
Sent: 30/06/2021 2:40:47 PM

Subject: RE: Submission Modification Application No Mod2021/0317 [MCR-W.FID4054884]

Dear Ms Williams

As you are aware, we act for the owners of 86 Bower Street, Manly in relation to modification application No. Mod2021/0317 (**Modification**).

Our client has brought it to our attention this morning that the Applicant of the Modification proposes to amend this so as to render it a Modification that is being submitted pursuant to section 4.55(2) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**), rather than section 4.55(1A).

On behalf of our client, we note our strong objection to Council authorising an amendment being made to the Modification. This objection is made on the basis that there is no express or implied authority in the EP&A Act which permits a proponent to amend a modification application.

Council may not be aware, but in [*AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces \[2021\] NSWCA 112*](#), being a recent decision handed down by the NSW Court of Appeal on 3 June 2021, Preston CJ of the Land and Environment Court confirmed the following:

- At [236] ***"There is no statutory provision allowing a proponent to amend an application or a request to modify a consent or an approval equivalent to cl 55 of the EPA Regulation that expressly allows an applicant to amend or vary a development application at any time before the application is determined, but only with the agreement of the consent authority. Detailed regulations have been made in the EPA Regulation on the form and content of the application for modification of development consent (cl 115); the fee payable (cl 115); the notification or advertising of the application (cl 117-119); notification of concurrence authorities and approval bodies (cl 120); keeping applications available for public inspection (cl 121); and giving notice of the determination of the application (cl 122). Yet, no provision is made allowing an applicant to amend or vary the application to modify the development consent. This should be seen to be a deliberate choice. The legislature has expressly allowed an applicant to amend an application for development consent but not an application or a request to modify a development consent."***
- At [235] ***"The terms of these statutory provisions entitle a proponent to make any number of applications or requests to modify a development consent or an approval, but confer no entitlement to amend any application or request for modification that has been made before it is determined. If a proponent wishes to modify a development consent or an approval in a manner or respect different to that which the proponent has requested in the application to modify the development consent or approval, the proponent needs to withdraw the application and make a new application requesting the different modification now sought. The terms of the statutory provisions conferring the entitlement to make an application or a request for modification do not allow the proponent to amend the application or request for modification that has already been made."***

In light of the above, Council must either determine the Modification in its current, unamended form. In the alternative, should the Applicant wish to modify the Modification, it will need to withdraw the Modification and make a new application (be that a section 4.55(2) modification application or a development application).

Should Council allow the amendment to the Modification despite being on notice about the

statutory provisions which prohibit this from occurring, we reserve our client's rights with respect to the matters referred to in this email correspondence.

Regards

Patrick

Patrick Holland

Partner

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From: Anna Williams <Anna.Williams@northernbeaches.nsw.gov.au>

Sent: Tuesday, 29 June 2021 10:19 AM

To: Elizabeth Ryan <eryan@mccullough.com.au>

Cc: Patrick Holland <PHolland@mccullough.com.au>; Louise Kerr <Louise.Kerr@northernbeaches.nsw.gov.au>; Adam Croft <adam.croft@northernbeaches.nsw.gov.au>; Council Mailbox <council@northernbeaches.nsw.gov.au>

Subject: RE: Submission Modification Application No Mod2021/0317 [MCR-W.FID3783891]

Good Morning Elizabeth,

Thanks for bringing this minor error to our attention. It is noted for the record and with the officer.

Regards,

Anna Williams

Manager, Development Assessments

Development Assessment

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From: Elizabeth Ryan <eryan@mccullough.com.au>
Sent: Tuesday, 29 June 2021 10:09 AM
To: Anna Williams <Anna.Williams@northernbeaches.nsw.gov.au>
Cc: Patrick Holland <PHolland@mccullough.com.au>; Louise Kerr <Louise.Kerr@northernbeaches.nsw.gov.au>; Adam Croft <adam.croft@northernbeaches.nsw.gov.au>; Council Mailbox <council@northernbeaches.nsw.gov.au>
Subject: Submission Modification Application No Mod2021/0317 [MCR-W.FID3783891]

Dear Ms Williams

We refer to the **attached** submission which was provided to Council on behalf of our client on 24 June 2021.

It has come to our attention that there is a minor typo at paragraph 23 of this submission. Namely, the reference to '98 Bowers Street, Manly' in the third line of paragraph 23 is incorrect and should refer to '**88 Bower** Street, Manly'.

Whilst we trust that Council's assessing officers would have readily identified the reference to '98' Bower Street as a typo, to avoid any potential confusion we thought it would be prudent to directly bring this typo to Council's attention.

We have corrected the typo in the **attached** amended version of the submission and confirm that no other changes have been made to this submission.

Kind Regards

Elizabeth Ryan

Lawyer

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From: Anna Williams <Anna.Williams@northernbeaches.nsw.gov.au>
Sent: Thursday, 24 June 2021 12:49 PM
To: Patrick Holland <PHolland@mccullough.com.au>
Subject: RE: Submission Modification Application No Mod2021/0317 [MCR-W.FID3783891]

Thankyou Patrick.

Submission received.

Regards,

Anna Williams

Manager, Development Assessments

Development Assessment

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From: Patrick Holland <PHolland@mccullough.com.au>

Sent: Thursday, 24 June 2021 12:43 PM

To: Anna Williams <Anna.Williams@northernbeaches.nsw.gov.au>

Cc: Louise Kerr <Louise.Kerr@northernbeaches.nsw.gov.au>; Adam Croft

<adam.croft@northernbeaches.nsw.gov.au>; Council Mailbox

<council@northernbeaches.nsw.gov.au>; Elizabeth Ryan <eryan@mccullough.com.au>

Subject: Submission Modification Application No Mod2021/0317 [MCR-W.FID3783891]

Dear Ms Williams

Please see **attached** a written submission which is provided on behalf of our client in relation to Modification Application No. Mod2021/0317.

Regards

Patrick

Patrick Holland

Partner

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