

19th October 2021

The General Manager
Northern Beaches Council
PO Box 82
Manly NSW 1655

Dear Sir,

Statement of Environmental Effects
Modification of Development Consent DA2019/0645
Demolition works, construction of a residential flat building and strata
subdivision
26 Whistler Street, Manly

1.0 Introduction

On 18th March 2020 development consent DA2019/0645 was granted approval for the demolition of the existing site structures and the construction of a residential flat building on the subject allotment.

The consent was subsequently modified pursuant to section 4.55(1A) of the Environmental Planning and Assessment Act 1979 (the Act) (Mod2020/0552) providing for a refinement in the detailing of the approved development to enhance buildability, achieve BCA fire requirements, improve internal amenity and the introduction of a fire rate canopy over the on-site substation openings to achieve compliance with Ausgrid requirements.

We have again been engaged to prepare an application pursuant to section 4.55(1A) of the Act involving minor refinements to the bedroom layout and secondary balcony geometry of Apartments 305, 503, 603 and 703 and the reconfiguration of the kitchen in Apartment 704 to enable the south facing kitchen window to be replaced with a door.

The modifications are generally contained within the approved building envelope such that the 3 dimensional form, streetscape appearance, car parking, drainage and landscape outcomes are not compromised. Importantly, the spatial relationship of the proposal to adjoining development, including the heritage listed substation building, is maintained together with a complimentary and compatible streetscape presentation and appropriate residential amenity outcomes.

To that extent 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 Section 4.55(1A) of the Act.

2.0 Detail of Modifications Sought

The proposed modifications are shown coloured on plans A-DA05(M), A-DA07(M) to A-DA09(M) and A-DA13(K) and A-DA16(K) prepared by Gardner Wetherill Associates. The modifications are confined to minor refinements to the bedroom layout and secondary balcony geometry of Apartments 305, 503, 603 and 703 and the reconfiguration of the kitchen in Apartment 704 to enable the south facing kitchen window to be replaced with a door.

The application also seeks the modification of Condition 1 to refer to the modified plans.

3.0 Section 4.55(1A) 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 otherwise unaltered. The approved heritage conservation and residential amenity outcomes in terms of solar access, privacy and view sharing are not compromised with the design quality of the development maintained. 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 unaltered with the residential amenity outcomes in terms of solar access, privacy and view sharing not compromised. Further, the heritage conservation outcomes achieved through approval of the original application as it relates to the spatial relationship of the proposal to the adjacent heritage listed substation have also not been 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 a residential flat building pursuant to the existing use rights provisions of the Act,
- The previously approved building heights, setbacks and footprint are maintained, and
- The modifications maintain the previously approved environmental outcomes in terms of residential amenity, heritage conservation 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 Manly Local Environmental Plan 2013

Zoning and permissibility

The subject property is zoned B2 Local Centre pursuant to Manly Local Environmental Plan 2013 (“MLEP 2013”) with residential flat buildings prohibited in the zone.

In the assessment of the original application Council was satisfied that the development benefited from existing use rights pursuant to Section 4.56 of the Environmental Planning and Assessment Act, 1979 (the Act).

Accordingly, the developments consistency with the zone objectives is not a relevant matter for consideration in relation to this particular application with there being no statutory zoning or zone objective impediment to the granting of approval to the proposed modifications.

Height of Buildings and Floor Space Ratio

Pursuant to clause 4.3 of MLEP 2013 the maximum building height for development on the land is 25 metres with a maximum FSR of 3:1 applying to the land pursuant to clause 4.4 of MLEP 2013.

The Council assessment report to the Northern Beaches Local Planning Panel meeting of 18th March 2020 confirms an approved maximum building height of 29.71 metres and an approved GFA/ FSR of 4,190 square metres or 4.2:1. We confirm that the previously approved maximum building height of 29.71 metres is not altered with a GFA of no more than 4,190 square metres maintained.

Heritage Conservation

Having regard to clause 5.10 MLEP 2013 heritage conservation provisions, we note that the site is not heritage listed or located within a conservation area however does immediately adjoin a 2 and 3 storey heritage listed electrical substation building to the north of the subject site. Given the minor nature of the modifications sought, which will not be discernible as viewed from or towards the heritage item we are of the opinion that the modifications will not engender any impacts upon the heritage significance of the subject site and heritage items in the vicinity.

That is, the heritage conservation outcomes achieved through approval of the original application are not compromised.

Acid Sulphate Soils

Having regard to the clause 6.1 MLEP 2013 provisions we note that no additional excavation is proposed beyond that previously approved by council and addressed in the Conceptual Acid Sulfate Soil Management Plan, dated 4th June 2019, prepared by JK Environmental.

Earthworks

Having regard to the clause 6.2 MLWP 2013 considerations no additional excavation is proposed beyond that identified in the approved Geotechnical Assessment Report prepared by JK Geotechnics.

Foreshore Scenic Protection Area

Pursuant to clause 6.9(2) the land is identified on the Foreshore Scenic Protection Area Map. Pursuant to clause 6.9(3) development consent must not be granted to development on land to which this clause applies unless the consent authority has considered the following matters:

- (a) impacts that are of detriment to the visual amenity of harbour or coastal foreshore, including overshadowing of the foreshore and any loss of views from a public place to the foreshore,*
- (b) measures to protect and improve scenic qualities of the coastline,*
- (c) suitability of development given its type, location and design and its relationship with and impact on the foreshore,*
- (d) measures to reduce the potential for conflict between land-based and water-based coastal activities.*

Having regard to these provisions, we have formed the considered opinion that the proposed modifications will not result in any actual or perceivable impact on the Foreshore Scenic Protection Area in that:

- Due to the location of the site and juxtaposition of adjoining development the proposed development, as modified, will not be readily discernible when viewed from Manly Beach, Manly Cove, Sydney Harbour and its immediate environs.
- The approved height, scale and architectural presentation of the development are not materially altered and remains compatible with the built form characteristics established by adjoining development.
- Having regards to the Land and Environment Court of NSW planning principle established in the matter of Project Venture Developments v Pittwater Council [2005] NSWLEC 191 most observers would not find the proposed building offensive, jarring or unsympathetic to its context or surrounds.

For these reasons Council can be satisfied that the development will not give rise to any actual or perceived impact on the Foreshore Scenic Protection Area having regard to the Clause 6.9 considerations.

Design Excellence

Having regard to the clause 6.13 MLEP 2013 Design Excellence provisions we are satisfied that the modifications proposed will not compromise the design quality of the development as approved.

5.0 Manly Development Control Plan 2013

Having assessed the modified development against the applicable provision of MDCP we note the following:

- The siting, scale, form and massing of the development is not altered with the modified proposal maintaining the previously approved building height, FSR, setbacks and spatial relationship with adjoining development,
- The modified proposal will not give rise to any adverse public or private view affectation,
- The previously approved basement waste storage and on-street collection arrangements are maintained,
- The previously approved car parking arrangement is maintained with access and egress to/ from spaces not compromised,
- The modified proposal does not compromise the residential amenity outcomes afforded to adjoining development in relation to visual and aural privacy and solar access with compliant levels of solar access maintained,
- The modified proposal complies with the applicable accessibility legislation,
- The previously approved acoustic outcomes are maintained,
- The previously approved landscape outcomes are maintained,
- The previously approved stormwater drainage regime is not altered as a consequence of the modifications sought; and

6.0 State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development/ Apartment Design Guide

Given the minor nature of the modifications sought the developments performance when assessed against SEPP 65 and the ADG is not compromised.

7.0 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.

A minor modifications do not change the description of the development as detailed on the original BASIX Certificate and to that extent no update is required.

8.0 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(1) of the Environmental Planning and Assessment Act 1979(as amended):

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

The developments performance when assessed against the relevant statutory planning regime is not compromised as detailed within this report.

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 sought are contained predominantly within the approved building envelope, or not readily discernible as viewed from outside the site, with the 3 dimensional form, streetscape appearance, heritage conservation and landscape outcomes as approved not compromised as consequence of the modifications sought.

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?*

The approved development will remain, 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 view sharing, height, boundary setbacks, privacy and landscape outcomes.

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?*

Approved car parking numbers are maintained.

Public domain

There are no public domain changes.

Economic impact in the locality

The proposed development will provide short term employment opportunities during construction.

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 sought are contained predominantly within the approved building envelope, or not discernible as viewed from outside the site, with the 3 dimensional

form, streetscape appearance, heritage conservation and landscape outcomes as approved not compromised as consequence of the modifications sought.

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 development will 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 adjacent development does not impose any insurmountable development constraints. No additional excavation is required to accommodate the proposed modifications. The site is well located with regards to utility services and public transport. There will be no excessive levels of transport demand created.

Are the site attributes conducive to development?

The site has no special physical or engineering constraints and 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.

It is considered that the development will result in a significant addition of good design to the locality. The development is consistent with the adopted planning regime and the Court approval.

9.0 Conclusion

The modifications provide for minor refinements to the bedroom layout and secondary balcony geometry of Apartments 503, 603 and 703 and the reconfiguration of the kitchen in Apartment 704 to enable the south facing kitchen window to be replaced with a door.

The modifications are generally contained within the approved building envelope such that the 3 dimensional form, streetscape appearance, car parking, drainage and landscape outcomes as approved are not compromised. Importantly, the spatial relationship of the proposal to adjoining development, including the heritage listed substation building, is maintained together with a complimentary and compatible streetscape presentation and appropriate residential amenity outcomes.

To that extent 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 Section 4.55(1A) of the Act.

Having given due consideration to the relevant considerations pursuant to s4.15(1) of the Act it is considered that the application, 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

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