

29 May 2022

General Manager
Northern Beaches Council
725 Pittwater Rd,
Dee Why, 2099, NSW

**Re: Statement of Modification - Development Application 88/2013
Lot 4, 5 & 6 in DP31806, 38 Frenchs Forest Road, Seaforth
Change of use to a cafe with signage and outdoor seating – Four brothers Cafe – shop 4**

Dear Sir,

Reference is made to DA88/2013 approved for premises 38 Frenchs Forest Road, Seaforth. It is noted that the Four Brothers Café has been in business for nine (9) years and runs a great business for the local community. The business sees it fit for an extension of hours within a reasonable period to allow greater flexibility of the operation and to provide an additional service to the community. The proposal is for a minor extension of the hours of operation to increase the existing permissible closing times from 6pm to 9pm.

It is our professional opinion that the proposed modification is minor and does not change the merit assessment granted under DA88/2013. It is important to note that there are no proposed building works, and the proposed modifications are consistent with hours of operation approved in business zones.

Proposal

The proposed modification is for the amendment of Condition 22 to increase hours of operation for the subject premises, as outlined below.

Existing Approved Hours of Operation – DA88/2013

22 (6BS01)

The hours of operation of the premises (i.e. hours open for business) must not exceed 5am and 6pm Monday to Friday and 6am to 3pm Saturday and Sunday without the prior approval of Council.

Reason: To ensure amenity of the surrounding locality is maintained and hours of operation are consistent with those in surrounding locality.

Proposed Hours of Operation

22 (6BS01)

The hours of operation of the premises (i.e. hours open for business) must not exceed 5am and **9pm** Monday to Friday and 6am to **9pm** Saturday and Sunday **and Public Holidays** without the prior approval of Council.

Reason: To ensure amenity of the surrounding locality is maintained and hours of operation are consistent with those in surrounding locality.

Statutory Provisions for Section 4.55 (2) Modification

It is submitted that the proposed modification falls within the definition of a Section 4.55 Modification of Consents – generally, Clause (2), being:

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

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

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

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

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

(5) (Repealed)

Source: EP&A Act 1979, Section 4.55

The proposed modifications comprises an increase to the hours of operation which are considered to be of negligible significance and minor in nature. Therefore, the changes proposed to the approved development do not constitute a substantial change to the development as consented, or to such a degree that it would not be considered substantially the same development. The modifications as submitted, have been reviewed and it is concluded that these modifications are acceptable and do not result in any significant adverse impacts upon the amenity or privacy of the building, neighbourhood, nor significantly change the development as approved and notified to the public previously.

In support of this position, due consideration has been given to numerous decisions made by the NSW Land and Environment Court and by the NSW Court of Appeal involving applications made pursuant to Section 4.55 of the EP&A Act. In this regard, particular reference is made to the City of Sydney vs Ilenace Pty Ltd (1984) 3 NSWLR 414 and Moto Projects (No 2) Pty Ltd vs North Sydney Council (1999) 106 LGERA 298. In both these cases, it was

established that the proposed modification would result in a building or development that would be “essentially or materially” the same as the currently approved development.

This position has been further reinforced by the Land and Environment Court of New South Wales, which has held that the question of substantially the same means ‘essentially or materially of having the same essence’ (Talbot J in *Wolgon Action Group Incorporated versus Lithgow City Council* in 2001 and Pearlman J in *Schroders Australia Property Management Pty Ltd versus Shoalhaven City Council and Anor* 1999).

A number of other cases have also been reviewed as part of the qualitative assessment of the application and it is submitted that the development the subject of this application is substantially the same as previously approved. The essential components of the principal end land use (i.e. cafe) and physical characteristics of the approved building are not altered as a consequence of the proposed modification (i.e building scale, materials, presentation to the street etc).

It is therefore submitted that the following outcomes are relevant to this proposed modification:

- This application for modification of a development consent does not alter the external appearance or built form of the subject premises.
- The built form outcome is indistinguishable in terms of overall bulk, scale and appearance of the development that has been previously approved.
- The amenity and streetscape outcomes of the original development consent are retained with no adverse impacts from the amendments in terms of amenity for privacy or visual impacts.
- The use of the land will remain for the purpose of a cafe as approved by Council.

The modification does not alter the merit-based assessment that generated the approval by Manly Council (now Northern Beaches Council). The approval, if modified, will retain the essence of the original consent and is therefore considered to fall within the relevant tests for Section 4.55 of The Act. The application meets the requirements of a Section 4.55 (2) Modification, and therefore the consent authority can consider and grant consent to the application on the basis that the development will remain substantially the same as that originally approved by Warringah Council (now Northern Beaches Council).

We trust that the information satisfies your requirements and if you have any further queries please do not hesitate in contacting me.

Kind Regards
Mathew Quattroville
Director
Four Towns Pty Ltd