

10th March 2023

The Chief Executive Officer
Northern Beaches Council
PO Box 882
Mona Vale NSW 1660

Dear Sir/ Madam,

**Statement of Environmental Effects
Modification of Land and Environment Court Issued Consent
Proceedings No 10083 of 2016
Boston Blyth Fleming at Northern Beaches Council
Proposed Residential Development
Lot 1, DP 5055, No. 8 Forest Road, Warriewood**

1.0 Introduction

On 3rd May 2017, the Land and Environment Court of NSW (the Court) upheld an appeal and granted deferred commencement consent to the above development involving the construction of a residential development incorporating 81 dwellings and associated civil works and landscaping. This consent has been modified on a number of occasions primarily relating to the titling arrangement of the development and the reconfiguration of floor space to modify the apartment mix and provide for a general refinement in the design, amenity and materiality of the development.

We have again been engaged to prepare an application pursuant to Section 4.56 of the Environmental Planning and Assessment Act 1979 (the Act) seeking a refinement in the design, external detailing, façade detail/finishes and landscaping of the approved development.

The proposed modifications do not alter the height, bulk and scale, setbacks, building footprints, car parking, drainage or landscaped area outcomes, residential amenity or environmental outcomes afforded through approval of the original application. In this regard, the approved development remains, in its modified state, a development which will relate to its surrounds and adjoining development in a consistent fashion to that 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

Architectural and Landscape Modifications

The modifications are depicted on Architectural plans A000(04), A001(08), A099.1(07), A099.2(07), A100.1(07), A100.02(07), A101.1(06), A101.2(06), A102.1(06), A102.2(06), A103.1(05), A103.2(05), A200(06), A300(06), A301(06), A302(06), the revised schedule of finishes prepared by ADS Architects and landscape plans L-01(M) to L-10(M) prepared by Site Design Studios. The modifications can be broadly summarised as follows:

<u>Amendments</u>	<u>Related Documents</u>
Façade Finishes and design	<ul style="list-style-type: none"> • External Finishes Schedule • Elevation Drawing A300-A302
Fence For Private open space kept 1.8m Height	<ul style="list-style-type: none"> • Ground Floor Plans A100.1-A100.2
Townhouse 6 addition of side sliding door on Ground floor	<ul style="list-style-type: none"> • Ground Floor Plan A100.1
Addition of back yard door on townhouses 4,6,9 and 10	<ul style="list-style-type: none"> • Ground Floor Plan A100.1
Master Bedroom on Townhouses 2 to13 Flipped with wardrobe and ensuite	<ul style="list-style-type: none"> • Level 1 Floor Plan A101.1
Townhouses front yard floor finish change from lawn to deck	<ul style="list-style-type: none"> • Ground Floor Plan A100.1 • Landscape Drawings L-03

The grass within the townhouse front courtyards is proposed to be replaced by decking due to basement ceiling height issue caused by the design of the required road structure. In order to reduce structural depth, the application proposes to replace the lawn with decking which will not compromise the amenity of utility of these secondary private open space areas.

Condition Modifications

The application seeks the modification of the following conditions:

Condition A1(a) is to be modified to reflect the modified plans prepared in support of this application.

Condition 41 is to be modified to facilitate the provision of 1.8 m high front fencing to ground floor level private open space areas for territorial enforcement and privacy.

The application is integrated development pursuant to the Rural Fires Act 1977 and to that extent the application is accompanied by an addendum bushfire report, dated 30th of March 2023, prepared by AEP.

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 proposed modifications maintain the previously approved dwelling density of 81 dwellings across the subject property with the existing dwelling house located on the subject property continues to be retained as a component of development.

The proposed modifications do not alter the height, bulk and scale, setbacks, building footprints, car parking, drainage or landscaped area outcomes, residential amenity or environmental outcomes afforded through approval of the original application. In this regard, the approved development remains, in its modified state, a development which will relate to its surrounds and adjoining development in a consistent fashion to that originally approved.

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 and residential density do not change,
- The previously approved built form, landscape and drainage outcomes are not significantly altered with the modifications representing a refinement in the detailing of the development as originally approved by the Court, and
- The modifications maintain or enhance the previously approved residential amenity and environmental outcomes.

On the basis of the above analysis, we regard the proposed application as being “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 Statutory Planning Considerations

4.1 Pittwater Local Environmental Plan 2014

The Pittwater Local Environmental Plan 2014 is the principal local environmental planning instrument applicable to the land. The relevant provisions of PLEP 2014 and the manner in which they relate to the site and the proposed development are assessed below.

4.1.1 Zoning and permissibility

The developments permissibility when assessed against the provisions of PLEP 2014 are not compromised as a consequence of the modifications sought. The development will continue to be consistent with the objectives of the zone and to that extent there is no statutory impediment to the granting of the proposed modifications.

4.1.2 Height of buildings

Pursuant to clause 4.3 of PLEP 2014 the maximum building height for development on the land is 10.5 metres.

We confirm that all proposed physical modifications sit comfortably below the prescribed building height standard.

4.1.3 Warriewood valley Release Area

Pursuant to clause 6.1 of PLEP 2014 development consent must not be granted for development on land in sector 5 unless the consent authority is satisfied that not more than 94 or less than 75 dwellings will be erected on the land. The stated objectives of the clause are as follows:

- *to permit development in the Warriewood Valley Release Area in accordance with the Warriewood Valley Strategic Review Report and the Warriewood Valley Strategic Review Addendum Report,*
- *to ensure that development in that area does not adversely impact on waterways and creek line corridors, protects existing native riparian vegetation and rehabilitates the creek line corridors,*
- *to facilitate the mitigation of odours from the Warriewood Sewage Treatment Plant on the users and occupiers of residential development in a buffer area*

This application does not seek any change to the approved dwelling density of 81 dwellings across the allotment including the retention of the existing dwelling house.

4.1.4 Acid sulfate soils

Pursuant to clause 7.1 of PLEP 2014 the site is identified as Class 5 on the Acid Sulfate Map. Having regard to the applicable considerations we have formed the considered opinion that the additional excavation proposed will not lower the watertable table on any adjoining Class 1, 2, 3 or 4 land below 1m AHD.

4.1.5 Flood planning

Clause 7.3 of PLEP 2014 applies to land at or below the flood planning level. The site is identified as being land within the Risk H3 and H5 Flood Category and subject to an Overland Flow Path – Minor. Pursuant to clause 7.3(3) (3) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that the development:

- is compatible with the flood hazard of the land, and*
- will not significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, and*
- incorporates appropriate measures to manage risk to life from flood, and*
- will not significantly adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses, and*
- is not likely to result in unsustainable social and economic costs to the community as a consequence of flooding.*

In this regard, the modifications sought do not alter the previously approved flood planning outcome for the site.

4.1.6 Biodiversity

Pursuant to clause 7.6 of PLEP 2014 the site is identified on Council's Biodiversity Map. Pursuant to clauses 7.6(3) and (4) and (3) before determining a development application for development on land to which this clause applies, the consent authority must consider:

- (a) *whether the development is likely to have:*

 - (i) *any adverse impact on the condition, ecological value and significance of the fauna and flora on the land, and*
 - (ii) *any adverse impact on the importance of the vegetation on the land to the habitat and survival of native fauna, and*
 - (iii) *any potential to fragment, disturb or diminish the biodiversity structure, function and composition of the land, and*
 - (iv) *any adverse impact on the habitat elements providing connectivity on the land, and*

- (b) *any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.*

Further, development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:

- (a) *the development is designed, sited and will be managed to avoid any significant adverse environmental impact, or*
- (b) *if that impact cannot be reasonably avoided by adopting feasible alternatives—the development is designed, sited and will be managed to minimise that impact, or*
- (c) *if that impact cannot be minimised—the development will be managed to mitigate that impact*

In this regard, the modifications sought do not alter the previously approved biodiversity outcomes for the site as detailed in the accompanying addendum letter prepared by AEP.

4.1.7 Geotechnical hazards

Pursuant to clause 7.7 of PLEP 2014 the south-western edge of the site is identified on Council's Geotechnical Hazard Map. In this regard, the modifications sought do not require any change to the previously approved level of excavation and accordingly there is no requirement for an updated geotechnical report.

4.2 Pittwater 21 Development Control Plan

The following sections of this statement provide a detailed assessment of the residential development against the applicable DCP provisions. The land is located within Sector 5 of the Warriewood Valley Release Area.

Locality Statement - Warriewood Valley Land Release Area

The Locality Statement for the Warriewood Valley Land Release Area is as follows:

Warriewood Valley is situated at the base of the escarpment, known as Ingleside Chase Reserve, between Mona Vale and Warriewood (see map). First identified as a Release Area in 1997, the Warriewood Valley Release Area previously consisted of 110 hectares including 32.68 hectares of industrial/commercial land and associated community facilities and infrastructure. Two recent reviews have been undertaken firstly the Warriewood Valley Strategic Review 2012 and secondly the Warriewood Valley Strategic Review Addendum Report 2014. The Release Area now includes Buffer Areas 1, 2 and 3, resulting in an area of approximately 190 hectares.

Warriewood Valley is primarily a residential area expected to provide a total of 2,451 new dwellings (this figure includes the dwellings approved under the former Part 3A legislation). When completed, it is anticipated to accommodate 6,618 residents (based on an average household occupancy of 2.7 persons per household).

The Warriewood Valley Land Release Area is characterised by a mix of residential, retail, commercial, industrial, recreational, and educational land uses.

Warriewood Valley continues to be developed as a desirable urban community in accordance with the adopted planning strategy for the area, and will include a mix of low to medium density housing, industrial/commercial development and open space and community services.

The creeklines, roads and open space areas will form the backbone of the new community, complemented with innovative water management systems, the natural environment, pedestrian/cycle path network, public transport, and recreation facilities.

The Warriewood Valley Area is affected by various hazards. identified on various maps within Pittwater LEP 2014.

The Warriewood Release Area includes vegetation areas, threatened species, or areas of natural environmental significance.

A number of identified heritage items are located in Warriewood Valley.

Given the nature of the modifications sought, the consent authority can be satisfied that the development as modified will remain consistent with the desired future character statement as outlined.

Section D – Development Type Controls

D16.12 Fences	
<p>Controls</p> <ul style="list-style-type: none"> ▪ In all cases, vegetation is preferable over fencing to delineate the property boundary. ▪ Fencing of properties is restricted to side and rear boundaries only and should not detract from the streetscape or adversely impact on residential amenity. ▪ No fencing is permitted forward of the building line of the dwelling. For corner lots, any fencing along the boundary which fronts the secondary street is only permitted behind the front building line. ▪ If fencing exceeds one (1) metre in height and abuts a public road, it must be set back from the boundary a minimum of one metre (in the case of corner lots or lots with more than one frontage this setback may be varied based on merit). This set back area shall be landscaped to screen the fence and soften its appearance from the road. <p>Any fencing must:</p> <ul style="list-style-type: none"> ▪ allow native animals to move between and to areas of environmental sensitivity and areas of habitat value; ▪ enable outlook from buildings for safety and surveillance; ▪ assist in highlighting entrances and in creating a sense of community identity; ▪ be compatible with facilities in the street frontage area, such as mail boxes and garbage collection areas; and ▪ complement any facilities and landscaping in public areas. <p>Side and rear boundary fencing must not exceed 1.8 metres in height. Fencing must be located on the ground level (existing) of the property boundary, not raised by retaining walls or the like.</p> <p>Where residential lots front/face/abut are located adjacent to Avenues and Sector Streets (e.g. Macpherson, Garden and Orchard Streets, and Warriewood Road), dwelling frontages, pedestrian access and postal addresses are to be maintained to these roads. Corner blocks are exempt from this requirement, where applicable.</p> <p>Fencing adjoining these roads resulting in walled or gated communities is not permitted.</p>	<p>The application proposes 1.8 m high fencing around the perimeter of the residential flat building comprising an 800mm high sandstone clad base with 1 m high palisade style fencing above. The proposed fencing will provide necessary territorial reinforcement, privacy and security to the ground floor apartments. The fencing will not compromise the developments ability to implement the approved site landscape regime such that the development will sit within a landscaped setting.</p> <p>The proposed fencing will not create a walling effect and to that extent is not inconsistent with these controls.</p>
D16.13 Building colours and materials	
<p>Outcomes</p> <ul style="list-style-type: none"> ▪ Achieve the desired future character of the Locality. ▪ The development enhances the visual quality and identity of the street scape. (S) ▪ The colours and materials of the development harmonise with the natural environment. (En, S) 	

<ul style="list-style-type: none"> ▪ To provide attractive building facades which establish identity and contribute to the streetscape. ▪ To ensure building colours and materials compliments and enhances the visual character its location with the natural landscapes of Pittwater. ▪ The visual prominence of the development is minimised. (S) The development reflects the natural amphitheatre of the locality. (En, S) ▪ Damage to existing native vegetation and habitat is minimised. (En) ▪ Colours and materials harmonise with the escarpment (S) <p>Controls</p> <ul style="list-style-type: none"> ▪ External colours and materials shall be natural tones such as green, brown and dark earthy colours. 	<p>This application is accompanied by a modified schedule of materials and finishes which will continue to comply with the outcomes of this control.</p>
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4.3 State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development

This application is accompanied by the required design verification statement pursuant to clause 102 of the Environmental Planning and Assessment Regulation 2021. The consent authority can be satisfied that the modifications sought do not compromise the design quality of the development as originally approved.

4.4 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies to the residential component of the development and aims to encourage sustainable residential development.

An amended BASIX certificate accompanies the development application and demonstrates that the proposal remains compliant with the BASIX water, energy and thermal efficiency targets.

5.0 Conclusion

Council can be satisfied that the approved developments performance when assessed against the relevant statutory planning considerations is not compromised.

The proposed modifications do not alter the height, bulk and scale, setbacks, building footprints, car parking, drainage or landscaped area outcomes, residential amenity or environmental outcomes afforded through approval of the original application. In this regard, the approved development remains, in its modified state, a development which will relate to its surrounds and adjoining development in a consistent fashion to that 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 s4.15 of the Act it is considered that the modifications, the subject of this document, succeeds on merit and is appropriate for the granting of consent.

Yours sincerely

BOSTON BLYTH FLEMING PTY LTD



Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director