2023	A request for further information was issued to the applicant. CN reviewed the amended Acoustic Assessment and noted

	<p>significant exceedances at adjacent residential receiver.</p> <p>It was requested that further mitigation measures were required to be investigated to satisfy the project noise goals.</p>
11 May 2023	Additional information received in response to CN's request for information dated 2 May 2023.
11 May 2023	<p>CN reviewed the various operational and management measures provided by the applicant in their response and issued a further information request. It was noted that the proposed measures not considered sufficient to appropriately manage the impacts to the most affected residential receiver.</p>
18 May 2023	<p>Additional information received in response to CN's request for information dated 11 May 2023.</p> <p>In addition to the various management procedures proposed to be implemented, the Applicant's acoustic consultant proposed a 2.8m high, movable acoustic barrier to manage the potential acoustic impacts.</p> <p>The acoustic consultant concluded the following:</p> <p><i>"The acoustic barrier will result in a maximum noise level of 64dB(A) (Patron SHOUT) arising from at the worst affected facade of R1 which is only 3 dB over the criteria. Please also note that predicted 64dB(A) is noise level on external facade, internal noise level will be around 54dB(A). Section 5.4 of NSW Road Noise Policy states that 'maximum internal noise levels below 50–55 dB(A) are unlikely to awaken people from sleep'. Hence, given the above solution is implemented, it is unlikely that nearby residential receivers will be affected".</i></p>
20 July 2023	<p>CN reviewed the above response from the Applicant's acoustic consultant and raised the following concerns in relation to the findings:</p> <ul style="list-style-type: none"> – The 3 dB(A) exceedance of the sleep arousal criteria is still significant, and Council is unable to form an opinion that it is not a concern. – The Applicant is to demonstrate how they are proposing to reduce the noise. This would likely involve hard controls – i.e. barriers that adequately attenuate the noise to below the sleep arousal criteria. It is up to the applicant to suggest reasonable attenuation measures to address this issue. – Sleep disturbance requires proper consideration, particularly given the proximity of the premises to the residential units.
24 August 2023	<p>Additional information received in response to CN's advice, dated 2023.</p> <p>The Applicant's acoustic consultant proposed the following acoustic attenuation measures in order to comply with the predicted noise level criteria:</p> <ul style="list-style-type: none"> - Construction of a solid awning, with absorptive material underneath, above the outdoor terrace.

	<ul style="list-style-type: none"> - Construction of a solid barrier on the eastern elevation of the outdoor terrace, to the downside of the awning with no gap in between.
13 December 2023	<p>A final request for additional information was issued to the applicant in relation to additional noise attenuation measures and details including:</p> <ul style="list-style-type: none"> - A 30/70 split (indoor/outdoor) of patron numbers. - All access doors to the terrace are to be closed from 10pm to midnight and must only allow egress. - Supporting detail to demonstrate the practical application/management of patron numbers and closing/operation of doors leading to the terrace (i.e. automation). - Architectural details of the proposed solid awning with absorptive material and solid barrier to the eastern side of the balcony. - The current indoor music limit is 82dB(A)Leq before midnight and 70dB(A)Leq after midnight. Internal noise levels are to be reduced to maximum 75dB(A)leq and not amplified (before midnight) and 70dB(A)leq after midnight. No music is to be on the external terrace. - Updated acoustic modelling/assessment to address the above amended conditions. This must include assessment against sleep disturbance criteria. The report must also address impacts to adjoining residential receivers, particularly after 10:00pm, including from conversations/laughter etc. - An updated Plan of Management (reflecting the above) and including the inclusion of a complaints register is to be provided.
30 March 2024	<p>Additional information received in response to CN's request for information, dated 13 December 2023. The additional information included the following documents:</p> <ul style="list-style-type: none"> • Amended Rooftop Bar Noise Assessment, dated 16 January 2024. • Amended Plan of Management, dated 29 March 2024 • Amended plans, dated 23 March 2024 which propose a solid awning and barrier to be designed prior to the issue of a Construction Certificate in accordance with the Amended Rooftop Bar Noise Assessment.
10 April - 29 April 2024	Renotification of amended information.
18 June 2024	HCCRPP Panel briefing.

3. STATUTORY CONSIDERATIONS

When determining a modification application, the consent authority must take into consideration the matters outlined in 4.55(2) of the EP&A Act in relation to modification of consents provisions, Section 4.15(1) of the EP&A Act in relation to matters for consideration for applications and Part 5 of the *Environmental Planning and Assessment Regulation 2021* (EP&A Regs) in relation to information requirements and notification. These matters are considered below.

3.1 Section 4.55 of the EP&A Act

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 for s4.55 applications and subject to and in accordance with the regulations, modify the consent if several matters are satisfactorily addressed pursuant to Section 4.55(2) of the EP&A Act. The matters include the following:

Subsection 4.55(2)(a) – substantially the same development

- (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) (s4.55(2)(a)), and***

An assessment of the qualitative and quantitative elements of the development approved and as proposed to be modified has been undertaken, and found the development being modified is essentially or materially the same as the development for which consent was originally granted in April 2020.

Adequate evidence has been provided in the form of a Noise Impact Assessment to demonstrate that noise emissions to all nearby development will be compliant, provided that the noise mitigation recommendations are adopted.

The proposal does not alter the existing conditions to such a degree that it is not substantially the same development.

- (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 (s4.55(2)(b)), and***

No public authority or approval bodies were required to be consulted.

- (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 (s4.55(2)(c)), and***

Notification was undertaken in accordance with CNs Community Participation Plan (CPP), and Division 2 of Part 5 of the EP&A Regs. The modification application was formally publicly notified on three separate occasions:

- i) 7 December to 21 December 2022.

Note: This notification period was formally amended to ensure the Strata plans of the surrounding properties were notified.

- ii) 6 January to 25 January 2023.

Note: This re-notification included all previous properties, plus the additional properties. Any person who had previously provided a submission was not required to re-submit their submission

In response to the December 2022 and January 2023 notification periods, a combined total of 35 submissions were received objecting to the proposal.

- iii) 10 April to 26 April 2024.

In response to this notification period, four unique submissions were received objecting to the proposal.

- (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 (Section 4.55(2)(d)).***

The issues raised in the submissions received during the notification period of 10 April to 26 April 2024 are considered and addressed in Section 4 of this report.

- (e) *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 (Section 4.55(3)).***

The matters required to be considered include:

- Matters for consideration pursuant to Section 4.15(1) of the EP&A Act – these matters are considered below in Section 3.2 of this report; and
- Reasons given by the consent authority for the grant of the consent that is sought to be modified – outlined below.

Reasons for Grant of Consent

The Planning Panel granted consent to the original development in a notice of determination dated 16 April 2020. The reasons outlined in the Statement of Reasons for this decision and included the following:

"In supporting the application, the Panel generally agreed with the environmental assessment and balance of considerations within the Council

assessment report, noting it was prepared by external planning consultants who were involved in assessment of the original concept approval and other related assessments. The Panel also considered consistency with the determined concept approval, as modified".

The Panel stated that the proposal:

- *Is consistent with the concept development consent for the site as modified (DA 2017-00701.02) and meets the requirements of section 4.24(2) of the Environmental Planning and Assessment Act 1979;*
- *Is supported by comprehensive professional and expert documentation;*
- *Public safety has been considered, taking into account the consultation by Council with the Licensed Premises Reference Group (LPRG) and the operational plan of management, and appropriate conditions have been incorporated including operations to occur as per an approved operational plan of management (updated to incorporate consent conditions and unable to be altered without the consent of Council and NSW Police) that manages a range of matters including public safety to the extent that a planning consent can. Ongoing management of the facility, including gaming, will be subject to additional requirements under other legislation.*
- *Includes an appropriate use as an adaptive reuse of the heritage buildings and may enhance appreciation by a wider audience. It is permitted within the zone, contributes to zone and precinct objectives and will further enhance economic revitalisation of the East End precinct. It will strengthen the vitality of the area as a boutique retail, entertainment and residential destination and diversify the precinct as a destination for activities including dining, entertainment, nightlife and events, contributing to increased vitality, whilst promoting tourism and employment in proximity to public transport linkages and other city centre amenities and activities.*

The proposed modification is generally consistent with Panel's Statement of Reasons, dated 16 April 2020.

3.2 Section 4.15(1) of the EP&A Act

Section 4.15(1) of the EP&A Act contains matters which the consent authority must take into consideration in determining a development application and modification applications pursuant to Section 4.55(2), which are of relevance to the application.

These matters include the following, which are considered in detail below:

- (a) *the provisions of—*
 - (i) *any environmental planning instrument, and*
 - (ii) *any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*
 - (iii) *any development control plan, and*
 - (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*

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- (iv) *the regulations (to the extent that they prescribe matters for the purposes of this paragraph),*
- (b) *that apply to the land to which the development application relates, the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (c) *the suitability of the site for the development,*
- (d) *any submissions made in accordance with this Act or the regulations,*
- (e) *the public interest.*

3.2.1 Section 4.15(1)(a) - Provisions of Environmental Planning Instruments, Proposed Instruments, DCPs, Planning Agreements and the Regulations

The relevant provisions under s4.15(1)(a) are considered below.

(a) Environmental planning instruments (s4.15(1)(a)(i))

The following Environmental Planning Instruments are relevant to this application:

3.2.2 Section 4.15(1)(a) - Provisions of Environmental Planning Instruments, Proposed Instruments, DCPs, Planning Agreements and the Regulations

The relevant environmental planning instruments, proposed instruments, development control plans, planning agreements and the matters for consideration under the EP&A Regs are considered below:

Newcastle Local Environmental Plan 2012

The relevant local environmental plan applying to the site is the *Newcastle Local Environmental Plan 2012* (NLEP 2012). The requirements of relevance in the NLEP 2012 are discussed in the table below:

The site is located within the MU1 Mixed Use zone pursuant to Clause 2.2 of the LEP. The zone objectives include the following (pursuant to the Land Use Table in Clause 2.3):

- *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*
- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.*

Given the nature of the proposed modification being an extension to the hours of operation for the outdoor component of an existing licenced premises, the zone objectives have limited relevance with the exception of the third objective being, *"To minimise conflict between land uses within this zone and land uses within adjoining zones"*.

The development is compatible with the existing character of development in the immediate area and is located on a site suitably zoned for the proposed land use. The site is located within the Newcastle City Centre where CN's strategic planning documents support and encourage the operation of venues as part of the nighttime economy.

The proposal includes on-going management and acoustic mitigation measures that will minimise amenity impact to nearby residences to a level considered to be satisfactory for a City Centre location. Therefore, the proposal is consistent with the third objective of this clause.

Clause 5.10 - Heritage Conservation

There are no changes which would have a detrimental impact on the significance of the listed heritage items in the vicinity of the site, nor will it impact the character of the heritage conservation area of which the site is a part (being the Newcastle City Centre Heritage Conservation Area).

Clause 6.5 - Public Safety - Licensed Premises

The modification application relates to extended hours of operation for the outdoor component of an existing licensed premises, not the establishment of a new licensed premises.

Although not specifically a hotel or registered club, consideration of this clause is warranted given the premises is licensed. Clause 6.5 requires the consideration of public safety before granting consent to a use of land as a licensed premises.

The applicant has provided detailed information to support the modification, including a PoM which have satisfactorily demonstrated that the proposed modification would not be detrimental to public safety, subject to compliance with the recommended conditions of consent. Therefore, it is considered that the proposal is consistent with this clause.

Part 7 - Additional Local Provisions - Newcastle City Centre

The site is located within the Newcastle City Centre. There are several requirements and objectives for development within the City Centre, which includes promoting the economic revitalisation of the City Centre and activity during the day and throughout the evening, facilitating design excellence and protecting the natural and cultural heritage of Newcastle.

The proposed modification which seeks consent to extended trade of the QT Rooftop remains consistent with the objectives of Part 7 of the NLEP 2012. Noting there are no design clauses specific to modification, the application is consistent with the provisions of Part 7.

(b) *Provisions of any Proposed Instruments (s4.15 (1)(a)(ii))*

There are no proposed instruments of relevance to the proposed modification application.

(c) *Provisions of any Development Control Plan (s4.15(1)(a)(iii))*

The following Development Control Plan is relevant to this application:

- *Newcastle Development Control Plan 2012*

The Newcastle Development Control Plan 2023 (DCP 2023) was formally adopted by City of Newcastle on the 1 March 2024.

Notwithstanding the adoption of the NDCP 2023, the subject modification application was lodged on the 24 January 2024 and is subject to the provisions of the former Newcastle Development Control Plan 2012 (NDCP 2012) in accordance with the nominated savings and transitional provisions of the NDCP 2023:

"DCP 2023 does not apply to any development application lodged but not finally determined before its commencement. Any development application lodged before its commencement will be assessed in accordance with any previous development control plan (DCP).

Exemptions

The above savings and transitional arrangements do not apply to the following sections:

- *D4 Commercial*
- *E3 Tighes Hill Local Character*
- *E4 Kotara Local Character*

Development applications to which these sections apply will be assessed in accordance with DCP 2023."

As the proposal is the subject of a modification application, and not a development application, the assessment remains subject to the provisions of the NDCP 2012.

It is noted that the amendments to the EP&A Act 1979 provisions in the *Environmental Planning and Assessment Bill 2012* expressly require a consent authority to give less weight to development control plan requirements, than the provisions of an environmental planning instrument (i.e. an LEP). Notwithstanding, the NDCP 2012 provisions are important in ensuring that any new development is compatible with the surrounding natural and built environment.

The main planning requirements of relevance in the NDCP 2012 are discussed in detail below:

- *Section 4.04 Safety and security*

The potential impacts of the development are considered acceptable and can be adequately addressed through conditions of consent. Conditions regarding hours of operation, CCTV management, maximum patron capacity, the PoM supported by the Acoustic assessment and mitigation measures are included in the Draft Schedule of Conditions in **Attachment B**.

Pedestrian access to and from the Rooftop bar is available directly from The Hotel Reception which is accessible from Hunter Street. To ensure minimal disturbance to hotel guests and nearby residential properties from patrons departing after midnight, a procedure outlined in the Plan of Management (POM) states that the hotel operator shall consider the amenity of neighbours and take reasonable measures to ensure the conduct of the business does not impact adversely on the surrounding areas of Perkins and King Streets and Victoria Lane. The proposal is considered acceptable having regard to this section of the DCP.

- *Section 4.05 Social Impact*

The proposal promotes social interaction, opportunities for employment, night-time trade, and a more active and safer site and surrounding neighbourhood. The modification seeks to use the outdoor area between 10:00pm and 12:00 midnight, in association with the existing small bar. The existing licensed premises is not seeking to extend its hours of operation or increase the existing patron capacity.

The use of the outdoor area after 10:00pm has been assessed in accordance with the amended acoustic assessment and is considered unlikely to create adverse impact upon the locality, subject to the reasonable on-going management of the premises, compliance with recommended conditions of development consent.

The proposal is considered acceptable having regard to this section of the DCP.

d) Other relevant policies

- Newcastle After Dark Strategy

The Newcastle After Dark Strategy (After Dark) guides the development of the city's nighttime economy. It outlines the key priorities and actions to be delivered by Council in its commitment to leading the development of a creative, safe and vibrant nightlife that contributes to the cultural and economic revitalisation of Newcastle.

After Dark acknowledges that there is an expectation that life in the city centre is going to involve denser social and business interactions and that nightlife precincts will have different approved uses and later trading hours and increased noise levels. It also discusses the Agent of Change principle, whereby the entity responsible for introducing the change into the built environment carries the onus of mitigating the impacts of the change. In this case, the applicant is proposing several measures to mitigate the impact of the use on the surrounding properties through physical noise mitigation measures and operational aspects.

After Dark also identifies CN's key areas of concern and threats to the night-time economy including noise, land use conflicts, and alcohol related violence. It also identifies different night-time precincts and major town centres. The proposal is located within one of the seven significant precincts, being the East End. In respect to the East End, the Strategy outlines that more small bars are welcomed, and the precinct is characterised by twilight through to night-time economy (i.e. 5:00pm to 1:00am). The proposed extended hours are consistent with After Dark.

The application provides the following statement in support of the proposal:

"The proposed modification will deliver positive social and economic impacts. The extension of hours aligns with the Newcastle After Dark Strategy's (2018) Priority for Night-time economic development. The strategy identifies the significant role of Newcastle's night-time economy at a regional and national scale, as well as significantly contributing to the city's revitalisation by supporting a diverse set of nightlife options in the nightlife precincts.

The proposed modification seeks to contribute to the night-time economic development of the East End Precinct. Similarly, the strategy highlights its support for existing businesses to maximise potential and value. The growth of such venues can effectively contribute to the regional economy, highlighting the importance of the modification to improve its hours of operation.

The Strategy notes that opportunities for the East End area for the development of more small bars, noting that the existing character of the area is associated with wine bars and small bars rather than traditional pubs.

Furthermore, the NSW Government have introduced a Bill to amend Schedule 8 of the EP&A Act to include provisions relating to Vibrancy Guidelines. This Bill supports this case and encourages “venues to operate in a way that achieves their full social, business and cultural potential as part of the night-time economy.”

The proposed modification is considered to align with the Vibrancy Guidelines and the Newcastle After Dark Strategy”.

The proposal is consistent with the intent of After Dark, in optimising an existing developed site, and providing improved management practices within this Newcastle City Centre location.

The amended PoM submitted with the application outlines the operational measures to ensure safety, security and amenity of guests, staff, residents and the broader community. Subject to the recommended conditions of consent, which include a 12-month trial period, the modification is consistent with the After Dark Strategy.

- Newcastle 2030 Community Strategic Plan (CSP)

The CSP is a shared community vision for how the city will look in the next 10 years. The CSP through consultation with the community and analysis of key economic, environmental, and societal trends to ensure appropriate planning and service delivery. This Plan is prepared regarding the social justice principles of equity, access, participation and rights, and addresses social, environmental, economic, and governance matters.

The applicant outlines, that *Vibrant, Safe and Active Public Places are key visions for Novocastrian neighbourhoods. Specific aspirations include having:*

- i. Public places that provide for diverse activity and strengthen our social connections.
- ii. The inclusion of culture, heritage and place which are valued, shared and celebrated.
- iii. A thriving city that attracts people to live, work, invest and visit.
- iv. Safe and activated places that are used by people day and night.

The proposed modification to facilitate extended trading hours is consistent with the CSP, by suitably addressing potential adverse impacts arising from the use, including noise and management of patrons.

There are several acoustic mitigation measures and operational conditions which are proposed as part of this application. These measures are considered to provide an improved outcome in terms of the current arrangement and the existing Hotel establishment.

- Local Strategic Planning Statement (LSPS)

The LSPS was adopted by CN in May 2020. The Statement is CNs 20-year land use vision and identifies how CN will sustainably manage the growth and change of our city. The LSPS gives effect to the Hunter Regional Plan 2036 and Greater Newcastle Metropolitan Plan 2036, implements priorities from the CSP, Newcastle 2040 and brings together land use planning actions in other adopted strategies.

The Statement outlines, that *key planning visions, outlined in the LSPS, allow for Newcastle to have a creative and innovative economy and a people orientated city, and includes the below direction relating to night-time economy:*

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- iv. Our night-time economy has grown and attracts people of all ages and backgrounds with a diverse range of venues and activities that support live music, arts and other entertainment as an integrated part of our city environment.

The proposal is consistent with the LSPS directions, in assisting to meet the needs of the community through the revitalisation of the East End, by providing *'food beverage offerings, stimulating the use of public transport, and making it a more walkable and safer street, valuing and designing to the attributes of the coastal location, enhancing social gathering opportunities and supporting the local night-time economy'*.

Subject to the recommended conditions of consent, which include a 12-month trial period, the proposed modification is consistent with the LSPS.

(d) Planning agreements under Section 7.4 of the EP&A Act (s4.15(1)(a)(iiia))

There have been no planning agreements entered into and there are no draft planning agreements being proposed for the site.

(e) Provisions of Regulations (s4.15(1)(a)(iv))

These provisions of the EP&A Regs have been considered and are addressed in the recommended draft conditions (where necessary).

3.2.3 Section 4.15(1)(b) - Likely Impacts of Development

During the initial rounds of exhibition there were 35 public submissions received. The submissions have raised a variety of issues, particularly acoustic impacts and disturbance to residential amenity.

Subsequently the applicant amended the application, in response concerns raised by objectors and in response to matters raised by CN during the assessment. The amended application included mitigation measures to reduce the impacts of the proposal, and additional information to support the proposal.

Potential impacts related to the current proposal have been assessed in accordance statutory requirements and in response to public submissions, including those matters raised during the Panel briefing.

The proposed development includes on-going management measures that will minimise amenity impact to nearby residences to a level considered to be satisfactory for a City Centre location.

A thorough assessment of the proposed completed has been undertaken and it has been determined that the potential and the proposal is recommended for approval subject to conditions of consent. A key recommendation is for a 12-month trial period, which will enable CN to evaluate the performance of the operator in relation to the compliance with development consent conditions, any substantiated complaints received, and any views expressed by the Police.

3.2.4 Section 4.15(1)(c) - Suitability of the site

The proposal is compatible with the existing and future character of the area and is located on a site suitably zoned for the intended use.

The site is located within the Newcastle City Centre where CN's strategic planning documents support and encourage the operation of venues as part of the nighttime economy.

3.2.5 Section 4.15(1)(d) - Public Submissions

Submissions received during the public exhibition period are considered and addressed in Section 4.3 of this report.

3.2.6 Section 4.15(1)(e) - Public interest

A comprehensive and detailed assessment of the matters for consideration under Section 4.15(1) of the *EP&A Act*, the provisions of the relevant policies, the provisions of the Newcastle Local Environmental 2012 and Newcastle Development Control Plan 2012 has been made.

Several public submissions have been submitted to CN since the initial lodgment of the modification application. The submissions have raised a variety of issues, all of which have been genuinely considered and evaluated. In response to these concerns and those of CN, many amendments were made to the proposal by the Applicant to respond to the matters raised within the submissions, to reduce the impacts of the proposal, and to provide additional information.

After a detailed consideration of the statutory requirements and the public submissions, including those matters raised during the Panel briefing, it has been determined that despite the objections received during the assessment process, the application is in the public interest.

Given the key nature of the proposal the key likely impact relates to acoustic and disturbance to amenity of surrounding residents as discussed in further detail below:

Acoustic Assessment

CN has reviewed the Noise Impact Assessment prepared by Acoustic Logic, dated 16 January 2024 and notes the report addresses internal and external noise concluding, that based on the assumption modelled with controls in place, the proposed development satisfies the assessment criteria.

The Noise Impact Assessment has followed the conventional process of determining the criteria for the potentially affected receivers, characterising source noise levels, modelling the propagation of these source levels, determining compliance, and specifying controls as necessary. The reports incorporate a series of assumptions in its noise modelling to simulate a likely use scenario. These assumptions have been repeated within the set conditions.

Internal Noise

- The Noise Impact Assessment modelled the existing operating internal amplified entertainment along with patron noise, which was propagated to receivers adjacent to the premises. The consultant concludes that based on the modelled assumptions, amplified entertainment and patron noise will be mitigated through a series of attenuation measures. These include:
- The sliding door between the bar and outdoor terrace to remain closed from 10:00pm to 12:00 midnight except to allow for the entry and exit of patrons.

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- Installation of a noise control limiter at the premises.

Outdoor Area

The Acoustic Assessment has also modelled patron noise from the outdoor area which was also propagated to receivers adjacent to the premises. The consultant concludes that based on the modelled assumptions, patron noise will be mitigated through a series of attenuation measures. This includes:

- Installation of a solid awning above the roof terrace, which is to be retained in the fully extended position from 10pm - 12 midnight
- The installation of a solid barrier on the eastern end of the terrace which will be permanent and leave no gaps with the solid awning.
- A limit of 30 patrons (at any one time), in the outdoor area between 10:00pm - 12:00 midnight.
- No music or PA audio being permitted in the outdoor area.

The above mitigation measures will be addressed within the following conditions of consent:

- A solid awning and barrier are to be designed prior to the issue of a Construction Certificate in accordance with the Rooftop Bar Noise Assessment prepared by Acoustic Logic dated 16 January 2024. Written final certification confirming the treatment has been designed to meet the noise levels specified in accordance with the requirements of the above report is to be submitted to the principal certifier and Newcastle City Council.
- Prior to the issue of an Occupation Certificate an appropriately qualified consultant is to install and set out the ongoing operating requirements of a noise limiting device to meet the noise levels specified in the Acoustic Logic Rooftop Bar Noise Assessment dated 16 January 2024. Written final certification confirming all treatments have been implemented in accordance with the requirements of the above report is to be submitted to the principal certifier and Newcastle City Council.
- The use of the outdoor area is to be restricted to 30 patrons between 10:00pm to 12:00 midnight Monday to Sunday.
- The sliding door is to be kept closed between 10:00pm to 12:00 midnight Monday to Sunday except to allow for entry or exit of patrons or unless in the case of an emergency.
- No music or amplified sounds other than emergency PA announcements are to be played in the outdoor area.

The operating scenario put forward by the applicant will require diligent and consistent monitoring along with adherence to the plan of management. The consultant has modelled with the installed controls creating a barrier and a restriction on maximum patron numbers in the outdoor area between 10:00pm to 12:00 midnight, the operation of the outdoor terrace is unlikely to exceed the guidelines.

Conclusion:

As discussed within relevant sections of this report, the proposal is not considered likely to result in significant noise impacts subject to reasonable on-going management of the premises and compliance with recommended conditions of development consent.

In addition to the above recommendations, the use of the outdoor terrace between 10:00pm and 12:00 midnight, Monday to Saturday will be subject to 12-month trial period. Council's

consideration of a proposed continuation of the hours permitted by the trial will be based on, among other things, the performance of the operator in relation to the compliance with development consent conditions, any substantiated complaints received, and any views expressed by the Police. All other issues raised by Council officers are considered in the related sections of this report. No further referrals were required to internal Council officers for comment.

The proposal is consistent with CN's strategic intent for the night-time economy, with the premises situated in a location desired by CN in contributing to the growth of the nighttime economy, and with reasonable intended hours of operation.

The proposed development includes on-going management measures that will minimise amenity impact to nearby residences to a level considered to be satisfactory for a City Centre location.

The development is in the public interest and will allow for the orderly and economic development of the site.

3.3 Part 5 of the Environmental Planning & Assessment Regulation 2021 (EP&A Regs)

There are several matters required to be addressed in an application for modification of development consent pursuant to Division 1, 2 and 3 of Part 5 of the EP&A Regs. These matters are considered in **Table 2** below.

Table 2: Consideration of the Requirements under the Regulation

Matter	Comment	Comply
Clause 100 Application for modification of development consent		
Applicant details (CI 100(1)(a))	Provided on the NSW Planning Portal ('the Portal').	Y
Description of the development (CI 100(1)(b))	Provided on the Portal and outlined in Section 2 of this Report.	Y
Address and title details (CI 100(1)(c))	Provided on the Portal and outlined in Section 1 of this Report.	Y
Description of the proposed modification (CI 100(1)(d))	Provided on the Portal and outlined in Section 2 of this Report.	Y
Whether to correct a minor error, mis-description or miscalculation, or some other effect (CI 100(1)(e))	The proposed modification is to modify the original consent under Section 4.55(2) and is not to correct a minor error, misdescription or miscalculation.	Y
Description of the expected impacts of the modification (CI 100(1)(f))	Refer to key issues section (where required).	Y
Undertaking that modified development will remain substantially same as	The modified development will remain substantially the same development as that originally approved. Refer to Section 3.1 of this Report.	Y

development originally approved (CI 100(1)(g))		
Owner's consent (CI 100(1)(i))	An undertaking has been provided on the Portal.	Y
Whether the application is being made to the Court (under section 4.55) or to the consent authority (under section 4.56) (CI 100(1)(j)).	This Application is made to the consent authority pursuant to Section 4.55(2) of the EP&A Act.	Y
Notification and exhibition requirements (CII 105-112)	Refer to Section 4.3 of this report.	Y

4. REFERRALS AND SUBMISSIONS

4.1 Agency Referrals

There were no concurrence requirements from agencies for the proposal and the application is not integrated development pursuant to Section 4.46 of the EP&A Act.

The application was referred to NSW Police who provided comments regarding the proposed modification application in the interest of public safety. However, should the proposal be considered for approval, several conditions of consent are recommended to be imposed on any consent granted. These include:

- The maximum number of persons permitted within the premises is to be restricted to 100 persons – as per the previous development application. From the hours of 10:00pm to 12:00 midnight, no more than 30 patrons are to be located within the outdoor area of the Roof Terrace Bar, this is consistent with the NSW Police recommendations
- From the hours of 10:00pm to 12:00 midnight all doors/windows between the bar and the outdoor terrace are to remain closed except for ingress and egress.
- Existing barrier on the outdoor terrace to remain extended between 10:00pm and 12:00 midnight.
- Appropriate signage is to be displayed at the entrance of the premises reminding patrons to minimise noise when departing the premises.
- No live musical entertainment being conducted at the premises unless a separate application and acoustic assessment prepared by a qualified acoustic consultant is submitted and approved by Council.
- No speakers to be installed on the outdoor terrace section of the bar.

Officers' response and comments:

In response to the Police comments, specific incidents or complaints directly relevant to the subject premises have not been cited.

As discussed within relevant sections of this report, the proposal is not considered likely to result in significant impacts by way of noise, anti-social behaviour, safety and security subject to reasonable on-going management of the premises and compliance with recommended conditions of development consent.

In addition to these measures, the use of the outdoor terrace between 10:00pm and 12:00 midnight, Monday to Saturday will be subject to 12-month trial period. Council's consideration of a proposed continuation of the hours permitted by the trial will be based on, among other things, the performance of the operator in relation to the compliance with development consent conditions, any substantiated complaints received, and any views expressed by the Police.

4.2 Council Referrals

The modification application was referred to the following Council officers for technical review as outlined **Table 3**. The outstanding issues raised by Council officers are considered in the Key Issues section of this report.

Table 3: Consideration of Council Referrals

Officer	Comments
Environmental Health	CN's Senior Environmental Health Officer has provided detailed technical input throughout the assessment process, including review of the submitted Noise Impact Assessment as discussed elsewhere within the report. Subject to the recommended conditions of consent the proposal is considered acceptable.

4.3 Notification and Community Consultation

The modification application was previously notified on two occasions from 7 December to 21 December 2022 and 6 January to 25 January 2023. In response to these notification periods, a combined total of 35 submissions were received objecting to the proposal. The submissions raised a variety of issues including noise; reliability of noise impact assessment; impact to residential amenity; anti-social behaviour; public notification process; incompatibility with the existing character of the area; and inconsistency with s4.55(1A) criteria. The key issues raised within previous submissions have been discussed previously in this report.

The current modification application (as amended) was notified in accordance with the CN's Community Participation Plan from 10 April until 24 April 2024. Four submissions were received expressing continued concerns regarding the proposal.

A summary of the relevant issues and concerns raised in the submissions is provided in **Table 3** below. Detailed comments on the issues raised have been provided elsewhere in the report and have not necessarily been repeated below.

Table 3: Consideration of community views

Issue raised	Response
<p>Substantially the same development</p> <p><i>Objections have raised concerns that the proposed modification application is not considered to be substantially the same as the development for which consent was originally granted in April 2020.</i></p>	<p>An assessment of the qualitative and quantitative elements of the approved development (as proposed to be modified) has been undertaken and found the proposed modification is essentially or materially the same as the development for which consent was originally granted in April 2020.</p>

<p>Noise</p> <p><i>Several Objections have raised concern over unreasonable impacts on residential receivers due to noise. These concerns predominantly derive from the proposed hours of operation and patronage within the outdoor area.</i></p>	<p>As discussed within this Report, an acoustic assessment was submitted with the application which has been revised throughout the assessment process to address several concerns raised by CN officers and those in the submissions.</p> <p>The Applicant's updated acoustic assessment dated 16 January 2024 has been reviewed and is considered acceptable.</p> <p>The amended acoustic assessment has adequately demonstrated acoustic impacts have been considered appropriate, including the impact to sleep disturbance, with the addition of several measures to further assist with maintaining a reasonable acoustic environment both on site and for surrounding residential receivers.</p> <p>An amended PoM was submitted which has provided further clarity and certainty around use of the internal and outdoor areas, hours of operation and operational management measures relating to acoustic management, patron management and capacity.</p>
<p>Hours of operation</p> <p><i>Objections have raised concern in relation to the proposed use of the outdoor space after 10:00pm.</i></p>	<p>The use of the outdoor area after 10:00pm has been assessed in accordance with the amended acoustic assessment and is considered unlikely to create adverse impact upon the locality, subject to the reasonable on-going management of the premises, compliance with recommended conditions of development consent.</p>
<p>Compatibility with surrounding residential uses</p> <p><i>The objections have raised concern over a decrease in residential amenity and subsequent quality of life (particularly due to nuisance and sleep disturbance).</i></p>	<p>As discussed within the relevant sections of this report, the proposal is not considered likely to create significant adverse impacts by way of noise, anti-social behaviour, safety and security subject to reasonable on-going management of the premises and compliance with recommended conditions of development consent.</p> <p>It is acknowledged that the Newcastle City Centre includes commercial, retail and residential uses and the proposed development has included appropriate mitigation measures having regard to its surrounding context.</p> <p>The proposed mitigation measures allow for the differing land uses to be managed together effectively within the Newcastle City Centre context.</p>
<p>Ineffective acoustic measures</p>	<p>The predicted results (compliant with NSW Liquor & Gaming and Sleep Disturbance criteria) presented in the Acoustic Report account for noise transmission</p>

<i>Objections have been raised that despite the proposed acoustic attenuation measures, noise will remain unimpeded, particularly to the north of the outdoor terrace.</i>	<p>through the northern opening and subsequent reflections to the residential receivers.</p> <p>Furthermore, the proposed measures report provides effective attenuation by eliminating the most significant noise transmission paths to the closest residential receiver. Noise projecting to the north and its reflections are anticipated to have insignificant contribution to the noise levels given the distance attenuation.</p>
<p>Detrimental impact on property value</p> <p><i>Objectors raised concern regarding the proposed development decreasing the value of nearby residential properties.</i></p>	<p>This is not a matter for consideration under Section 4.15 of the <i>Environmental Planning and Assessment Act 1979</i>.</p>
<p>Public interest</p> <p><i>Objections have raised concerns in relation to the public interest, particularly that there are already sufficient late-trading premises</i></p>	<p>The social and economic impacts support the night-time development of Newcastle. which contributes to the East End Precinct.</p>

Conclusion:

The issues and concerns raised in the community submissions during the most recent do not warrant the refusal of the application in its present form or require any further amendments to the submitted documentation.

Issues raised in the submissions received by CN have been considered in the assessment, and, where appropriate, conditions of consent have been included in the recommended Draft Schedule of Conditions (**refer to Attachment A**).

The proposed development does not raise any other significant public interest issues beyond matters already addressed in this report.

5. CONCLUSION

The s.4.55(2) modification application has been considered in accordance with the requirements of the EP&A Act and Regs as outlined in this report.

Following a thorough assessment of the relevant planning policies, issues raised in submissions and the key issues identified in this report, it is considered that the application can be supported.

On balance the proposal is suitable for the site and adequately responds to environmental, social and economic impacts from the development and therefore, is within the public interest.

6. RECOMMENDATION

It is recommended:

- That the Modification Application MA2022/00433 to amend condition no. 76 to permit the use of the outdoor terrace associated with the rooftop bar between 10:00pm and 12:00 midnight Monday to Saturday at 185 Hunter Street, Newcastle be APPROVED pursuant to Section 4.55(2) of the *Environmental Planning and Assessment Act 1979* subject to the draft conditions of consent attached to this report at Attachment A; and
- Pursuant to Clause 118 of the *Environmental Planning and Assessment Regulation 2021*, a notice of determination is to be prepared by Council following the Panel's determination of this modification application.