

5th September 2021

The General Manager
Northern Beaches Council
Po Box 82
Manly NSW 1655

Dear Sir,

Statement of Environmental Effects
Section 4.55(1A) Modification of Consent DA2020/1179
Demolition and Construction of a Seniors Housing Development
1793, 1795 and 1797 Pittwater Road and No. 38 Park Street, Mona Vale

1.0 Introduction

On 10th February 2021, development consent DA2020/1179 was granted for demolition works and the construction of a senior's housing development on the subject properties.

This application, made pursuant to Section 4.55(1A) of the Environmental Planning and Assessment Act 1979 (the Act), seeks the modification of condition 20 of the development consent removing the need to retain tree T22 being a Jacaranda mimosifolia. The accompanying arborist report prepared by Ezigrow contains the following commentary in relation to this tree:

Upon reviewing the above reports and the Notice of Determination for DA2019/1072, it is apparent that Tree 22 has been listed as an exempt species tree and could be removed without Council consent. This is as per Northern Beaches Council's current DCP.

Furthermore, during the site visit, and upon reviewing the proposed plans, it is apparent that the excavation for the basement will encroach into the Tree Protection Zone (TPZ) of this tree to an unacceptable level. It is also evident from viewing the tree onsite, that a number of significant roots will be severed during construction, and this will put the tree at an increased risk of failure. The result of this would be the whole tree failing into the neighbouring property. It is therefore strongly recommended that this tree be removed, and Tree 38 (listed for transplantation) be transplanted approximately into this space.

To remove any doubt as to the ability to remove this tree notwithstanding the original arboreal advice we propose that an additional provision be incorporated into condition 20 as follows:

- e) *No objection is raised to the removal of tree T22 being a Jacaranda mimosifolia provided T38 is transplanted generally in this location on the subject property.*

As the modifications do not alter the previously approved land use or built form circumstances across the consolidated development site Council can be satisfied that the modifications involve minimal environmental impact and the development as modified represents substantially the same development as originally approved. Accordingly, the application is appropriately dealt with by way of s4.55(1A) of the Act.

2.0 Proposed modifications

The application seeks the modification of condition 20 of the development consent removing the need to retain tree T22 being a Jacaranda mimosifolia.

To remove any doubt as to the ability to remove this tree notwithstanding the original arboreal advice we propose that an additional provision be incorporated into condition 20 as follows:

- e) *No objection is raised to the removal of tree T22 being a Jacaranda mimosifolia provided T38 is transplanted generally in this location on the subject property.*

3.0 Section 4.55 of the Environmental Planning and Assessment Act 1979

Section 4.55(1A) of the Act provides that:

- (1) *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 proposed modification is of minimal environmental impact, and*
 - (b) *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*
 - (c) *it has notified the application in accordance with:*
 - (i) *the regulations, if the regulations so require, and*

- (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.*
- (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.*

In answering the above threshold question, we have formed the considered opinion that the modifications sought are of minimal environmental impact given that the previously approved land use, built form and landscape circumstances are not materially altered. The modification proposed to condition 20 relates to the removal of T22 and its replacement with the relocated T38 such that the landscape outcomes for the site are not compromised. Such modification will facilitate the orderly and economic development of the land with excavation able to occur without impact on retained trees. The modifications to the wording of condition 20 are both quantitatively and qualitatively of minimal environmental impact.

In answering the threshold question as to whether the proposal represents “substantially the same” development the proposal must be compared to the development for which consent was originally granted, and the applicable planning controls. In order for Council to be satisfied that the proposal is “substantially the same” there must be a finding that the modified development is “essentially” or “materially” the same as the (currently) approved development - *Moto Projects (no. 2) Pty Ltd v North Sydney Council* [1999] 106 LGERA 298 per Bignold J.

The above reference by Bignold J to “essentially” and “materially” the same is taken from Stein J in *Vacik Pty Ltd v Penrith City Council* (unreported), Land and Environment Court NSW, 24 February 1992, where his honour said in reference to Section 102 of the Environmental Planning and Assessment Act (the predecessor to Section 96):

“Substantially when used in the Section means essentially or materially or having the same essence.”

What the abovementioned authorities confirms is that in undertaking the comparative analysis the enquiry must focus on qualitative elements (numerical aspects such as heights, setbacks etc) and the general context in which the development was approved (including relationships to neighbouring properties and aspects of development that were of importance to the consent authority when granting the original approval).

When one undertakes the above analysis in respect of the subject application it is clear that the previously approved land use, built form and landscape circumstances are not compromised with the environmental outcomes associated with the original approval maintained.

In this regard, the approved development remains, in its modified state, a development which will continue to relate to its surrounds and adjoining development in the same fashion to that originally approved.

The Court in the authority of *Stavrides v Canada Bay City Council* [2007] NSWLEC 248 established general principles which should be considered in determining whether a modified proposal was “substantially the same” as that originally. A number of those general principles are relevant to the subject application, namely:

- The application remains a proposal involving the construction of senior’s housing on the subject properties,
- The previously approved land use and built form circumstances are maintained, and
- The modifications do not compromise the previously approved landscape outcomes.

On the basis of the above analysis, we regard the proposed application as being of minimal environmental impact and “essentially or materially” the same as the approved development such that the application is appropriately categorised as being “substantially the same” and appropriately dealt with by way of Section 4.55(1A) of the Act.

4.0 Pittwater Local Environmental Plan 2014

Zoning and permissibility

The development remains permissible with consent pursuant to SEPP HSPD.

Height of buildings

The previously approved built form circumstance is unaltered.

5.0 Pittwater 21 Development Control Plan

The modifications do not compromise the developments performance when assessed against the applicable DCP provisions. The modification will facilitate the orderly and economic development of the land with excavation able to occur without impact on retained trees.

6.0 Conclusion

On 10th February 2021, development consent DA2020/1179 was granted for demolition works and the construction of a senior's housing development on the subject properties.

This application, made pursuant to Section 4.55(1A) of the Environmental Planning and Assessment Act 1979 (the Act), seeks the modification of condition 20 of the development consent removing the need to retain tree T22 being a *Jacaranda mimosifolia*. The accompanying arborist report prepared by Ezigrow contains the following commentary in relation to this tree:

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- e) *No objection is raised to the removal of tree T22 being a *Jacaranda mimosifolia* provided T38 is transplanted generally in this location on the subject property.*

As the modifications do not alter the previously approved land use or built form circumstances across the consolidated development site Council can be satisfied that the modifications involve minimal environmental impact and the development as modified represents substantially the same development as originally approved.

Accordingly, the application is appropriately dealt with by way of s4.55(1A) of the Act.

Yours faithfully

Boston Blyth Fleming Pty Limited

A handwritten signature in black ink, appearing to read 'Greg Boston', written in a cursive style.

Greg Boston
B Urb & Reg Plan (UNE) MPIA
B Env Hlth (UWS)
Director