Our reference
Direct line
Email
Partner responsible

Anthony Whealy 2846950
9931-4867
awhealy@nsw.gadens.com.au
Anthony Whealy
Acc. Spec. (Loc. Govt & Plan.)

gadens lawyers

Gadens Lawyers
Sydney Pty Limited
ABN 69 100 983 308

Skygarden Building
77 Castlereagh Street
Sydney NSW 2000
Australia

DX 364 Sydney

tel +61 2 9931 4999
fax +61 2 9931 4888

www.gadens.com.au

7 April 2009

Mr Tim Peterson
Hilrok Properties Pty Ltd
17 The Corso
MANLY NSW 2095

Dear Mr Peterson

Section 96 Modification Application – Alterations and Addition to Ivanhoe Hotel

We refer to your instructions to advise in relation to proposed amendments to the approved alterations and additions at the above property (the **Approved Development**), and the ability to seek these amendments by way of a section 96 modification of the development consent.

The threshold test for whether an approval can be modified by Council pursuant to s 96 of the *EP&A Act* is where Council or the Court is satisfied that the development as modified would be **substantially the same development** as the development for which approval was originally granted. It is therefore necessary to compare the approved development with the proposed modified development.

We have been provided with details of the proposed modifications, as well as plans and draft application drawings of that modified development. We are also familiar with the details of the Approved Development.

The Approved Development

The Approved Development is for alterations and additions to extend the existing Hotel use from its current operations within No 27 The Corso into the adjoining St George Bank building at No 25, into the adjoining Commonwealth Bank building at No 28 and part of the adjoining Soul Pattinson Chemist building at No 23. The alterations and additions include:

Basement Level

1. Remove existing nightclub use with storage, cellar, garbage room and toilets.

Ground Floor Level

1. Replace existing bottleshop with new Pizza kitchen
2. Construct new bar and TAB agency at No 29
3. Replace Chemist at No 23 with new bottleshop
4. Construct new coffee shop and gaming lounge at No 25

First Floor Level

1. Repairs to existing facade

2. Replace existing balcony with new metal roof

3. Relocation of existing bistro to No 25

4. Relocation of toilet facilities to No 25

The Approved Development would result in an increased floor area for the Hotel use of approximately 350m^2 with no increase in patron capacity.

The Approved Development would result in a total street frontage of approximately 34m.

Proposed Modification

The Proposed Modification no longer proposes to extend the hotel use into the Soul Pattinson Chemist building at No 23. The proposed design modifications to the Approved Development include:

Basement Level

1. Revised amenity layout including a disabled toilet

Ground Floor

1. Relocate Bottleshop from existing Chemist at No. 23, The Corso to within the existing St George Shop.

2. Relocated the Gaming/ Poker Machine Room from the south western corner to the north eastern corner of the level.

3. Relocation of the south eastern bar to the opposite wall.

4. Other minor reconfigurations.

First Floor Level

1. Relocation of existing amenities and creation of a new disabled toilet.

2. Creation of a raised area eastern side of the level.

3. Creation of new openings.

Level 2 Floor Level / Roof Plan

1. Creation of an open pergola above the north west corner of the first floor level.

2. Creation of a retractable sun protection/ fabric roof above the south east corner of the first floor level

The design changes result in a reduction of 136m^2 in the total area of the hotel/ bottleshop use.

The modification will result in the Chemist at No. 23 not being included in the Hotel use and the existing chemist shop use will remain. This will result in the street frontage of the Hotel being reduced by 4.64m to approximately 29.4m.

Summary advice

In our view, the application can properly and lawfully be made pursuant to section 96 of the *Environmental Planning and Assessment Act 1979* (EP&A Act), as a modification to the Approved Development. This means that it is not necessary to submit a full development application. Rather, an application can be made pursuant to section 96(2) of the EP&A Act.

We believe that the proposed modifications to the Approved Development would satisfy the threshold requirement of section 96 of the EP&A Act, namely that the development as modified remain substantially the same as the development for which consent was originally granted.

A number of judgements of the Courts have clarified what is meant by the requirement that a modified development remain "substantially the same as" the original approved development. What is permitted is "*alteration without radical transformation*". In the present circumstances, we have no doubt that the proposed modifications to the Approved Development will satisfy this requirement. The Approved Development will be altered but will not undergo "radical transformation" in either a qualitative or quantitative sense.

Although each application must be considered on its own facts, we have provided a number of examples of other modification applications that have been accepted by the Courts as satisfying the "substantially the same" threshold test. We believe that these demonstrate quite clearly the broad scope of the modification power available under section 96(2) of the EP&A Act.

Our more detailed advice is below.

Ability to make a s 96 modification application

Section 96 of the EP&A Act allows the council or Court to modify a development consent where 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.

Where proposed modifications would have only "minimal environmental impact", a s. 96(1A) application is appropriate. However, where proposed amendments may have an environmental impact that could be considered more than "minimal", a s 96(2) application should be made.

There is no threshold requirement that a s 96(2) modification be of "minimal environmental impact". This of necessity implies that there will be environmental impacts, perhaps considerable environmental impacts. Provided the Council is satisfied that the modified development would be substantially the same as the original development, it will then assess the proposal on its merits to decide whether the environmental impacts are acceptable in all the circumstances.

The threshold requirement however is that the development as modified **must** remain substantially the same as the originally approved development.

What is meant by the term "*substantially the same*"?

As a general principle, the courts have consistently held that the question of whether a development is substantially the same is a question of fact and degree, *"an ultimate finding of fact based upon the primary facts found" (Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280) **(Moto)**, requiring a comparison of the approved and modified developments. In *Vacik Pty Ltd v Penrith City Council* (unreported 24 February 1992), Stein J held that *"in assessing whether the consent as*

modified will be substantially the same development, one needs to compare the before and after situations".

Similarly, in Moto, Bignold J stated that:

> *"The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is "essentially or materially" "the same as the (currently) approved development."*

This means that the question is a factual question, based on the facts and circumstances of the particular case. In particular, it will depend on what has been approved, what aspects of that approval are proposed to change, and in what manner they are proposed to be changed. There is therefore no standard answer that always applies. However, the Courts have established a number of guiding principles to assist in deciding whether a development as modified will remain substantially the same.

In *North Sydney Council v Michael Standley and Associates Pty Ltd* (1998) 43 NSWLR 468 (**Michael Standley**) the Court of Appeal adopted a test of "*alteration without radical transformation*" so that it is essentially or materially the same. This concept of "*alteration without radical transformation*" has consistently been applied by the Courts since that time.

In addition, the Courts have also confirmed that the modification power is to be construed broadly and facultatively. In other words, it is generally to be interpreted in a way that is favourable to applicants, because the purpose of the provision is to enable development to be modified without the need for a full DA. In that regard, the Courts have said that:

> "*It is clear from the decision of the Court of Appeal in North Sydney Council v Michael Standley and Associates Pty Ltd (1998) 97 LGERA 433 that the provisions of s 96 are facultative and not restrictive and are designed to assist constructively the modification process rather than to act as a substantive impediment to it*". See *Bassett and Jones Architects Pty Limited v Waverley Council (No 2)* [2005] NSWLEC 530; and

> "*The Court of Appeal has recently restated the proposition that s96 is a facultative, beneficial provision and one which is to be construed and applied in a way that is favourable to those who are to benefit from the provision*: see *Moy v Warringah Council* [2004] NSWCCA 77

However, the Court has also emphasised that a material change to **an essential feature** of a development may result in the development not being "substantially the same" notwithstanding that the changes to the development as a whole are relatively minor. In *The Satellite Group (Ultimo) Pty Ltd v Sydney City Council* (unreported 2 October 1998) Talbot J held that:

> *"It is not appropriate, in my opinion, to attempt to confine the consideration of the extent of changes to the context of the whole building, notwithstanding that the consent authority is required to consider the totality of the development as proposed for modification and to take into consideration such of the matters referred to in s.79C as are of relevance to that development.* ***The focus may be on a critical element of a building which is to be the subject of change in order to determine whether the entire development is substantially the same development*** *(*emphasis added)."

To illustrate the point, we note that in that matter it was proposed to modify a 9 storey residential and commercial building by deleting almost all of the retail component (8 out of 9 approved retail shops, all of which were at ground floor level) and to replace them with further residential floor space. This would have resulted in the development no longer retaining any real commercial / retail component. The Court held that the mixed use nature of the development was an essential feature of the approved development

and as such, the proposal to replace it would not have resulted in substantially the same development. In that case, the proposed **change of use** was a "radical transformation" of the approved development. It was also highly relevant that the retail floor space was all to be removed from street level, where it was most highly visible in the original approval. Justice Talbot commented that:

> *"The fact that the changes are proposed at street level has a significant impact on the categorisation of the development. ... In the present case, the aesthetic or external appearance of the building will change at a significant point, namely at street level. The characterisation of the use at that level will [also] undergo radical change"*

In light of the above, it is well settled that the test of what is "substantially the same" allows alteration provided that it does not result in "*radical transformation*" (Michael Standley) or the removal of *"a material and essential feature of the approved development"* (Moto).

Analysis of the Proposed Modification for The Ivanhoe Hotel

We have detailed (above) the nature and scope of the proposed modifications.

We have undertaken the necessary factual comparison between the Approved Development and the modified scheme now proposed.

It is our view that a comparison of the 2 developments plainly demonstrates that the modified development would be substantially the same as the existing Approved Development. It will be altered but will not in any sense undergo radical transformation. The development will remain materially or essentially the same.

In that regard, the proposed **use** of the development remains unchanged. Externally, the resulting development will look very similar to the current Approval. The overall street frontage of the Hotel will be slightly reduced by 4.64m to 29.4m. As mentioned above, that is to be compared to situations where significant change occurs at street level, where it is more likely to have a significant impact. That is not the case in relation to this proposal.

We are satisfied that the modifications do not alter any material or essential feature of the building. Importantly, the proposed amendments (as described above) do not change the overall character of the Approved Development as alterations and additions to extend the existing Hotel.

As such, we have no doubt that the modified development will remain substantially the same as the Approved Development.

It will also be necessary for Council to undertake a merit assessment of the proposed modified development. We are of the view that the modification will not have any unacceptable impacts. This is a separate question to the threshold question on "substantially the same", however we mention it for completeness.

In summary, we believe that the proposed amendments to the Approved Development would result in a development that is substantially the same as the development for which consent was originally granted, both in substance and form. We therefore believe that the consent is able to be modified pursuant to section 96(2) of the EP&A Act.

Other Comparative Modification Applications Accepted by the Courts.

As mentioned above, each modification application needs to be assessed on its own facts and circumstances, because what is involved is a comparison between an approved set of drawings and a proposed modified scheme. This is a unique factual exercise in each case. Nevertheless, we have set out a number of illustrative examples of other modification applications which have been accepted by the Courts as satisfying the "substantially the same" threshold test. We believe that these demonstrate quite clearly the broad scope of the modification power available under section 96(2) of the EP&A Act.

Other illustrative examples are as follows:

1. Davi Developments Pty Ltd v Leichhardt Council **[2007] NSWLEC 106,** ***Talbot J.***

The application for modification related to a seven storey residential flat building with two levels of basement parking. It sought an approval for the reduction of one floor, deletion of the lift overrun and the reconfiguration of the units with a rearrangement of the car park plan. The question was whether a modified 6-storey building was substantially the same as a seven storey building. Talbot J said:

> *"The number of units will be substantially reduced from 42 to 30 and the unit mix throughout the building will be different. The number of residential floors will be one less and the internal layout of individual rooms has been changed. The height of the main parapet is increased by 400mm with an architectural element arising above that for a further 500mm. The car parking layout is entirely different. A lift overrun has been removed".*

Nevertheless he held at paragraph 57 that:

> *"I would be prepared to find that the fundamental characteristics and essence of the building will remain essentially the same. Some of the qualitative and quantitative effects will be different but not to the extent that the character will be changed in a material respect."*

As such, the modified development was substantially the same.

2. ***Bassett & Jones Architects v Waverley Council*** **[2006] NSWLEC 69; and** ***Bassett and Jones Architects Pty Limited v Waverley Council (No 2)*** **[2005] NSWLEC 530.**

The proposed modification included the following changes from the proposal that was granted consent by the Court:

- the construction of an additional storey to the approved front building which alters the building from three-storeys to four-storeys
- the provision of a zero side setback for a part of the external side walls at all three levels; and;
- construction of a blade wall and columns at the sides of the ground floor level shop.

The increase in floor space proposed (approximately 112m^2) was as follows:

Floor Space ratio/Floor space: Clause 27 of WLEP

Original plans	New plans	Difference	% Increase	Compliance

1:1	1.20:1	0.20:1	20%	No
557m2	669m2	112.5m2	20%	N/A

Similarly, the height increase was as follows:

Height of building No 1 above NGL: Clause 28 of WLEP

Original plans	New plans	Difference	% Increase	Compliance
8.31-8.71m	10.61-10.96m	2.25-2.3m	26-28%	No

The Court ruled that :

> *"In essence the application seeks to add a proposed top storey facing McPherson Street to a mixed commercial/ residential development that has three elements, one fronting McPherson Street and two further elements behind....*
>
> *I am satisfied that, although the question of the exceedance of the development standard in each instance may give rise to issues of significance in a merit assessment, the fact that the development standard is breached by the s 96AA modification application is not in itself a matter which causes the modification application to be transmuted into one which is not substantially the same as the development to which consent was given."*

As such, the proposed modifications were substantially the same as the original approval.

3. Jaques Avenue Bondi Pty Limited v Waverley Council [No 2] **[2004] NSWLEC 101**

In this matter the original consent was for two 5 storey buildings with a central courtyard, comprising 74 units and two retail tenancies. This was made up of 44 one bedroom units, 29 two-bedroom units and 1 three-bedroom unit (74 units in total). There was also 233 m^2 of retail space provided at ground level, making it a mixed-use development.

The modification application sought to increase the total number of units from 74 to 79. However the modified proposal would not comply with the height limit in the local environmental plan, whereas the original approval did comply.

The Court held:

> *"I accept that the quantitative difference between that which was the subject of the 2003 consent and that proposed in the present application, being the addition of 5 further residences to a total of 79, does not involve such a degree of change as to result in development which is not substantially the same.*
>
> *To the extent that there might be one, any substantial qualitative difference between that which was the subject of the 2003 consent and that proposed in the present application, arises from the fact that the original application complied with the 15 m height limit for the site and the proposed amendments do not.*

Taking a facultative and favourable approach, I am satisfied that the modification application would result in a development that, in fact, is substantially the same as that which was approved in the 2003 consent proceedings."

4. ***Boyd v Bega Valley Council* [2007] NSWLEC 23**

In this matter, it was proposed to add a second storey to a single storey dual occupancy development at Merimbula. This was applied for under section 96 of the Act. Although the application was unsuccessful for other reasons (visual impact from the waterway caused by poor architectural design), Commissioner Murrell was satisfied that the increase from a single storey to a two storey dwelling would satisfy the "substantially the same development" test.

5. ***Eastview (Australia) Pty Ltd v Ryde City Council* [2005] NSWLEC 393**

This application submitted under section 96 included the following modifications:

- an increase of the footprint of buildings D and A in size by 250 m^2 per floor;
- a change in the position and shape of the basement car park;
- a redesign of layout and position of plant rooms, lifts, stairs and bathrooms;
- addition of loading dock facilities;
- changes to the public space in between buildings A and D incorporating changes to the drop-off area;
- provision for a café of 220 m^2;
- realignment of buildings A and D (5 degrees rotation to building A and 7 degrees rotation to building D);
- modification of the facade treatment of buildings A and D (to incorporate a current high-performance aluminium-framed glazed-curtain wall system with solar control louvres).

In this matter, the Court was satisfied that despite the number and level of changes to the approved development, the proposal would, when considered overall, remain substantially the same development.

We believe that the examples outlined above are illustrative of the broad and facultative nature of section 96 of the EP&A Act.

If you have any questions regarding this letter please contact Anthony Whealy (direct line: 9931 4867).

Yours sincerely

Anthony J Whealy
Partner

Accredited Specialist Local Government & Planning
for **GADENS LAWYERS**