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The General Manager  
Northern Beaches Council  
PO Box 82  
MANLY NSW 1655

Dear Sir/Madam,

**DEVELOPMENT CONSENT No. 2021/1039**  
**16 WYATT AVENUE, BELROSE**

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**Introduction**

This Statement of Environmental Effects (SEE) has been prepared to accompany an Application to amend Development Consent No. 2021/1039 pursuant to Section 4.56 of the *Environmental Planning and Assessment Act 1979*.

The subject site formally comprises Lot 2566 in Deposited Plan 752038 and is commonly known as No. 16 Wyatt Avenue, Belrose.

The site is located on the north-western side of Wyatt Avenue, approximately 380 metres to the south-west of Forest Way. The site encompasses an area of approximately 9,342m<sup>2</sup>, and is irregular in shape with a frontage of 28.745 metres to Wyatt Avenue.

The site is currently occupied by a 2-storey dwelling house setback approximately 35 metres from Wyatt Avenue. Off-street car parking is located within an attached garage located in front of the dwelling, setback approximately 29 metres from Wyatt Avenue. The site is accessed via a combined entry/exit driveway located along the Wyatt Avenue frontage.

A swimming pool is located to the rear of the dwelling, and a series of outbuildings occupy the rear (north-western) portion of the site. Further, the site accommodates an informal helipad that is used on a relatively frequent basis.

The topography of the site typically falls downhill from the south-east to the north-west, with a total level change of approximately 29 metres.

The existing vegetation on the site comprises a scattering of trees, shrubs and groundcovers. The existing trees are primarily located to the rear of the existing dwelling, and in the north-eastern corner of the site.

The site is located within a mixed-use precinct characterised by a mix of detached dwellings, townhouses, existing and approved boarding houses, educational facilities, and specialist landscape supply/nurseries.

The Northern Beaches Local Government Area (LGA) is statistically one (1) of the most expensive LGA's in New South Wales (NSW). In that regard, the Northern Beaches *Local Strategic Planning Statement* (LSPS) (March 2020) notes that:

*There is limited supply of social housing and affordable rental housing on the Northern Beaches.*

*The lack of affordable housing is pronounced for households on lower incomes, driving the demand for social housing and affordable rental housing.*

*Providing more diverse and affordable rental and social housing options will help very low to moderate income households, including key workers, such as police and health care workers, stay in the area. It will mean people of all incomes and backgrounds can participate in the community.*

## **Approved Development**

On 28 March 2023, the Land and Environment Court upheld an appeal for “*Demolition works and the construction of a boarding house*” (*Northern Beaches Essential Accommodation Pty Ltd v Northern Beaches Council [2023] NSWLEC 1134*).

The approved development includes the construction of two (2) buildings (an upper building and a lower building) accommodating a total of 55 boarding rooms (including a manager's room), 30 basement level car parking spaces, four (4) at-grade car parking spaces, 13 motorcycle and 55 bicycle spaces.

The upper (southern) building includes 23 boarding rooms and two (2) communal rooms incorporating cooking/dining/seating areas and one (1) of the communal rooms includes an outdoor terrace.

The lower (northern) building includes 32 boarding rooms and four (4) communal rooms incorporating cooking/dining/seating areas and three (3) of the communal rooms include an outdoor terrace.

The individual boarding rooms range in size from 28.6m<sup>2</sup> to 18.6m<sup>2</sup> and have been designed to accommodate a maximum of two (2) people. The individual rooms include double beds, bathrooms, cupboards and bench space.

Condition 3 (Part B) of the Consent is expressed as follows:

*In order that each of the boarding rooms and the manager's residence are not capable of being used as self-contained dwellings, each of the boarding rooms and the manager's residence must not contain, or at any time have installed, any cooking or meal preparation facilities. This includes plug-in electrical appliances. All meals must be prepared in the communal kitchens provided separately within the premises.*

Further, Condition 87 of the Consent is expressed as follows:

*The requirements of the Boarding House Plan of Management approved by this consent shall be fully implemented in perpetuity from the date of issue of an Occupation Certificate.*

The approved Plan of Management specifies that “All food preparation and cooking is to be done in the communal kitchens or common areas which have cooking facilities. No food preparation or cooking is to be done in rooms”.

### **Proposed Amendment**

The proposed amendment seeks to provide the option for food preparation and cooking to occur within the 32 boarding house rooms (identified as Rooms L101 – L215) located within the lower building.

The proposed amendment does not require any physical work, and the cooking facilities will be limited to the placement of a microwave oven on the approved bench space within the 32 individual boarding rooms.

The occupants of the 32 individual boarding rooms will still have access to the communal facilities and the proposed amendment is simply intended to allow for the option of more conveniently preparing meals within the individual boarding rooms if desired.

The Plan of Management (Revision D, dated 12 May 2025) has been updated to reflect the proposed amendment (relating to food preparation and cooking in Rooms L101 – L215) and the requirements of Condition 85 (relating to waste management).

Finally, a series of adjustments are proposed to the Conditions of Consent (identified by “tracked changes”) to allow some physical works to commence on the site (that do not themselves require a Construction Certificate) prior to the issue of the Construction Certificate for the development as a whole.

Again, the proposed adjustments to the Conditions of Consent do not alter the approved development in any way and are simply intended to facilitate the initial commencement of physical works on the site in a more timely and efficient manner.

## Legislative Context

Section 4.56 of the *Environmental Planning and Assessment Act 1979* specifies, *inter alia*, that:

*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 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 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.*

Section 4.56(1A) specifies that in determining an application of a consent, the consent authority shall take into consideration such of the matters referred to in Section 4.15 as are of relevance to the development the subject of the application.

Further, 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.

## Substantially the Same Development

The applicable legal principles governing the exercise of the power contained in Section 4.55(2) of the *Environmental Planning and Assessment Act 1979* were summarised by Pepper J in *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3)* [2015] NSWLEC 75 ("Westlime") at [173] as follows:

- "(1) first, the power contained in the provision is to "modify the consent". Originally the power was restricted to modifying the details of the consent but the power was enlarged in 1985 (North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468 at 475 and Scrap Realty Pty Ltd v Botany Bay City Council [2008] NSWLEC 333; (2008) 166 LGERA 342 at [13]). Parliament has therefore "chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity" (Michael Standley at 440);*
- (2) the modification power is beneficial and facultative (Michael Standley at 440);*
- (3) the condition precedent to the exercise of the power to modify consents is directed to "the development", making the comparison between the development as modified and the development as originally consented to (Scrap Reality at [16]);*

- (4) the applicant for the modification bears the onus of showing that the modified development is substantially the same as the original development (*Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8);
- (5) the term "substantially" means "essentially or materially having the same essence" (*Vacik* endorsed in *Michael Standley* at 440 and *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280; (1999) 106 LGERA 298 at [30]);
- (6) the formation of the requisite mental state by the consent authority will involve questions of fact and degree which will reasonably admit of different conclusions (*Scrap Realty* at [19]);
- (7) the term "modify" means "to alter without radical transformation" (*Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414 at 42, *Michael Standley* at 474, *Scrap Realty* at [13] and *Moto Projects* at [27]);
- (8) in approaching the comparison exercise "one should not fall into the trap" of stating that because the development was for a certain use and that as amended it will be for precisely the same use, it is substantially the same development. But the use of land will be relevant to the assessment made under s 96(2)(a) (*Vacik*);
- (9) the comparative task involves more than a comparison of the physical features or components of the development as currently approved and modified. The comparison should involve a qualitative and quantitative appreciation of the developments in their "proper contexts (including the circumstances in which the development consent was granted)" (*Moto Projects* at [56]); and
- (10) a numeric or quantitative evaluation of the modification when compared to the original consent absent any qualitative assessment will be "legally flawed" (*Moto Projects* at [52])."

Further, in *Canterbury-Bankstown Council v Realize Architecture Pty Ltd* [2024] NSWLEC 31, it was held that there are three (3) tasks to be undertaken to determine whether an amended development remains substantially the same as the approved development as follows:

1. *Finding the primary facts:* This involves drawing inferences of fact from the evidence of the respects in which the originally approved development would be modified. These respects include the components or features of the development that would be modified, such as height, bulk, scale, floor space, open space and use, and the impacts of the modification of those components or features of the development.
2. *Interpreting the law:* This involves interpreting the words and phrases of the precondition in s 4.55(2) as to their meaning.
3. *Categorising the facts found:* This involves determining whether the facts found regarding the respects in which the development would be modified fall within or without the words and phrases of the precondition in s 4.55(2). American jurist, Karl Llewellyn termed such descriptions of words and phrases as "abstract fact-categories": Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana Publication 1960) 80. In the Australian authorities, they are commonly referred to as "statutory descriptions" or "statutory criteria": see, for example, *The Australian Gas Light Company v The Valuer-General* (1940) 40 SR (NSW) 126 at 137-138; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139

*at 156; Randwick Municipal Council v Manousaki (1988) 66 LGRA 330 at 333. The decision-maker's task is to determine whether the facts found fall within or without the statutory description, "according to the relative significance attached to them" by the decision-maker: The Australian Gas Light Company v The Valuer-General at 138.*

The Court expressly endorsed the 'balanced approach' that had been undertaken in *Realize Architecture* to answer the "substantially the same" test in Section 4.55(2)(a) (which is the same as Section 4.56(1)(a) of the *Environmental Planning and Assessment Act 1979* and went on to clarify that this balanced approach should be undertaken by consent authorities.

Further, the Court expressly noted that Section 4.55(2) of the *Environmental Planning and Assessment Act 1979* "does not refer to "critical elements" or even "elements of the two developments" and that in relation to the task of identifying "the material and essential features of the originally approved developments", in fact, Section 4.55 (and Section 4.56) "does not demand such an enquiry".

This is because these traditional ways, even if helpful, do not displace the statutory test in Section 4.55 (and Section 4.56) of the *Environmental Planning and Assessment Act 1979* to consider whether the relevant developments are "substantially the same" as one another, which does not demand that the comparison be undertaken in any particular way (*Feldkirchen Pty Ltd v Development Implementation Pty Ltd [2002] NSWCA 227*).

Finally, in *Tipalea Watson Pty Ltd v Ku-ring-gai Council NSWLEC 253*, it was held that substantially the same development maintains the "essential characteristics" of the approved development. Further, in *Moto Projects (No. 2) Pty Ltd v North Sydney Council [1991] 106 LGRA 298*, Bignold J said (at 309 [56]):

*The requisite factual finding 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. The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where the comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being prepared in their proper contexts.*

The reference of Bignold J to "essentially" and "materially" the same is derived 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 1979* (a predecessor to Section 4.55) that "Substantially when used in the Section means essentially or materially or having the same essence".

In summary, the approach for testing whether the amended development remains "substantially the same" as the approved development may be approached by adopting the following three (3) steps:

1. What is the essence of the approved development, including the circumstances in which the consent was granted?
2. What are the proposed changes, both qualitatively and quantitatively?
3. Do the proposed amendments, by comparison of both qualitative and quantitative elements, result in an amended development which remains essentially or materially the same as the approved development, or put another way, do the proposed amendments avoid a radical transformation to the essence of the approved development?

Firstly, the proposed amendment does not require any physical work, and the cooking facilities will be limited to the placement of a microwave oven on the approved bench space within the 32 individual boarding rooms.

Secondly, the occupants of the 32 individual boarding rooms will still have access to the communal facilities and the proposed amendment is simply intended to allow for the option of more conveniently preparing meals within the individual boarding rooms if desired.

Thirdly, the proposed amendment does not change the essence or nature of the approved facility as a boarding house comprising individual boarding rooms and communal facilities.

Fourthly, the approved facility will continue to operate in accordance with the approved Plan of Management with the only operational change being the option of more conveniently preparing meals within the 32 individual boarding rooms if desired.

Finally, the proposed adjustments to the Conditions of Consent do not alter the approved development in any way and are simply intended to facilitate the initial commencement of physical works on the site in a more timely and efficient manner.

In the circumstances, the amended development maintains the essential features and characteristics of the approved development, and the use, operation and function of the site remain substantially unchanged. On that basis, the approved development is not being radically altered or transformed, and the amended development remains substantially the same as the approved development.

### **Consultation and Notification**

The approved development was formally exhibited in accordance with the relevant legislative requirements, and the consent authority remains responsible for any formal exhibition of the proposed amendments.

Irrespective, the proposed amendment does not require any physical work, and the approved facility will continue to operate in accordance with the approved Plan of Management.



## Section 4.55 Assessment

The heads of consideration incorporated in Section 4.55 of the *Environmental Planning and Assessment Act 1979* comprise:

- any environmental planning instrument;
- any proposed environmental planning instrument that is or has been the subject of public consultation and that has been notified to the consent authority;
- any development control plan;
- any planning agreement;
- any matters prescribed by the Regulation;
- the likely impacts of the development, including environmental impacts on both the natural and built environments, and the social and economic impacts in the locality;
- the suitability of the site for the development;
- any submissions made in accordance with the Act or the Regulations; and
- the public interest.

### Environmental Planning Instruments

#### *SEPP (Affordable Rental Housing) 2009*

SEPP (Affordable Rental Housing) 2009 generally aims to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses, and non-discretionary development standards.

The DA was submitted on 12 July 2021 and the appeal was upheld on 28 March 2023. In that regard, SEPP (Affordable Rental Housing) 2009 was repealed on 26 November 2021 and replaced by SEPP (Housing) 2021.

Irrespective, SEPP (Affordable Rental Housing) 2009 continues to apply to *“an application to modify a development consent granted after the commencement date, if it relates to a development application made, but not determined, on or before the commencement date”* pursuant to Schedule 7(1)(da).

The SEPP prevails to the extent of any inconsistency with any other environmental planning instrument, and Division 3 applies to boarding houses.

The Warringah Local Environmental Plan (LEP) 2000 adopts *“Local Statements”* for individual areas and does not prescribe land use zones. Accordingly, the provisions of the SEPP do not specifically apply to the proposed development.

Irrespective, the provisions of the SEPP have been considered in the event of an absence of controls relating to boarding houses in the LEP.

The Warringah LEP 2000 defines a *“boarding house”* as follows:



- (a) means any premises that—
  - (i) are wholly or partly let as a lodging for the purposes of providing the occupants with a principal place of residence, and
  - (ii) are used and occupied by at least 4 long term unrelated residents, and
  - (iii) include a communal living space used for eating and recreation, and
  - (iv) are not licensed to sell liquor, and
- (b) does not include premises that have been subdivided or in which there is separate ownership of parts of the premises.

The SEPP defines a “boarding room” as follows:

**boarding room** means a room or suite of rooms within a boarding house occupied or so constructed or adapted as to be capable of being occupied by one or more lodgers.

Clause 29(3) of the SEPP specifies that “A boarding house may have private kitchen or bathroom facilities in each room but is not required to have those facilities in any boarding room”.

Firstly, the proposed amendment does not require any physical work, and the cooking facilities will be limited to the placement of a microwave oven on the approved bench space within the 32 individual boarding rooms.

Secondly, the occupants of the 32 individual boarding rooms will still have access to the communal facilities and the proposed amendment is simply intended to allow for the option of more conveniently preparing meals within the individual boarding rooms if desired.

Thirdly, the proposed amendment does not change the essence or nature of the approved facility as a boarding house comprising individual boarding rooms and communal facilities.

In the circumstances, the relevant provisions of the SEPP are limited to the controls relating to “accommodation size” specified in Clause 29(2)(f) as follows:

- (2) A consent authority must not refuse consent to development to which this Division applies on any of the following grounds—
  - (f) **accommodation size**
    - if each boarding room has a gross floor area (excluding any area used for the purposes of private kitchen or bathroom facilities) of at least—
      - (i) 12 square metres in the case of a boarding room intended to be used by a single lodger, or
      - (ii) 16 square metres in any other case.

The 32 individual boarding rooms in the lower building are designed to accommodate two (2) lodgers. The individual rooms are approximately 17.2m<sup>2</sup> “excluding any area used for the purposes of private kitchen or bathroom facilities”.

In the circumstances, the proposed amendment satisfies the “*must not refuse*” provisions in Clause 29(2)(f) of the SEPP.

*Warringah LEP 2000*

The site is located in the *Belrose North Locality* pursuant to the Warringah LEP 2000 and “*boarding houses*” are permissible in the Locality with the consent of Council.

Clause 12 of the LEP requires the consent authority to be satisfied that the proposed development is consistent with the desired future character described in the Locality Statement.

The desired future character of the *Belrose North Locality* is expressed as follows:

*The present character of the Belrose North locality will remain unchanged except in circumstances specifically addressed as follows.*

*The natural landscape including landforms and vegetation will be protected and, where possible, enhanced. Buildings will be grouped in areas that will result in the minimum amount of disturbance of vegetation and landforms and buildings which are designed to blend with the colours and textures of the natural landscape will be strongly encouraged.*

*Development will be limited to new detached style housing conforming with the housing density standards set out below and low intensity, low impact uses.*

*A dense bushland buffer will be retained or established along Forest Way. Fencing is not to detract from the landscaped vista of the streetscape.*

*Development in the locality will not create siltation or pollution of Middle Harbour.*

In *Vigor Master Pty Ltd v Warringah Shire Council* [2008] NSWLEC 1128 referred to definitions of “*intensity*” and “*impact*” as follows:

*Intensity - is commonly used to identify the nature of the proposal in terms of its size and scale and the extent of the activities associated with the proposal. Therefore “low intensity” would constitute a development which has a low level of activities associated with it.*

*Impact - is commonly used in planning assessment to identify the likely future consequences of proposed development in terms of its surroundings and can relate to visual, noise, traffic, vegetation, streetscape privacy, solar access etc. Therefore ‘low impact’ would constitute a magnitude of impacts such that was minimal, minor or negligible level and unlikely to significantly change the amenity of the locality.*

The provisions of Clause 12 of the LEP were considered by the Court when the appeal was upheld in relation to the approved development (*Northern Beaches Essential Accommodation*

*Pty Ltd v Northern Beaches Council [2023] NSWLEC 1134*) and the Judgement includes the following findings:

53. *Having considered the evidence of the expert planners in the JER and oral evidence in cross examination, I conclude that the Proposed Development is consistent with the DFC of the C8 Locality Belrose North for the following reasons:*

- (1) *I have taken into consideration my observations of the locality during the site inspection and noting the developments approved in the locality I find that the DFC has evolved (Woollahra v SJD);*
- (2) *The Proposed Development is designed to blend in with the colours and textures of the natural landscape;*
- (3) *The use of the Proposed Development will be low intensity, low impact notwithstanding the number of rooms because the size of the boarding house is commensurate with the size of the Site itself, as compared with the adjacent site at 14 Wyatt Ave, Belrose;*
- (4) *The proposed landscaping will enhance the vegetation on the Site.*

The proposed amendment does not require any physical work, the colours and textures of the approved building remain unchanged, the number of boarding rooms remain unchanged, and the approved landscaping remains unchanged.

Further, the proposed amendment does not change the essence or nature of the approved facility as a boarding house comprising individual boarding rooms and communal facilities.

In the circumstances, the amended development remains consistent with the desired future character of the Locality.

Further, the *Built Form* controls in the Locality Statement include *"The maximum housing density is 1 dwelling per 20 ha of site area"*. The LEP defines a *"dwelling"* as follows:

***dwelling*** means a room or a suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile.

The proposed amendment does not change the use of the facility as a *"boarding house"*. Further, the proposed amendment does not change the nature of the use of the individual boarding rooms as *"providing the residents a principal place of residence"*.

Finally, Clause 20 of the LEP specifies that *"consent may be granted to proposed development even if the development does not comply with one or more development standards, provided the resulting development is consistent with the general principles of development control, the desired future character of the locality and any relevant State environmental planning policy"*.

In that regard, Clause 20 of the LEP applies to applications for development consent, not to applications to amend a consent already granted. Irrespective, the amended development

remains consistent with the desired future character of the Locality, and the proposed amendments satisfy the *"must not refuse"* provisions in Clause 29(2)(f) of the SEPP.

The *General Principles of Development Control* do not include any provisions relating to the inclusion of cooking facilities within individual boarding house rooms, circumstances, in which the amended development remains consistent with the *General Principles of Development Control*.

The LEP does not incorporate any further provisions of specific relevance to the proposed amendment.

#### Proposed Environmental Planning Instruments

The Council is in the process of preparing a comprehensive LEP, however the proposed LEP does not include any controls of specific relevance to the approved boarding house.

#### Development Control Plans

Section 3.42 of the *Environmental Planning and Assessment Act 1979* specifies that the provisions of a DCP *"are not statutory requirements"*.

Further, Section 4.15(3A)(b) specifies that the consent authority *"is to be flexible in applying"* the provisions of a DCP, and *"allow reasonable alternative solutions that achieve the objectives of those standards for dealing with that aspect of the development"*.

In this instance, the Warringah LEP 2000 provides the level of detail normally incorporated in a DCP and there are no further DCP controls of specific relevance to the proposed amendment.

#### Impacts of the Development

The proposed amendment does not change the use of the facility as a *"boarding house"*. Further, the proposed amendment does not change the nature of the use of the individual boarding rooms as *"providing the residents a principal place of residence"*.

The proposed amendment does not require any physical work, and the cooking facilities will be limited to the placement of a microwave oven on the approved bench space within the 32 individual boarding rooms.

The occupants of the 32 individual boarding rooms will still have access to the communal facilities and the proposed amendment is simply intended to allow for the option of more conveniently preparing meals within the individual boarding rooms if desired.

Further, the approved facility will continue to operate in accordance with the approved Plan of Management with the only operational change being the option of more conveniently preparing meals within the 32 individual boarding rooms if desired.

The amended development maintains the essential features and characteristics of the approved development, and the use, operation and function of the site remain substantially unchanged. On that basis, the approved development is not being radically altered or transformed, and the amended development remains substantially the same as the approved development.

Finally, the proposed amendments will not change the external form or appearance of the approved development, or its physical, visual or operational relationship with the public domain or the surrounding properties.

### **Conclusion**

I trust this submission is satisfactory for your purposes, however should you require any further information or clarification please do not hesitate to contact the writer.

Yours Sincerely,



James Lovell  
Director  
James Lovell and Associates Pty Ltd