

29 March 2021

The General Manager
Northern Beaches Council
PO Box 12

Re: Statement of modification for DA2020/1382 - 4 Nulang Rd, Forestville

To whom it may concern

Please find enclosed the s4.55 1A proposal which seeks to add a walkway access from the first floor level of the CDC approved dwelling to the outdoor area and as a means of access to the DA approved pool from the living areas.

Substantially the same development [Section 4.55(1A)]

When assessing a modification application, the consent authority has a threshold decision to make, and must be satisfied that what is proposed is “substantially the same” development as the original development, as set out in Section 4.55(A1)(a) of the EP&A Act. Whether the development will be “substantially the same” as the original consent is a mixed question of fact and law. This decision can be guided by principles and tests established in the Courts.

Decisions of the Land and Environment Court support the proposition that the main elements of the proposal are matters substantially the same as the existing development consent, as outlined below.

Modification Principles Established by the Courts

In 2015, the principles regarding Section 96 (now Section 4.55) were summarised in *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3) [2015] NSWLEC 75* where Pepper J set out the legal principles that apply as follows:

The applicable legal principles governing the exercise of the power contained in s 96 of the EPAA may be stated 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 Realty 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 [*
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]).*

Modification Principles Applied to the Proposal

When considered against these principles, the proposed modification described earlier in this Statement will result in a development that is substantially the same as the development for which consent was originally granted and the consent authority can therefore consider the application pursuant to Section 4.55(1A) of the EP&A Act.

A comparison between the development as modified and the development the subject of the original consent, there is no substantial change to the appearance of the development and no material increase in environmental impacts.

Yours faithfully

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