

PENRITH CITY COUNCIL

MAJOR ASSESSMENT REPORT

Application number:	DA19/0604.01
Proposed development:	Modification to Extend McDonald's Restaurant Trading Hours to 24/7 Operations on Permanent Basis
Property address:	4 Endeavour Avenue, ST CLAIR NSW 2759
Property description:	Lot 2 DP 1018519
Date received:	18 February 2021
Assessing officer	Jacqueline Klincke
Zoning:	SEPP WSA - Affected by Obstacle Limitation SEPP WSA - Affected by Wildlife Buffer Zone Zone B2 Local Centre - LEP 2010
Class of building:	Class 6
Recommendations:	Approve

Executive Summary

Council is in receipt of a Section 4.55(2) modification application to extend the hours of operation to 24-hours, 7 days a week for St Clair McDonald's at 4 Endeavour Avenue, St Clair, on a permanent basis. Condition 2 of development consent DA19/0604 granted approval for the 24-hour operations of the restaurant, for an 18-month trial period to monitor any concerns regarding potential anti-social behaviour, noise impacts and business management practices. The trial period has now been concluded and subsequently, this modification application has been lodged seeking permanency to the extended trading hours.

Under provisions of the *Penrith Local Environmental Plan 2010*, the subject site is zoned B2 Local Centre, and the proposal is defined as *commercial development* which is permissible in the B2 zone. Consent was granted for the construction of a McDonald's restaurant, including drive-thru under consent DA986577.

In accordance with Appendix F4 of the *Penrith Development Control Plan 2014* and Council's adopted *Community Engagement Strategy and Participation Plan 2019*, the modification application was notified to fifty-three (53) nearby and adjoining properties and publicly exhibited for a period of fourteen (14) days between 1 March and 15 March 2021. One (1) submission was received in response and the issues raised in the submission have formed part of the assessment of this application. Correspondence was provided to the objector dated 3 May 2021 addressing the concerns raised and in this regard, the objection received is considered resolved.

An assessment under Section 4.55(2) and 4.15 of the *Environmental Planning and Assessment Act 1979* has been undertaken and the modification application is recommended for approval, subject to modified conditions of consent.

Site & Surrounds

The subject site is located southwest of the intersection of Bennett Road and Endeavour Avenue and is occupied by St Clair McDonald's within St Clair Shopping Centre. The site is legally defined as Lot 2 DP 1018519 and is known as 4 Endeavour Avenue, St Clair.

The surrounding area is characterised by existing commercial premises and car parking adjoining the subject tenancy; a pre-school, Uniting Church and Leisure Centre to the south, St Clair High School to the west; Bennet & Endeavour Soccer Field to the north; and a day car centre, a number of health consulting rooms and established R2 Low Density Residential properties to the east.

Existing McDonald's Restaurant Hours:

The current base hours for the restaurant are from 6am - 11pm Monday to Sunday, with DA19/0604 granting an extension to these hours to form 24-hour operations for an 18-month trial period.

Site Constraints:

The subject site is affected by an easement for services 1m wide and 2m wide, an easement 1m wide for electricity purposes, and a 1m easement for drainage.

Site History:

- DA986577 - approval for the construction of a McDonald's Family Restaurant with seating capacity for 48 people, a drive-thru facility, and the use of 10 car parking spaces within the existing shopping centre
- DA07/1181 - approval for alterations and additions including provision of McCafe, extension to dining area, upgrade of external facade, and roof over playland.
- DA09/0116 - approval for alterations and additions including the expansion of the storage area and crew room, and reconfiguration of drive-thru.
- DA09/0355 - refusal of extended operating hours to 24 hours, 7 days a week.
- DA19/0604 - approval for 24-hour operations, 7 days a week on an 18-month trial basis.

Proposal

The modification application seeks to extend the operating hours of an existing McDonald's restaurant to 24-hours, 7 days a week, on a permanent basis.

It is noted Condition 2 of development consent DA19/0604 granted approval to extend the operating hours to 24-hours for an 18-month trial period to monitor any potential anti-social behaviour and business management practices. The trial period has now concluded and subsequently, this modification has been lodged seeking permanency to the extended trading hours and amendment of Condition 2.

Plans that apply

- Local Environmental Plan 2010 (Amendment 4)
- Development Control Plan 2014
- State Environmental Planning Policy (Western Sydney Aerotropolis) 2020
- Sydney Regional Environmental Plan No.20 - Hawkesbury Nepean River

Planning Assessment

• Section 4.55(2) - Other modifications

The proposed modifications have been assessed in accordance with the matters for consideration under Section 4.55(2) and Section 4.15 of the *Environmental Planning and Assessment Act 1979*. The proposed modifications satisfy the relevant provisions of the Act in this regard.

Under the provisions of Section 4.55(2) of the *Environmental Planning and Assessment Act 1979*, Council may, in response to an application being made, modify a previously approved development 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 the 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 any period prescribed by the regulations or provided by the development control plan, as the case may be.*

In this regard, the following is noted:

(a) In *Vacik Pty Ltd v. Penrith City Council* (unreported 1992) the question of substantially the same development was considered by Stein J. and in particular the meaning of the word '*substantially*'. In his opinion, '*substantially*' is taken in the context to mean '*essentially or materially or having the same essence*'. In *North Sydney Council v. Michael Standley & Associates Pty Ltd* (1998) the NSWCA recognised that a modified development must be different in some respect to the approved development and used the formulation that '*modify*' meant '*to alter without radical transformation*'.

In applying the ordinary meaning of the words '*substantially the same development*' informed by the above cases, the modified development as proposed is of the same essence as the proposal only involves modifying the hours of operation of an existing McDonald's restaurant. The modified development demonstrates that noise levels associated with the permanency of the 24-hour operations are compliant with the relevant noise criteria, as detailed in the submitted Noise Impact Assessment Report which is endorsed by Council's Environmental Management Officer. In addition, Council's Community Safety Coordinator and NSW Police raised no objections to the potential for anti-social behaviour, subject to adherence to the submitted Plan of Management, dated February 2021.

(b) Consultation with the Minister, a public authority or other approval body is not required to be undertaken in respect to a condition imposed as a requirement of a concurrence or in accordance with general terms of an approval.

(c) The modified development was notified to nearby and adjoining properties as per the requirements of the Council's adopted *Community Engagement Strategy and Participation Plan 2019* and the *Penrith Development Control Plan 2014*.

(d) One public submission was received regarding the application and a response was provided to the objector on 3 May 2021. In this regard, the objection is considered resolved.

Section 4.15(1)(a)(i) The provisions of any environmental planning instrument

State Environmental Planning Policy (Western Sydney Aerotropolis) 2020

An assessment has been undertaken of the proposal against the relevant criteria within the *State Environmental Planning Policy (Western Sydney Aerotropolis) 2020* and the proposal is satisfactory. It is noted that the subject site is affected by an Obstacle Limitation and Wildlife Buffer zone, however, these affectations do not impact the recommendations of this report.

Sydney Regional Environmental Plan No.20 - Hawkesbury Nepean River

An assessment has been undertaken of the modification application against the relevant criteria within the Sydney Regional Environmental Plan No. 20—Hawkesbury-Nepean River (No. 2—1997) and the modified development is satisfactory subject to recommended conditions of consent.

Local Environmental Plan 2010 (Amendment 4)

Provision	Compliance
Clause 1.2 Aims of the plan	Complies
Clause 2.3 Permissibility	Complies
Clause 2.3 Zone objectives	Complies
Clause 4.3 Height of buildings	N/A
Clause 4.4 Floor Space Ratio	N/A

Section 4.15(1)(a)(ii) The provisions of any draft environmental planning instrument

It is noted that the *Draft Environment SEPP*, *Draft Remediation of Land SEPP*, and *Draft Design and Place SEPP* apply to the subject site but while so, do not affect or alter the recommendation of this report.

Section 4.15(1)(a)(iii) The provisions of any development control plan

Development Control Plan 2014

Provision	Compliance
DCP Principles	Complies
C1 Site Planning and Design Principles	Complies
C2 Vegetation Management	Complies
C3 Water Management	Complies
C4 Land Management	Complies
C5 Waste Management	Complies
C6 Landscape Design	Complies
C7 Culture and Heritage	N/A
C8 Public Domain	Complies
C9 Advertising and Signage	N/A
C10 Transport, Access and Parking	N/A
C11 Subdivision	N/A
C12 Noise and Vibration	Complies - see Appendix - Development Control Plan Compliance
C13 Infrastructure and Services	Complies

Section 4.15(1)(a)(iiia) The provisions of any planning agreement

There are no planning agreements applying to the proposal.

Section 4.15(1)(a)(iv) The provisions of the regulations

The modified development remains compliant with the relevant Regulations, subject to the original conditions of consent.

Section 4.15(1)(b) The likely impacts of the development

The likely impacts of the modified operating hours as identified during the assessment of the original proposal remain largely unaltered. During the 18-month trial period, Council did not receive any record of formal complaints in regards to anti-social behaviour, litter or noise impacts. This subject modification application was referred to NSW Police (Nepean Police Area Command) and Council's Community Safety Coordinator who both raised no concerns in relation to the extended operating hours. Furthermore, subject to adherence to the approved Noise Impact Assessment Report and amended Plan of Management, the 24-hour operations of the McDonald's restaurant are considered to not cause any adverse impacts to the surrounding residential properties.

Section 4.15(1)(c) The suitability of the site for the development

The suitability of the site was assessed as part of the original application (DA19/0604) and the site remains suitable for the development.

Section 4.15(1)(d) Any Submissions

Community Consultation

In accordance with Appendix F4 of the *Penrith Development Control Plan 2014* and Council's adopted *Community Engagement Strategy and Participation Plan 2019*, the proposal was notified to nearby and adjoining properties and publicly exhibited between 1 March and 15 March 2021. During this period, one (1) submission was received objecting to the proposal. The following issues raised in the submission have formed part of the assessment:

Issue Raised	Response
Anti-Social Behaviour and Impact on Character	<p>The proposed 24-hour operation of the McDonald's restaurant was referred to Council's Community Safety Coordinator and NSW Police (Nepean Police Area Command) who both did not raise any major concerns in relation to the extended hours of operation. The Police indicated that crime risk in this location is considered to be low which is also the view of Council's Community Safety Coordinator.</p> <p>Furthermore, the previous approval for the McDonald's provided an 18-month trial period for the 24-hour operations of the restaurant to monitor any potential negative impacts and concerns. During this trial period, Council did not receive any record of formal complaints.</p> <p>Noting the above, it is not considered likely that the 24-hour operations will result in significant impacts on community safety, character, amenity or increased anti-social behaviour in the locality. In the case where they are any issues associated with the 24-hour operations, reports can be made to the operator, Council, and/or Police.</p>

Excessive Noise Impacts	<p>The application was accompanied with a Noise Impact Assessment Report, which was reviewed by Council's Environmental Management Unit. The report demonstrates the noise levels generated by the 24-hour operations of the restaurant comply with, and are well within the applicable guidelines and noise criteria stipulated under the NSW Noise Policy for Industry 2017, <i>Protection of the Environment Operations Act 1997</i>, and Australian Standard requirements.</p> <p>Given that the application has demonstrated that the extended hours of operation satisfy the relevant maximum noise level permitted, it is not considered likely that the McDonald's 24-hour operations will result in any significant impacts on the amenity of the surrounding properties.</p> <p>Notwithstanding the above, a condition of consent has been imposed requiring that any ongoing noise complaints associated with the development be reported to Council and that a Noise Impact Assessment may be required to address any concerns raised by the community.</p>
Lighting Impacts	<p>The proposal does not seek approval for any additional illuminated signage and lighting. The existing illumination of signs and lighting within the car park and around the shopping centre have been approved in previous development applications and remain compliant with the relevant Australian Standards in regards to obtrusive lighting. In this regard, no concerns are raised.</p>
Odour Impacts	<p>Due to the nature of the development, the proposed 24-hour operations of the McDonald's restaurant is considered to have minimal impact on surrounding properties from potential odours associated with cooking and waste storage on the premises. The operations of the restaurant will continue to operate in accordance with the Food Standard Code and the relevant Australian Standards.</p>
Litter and Rubbish	<p>A Plan of Management was submitted with the application outlining waste management practices and procedures to ensure that the surrounding areas and public domain are clear of litter at all times. An assessment of this document has been undertaken and it is considered to be acceptable and adherence to the Plan of Management is ensured via a condition of consent.</p> <p>It is also noted that the previous approval for the McDonald's provided an 18-month trial period for the 24-hour operations. During this time, Council did not receive any complaints in regards to noise.</p>

Correspondence was provided to the objector, dated 3 May 2021, addressing the concerns raised above and in this regard, the objection is considered to be resolved.

Referrals

The application was referred to the following stakeholders and their comments have formed part of the assessment:

Referral Body	Comments Received
Environmental - Environmental management	No objections
Environmental - Public Health	No objections
Traffic Engineer	No objection subject to conditions
Community Safety Officer	No objections

Section 4.15(1)(e) The public interest

The modified operating hours remain in the public interest.

Conclusion

The modified proposal has been assessed against the relevant environmental planning instruments and the proposal is considered to satisfy the aims, objectives and provisions of these policies. The modified hours of operation are not considered likely to create any significant impacts on the natural, social or economic environments and in this regard, the application is considered worthy of support and is recommended for approval.

Recommendation

That DA19/0604.01 to extend the hours of operation of St Clair McDonald's to 24-hours on a permanent basis at 4 Endeavour Avenue, St Clair, be approved, subject to the following amended conditions of consent.

CONDITIONS

General

1 [A001 - Approved plans table](#)

The development must be implemented substantially in accordance with the following stamped approved documents issued by Council, the application form, any other supporting documentation and the following conditions:

- Noise Impact Assessment, prepared by Muller Acoustic Consulting Pty Ltd, Document ID: MAC190847RP1, dated 14 June 2019
- Plan of Management, prepared by McDonald's Australia Ltd, dated February 2021
- Crime Prevention Through Environmental Design, prepared by KDC, ref: 631.30063-St Claire CPTED-v0.1, dated February 2021

As amended on 21 May 2021 under Section 4.55(2) of the Environmental Planning and Assessment Act 1979.

2 [A029 - HOURS OF OPERATION AND DELIVERY TIMES](#)

The approved hours of operation for the McDonald's restaurant are as follows:

- 24 hours, Mondays to Sundays.

As amended on 21 May 2021 under Section 4.55(2) of the Environmental Planning and Assessment Act 1979.

3 [A Special 1](#)

Store management shall be available at a mutually convenient time, at the invitation of Penrith City Council and/or the NSW Police, to discuss and action agreed community safety, security or other issues in conjunction with other local stakeholders in the area should the need arise.

4 [A Special 2](#)

The policies, procedures and mitigation measures outlined in the Plan of Management, prepared by McDonald's Australia Limited, dated February 2021 must be adhered to in perpetuity.

As amended on 21 May 2021 under Section 4.55(2) of the Environmental Planning and Assessment Act 1979.

Environmental Matters

5 [D013 - Approved noise level 1](#)

Noise levels from the premises shall not exceed the relevant noise criteria detailed in the Noise Assessment Report (Reference:MAC190847RP1) prepared by Muller Acoustic Consulting and dated June 2019. The provisions of the *Protection of the Environment Operations Act 1997* apply to the development, in terms of regulating offensive noise.

6 [D Special \(BLANK\)](#)

In the event of noise complaints relating to the development being received by Council, the owner and/or occupier of the development may be required by Council to obtain the services of a suitably qualified acoustic consultant to undertake a noise impact assessment on the development to address the concerns of the community.

The noise impact assessment report is to be prepared and provided to Council for approval within forty-five (45) days of being required. Any mitigation works are to be undertaken within (30) days from the date of notice from Council, unless otherwise specified.

Engineering

7 [K Special \(BLANK\)](#)

The external lighting of the premises and adjacent pedestrian areas shall be in accordance with the approved Plan of Management, prepared by McDonald's Australia, dated February 2021, and the approved Crime Prevention Through Environmental Design statement, prepared by KDC, dated February 2021.

As amended on 21 May 2021 under Section 4.55(2) of the Environmental Planning and Assessment Act 1979.

Appendix - Development Control Plan Compliance

Development Control Plan 2014

Part C - City-wide Controls

C12 Noise and Vibration

In regards to potential noise impacts, the application was accompanied by a Noise Assessment Report, prepared by Muller Acoustic Consulting, dated 14 June 2019 for the proposed 24-hour operations of the restaurant. The Noise Assessment is based upon the 'worst case scenario' and uses modelling based upon input data of patrons yelling, car doors slamming and multiple events occurring simultaneously and concludes that noise predictions are significantly below applicable criteria at all surrounding residential receivers, including during the night-time period. The Noise Assessment Report was referred to Council's Environmental Management Department who considers the report satisfactorily assesses the potential impact of the proposed extended operating hours in accordance with the NSW EPA Noise Policy for Industry 2017, *Protection of the Environment Operations Act 1997* and applicable Australian Standards.

A condition remains in place requiring noise levels from the premises to not exceed the relevant noise criteria detailed in the Noise Assessment Report and requires the owner of the development to provide Council a Noise Impact Assessment should any noise complaints arise. In addition, the submitted Plan of Management, prepared by McDonald's Australia Limited, dated February 2021, outlines the Duty Manager will closely monitor the noise produced at the premises. Adherence to all policies, procedures and mitigation measures outlined in the Plan of Management is ensured through conditions of consent. In this regard, it is considered that the permanency of the 24-hour operations will not cause significant acoustic impacts on the surrounding locality and the nearby residential properties.