

11 September 2015

The General Manager
Warringah Council
725 Pittwater Road,
Dee Why 2099

Dear Sir,

REQUEST FOR MODIFICATION OF DEVELOPMENT CONSENT 2015/0061
Lots 1-5, DP 7022, NO. 29 Moore Road Freshwater – Harbord Beach Hotel

1. INTRODUCTION

The Council consented to the subject DA by notice of determination dated the 6th May 2015. The consent permitted alterations and additions to the hotel to permit the demolition of the lattice timber screens to the top of the masonry fences that surround the courtyard areas to the Moore Road frontage of the hotel with glass set into an aluminium frame. Condition 7 of that consent requires:

7. *The glass panels are not to be fitted with clear glazing. In this regard, the panels are to be installed with opaque or frosted treatment. The panels are also to be designed and installed as fixed panels which are not capable of being opened in any manner or time.*

Reason: In order to maintain acoustic and visual privacy to adjoining/nearby properties.

The DA assessment report noted the panels were intended to be capable of opening for ventilation but no details were provided with the application as to the details of the panels to be opened, not the times and duration of the panels being opened. The condition was imposed in response to neighbour submissions as a consequence of the Council notification of the development application.

2. DETAIL OF THE CHANGES

This application seeks to delete condition 7 and to permit the panels to be (in part) clear glass and to permit at least 50% of the panels to open. At this time the hotel has not designed the detail of the panels pending the resolution of this application, but it is envisaged each panel will be capable of sliding within its individual frame to a maximum 50% of the panel width. The panels are intended to be clear glass with an etched edge to reflect the sketch detail at Figure A2 of the letter from John Oultram Heritage & Design. The reason for the detailing of the glass panel is to permit an outlook from the terrace spaces as well as permitting the prevailing sea breeze into the courtyards.

The applicant has engaged Mr S Cooper of the Acoustic Group to assess the likely impacts associated with the prevailing site conditions and circumstances and the change in the materials to top the surrounding courtyard walls. Cooper's report dated 25th August 2015 details acoustic assessments he has undertaken in association with the use of the site going back to 1997. Cooper notes "*previous testing in relation to outdoor areas of the hotel whilst having at times noise from the outdoor area being audible did not cause a measurable increase above ambient background level at residential boundaries and therefore not only satisfied the general EPA/Council criteria but also satisfied the more stringent LAB/OLGR noise criteria for a licensed premises. Therefore on an acoustic basis I see there are no issues in terms of the proposal but in effect the potential for a slight degree of reduction for noises that is already compliant.*"

Given the observations by Cooper and the opinion of Oultram that the replacement of the ungainly lattice with a more elegant and permanent screen associated with the terraces space that of themselves are not a component parts of the original heritage fabric of the building supports the applicants assertion that there is no material objection to the replacement of the lattice work with a glass framed panels that will assist in the function and ambience of the courtyard terraces. In relation to privacy, Copper makes the observation that given the relative seating levels within the terraces spaces and the distance to neighbouring dwellings it would be more likely for residents to look into the hotel premises than visa versa, and whilst there maybe issues of ambient background light sources at night time, the more apparent and direct issue of privacy occurs from pedestrians within the public roadway itself than persons using the outdoor terraces of the hotel. Accordingly the applicant contends condition 7 is unnecessary and therefore unreasonable and should be deleted.

3. APPLICATION FOR MODIFICATION

The application is made pursuant to S.96 (1A) of the EP & A Act 1979. S.96 (1A) of the Act provides:

(1A) Modifications involving minimal environmental impact

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, 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 any period prescribed by the regulations or provided by the development control plan, as the case may be.*

Subsections (1), (2) and (5) do not apply to such a modification.

In this instance it is considered the change to the detail of the consent as issued is minor or without environmental impact particularly given the comments provided by The Acoustic Group. The land use outcome remains within the ambit of the approved land use as a component of the Harbord Hotel and the replacement of the lattice work provides for an improved visual presentation and acoustic performance of the surrounds to the courtyard terrace. The building form, bulk and scale remain as per the original consent.

A consideration of whether the development is substantially the same development has been the subject of numerous decisions by the Land & Environment Court and by the NSW Court of Appeal in matters involving applications made pursuant to S.96 of the Act. *Sydney City Council v Ilence Pty Ltd (1984) 3 NSWLR 414* drew a distinction between matters of substance compared to matters of detail. In *Moto Projects (No.2) Pty Ltd v North Sydney Council (1999) 106 LGERA 298* Bignold J referred to a requirement for the modified development to be substantially the same as the originally approved development and that the requisite finding of fact to require a comparison of the developments. However, Bignold noted the result of the comparison must be a finding that the modified development is 'essentially or materially' the same as the (currently) approved development. Bignold noted;

The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the development being compared in their proper contexts (including the circumstances in which the development consent was granted).

In *Basemount Pty Ltd & Or v Baulkham Hills Shire Council NSWLEC 95* Cowdroy J referred to the finding of Talbot J in *Andari – Diakanastasi v Rockdale City Council* and to a requirement that in totality the two sets of plans should include common elements and not be in contrast to each other. In *North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468; 97 LGRERA 443* Mason P noted:

Parliament has therefore made it plain that consent is not set in concrete. It has chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity. The consent authority can withhold its approval for unsuitable applications even if the threshold of subs (1) is passed.

*I agree with Bignold J in *Houlton v Woollahra Municipal Council (1997) 95 LGRERA 201* who (at 203) described the power conferred by s.102 as beneficial and facultative. The risk of abuse is circumscribed by a number of factors. Paragraphs (a), (b) and (c) of subs (1) provide narrow gateways through which those who invoke the power must first proceed. Subsection (1A) and subs (2) ensure that proper notice is given to persons having a proper interest in the modified development. And there is nothing to stop public consultation by a Council if it thinks that this would aid it in its decision making referable to modification. Finally, subs (3A), coupled with the consent authorities discretion to withhold consent, tend to ensure that modifications will not be enterprised, nor taken in hand, unadvisedly, lightly or wantonly. Naturally some modifications will be controversial, but decision making under this Act is no stranger to controversy.*

Senior Commission Moore in *Jaques Ave Bondi Pty Ltd v Waverly Council (No.2) (2004) NSWLEC 101* relied upon *Moto Projects* in the determination, involving an application to increase the number of units in this development by 5 to a total of 79. Moore concluded the degree of change did not result in the a development which was not substantially the same, despite the fact that in that case the changes included an overall increase in height of the building. Moore relied upon a quantitative and qualitative assessment of the changes as determined by the Moto test.

In my opinion a quantitative and qualitative assessment of the application is that it remains substantially the same. The approved land use is not altered as a consequence of the changes as proposed. The outcomes arising from the screening is appropriate in the heritage consideration of the local item and reasonable in the acoustic performance of the panels as opposed to the existing lattice.

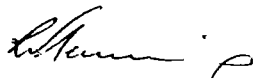
4.0 CONCLUSION

Pursuant to section S.96 (1A) of the Environmental Planning and Assessment Act 1979 the consent authority can be satisfied that the modified consent as sought by this submission is substantially the same development as referred to in the original application. For the reasons outlined above, we consider the amendments to the detail of the consent are reasonable.

We would be pleased to clarify or expand upon this submission as maybe necessary.

Yours sincerely

BOSTON BLYTH FLEMING



Ross Fleming

ANNEXURES

1. *The Acoustic Group – letter 25th August 2015*
2. *John Oultram Heritage & Design – letter dated 2nd July 2015*