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**Attachments:** MOD2018 0049 Section 96 8 Forest Rd Warriewood - Submission Evolution Planning 020318.pdf;

**From:** Tony Robb [mailto:tony@evolutionplanning.com.au]  
**Sent:** Friday, 2 March 2018 2:02 PM  
**To:** Rebecca Englund; Council Mailbox  
**Subject:** Mod No 2018/0049 - 8 Forest Rd, Warriewood

Dear Rebecca

Please find attached copy of our submission, prepared on behalf of the owners of 4 Forest Rd, Warriewood

Can you please confirm receipt and advice me of any progress of the matter

Regards

Tony Robb  
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1 March 2018

General Manager  
Northern Beaches Council  
PO Box 882  
MONA VALE NSW 1660

By email: [council@northernbeaches.nsw.gov.au](mailto:council@northernbeaches.nsw.gov.au)

Dear Sir or Madam:

**RE: MOD2018/0049 - Application to Modify N0440/15 – 8 Forest Road, Warriewood**

We have been engaged, in a town planning advisory capacity, by Messrs. Gualtieri and Sacco, owners of 4 Forest Road, Warriewood, to review an application to modify NO440/15 and to make any submissions on their behalf.

The proposed modification, (not to be confused with the pending Section 96 applications related to titling and subdivision arrangements; and, a second modification application related to the staging of construction works), seeks to increase the approved dwelling yield from 81 to 87.

The effect of the proposed modification has the effect of reducing the potential dwelling yield of 4 Forest Road from 13 to 7.

The owners of 4 Forest Road were very disappointed by the approval of the current DA, limiting the development potential of their land to 13 dwellings, (despite earlier being advised by Council staff that an earlier concept of 18 dwellings should be increased in yield and perhaps should include a Residential Flat Building typology). They are now extremely distressed by this further application which will further diminish their development potential.

Summary Submission

In summary, on behalf of the owners of 4 Forest Road, Warriewood, we wish to object to the proposed modification of consent on the following grounds:

1. The proposed modified development is not “substantially the same” as that originally approved and therefore does not satisfy the threshold test for it to be considered under Section 96 of the Act;
2. The proposed modified development is contrary to the judgement of Brown C in *Warriewood Vale Pty Ltd v Northern Beaches Council & Anor (No.2) [2017] NSWLEC 1220*; the *Warriewood Valley Strategic Review Report* and the *Warriewood Valley Strategic Review Addendum Report* in terms of the land development capability of the Sector, specifically land at 4 Forest Road;



3. The proposed modified development is inconsistent with objectives of the Act in so far as it does not represent the orderly and economic use and development of the Sector;
4. Increased risk in terms of bushfire;
5. Unacceptable traffic impacts;
6. The proposal is not within the public interest.

#### Submission

##### 1. Not “Substantially the same development”

At a superficial level, one may form the view that the proposed modified development is substantially the same as that approved as it generally looks the same and only involves an increase in yield of 7-8%. Such a conclusion would be ill-informed, in our view, when the question is considered properly under the relevant authorities.

In *Moto Projects No 2 Pty Limited v North Sydney Council* [1999] 106 LGERA 298, Bignold J observed as follows.

*“The relevant satisfaction required by section 96(2)(a) to be found to exist in order that the modification power be available involves an ultimate finding of fact based upon the primary facts found. I must be satisfied that the modified development is substantially the same as the original approved development.*

*The requisite factual finding obviously 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 with a 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 compared in their proper contexts including the circumstances in which the development consent was granted”*

In *Vacik Pty Ltd v Penrith City Council NSWLEC*, 24 February 1992 (unreported), Stein J states the test in the following terms: “ ‘substantially’, when used in the section, means essentially or materially having the same essence.”

Stein J in *Vacik* further phrased the consideration of the s.96 (then s.102) threshold test as follows:



*“In assessing whether the consent as modified will be substantially the same development one needs to compare the before and after situations.”*

Our dispute with the applicants’ contention that the proposed development, as modified, is substantially the same as that originally approved lies in the findings of both Stein J in *Vacik* and Bignold J in the *Moto Projects* matter, where consideration should be given to the ‘before and after situations’ and that the threshold test consideration should comprise ‘qualitative comparisons of the developments compared in their proper contexts including the circumstances in which the development consent was granted’.

Importantly, *“the circumstances in which the development consent was granted”* needs to be considered. In this case, this means the further consideration of the judgement of Brown C in *Warriewood Vale Pty Ltd v Northern Beaches Council & Anor (No.2) [2017] NSWLEC 1220*.

The judgement is considered further below, but in the context of the relevant Section 96 considerations under the *Moto Projects* matter, the Appeal was upheld on the basis of the subject site having a land capability of 81 dwellings and the land at 4 Forest Road of 10-13 dwellings.

The later yield, provided by the proponents’ town planner, was a rather convenient figure, in our view, as it would not hinder the yield sought in the subject DA. That aside, the current proposal has the effect of reducing the yield of 4 Forest Road to 7 dwellings. This is contrary to the circumstances in which the development consent was granted and we therefore submit the current application cannot be considered to be substantially the same development and must therefore be rejected. The land capability of 4 Forest Road was central to the judgement of Brown C and the proponent has failed to properly consider the circumstances in which the consent was granted.

The proponent broadly acknowledges this issue and attempts to rely on an error at Clause 6.1(3) of the LEP to support their position.

The error stems from a mis-translation of the *Warriewood Valley Strategic Review Addendum Report*, (where a density of 32 dwellings/hectare for the Sector is envisaged), to the LEP density provision at Clause 6.1(3), where upon correct application of the Strategy, the correct upper total yield across the entire Sector should be 99 and not 94 dwellings as the LEP currently provides.

We do not dispute the anomaly in the LEP. However, the proponent suggests that Council (or a “third party” – presumably the owners of 4 Forest Road) could lodge a Planning Proposal to correct the error and that if such a proposal was successful the yield available to 4 Forest Road would be 12 – which sits within the yield range identified by the Court.

We strongly dispute the logic of the proponent of relying on someone else making an application to amend the LEP and the logic which presumes that any such application would be successful in order to support their position that the proposal is substantially the same development.

Our position is that if the proponent is relying on an upper yield of 99 dwellings to demonstrate that the modified development is substantially the same as that originally approved, then they should lodge a



Planning Proposal, and have the LEP amended, before relying on a permitted yield of 99 dwellings to support the application.

There is no guarantee that any such Planning Proposal would be a *fait accompli* and even if the dwelling yield was increased, it was suggested during the hearing by the proponents' legal representative that there would be nothing to stop the owners of 8 Forest Road taking advantage of the higher yield to further increase their yield further to the detriment of the owners of 4 Forest Road.

The fact is that the current LEP includes an upper limit density of the Sector of 94 dwellings and until this provision changes then that is the statutory framework within which this matter should be considered.

The qualitative and quantitative approach taken in the Moto Projects matters should also consider any change in the likely impacts of the proposed modified development.

The proposed modified development has a direct adverse impact on the development potential of 4 Forest Road reducing it from 13 dwellings to 7 dwellings – nearly half of the development potential for the site which the Court found it to be capable of accommodating.

The direct and significant impact on the development potential of 4 Forest Road would, when considered under the terms used by Stein J in *Vacik* - “...*one needs to compare the before and after situations.*”, also leads us to the conclusion that the proposal (and specifically the impacts associated with the development) is materially and in essence not the same as that originally approved.

The logic of relying on the error in the LEP is fraught; the circumstances of how the approved dwelling yield has been arrived at has not been satisfactorily considered since the approved yield was heavily guided by the land capability of 4 Forest Road of 10-13 dwellings; and, the proposal introduces significant additional adverse impacts on adjoining land in terms of their ability to development their land to the best economic use.

Furthermore, the proponent supports their position that the modified development is substantially the same by what appears to be a misleading statement “*All proposed works are located within the previously approved building footprint and envelope with previously approved landscape and drainage regimes unaltered...*”.

Unfortunately, the proposed modified floor plans are not available. However, a comparison of the approved and proposed modified roof plans clearly shows that the envelope of the northern part of Building A is extended towards the boundary. Refer to comparison below.



Figure 1: Comparison Approved Roof Plan (Left) and Proposed Modified Roof Plan

The submission by the proponent to demonstrate that the development, as modified, is substantially the same as that originally approved is fundamentally flawed when considered against the foremost case law authority and is inaccurate and we again submit that the proposal does not meet the threshold test under Section 96 of the Act and should be immediately rejected for this reason.

## 2. *Inconsistencies with Judgement and Warriewood Strategy*

Our objection in relation to inconsistencies of the proposed modified development and the findings of Brown C in *Warriewood Vale Pty Ltd v Northern Beaches Council & Anor (No.2)* [2017] NSWLEC 1220 (the 'Judgement') and the 'Warriewood Strategy' centres around the concept of Land capability.

The *Warriewood Valley Strategic Review Addendum Report*, when read as a whole, is predicated on the concept of the land capability of certain Sectors (or part of a Sector in this case). It identifies constraints to development, ranks land in terms of development capability; and, provides recommendations for residential densities. Both 4 and 8 Forest Road are identified (at Map 11) as having a recommended density of 32 dwellings/hectare.



At pp 60 of the Judgement, Brown C states:

*“As a starting point, the council accepted that the yield of 81 dwellings on 8 Forest Road was within the environmental and physical capacity of that site. All concerns relating to the proposed development and identified in the council’s contentions have been addressed through amendments to the original plans. **This does not mean however that 4 Forest Road is only entitled to 13 dwellings because of the design proposed for 8 Forest Road. The question of the capacity of 4 Forest Road to accommodate residential development must also be considered as part of the potential distribution of the dwelling yield over both properties.**”*

**[emphasis added]**

Brown C then went on, at length (pp 61-70), to consider the evidence of the experts in terms of an appropriate yield for 4 Forest Road, and ultimately concluded that a yield of 10-13 dwellings would be appropriate based on the alternatives put forward in evidence at that time.

The significance of this comprehensive consideration of the potential yield for 4 Forest Road, as referred to at pp 60, cannot be understated. If Brown C found the capacity of 4 Forest Road to be 18 dwellings, for example, then it would likely have followed that the entitlement of 8 Forest Road would be reduced to 76 dwellings. We say this because such an approach would be consistent with the land capability methodology contained within the *Warriewood Valley Strategic Review Addendum Report*.

Our point is that the approval of 81 dwellings at 8 Forest Road was predicated, to a large extent, by the development potential of 4 Forest Road not exceeding 13 dwellings. It would therefore be ill-conceived, in the context of the approach taken by Brown C and the methodology followed in the *Warriewood Valley Strategic Review Addendum Report*, to diminish the yield of 4 Forest Road by increasing the yield of 8 Forest Road. Such yields should be based on land capability as a result of the consideration of site constraints and how such constraints may be managed, rather than one party grabbing the development yield available because the other party has elected not to develop their land.

At pp 72 of the Judgement, Brown C states:

*“I am satisfied that the development of 8 Forest Road for **81 dwellings** is consistent with cl 6.1(1)(a) of LEP 2014 and consequently, there is no barrier to the approval of a development on 8 Forest Road **that has a dwelling yield of 81 dwellings.**”*

**[emphasis added]**

This finding implies that a yield above 81 dwelling may represent a barrier to the approval.

It is our position that a yield above 81 dwellings does represent a barrier to approval since the land capability of 4 Forest Road has been found to be 10-13 dwellings.



The current application, which seeks to degrade that capability, is inconsistent with the findings of the Court; the land capability approach of the *Warriewood Valley Strategic Review Addendum Report*; and hinders the objectives of the Act related to the orderly development and economic use of land.

In light of the Judgement and the current statutory planning framework, the orderly development and economic use of land would be achieved by developing 8 Forest Road with a yield of 81 dwellings and 4 Forest Road with a yield of 13 dwellings – nothing more – nothing less.

The fact that further yield may be available across the entire Sector pursuant to Clause 6.1(3), (because the owners of 4 Forest Road have elected not to develop their land at this time), is of no consequence. The future development of the Sector has to be in accordance with the objectives of Clause 6.1 of the LEP which includes consideration of the *Warriewood Valley Strategic Review Addendum Report* (and the land capability approach of determining yield) and now the Judgement which includes specific findings on the appropriate yields of the two parts of the Sector. The current proposal is entirely contrary to such findings.

The proponent suggests that the proposed modified development could be consistent with findings of Brown C and still satisfy Clause 6.1(3) of the LEP if the LEP were to amended.

This argument is ill-conceived, for reasons outlined above where the proponent attempts to use a similar argument to support their position that the development is substantially the same as that originally approved.

The fact is that Clause 6.1(3) stipulates an upper limit density for the Sector of 94 dwellings and the current proposal cannot be justified on any other density provision.

### 3. *Objects of the Act*

The proposed modified development is inconsistent with objectives of the Act in so far as it does not represent the orderly and economic use and development of the Sector, specifically the restricted ability to develop the land at 4 Forest Road to a level to which it was found to be capable of as found by the Court.

### 4. *Bushfire*

The proposed modification of this Integrated Development will be referred to the NSW Rural Fire Service and we ask that careful consideration be given to the proposed increase in population on this bushfire affected land and the implications of further traffic in the event of a mass evacuation of the site through, in our view, a limited access route and through an already congested industrial/commercial area.

### 5. *Traffic*

The increase in traffic generation is unacceptable, particularly since the entire development will rely on access and egress via Jubilee Avenue which is already heavily congested during peak periods, which we believe was not satisfactorily taken into consideration in the determination of the DA.





## 6. *The Public Interest*

The proposed ill-weighted appropriation of density across the Sector is not in the public interest in terms of the expectations of the owners of 4 Forest Road (and if approved other land owners by way of setting a poor precedent not being in accordance with public planning policy) in terms their ability to develop their land.

In this case the expectations of the owners of 4 Forest Road to develop their land is informed by Clause 6.1(3) of the LEP, the *Warriewood Valley Strategic Review Addendum Report* and the judgement of Brown C.

The proposed modification blights these expectations by hindering the land capability of 4 Forest Road identified in the Judgement; the LEP; and; the Warriewood Strategy - which looks to the question of "land capability" to guide the orderly development of each Sector.

It is not in the public interest to allow one party to grab the development yield available to another party because the other party has elected not to develop their land.

Should the proponent seek to appeal any decision of Council the owners of 4 Forest Road, as a directly affected party, will seek to intervene in any such proceedings and we respectfully request that we are informed of any such steps taken by the proponent.

Please contact the undersigned on 0430 007 725 should you wish to discuss this submission further or to provide any information on the progress of the assessment of the application.

Yours sincerely,

Tony Robb  
Principal  
BA(Hons).UPS, Dip.UPS (Westminster).MPIA