

15<sup>th</sup> March 2021

Northern Beaches Council  
PO Box 82  
Manly NSW 1655



Dear Sir,

**Statement of Environmental Effects**  
**Modification of Land and Environment Court Issued Consent**  
**Proceedings 2018/289481 - DA2018/1166**  
**Proposed boarding house**  
**11 May Road and 613 – 615 Pittwater Road, Dee Why**

**1.0 Introduction**

On 22<sup>nd</sup> January 2020 the Land and Environment Court of NSW (the Court) upheld an appeal and granted consent to the above development involving the demolition of the existing structures on the site and the construction of series of 2 storey buildings, containing 80 boarding rooms including 5 managers rooms, with associated access, communal areas and landscape works over a split-level basement car park containing 47 car parking spaces, 66 bicycle spaces and 21 motorcycle spaces.

We have been engaged to prepare an application seeking the deletion of the basement carpark at RL 42.80 and the associated car lift and the reconfiguration of the carparking at RL 45.60 to accommodate 22 car parking spaces. These spaces are in addition to the 5 car parking spaces previously approved at RL 31.80 bringing the total number of car parking spaces for the proposed development to 27 including 8 spaces for people with a disability and 5 car share spaces. Condition 2 of the consent will need to be modified to reference these modified plans.

The application also seeks the modification of Condition 6 of the development consent pertaining to the payment of Section 94A Development Contributions to reflect the reduced cost of works as detailed in the accompanying cost summary report.

This request is made pursuant to Section 4.56 of the Environmental Planning and Assessment Act 1979 ("the Act").

The request is made on the basis that the construction of the second basement level is technically difficult and cost prohibitive given that geotechnical advice has confirmed that the excavation will be into rock. The deletion of this secondary basement level will also significantly reduce site disturbance and the required period of excavation works whilst also reducing associated impacts on surrounding residential properties and the road network. Such outcome provides for enhanced environmental planning outcomes for this particular site and facilitates the orderly and economic use and development of the land.

The application is accompanied by a car parking statement, dated 3<sup>rd</sup> March 2021, prepared by TEF Consulting which details the acceptability of the quantum of car parking proposed having regard to the recent judgement of the Land and Environment Court of New South Wales in the matter of *Williamson v Northern Beaches Council [2020] NSWLEC 1110* where the Court accepted that a car share vehicle would effectively replace 5 privately owned vehicles. The car parking statement also justifies the car parking on the basis that the subject property is located within an accessible area and immediately adjacent to the Dee Why town centre and given that the subject development provides more than the required bicycle and motorcycle car parking spaces as prescribed by State Environmental Planning Policy (Affordable Rental Housing) 2009.

The modifications will not alter the 3-dimensional built form circumstance of the development and will not compromise the residential amenity, landscape, drainage or streetscape outcomes achieved through approval of the original scheme.

To that extent, Council can be satisfied that the development will continue to provide appropriately for off-street carparking and that the modified proposal represents substantially the same development as originally approved. Accordingly, the application is appropriately dealt with by way of Section 4.56 of the Act which enables Council as the consent authority to modify a Court issued consent.

## **2.0 Detail of Modifications Sought**

The modifications propose the deletion of the basement carpark at RL 42.80 and the associated car lift and the reconfiguration of the carparking at RL 45.60 to accommodate 22 car parking spaces. These spaces are in addition to the 5 car parking spaces previously approved at RL 31.80 bringing the total number of car parking spaces for the proposed development to 27 including 8 spaces for people with a disability and 5 car share spaces. This application relies on amended plans SA-01(G), DA-02(G) to DA-05(G), DA-06(H), DA-07(G) to DA-09(G), DA-11(D) to DA-13(D), DA-14(E), DA-15(D), DA-16(D) and DA-17(E) prepared by Leech Harmon Architects. Condition 2 of the consent will need to be modified to reference these modified plans.

The application also seeks the modification of Condition 6 of the development consent pertaining to the payment of Section 94A Development Contributions to reflect the reduced cost of works as detailed in the accompanying cost summary report.

### **3.0 Section 4.56 of the Environmental Planning and Assessment Act 1979**

Section 4.56 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 4.15 (1) as are of relevance to the development the subject of the application. 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."*

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 approved development remains, in its modified state, a development which will continue to relate to its surrounds and adjoining development in the same fashion as originally approved in terms of above- ground built form and landscape outcomes.

This report demonstrates that the deletion of the basement level and the reconfiguration of the upper level carpark will not give rise to any adverse streetscape, residential amenity or broader environmental impacts. The modifications will not alter the 3-dimensional built form circumstance and residential amenity outcomes achieved through approval of the original scheme.

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 external building appearance, envelope and volume as perceived from adjoining properties and the public domain are not altered;
- The modifications maintain the previously approved residential amenity outcomes in terms of views, privacy, visual bulk and overshadowing; and
- The modifications maintain the previously approved streetscape and landscape outcomes.

In this regard, we consider the proposed modified development to be “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 4.56 of the Act.

#### **4.0 Matters for Consideration Pursuant to Section 4.15(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 4.15 of the Act:

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

#### **State Environmental Planning Policy (Affordable Rental Housing) 2009**

The developments performance when assessed against this SEPP is not compromised noting that the clause 29(e) SEPP ARH car parking provision is a “must not refuse” standard rather than a minimum or maximum standard to which clause 4.6 of WLEP would apply.

The application is accompanied by a car parking statement, dated 3<sup>rd</sup> March 2021, prepared by TEF Consulting which details the acceptability of the quantum of car parking proposed having regard to the recent judgement of the Land and Environment Court of New South Wales in the matter of *Williamson v Northern Beaches Council [2020] NSWLEC 1110* where the Court accepted that a car share vehicle would effectively replace 5 privately owned vehicles.

The car parking statement also justifies the car parking on the basis that the subject property is located within an accessible area and immediately adjacent to the Dee Why town centre and given that the subject development provides more than the required bicycle and motorcycle car parking spaces as prescribed by State Environmental Planning Policy (Affordable Rental Housing) 2009.

## **Warringah Local Environmental Plan 2011**

### Height of Buildings

Pursuant to the height of buildings map, the site has a maximum building height limit of 8.5 metres. The approved building height is not altered as a consequence of the modifications sought with all modified works sitting comfortably below the height standard.

### Earthworks

Although excavation has been significantly reduced, we rely on the geotechnical report prepared by Crozier Geotechnical Consultants in support of the original application.

## **Warringah Development Control Plan 2011**

We confirm that the modifications sought to the approved basement car parking arrangement will not compromise the developments performance when assessed against the applicable Warringah Development Control Plan 2011 provisions relating to built form, landscaping, car parking, residential amenity and streetscape outcomes.

The request to delete a basement car parking level is made on the basis that the construction of the second basement level is technically difficult and cost prohibitive given that geotechnical advice has confirmed that the excavation will be into rock. The deletion of this secondary basement level will also significantly reduce site disturbance and the required period of excavation works whilst also reducing associated impacts on surrounding residential properties and the road network. Such outcome provides for enhanced environmental planning outcomes for this particular site and facilitates the orderly and economic use and development of the land.

The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

### *Context and Setting*

- i) *What is the relationship to the region and local context on terms of:*
- *the scenic qualities and features of the landscape?*
  - *the character and amenity of the locality and streetscape?*
  - *the scale, bulk, height, mass, form, character, density and design of development in the locality?*
  - *the previous and existing land uses and activities in the locality?*

The modifications will not alter the 3-dimensional built form circumstance of the development and will not compromise the residential amenity or streetscape outcomes achieved through approval of the original scheme.

ii) *What are the potential impacts on adjacent properties in terms of:*

- *relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)?*
- *visual and acoustic privacy?*
- *views and vistas?*
- *edge conditions such as boundary treatments and fencing?*

A above.

#### *Access, transport and traffic*

*Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:*

- *travel demand?*
- *dependency on motor vehicles?*
- *traffic generation and the capacity of the local and arterial road network?*
- *public transport availability and use (including freight rail where relevant)?*
- *conflicts within and between transport modes?*
- *traffic management schemes?*
- *vehicular parking spaces?*

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#### *Public domain*

No change.

#### *Economic impact in the locality*

No change to approved outcome.

#### *Site design and internal design*

i) *Is the development design sensitive to environmental conditions and site attributes including:*

- *size, shape and design of allotments?*
- *the proportion of site covered by buildings?*
- *the position of buildings?*
- *the size (bulk, height, mass), form, appearance and design of buildings?*
- *the amount, location, design, use and management of private and communal open space?*
- *landscaping?*

The modifications will not materially alter the 3-dimensional built form circumstance and residential amenity outcomes achieved through approval of the original scheme.

ii) *How would the development affect the health and safety of the occupants in terms of:*

- *lighting, ventilation and insulation?*
- *building fire risk – prevention and suppression/*
- *building materials and finishes?*
- *a common wall structure and design?*
- *access and facilities for the disabled?*
- *likely compliance with the Building Code of Australia?*

The proposed modifications will be able comply with the provisions of the Building Code of Australia without difficulty. There will be no detrimental effects on the occupants through the building design which will achieve the relevant standards pertaining to health, safety and accessibility.

#### *Construction*

i) *What would be the impacts of construction activities in terms of:*

- *the environmental planning issues listed above?*
- *site safety?*

Normal site safety measures and procedures will ensure that no site safety or environmental impacts will arise during construction.

#### The suitability of the site for the development.

*Does the proposal fit in the locality?*

- *are the constraints posed by adjacent developments prohibitive?*
- *would development lead to unmanageable transport demands and are there adequate transport facilities in the area?*
- *are utilities and services available to the site adequate for the development?*

The site is suitable for the development.

*Are the site attributes conducive to development?*

The site is suitable for the proposed development.



Any submissions received in accordance with this Act or the regulations.

It is envisaged that any submissions made in relation to the proposed development will be appropriately assessed by Council.

The public interest.

The development is consistent with the adopted planning regime and the Court approval. The modifications will not materially alter the 3-dimensional built form circumstance or residential amenity outcomes achieved through approval of the original scheme. Approval would not be antipathetic to the public interest.

## **5.0 Conclusion**

This application proposes the deletion of the basement carpark at RL 42.80 and the associated car lift and the reconfiguration of the carparking at RL 45.60 to accommodate 22 car parking spaces. These spaces are in addition to the 5 car parking spaces previously approved at RL 31.80 bringing the total number of car parking spaces for the proposed development to 27 including 8 spaces for people with a disability and 5 car share spaces. Condition 2 of the consent will need to be modified to reference these modified plans.

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To that extent, Council can be satisfied that the development will continue to provide appropriately for off-street carparking and that the modified proposal represents substantially the same development as originally approved. Accordingly, the application is appropriately dealt with by way of Section 4.56 of the Act which enables Council as the consent authority to modify a Court issued consent.

Having given due consideration to the relevant considerations pursuant to section 4.15 of the Act it is considered that the application, the subject of this document, succeeds on merit and is appropriate for the granting of a modified consent.

Yours sincerely

**BOSTON BLYTH FLEMING PTY LTD**



**Greg Boston**

**B Urb & Reg Plan (UNE) MPIA**

**Director**