

10th January 2018

The General Manager
Northern Beaches Council (North)
PO Box 882
Mona Vale NSW 1660

Dear Sir,

**Statement of Environmental Effects
Modification of Land and Environment Court Issued Consent
Proceedings No 10083 of 2016
Boston Blyth Fleming ats Northern Beaches Council
Proposed Residential Development
Lot 1, DP 5055, No. 8 Forest Road, Warriewood**

1.0 Introduction

On 3rd May 2017, the Land and Environment Court of NSW (the Court) upheld an appeal and granted deferred commencement consent to the above development involving the construction of a residential development incorporating 81 dwellings and associated civil works and landscaping. The deferred commencement conditions have been satisfied that the consent now operative.

Council is currently considering an application made pursuant to section 96(AA) of the Environmental Planning and Assessment Act 1979 (“the Act”) proposing the modification of the consent from Community Title Subdivision to Strata Title Subdivision together with some minor adjustments to the previously approved Torrens Title Subdivision Plan to accommodate such change.

We have again been engaged to prepare an application pursuant to Section 96(AA) of the Act seeking the modification of a number of conditions, and the introduction of a staging plan, to enable the staging of the approved development works. The application also proposes additional basement vehicular circulation and bulk storage areas and minor changes to basement fire egress stair locations with the temporary access driveway alignment, as approved pursuant to the deferred commencement condition, also nominated on the modified plans.

This submission is to be read in conjunction with the following modified documentation:

- Site Plan A-001(01), dated 10th January 2018, prepared by Drew Dickson Architects.
- Basement Plan – East A-099.1(01), dated 10th January 2018, prepared by Drew Dickson Architects.
- Basement Plan – West A-099.2(01), dated 10th January 2018, prepared by Drew Dickson Architects.

The previously approved above ground built form, apartment layout, landscape and drainage regimes are unaltered as a consequence of the modifications sought. 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 Section 96(AA) of the Environmental Planning and Assessment Act 1979 which enables Council as the consent authority to modify a Court issued consent.

2.0 Detail of Modifications Sought

Condition Modifications

The application proposes the introduction of a staging plan, to enable the staging of the approved development works. Such staging requires the modification of the following conditions:

Condition A1(a) - This condition is to be modified to reflect the modified plans as outlined above.

Condition C1 - This condition is to be modified to facilitate the staging of construction works as follows:

Submission of construction plans and specifications and documentation which are consistent with the approved development consent plans, pertaining to the relevant construction stage as depicted on the approved Staging Plans, the requirements....

Condition C6 - This condition is to be modified to facilitate the staging of construction works as follows:

An Erosion and Sediment Management Plan is to be submitted prior to the issue of the relevant Construction Certificate. Control over discharge.....

Condition C7 - This condition is to be modified to facilitate the staging of construction works as follows:

*Engineering plans and specifications for the construction of all roads.....
prior to the issue of the relevant construction certificate for the works as
depicted on the approved Staging Plans.*

Condition C9 - This condition is to be modified to require the dedication of creek line land prior to issue of any Subdivision Certificate. This allows the issue of an early works Construction Certificate prior to issue of the Subdivision Certificate. The payment of the required monetary contribution will still occur prior to the issue of any Construction Certificate. The proposed modified wording is as follows:

A monetary contribution of \$4,719,660.63 (subject to (a) below) is to be made prior to issue of any Construction Certificate and dedication of 5,895 square metres of creek line land is to occur prior to issue of any Subdivision Certificate relating to the development for the provision of public infrastructure and services pursuant to section 94 of the environmental planning and assessment act 1979. (No change to balance of condition)

Condition C13 - This condition is to be modified to facilitate the staging of construction works as follows:

Prior to the issue of any Construction Certificate pertaining to the relevant construction stage as depicted on the approved Staging Plans, certification is required from a suitably qualified traffic and access consultant...

Condition C14 - This condition is to be modified to facilitate the staging of construction works as follows:

Prior to the issue of any Construction Certificate pertaining to the relevant construction stage as depicted on the approved Staging Plans, certification from a suitably qualified access consultant

Condition C18 - This condition is to be modified to facilitate the staging of construction works as follows:

Structural engineering detailed relating to the approved development are to be submitted to the Accredited Certifier or Council prior to release of the relevant Construction Certificate. Each plan/sheet.....

Condition C19 - This condition is to be modified to facilitate the staging of construction works as follows:

Prior to the issue of the relevant Construction Certificate the development should.....

Condition C20 - his condition is to be modified to facilitate the staging of construction works as follows:

Civil engineering detailed design for proposed works are to be submitted to the Accredited Certifier or Council with the relevant Construction Certificate application. Each plan/sheet.....

Condition E1 - This condition is to be modified to facilitate the staging of construction works as follows:

An Interim/ Final Occupation Certificate application stating that the development...

Condition E2 - This condition is to be modified to facilitate the staging of construction works as follows:

A copy of the Section 73 Compliance Certificate.....with any Interim/ Final Occupation Certificate.

Condition E3 - This condition is to be modified to facilitate the staging of construction works as follows:

All dwellings are to have approved.....appropriately qualified electrician prior to the completion of the relevant stage of an Interim/ Final Occupation Certificate

Condition E4 - This condition is to be modified to facilitate the staging of construction works as follows:

Prior to issuance of the relevant Interim/ Final Occupation Certificate....

Condition E5 - This condition is to be modified to facilitate the staging of construction works as follows:

Damage to Council's assets.....Council's written approval that all restorations have been completed satisfactorily must be obtained and provided to the accredited certifier prior to the completion of the relevant stage of an Interim/ Final Occupation Certificate.

Condition E6 - This condition is to be modified to facilitate the staging of construction works as follows:

All infrastructure works, including roads, drainage, landscaping and civil engineering works, required under this Consent are to be completed prior to the issuance of the relevant Interim/ Final Occupation Certificate pertaining to the construction stage as depicted on staging plans Site Plan A-001(01), Basement Plan – East, Basement Plan – West A-099.2(01), dated 10th January 2018, prepared by Drew Dickson Architects (the Staging Plans).

Condition E7 - This condition is to be modified to facilitate the staging of construction works as follows:

A suitably qualified professional is to provide certification....., issued by the New South Wales Office of Water, as referenced in this consent, pertaining to the relevant construction stage as depicted on staging plans Site Plan A-001(01), Basement Plan – East, Basement Plan – West A-099.2(01), dated 10th January 2018, prepared by Drew Dickson Architects.

Condition E9 - This condition is to be modified to facilitate the staging of construction works as follows:

A qualified landscape architect is to certify that all landscape works, pertaining to the relevant construction stage as depicted on the approved Staging Plans have been undertaken prior to the issue of the relevant Interim/ Final Occupation Certificate.

Condition E11 - This condition is to be modified to facilitate the staging of construction works as follows:

Prior to the issuance of any Interim/ Final Occupation Certificate for the relevant stage of works as depicted on the approved Staging Plans, a suitably qualified professional.....

Condition E12 - This condition is to be modified to facilitate the staging of construction works as follows:

Prior to the issuance of any Interim/ Final Occupation Certificate for the relevant stage of works as depicted on the approved Staging Plans, Works-As-Executed plans for all structures....

Condition E13 - This condition is to be modified to facilitate the staging of construction works as follows:

A maintenance period is to apply..... The maintenance period will apply for six (6) months after the issuance of any Interim/ Final Occupation Certificate for the relevant stage of works as depicted on the approved Staging Plans. In that period the applicant.....

Condition E14 - This condition is to be modified to facilitate the staging of construction works as follows:

Prior to the issuance of any Interim/ Final Occupation Certificate for the relevant stage of works as depicted on the approved Staging Plans, Certification is required.....

Built Form Modifications

The application also proposes additional basement vehicular circulation and bulk storage areas and minor changes to basement fire egress stair locations with the temporary access driveway alignment, as approved pursuant to the deferred commencement condition, also nominated as a modification to the site plan.

3.0 Section 96(AA) of the Environmental Planning and Assessment Act 1979

Section 96(AA) 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 Court and subject to and in accordance with the regulations, modify the development 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 the consent was originally granted and before that consent as originally granted was modified (if at all), and*
 - (b) *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*
 - (c) *it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person, 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.*
- (1A) *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 79C (1) as are of relevance to the development the subject of the application.“*

In answering the above 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 above ground built form, landscape and drainage regimes are unaltered as a consequence of the modifications sought with modifications limited to conditional changes to facilitate the staging of construction works, additional basement vehicular circulation and bulk storage areas and minor changes to basement fire egress stair locations. The temporary access driveway alignment, as approved pursuant to the deferred commencement condition, is also nominated on the modified site plan.

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 an identical fashion to that originally approved in terms of building form/ urban design, spatial relationship, landscaping and drainage.

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 proposed use does not change;
- The previously approved above ground built form, landscape and drainage regimes are unaltered as a consequence of the modifications sought; and
- The modifications maintain the previously approved residential amenity and environmental outcomes.

On the basis of the above analysis we regard the proposed application as being “essentially or materially” the same as the approved development such that the application is appropriately categorised as being “substantially the same” and is appropriately dealt with by way of Section 96(AA) of the Act.

4.0 Matters for Consideration Pursuant to Section 79C(1) of the Environmental Planning and Assessment Act 1979 as amended

The following matters are to be taken into consideration when assessing an application pursuant to section 79C of the Environmental Planning and Assessment Act 1979(as amended):

The provision of any planning instrument, draft environmental planning instrument, development control plan or regulations.

4.1 Pittwater Local Environmental Plan 2014

The developments permissibility once when assessed against the provisions of PLEP 2014 are not compromised as a consequence of the modifications sought.

The application does not involve any change to the previously approved above ground built form circumstance the relatively minor increase in excavation not giving rise to any adverse environmental consequences.

4.2 Pittwater 21 Development Control Plan

The previously approved above ground built form, landscape and drainage regimes are unaltered as a consequence of the modifications sought. The relatively minor increase in excavation is located centrally within the development site and to that extent will not give rise to any adverse residential amenity or environmental consequences.

The approved developments performance when assessed against the relevant provisions of P21DCP are not compromised.

4.3 State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development and the Apartment Design Guide

The previously approved above ground built form, landscape and drainage regimes are unaltered as a consequence of the modifications sought. The application proposes additional basement vehicular circulation and bulk storage areas and minor changes to basement fire egress stair locations which are inconsequential in terms of the development's performance when assessed against this Policy.

The approved developments performance when assessed against the relevant provisions of SEPP 65 and the ADG are not compromised.

5.0 Conclusion

Council can be satisfied that the approved developments performance when assessed against the relevant statutory planning considerations is not compromised.

This submission demonstrates that the modifications sought will not give rise to any adverse streetscape, environmental, built form or residential amenity consequences however will provide for the orderly and economic use and development of the land through the introduction of an appropriate construction staging mechanism.

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 Section 96(AA) of the Environmental Planning and Assessment Act 1979 which enables Council as the consent authority to modify a Court issued consent.

Yours sincerely

BOSTON BLYTH FLEMING PTY LTD



Greg Boston

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Director