

**REPORT TO GEORGES RIVER COUNCIL  
IHAP MEETING OF 25 AUGUST 2016**

<b>IHAP Report No</b>	1	<b>Development Application No</b>	DA2016/47
<b>Site Address &amp; Ward Locality</b>	247 Princes Highway, Carlton Kogarah Bay Ward		
<b>Proposal</b>	Change of Use – Restaurant and Community Facility		
<b>Report Author/s</b>	George Andonoski – Manager Planning and Development		
<b>Zoning:</b>	RE1 Public Recreation		
<b>Date of Lodgement</b>	22 March 2016		
<b>Owner</b>	Perry Properties Pty Ltd		
<b>Applicant</b>	Gat & Associates		
<b>Submissions</b>	Nil.		
<b>Cost of Works</b>	N/A		
<b>Issues</b>	Potential Council conflict of interest.		
<b>Recommendation</b>	That the application be refused on the grounds outlined in the body of the report.		

**Site Plan**



## **Executive Summary**

### **Proposal**

1. Council is in receipt of an application for the Change of Use - Restaurant and Community Facility on the subject site.

### **Site and Locality**

2. The subject site is located on the northern side of the Princes Highway on the corner of English Street and within the Jubilee Oval Precinct. Existing on the site is a two (2) storey heritage listed building that is currently used as a restaurant.

### **Zoning and KLEP 2012 Compliance**

3. The site is zoned RE1 Public Recreation under KLEP 2012 and the proposal is a permissible form of development with Council's consent.

### **Kogarah Development Control Plan 2013 (KDCP 2013)**

4. The proposed development is not subject to the provisions of the Kogarah DCP 2013.

### **Submissions**

5. The application was not notified.

### **Conclusion**

6. Having regard to the Heads of Consideration under Section 79C (1) of the Environmental Planning and Assessment Act 1979 and following a detailed assessment of the proposal Development Application No. 47/2016, it is considered that an approval would be contrary to the public interest and the application should be refused. Therefore the following is recommended:

That Council as the Consent Authority pursuant to Section 80(1)(b) Environmental Planning & Assessment Act 1979, refuse Development Application No 47/2016 for Change of Use - restaurant and community facility at No 247 Princes Highway CARLTON for the following reasons:

1. The proposed development is considered contrary to the objectives of the zone - "*to enable land to be used for public open space or recreational purposes*" of the RE1 Public Recreation zone; and
2. The development is not in the public interest as it would prejudice and delay Council's ability to acquire the land for the purpose of providing public open space in the locality. (Section 79C(1)(a) (i) & (e) Environmental Planning and Assessment Act, 1979).

## Report in Full

### Proposal

7. Council is in receipt of an application for the continued use of the existing building on the subject site as a restaurant and community facility. The use is to commence after the current Deed and existing consent expires on 30 March 2017. No modifications or additions are proposed to the existing structure of the building which will accommodate 85 persons.
8. The hours of operation proposed are 10:00am – 9:00pm, seven (7) days per week.

### The Site and Locality

9. The subject site is located on the northern side of the Princes Highway on the corner of English Street and within the Jubilee Oval Precinct. Existing on the site is a two (2) storey heritage listed building that is currently used as a restaurant. At the rear of the site is a carpark containing parking for thirteen (13) vehicles.



### Background

10. The use of the premises as a restaurant has been the subject of a number of applications dating back to 1982.
11. Council granted Development Consent No 12/87 on 31 March 1987 for the use of the premises as a restaurant subject to condition 23 which limited the duration of the consent to 20 years (to expire 31 March 2007) and reads:

*“The duration of the consent being limited to a period of twenty years and the continued use of the premises being subject to review by Council at the end of such period”*

12. On the 14 February 1991 Council granted consent to an application to modify condition 23 to extend the duration of the consent to 30 years. Accordingly, the consent for use of the premises as a restaurant expires on 31 March 2017
13. As required by condition 21 of the original Development Consent No 12/87 the owners also entered into a Deed with Council related to the purchase of the site at residential value should Council acquire the land for open space purposes.
14. Council at its meeting on 10 November 2008 considered a confidential report regarding the acquisition of the site and resolved:  
  
*“That the property 247 Princes Highway Kogarah be acquired at residential value at the expiry of the existing lease in 2013.”*
15. On 26 November 2008 Council refused a Section 96 Application to modify condition 23 of Development Consent No 12/87 to extend the use of the premises as a restaurant till 31 March 2038.
16. A further Section 96 Application to delete condition 23 from Development Consent No 12/87 and allow the restaurant to have an unlimited time consent was refused on 29 October 2009.
17. A Development Application for the continued use of the building as a restaurant was lodged with Council on 6 April 2010 and placed on neighbour notification from 15 April to 29 April 2010 (Development Application 90/2010).
18. Council at its meeting on 26 July 2010 considered a confidential report regarding the acquisition of the property and resolved to adopt paragraph 15 of the report which states:  
  
  - a) *That the General Manager be authorised to purchase the property 247 Princes Highway, Kogarah for an amount up to (amount deleted).*
  - b) *That should the purchase proceed, (amount deleted) of the cost be funded through S94 – Plan 5 Open Space Acquisition and the balance through the Investment Fund.*
  - c) *That the General Manager be authorised to execute any related contracts and transfers under his Power of Attorney.*
  - d) *That in the event that a purchase cannot be secured in accordance with Part a) above, a further report be submitted to Council on possible compulsory acquisition of the subject property.”*
19. At its meeting of 11 October 2010, Council resolved the following;  
  
*“That subject to the consent of the Minister for Local Government, the property 247 Princes Highway, Kogarah be acquired by compulsory acquisition”.*

20. At its meeting of 27 April 2011, Council resolved to refuse Development Application 90/2010 for the following reasons;
- (i) *The proposed development is considered contrary to objective (b) -“to identify and protect land intended to be acquired for local public open space” of the Open Space 6(a) - Open Space (Public) zone; and is also contrary to the public interest, as it would prejudice and delay Council’s ability to acquire the land for its intended purpose as public open space (Section 79C(1)(a) (i) & (e) Environmental Planning and Assessment Act, 1979).*
21. At its meeting of 27 February 2012, Council resolved as follows;
- “a) *That Council’s resolution of 11 October 2010 (Minute No. 176/2010) as follows:*
- “That subject to the consent of the Minister for Local Government, the property 247 Princes Highway, Kogarah be acquired by way of compulsory acquisition.”*
- be and is hereby rescinded.*
- b) *That the General Manager be authorised to purchase the property known as 247 Princes Highway, Kogarah up to the amount referred to in paragraph 12 of the report.*
  - c) *That in the event that a purchase amount in accordance with part (b) above cannot be negotiated with the owner, no further action be taken to acquire the property until the expiry of the related Development Consent in March 2017.”*
22. In accordance with part (b) of the above resolution, negotiations with the purchaser were undertaken but a purchase price could not be negotiated and no further action was taken.
23. On 22 March the current application (DA 47/2016) was lodged with Council. The application was not notified as it did not result in any additional impacts on the locality and was not required under the provisions of the DCP.
24. At its meeting of 26 April 2016, Council resolved as follows;
- “(a) *That subject to the consent of the Minister for Local Government , the property No. 247 Princes Highway, Kogarah be acquired by way of compulsory acquisition.*
  - (b) *That a further report be submitted to Council following receipt of the valuation referred to in paragraph 8 of the report.”*

Council officers are pursuing the acquisition process, which will be subject of separate consideration by Council.

## Section 79C Assessment

25. The following is an assessment of the application with regard to Section 79C (1) of the Environmental Planning and Assessment Act 1979.

(1) ***Matters for consideration – general***

***In determining an 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:***

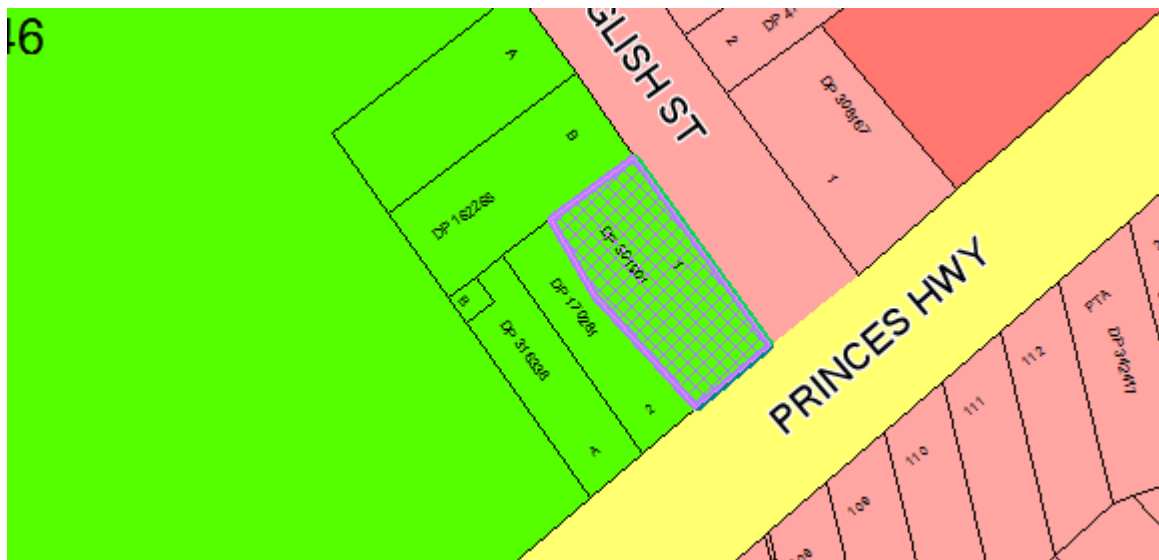
- (a) ***the provision of:***  
(i) ***any environmental planning instrument,***

### **Kogarah Local Environmental Plan 2012 (KLEP 2012)**

#### **Part 2 – Permitted or Prohibited Development**

##### **Clause 2.1 – Land Use Zones**

26. The subject site is zoned RE1 Public Recreation and the proposal is a permissible form of development with Council's consent. The proposed development is considered to be contrary the objective of the zone which is to enable land to be used for public open space or recreational purposes.



#### **Part 4 – Principal Development Standards**

27. Not applicable

## **Part 5 – Miscellaneous Provisions**

### Clause 5.1 – Relevant Acquisition Authority

28. The Council is identified as the Authority of the State for land shown on the zoning map as Zone RE1 Public Recreation and marked “Local Open Space”.

### Clause 5.9 – Preservation of Trees or Vegetation

29. The proposed development does not involve the removal of any tree or vegetation subject to the provisions of this clause.

### Clause 5.10 – Heritage Conservation

30. The subject site is listed as a “former hotel” in Schedule 3 – Heritage Items and is identified as of State Significance.
31. However, the NSW Heritage Branch has advised that the building is not listed on the State Register and therefore is not subject to the provisions of the Heritage Act 1997.
32. Previous applications were referred to Council’s Heritage Advisor were no objection was raised to the ongoing use on heritage grounds. As the current application is for the continued use, and no works are proposed, there are no impacts on the heritage significance of the building.

## **Part 6 – Additional Local Provisions**

### Clause 6.1 – Acid Sulfate Soils

33. The subject site is not shown as being affected by acid sulfate soils as identified on the Acid Sulfate Soil Map.

### Clause 6.2 – Earthworks

34. The proposed development does not result in any additional earthworks.

### Clause 6.3 – Flood Planning

35. The subject site has not been identified as a flood planning area on the Flood Planning Maps.

## **State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004**

36. A BASIX Certificate is not required for this development.

## **State Environmental Planning Policy (Infrastructure) 2007**

37. The provisions of the ISEPP 2007 do not apply to this development as there is no increase in size or capacity, nor is there any enlargement or extension of the existing premises.

## **Deemed State Environmental Planning Policy – Georges River Catchment**

38. All stormwater from the proposed development can be treated in accordance with Council's Water Management Policy and would satisfy the relevant provisions of the Deemed State Environmental Planning Policy – Georges River Catchment

- (ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority, and**

*A Planning Proposal for the New City Plan to amend Kogarah LEP 2012 has been exhibited and endorsed by Council for referral to the Minister for the plan to be made.*

*The zone and subsequently the objectives of the zone under the New City Plan will remain the same as those that currently apply to the site and as such it is considered that the proposal will remain contrary to the objectives of the New City Plan.*

*There are no other draft planning instruments that are applicable to this site.*

- (iii) any development control plan,**

## **Kogarah Development Control Plan 2013 (KDCP 2013)**

39. The proposed application is not subject to the provisions of the Kogarah Development Control Plan 2013 (KDCP2013).

- (iv) any matters prescribed by the regulations, that apply to the land to which the development application relates,**

40. Not applicable.

- (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,**



41. The proposal is not considered to have a significant impact on the natural and built environment or the social and economic environment of the locality.

**(c) *the suitability of the site for the development,***

42. It is considered that the proposed development is unacceptable as it would restrict and prejudice Council's ability to acquire the land for its intended purpose.

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

43. In accordance with the provisions of Section A2 – Public Notification of KDCP 2013 application was not placed on neighbour notification.

**(e) *the public interest.***

44. It is considered that the change of use to restaurant and community facility with no time limit is contrary to the public interest as it would restrict and prejudice Council's ability to acquire the land for its intended purpose of public open space.

45. A number of previous applications for similar development were refused by Council under the provisions of KLEP 1998. Under this LEP the property was zoned Open Space 6(a) – Open Space (Public) zone with one of the objectives being to recognise publicly owned land used or capable of being used for local public recreation.

46. KLEP 1998 also had a specific Clause 14 – Land Acquisition for public purposes. In particular Clause 14(4) requires that Council must take into consideration the effect of the proposed development on the cost of the acquisition, the imminence of the acquisition and the costs of the reinstatement of the land for the purposes for which the land is acquired.

47. Whilst the provisions of KLEP 1998 are no longer applicable or relevant to this application, as a result of those clauses at the time, Council did seek further advice in relation to determining the application and having regard to similar considerations as required by Clause 14(4).

48. This advice was clear that there is a significant increase in the value of the site with an unlimited development consent compared to one with a limited consent or obviously no consent at all. Further to that, the advice did state that effect of the development on the cost of acquisition, the imminence of the acquisition and the cost of reinstatement of the land for which the land is to be acquired are legitimate matters for consideration under s79C.

49. On this basis, as stated, the granting of consent will have an impact on the value of the land and restrict or prejudice Council's ability to purchase the land to allow for an increase in public open space in the locality.

## **Conclusion**

50. The application has been assessed having regard to the Heads of Consideration under Section 79C of the Environmental Planning and Assessment Act 1979, the provisions of KLEP 2012 and KDCP 2013.
51. Following detailed assessment it is considered that Development Application No 47/2016 should be refused for the reasons outlined in the report.

## **Attachments**

1. A4 Set of Plans
2. Statement of Environmental Effects