

18th March 2021

The General Manager
Northern Beaches Council
PO Box 82
Manly NSW 2095

Dear Sir,

Statement of Environmental Effects
Section 4.55(1A) Modification of Consent DA2019/1173
Proposed seniors housing development
3 Berith Street, Wheeler Heights

1.0 Introduction

On 4th March 2020 deferred commencement development consent DA2019/1173 was granted by Council proposing the demolition of existing development and construction of a seniors housing development comprising 6 x infill self-care housing units and basement parking, and strata subdivision. Council confirmed via correspondence of 30th April 2020 that the deferred commencement condition had been satisfied and that the consent became operative from this date.

This Statement of Environmental Effects (SoEE) has been prepared in support of an application seeking a further refinement in the detailing of the approved development pursuant to Section 4.55(1A) of the Environmental Planning and Assessment Act 1979 (the Act). Specifically, the application seeks a number of modifications to the approved plans to comply with the conditions of development consent and to enhance the amenity of the development through adjustments in window treatments and detailing. The proposed modifications will enhance the amenity of the development and the visual privacy between adjoining development whilst not compromising the architectural quality of the building as approved.

The application also seeks removal of Tree 1, being a Liquid amber tree located within the road reserve, the seedpods of which create a clear and present slip hazard for residents and its replacement with an appropriate street tree species as nominated by Council.

The height, setback and general form of the development is maintained with the proposed modifications not compromising the streetscape, landscape or residential amenity outcomes afforded through approval of the original application.

As such, Council can be satisfied that the modifications involve minimal environmental impact and the development as modified represents substantially the same development as originally approved. Accordingly, the application is appropriately dealt with by way of s4.55(1A) of the Act.

2.0 Proposed modifications

The proposed modifications are depicted on Architectural plans A01(s4.55) to A08(s4.55) prepared by Barry Rush and Associates Pty Limited. Specifically, the modifications can be summarised as follows:

A02_Basement:

- In accordance with Condition 22 the proposed single-sided aisle within the basement car parking area increased to be minimum 6.1m wide.
- In accordance with Condition 11(c)(v) the modification of the basement geometry to accommodate a total of ten (10) car parking spaces, eight (8) residential car parking spaces, two (2) visitor spaces, one (1) residential car park space to be increased to 3.8m in width and all car parking spaces to comply with the requirements for parking with a disability as set out in AS 2890.
- The provision of AC units for all 6 apartments.
- High level louvred windows added to the basement for mechanical ventilation.
- Fan, exhaust riser and ducting for basement car-park ventilation indicated in accordance with preliminary mechanical drawings.

A03_Site and Ground Floor Plan:

- New pedestrian egress provided along southern side for occupants of Units 5 and 6 noting that 2 alternative exits required (BCA C3.11g).
- Waste Room setback 1.0m from the southern side boundary and the bulky store deleted (Condition 11(b)(i)).
- Fire (Hydrant + dual check valve) and hydraulic (gas & water meters) services located in accordance with preliminary hydraulic/fire drawings.
- Concrete columns (CC) to support the first-floor terraces added to achieve structural requirements.
- Sky light added to bathrooms with no windows to Units 5 and 6.
- North-west corner of living room Unit 6 realigned to simplify construction.
- Area calculation for Unit 6 corrected from 83.6sqm to 81.2sqm.

- Hot water units, down pipes, louvres covering Bathroom/ kitchen exhausts on facades, Carpark exhaust, electrical/ NBN cupboards and other services located.
- Fixed privacy screens - angled to prevent direct overlooking to neighbors proposed to living room windows of Units 5 and 6 (Condition 11(c)(iv)).
- Kitchen windows Units 5 and 6 reduced from 1500mm to 600mm high, window awning deleted.
- Construction for single storey Units 5 and 6 is brick veneer changed from proposed cavity brick. BASIX updated.
- Face block (south and north walls of living rooms Units 1 and 2) replaced with face brick to match balance of building.
- Roof added to bedrooms 2 and 3 – Units 1 and 2, this was created when first floor bed 2 and 3 were setback an additional 500mm (Condition 11(c)(i)).
- Retaining walls along south and north boundary positioned where required maintaining 1 metre setback to boundary, southern retaining wall Unit 6 moved in to be 1 metre from boundary (Condition 11(a)(i)).
- RWT Unit 5 moved further west along building façade.
- Minor changes to the Unit 1 and Unit 2 bedroom 1 windows to create a highlight windows.
- Minor changes to materials and finishes on the southern and northern façades.

A04_First Floor Plan:

- The outer wall recessed (Bed 2 and 3) Units 3 and 4 for an additional 500mm from the side boundaries (Condition 11(b)(i)).
- Modification to “Slatted Timber Screen” proposed for First Floor windows have to be substituted with alternative non-combustible material (Certifier required) and to be *fixed privacy screens angled to prevent direct overlooking to neighbors*. These screens installed on the following windows / balconies: Unit 3 and 4 bedrooms 1, 2 and 3 and the northern and southern edge of the balconies to Units 3 and 4 (Condition 11(c)(iv)).
- The front balconies for the upper level to Units 3 and 4 modified to include 50% open style or glazed or lightweight (infill) balustrade sections facing the street (Condition 11(b)(ii)).
- The kitchen window to Unit 3 on the southern elevation modified to a high level window (Condition 11(c)(iv)).
- Hot water units, down pipes, louvres covering Bathroom/ kitchen exhausts on facades, Carpark exhaust, electrical/ NBN cupboards and other services located.
- Sky light added to the Unit 3 corridor and to Unit 4 and slight changes in the location of the approved skylights to Units 5 and 6.
- Construction for first floor units 3 and changed to brick veneer, previously double brick. BASIX updated.

A05_Roof Plan:

Roof slope to front building revised – single slope towards the central corridor replaced with 2 degree slopes towards North and South. This is done to accommodate roof structure and maintain the approved parapet height.

The application also seeks removal of Tree 1, being a liquid amber tree located within the road reserve, the seedpods of which create a clear and present slip hazard for residents and its replacement with an appropriate street tree species as nominated by Council.

The application will necessitate the modification of condition 2 of the consent to reference the amended plans.

3.0 Section 4.55 of the Environmental Planning and Assessment Act 1979

Section 4.55(1A) 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 consent authority and subject to and in accordance with the regulations, modify the consent if:*
 - (a) *it is satisfied that the proposed modification is of minimal environmental impact, and*
 - (b) *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*
 - (c) *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*
 - (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.*

- (3) *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, we have formed the considered opinion that the modifications sought are of minimal environmental impact given that the previously approved building height, setbacks and envelope are not materially unaltered with a majority of the proposed modifications undertaken to comply with the conditions of development consent. The approved residential amenity outcomes in terms of solar access, privacy and view sharing are not compromised with visual privacy between properties enhanced as a consequence of the modifications sought. The modifications are both quantitatively and qualitatively of minimal environmental impact.

In answering the 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 previously approved building height and envelope are maintained with the residential amenity outcomes in terms of solar access, privacy and view sharing not compromised.

In this regard, 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 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 application remains a proposal involving the construction of seniors housing,
- The previously approved building heights, setbacks and footprint are generally maintained, and
- The modifications maintain the previously approved environmental outcomes in terms of residential amenity, landscaping and streetscape presentation.

On the basis of the above analysis we regard the proposed application as being of minimal environmental impact and “essentially or materially” the same as the approved development such that the application is appropriately categorised as being “substantially the same” and appropriately dealt with by way of Section 4.55(1A) of the Act.

4.0 Warringah Local Environmental Plan 2011

Zoning and permissibility

The subject site is zoned R2 Low Density Residential pursuant to the provisions of Warringah Local Environmental Plan 2011 (WLEP) with the modifications to the approved seniors housing remaining permissible with consent pursuant to State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD).

Height of buildings

We confirm that the previously approved building height, wall heights and number of storeys are unaltered as a consequence of the modifications sought. Strict compliance with the 8.0 metre SEPP HSPD ceiling height standard and 8.5 metre WLEP overall building height standard is maintained.

Such outcome preserves the view sharing scenario achieved through approval of the original scheme.

Development on sloping land

Pursuant to Clause 6.4 WLEP 2011 the subject site falls under Area A on the Landslip Risk Map which is defined by a slope of less than 5 degrees. In this regard, the application is accompanied by an updated geotechnical site investigation report addressing the changes to the previously approved excavation.

5.0 State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004

The developments performance when assessed against the provisions of SEPP HSPD are not compromised as a consequence of the modifications sought.

6.0 Warringah Development Control Plan

Having assessed the modified development against the applicable provision of Warringah Development Control Plan we note the following:

- The height, siting, scale and setbacks of the development are maintained other than as required to comply with conditions of development consent.
- The proposal maintains the previously approved building heights and above ground side and rear setbacks and an appropriate spatial relationship with adjoining development,
- The modified proposal does not compromise the previously approved landscape or drainage regimes,
- The modified proposal does not compromise the residential amenity outcomes afforded to adjoining development in relation to visual and aural privacy, solar access and view sharing. In fact, the modifications proposed result in enhanced visual privacy between adjoining development through the introduction of privacy attenuation measures to a number of side boundary facing windows. Further, the master bedroom balcony extension has been limited to prevent backward views into adjoining development,
- Changes to required excavation are addressed in the accompanying geotechnical report, and
- The modifications will not compromise the design quality of the development or its contribution to the streetscape.

7.0 Conclusion

This Statement of Environmental Effects has been prepared in support of an application seeking a refinement of the approved development pursuant to Section 4.55(1A) of the Environmental Planning and Assessment Act 1979 (the Act). Specifically, the application seeks a number of modifications to the approved plans to comply with the conditions of development consent and to enhance the amenity of the development through adjustments in window treatments and detailing. The proposed modifications will enhance the amenity of the development and the visual privacy between adjoining development whilst not compromising the architectural quality of the building as approved.

The application also seeks removal of Tree 1, being a Liquid amber tree located within the road reserve, the seedpods of which create a clear and present slip hazard for residents and its replacement with an appropriate street tree species as nominated by Council.

The height, setback and form of the development are maintained with no change to the approved streetscape, residential amenity, landscape, drainage or design quality of the development as approved. As such, Council can be satisfied that the modifications involve minimal environmental impact and the development as modified represents substantially the same development as originally approved.

Accordingly, the application is appropriately dealt with by way of s4.55(1A) of the Act.

Yours faithfully

Boston Blyth Fleming Pty Limited

A handwritten signature in black ink, appearing to read 'Greg Boston', is written over a horizontal line.

Greg Boston
B Urb & Reg Plan (UNE) MPIA
B Env Hlth (UWS)
Director