

21 July 2021

The General Manager
Northern Beaches Council

REQUEST FOR SECTION 4.55(1a) MODIFICATION OF DA APPROVAL (DA2021/0417)

13 THE CORSO, MANLY

STATEMENT OF MODIFICATION - STATEMENT OF ENVIRONMENTAL EFFECTS

1. INTRODUCTION

On the 20 May 2021 Northern Beaches Council approved a development application for a change of use to a business premises with ancillary café, signage and fit out works at 13 the Corso, Manly.

2. DETAIL OF MODIFICATIONS AS SOUGHT

This application seeks to delete the approved door opening accessed from the laneway, as detailed on the plans provided by alphaplus

3. APPLICATION FOR MODIFICATION

SECTION 4.56 ENVIRONMENTAL PLANNING & ASSESSMENT ACT 1979

The application is made pursuant to Section 4.55(1a) which relates to modifications involving minimal environmental impact.

In this instance it is not considered the proposed design modifications to the drawings substantially alter or change the development as consented. The land use outcome remains within the ambit of the approved land use as referred to within the notice of determination.

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 Ilene 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 Baulkam 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 and the deletion of the laneway door does not give rise to any environmental impacts.

4.0 MATTERS FOR CONSIDERATION PURSUANT TO S4.15 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 S4.15 of the Environmental Planning and Assessment Act 1979 (as amended):

The provisions of any environmental planning instrument, proposed instrument that has been the subject of public consultation under this Act and any development control plan.

4.1 MANLY LOCAL ENVIRONMENTAL PLAN

With regard to addressing the relevant LEP controls applicable to the site:

- The land use as approved will be maintained
- The deletion of the laneway door does not impact on the heritage value of the conservation area, pursuant to clause 5.10 of the LEP.
- There are no scenic protection concerns raised with the deletion of the laneway door.

4.2 MANLY DEVELOPMENT CONTROL PLAN

The deletion of the laneway door does not significantly alter the development as approved and is considered consistent with the DCP controls as they are reasonably applied.

5.0 CONCLUSION

Pursuant to section S.4.55 (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

William Fleming

Planner

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