

13 February 2014

The General Manager
Warringah Council
Civic Centre
DEE WHY 2099

Dear Sir

Application to Modify Consent Rev 2008/0036 dated 30th March 2012
SARGOOD CENTRE – Lot 202, DP 1100018 No. 1 Brissenden Ave. COLLAROY

1. INTRODUCTION

Council issued consent to the use of subject site on the 25th March 2009 permitting the construction of a spinal cord injuries residential health care and rehabilitation centre. The original consent has been revised and modified by application REV2008/0036 dated 30th March 2012. This application follows a financial review of the project and its anticipated construction costs and a change in the service provider.

2. PROPOSED CHANGES

This application maintains the approved use of the site.

The application proposes modifications to the approved building form in the manner detailed by drawings DA 110; DA 111; DA112; DA 511; DA 611 date January 2014 prepared by WMK Architecture and landscape drawings dated February 2014 prepared by Oculus. The architectural drawings provide the revised layout (in black) overdrawn on the approved floor plan and elevations in color.

The application seeks the modification the conditions of consent to delete the reference to the approved plans in condition 1 of the consent and replace the reference to the plans prepared by WMK Architecture and submitted with this application. In support of the modification as proposed the application provides documentation and reports addressing the revised building detail including:

- Geotechnical and ground water review prepared by J K Geotechniques
- Environmental Site Report prepared by EIS
- Traffic & parking assessment prepared by Lyle Marshall & Assoc.
- BCA assessment by Group DLA
- Access Report by Access Aust.
- Arborist Report by Urban Forestry

- Aboriginal Heritage assessment by Allen Madden
- Civil Engineering review by Henry & Hymas

3. REVISED DETAILS

The application provides for:

(i) BASEMENT

- The floor plan of the basement is significantly reduced retaining the approved parking car parking component of 16 spaces plus storage. The change to the stair location detail reflects the revision to the Level 1 floor plan. Changes to the shoring wall detail adjacent to the eastern boundary reflect the tree protection conditions of the consent. The setback to the northern boundary is revised to provide for 1m setback in accordance with the approval as issued.

(ii) LEVEL 1

- Reduction in excavated area (refer gridline 9).
- Internal lift and stairs repositioned.
- Laundry moved from basement to this level.
- Revised internal layout

The changes at this level are essentially changes within the approved volume of the structure (with the exception of the boundary adjustment to the northern boundary reflecting the conditions of the consent). The changes have only minor implications in terms of the outcomes of the building form as approved.

(iii) LEVEL 2

- Increase in the setbacks to Brissenden and Beach roads and to the western common boundary to reflect the conditions of the consent and resulting in the elimination of deck and screening details and increase in deep soil landscaping
- The major change is an internal rationalization of the kitchen/dining area as a single integrated space and to increase the accommodation units from the approved 13 units to 16 units. This change is confined within the approved volume of the building. The traffic report addresses this change in terms of the parking standards associated with SEPP (Housing for Aged and Disabled Persons) and the RTA traffic generation standards and concludes the revised scheme satisfies the performance outcomes of those standards. The revised BCA and access concludes the revised meets the requirements of the applicable standards.

The changes at this level reflect the conditions of the approval and are principally internal adjustments and have minimal effect on the building form.

(iv) ROOF

- The roof is revised and simplified to address the changes to the internal function of the central portion of the building and to reduce cost. The outcome is a simpler and lower roof profile as indicated on the drawings whilst maintaining the general form and profile of the concept as originally proposed and approved.

3. S.96 EP& A Act 1979

S.96 of the Environmental Planning & Assessment Act 1979 provides:

96 Modification of consents—generally

(1) Modifications involving minor error, misdescription or miscalculation

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 a development consent granted by it to correct a minor error, misdescription or miscalculation. Subsections (1A), (2), (3), (5), (6) and (7) do not apply to such a modification.

(1A) Modifications involving minimal environmental impact

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, or*
 - (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.*

(2) Other modifications

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 development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and*
- (b) *it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and*
- (c) *it has notified the application in accordance with:*
- (i) *the regulations, if the regulations so require, or*
 - (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 the period prescribed by the regulations or provided by the development control plan, as the case may be.*

The modification of conditions is sought pursuant to S.96 (1A) of the Act on the basis that notwithstanding the revised architectural details the land use outcome as consented to:

- does not change;
- the changes to the building form are reasonably considered minor and are within the ambit of the approval as previously issued; and
- there are no significant environmental consequences of the revised application details as proposed.

Reliance on this section of the Act has been the subject of discussion with Council in the preparation of this application.

A consideration of whether the development is substantially the same development has been the subject of numerous decisions by the Land & Environment Court and by the NSW Court of Appeal in matters involving applications made pursuant to S.96 of the Act. *Sydney City Council v Ilenace Pty Ltd* (1984) 3 NSWLR 414 drew a distinction between matters of substance compared to matters of detail. In *Moto Projects (No.2) Pty Ltd v North Sydney Council* (1999) 106 LGERA 298 Bignold J referred to a requirement for the modified development to be substantially the same as the originally approved development and that the requisite finding of fact to require a comparison of the developments. However, Bignold noted the result of the comparison must be a finding that the modified development is 'essentially or materially' the same as the (currently) approved development. Bignold noted;

The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the development being compared in their proper contexts (including the circumstances in which the development consent was granted).

In *Basemount Pty Ltd & Or v Baulkham Hills Shire Council* NSWLEC 95 Cowdroy J referred to the finding of Talbot J in *Andari – Diakanastasi v Rockdale City Council* and to a requirement that in totality the two sets of plans should include common elements and not be in contrast to each other. In *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468; 97 LGRERA 443 Mason P noted:

Parliament has therefore made it plain that consent is not set in concrete. It has chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity. The consent authority can withhold its approval for unsuitable applications even if the threshold of subs (1) is passed.

I agree with Bignold J in Houlton v Woollahra Municipal Council (1997) 95 LGRERA 201 who (at 203) described the power conferred by s.102 as beneficial and facultative. The risk of abuse is circumscribed by a number of factors. Paragraphs (a), (b) and (c) of subs (1) provide narrow gateways through which those who invoke the power must first proceed. Subsection (1A) and subs (2) ensure that proper notice is given to persons having a proper interest in the modified development. And there is nothing to stop public consultation by a Council if it thinks that this would aid it in its decision making referable to modification. Finally, subs (3A), coupled with the consent authorities discretion to withhold consent, tend to ensure that modifications will not be enterprised, nor taken in hand, unadvisedly, lightly or wantonly. Naturally some modifications will be controversial, but decision making under this Act is no stranger to controversy.

In my opinion a quantitative and qualitative assessment of the application leads to a conclusion the development is substantially the same. The land use and building form remain significantly the same with the adjustments to the boundary details reflecting the conditions pertaining to the consent. The significant changes are confined within the internal volume and/or involve a reduced excavated zone and improving the environmental impact of the works as originally consented to.

The outcomes address the performance obligation of the consent to retain the trees to the Beach Road frontage with the exception of the two casuarinas specimens as per the arborist report which the Council landscape officer agrees can be replaced with mature alternatives.

4. WARRINGAH LEP 2011 and DCP

Pursuant to this LEP the land is zoned SP1 permitting the use of the site for a *health service and facility*. The aims and objectives of the zoning of the land are specifically to facility the land use as contemplated by this application.

Part F of WDCP refers at Part F3 to special activity areas including specific reference to this site and requires:

"Land in the SP1 zone will continue to be used for the special uses identified in the links below. Further development of land will generally need to be sympathetic to the scale and amenity of surrounding development, particularly adjacent to residential zones. The natural landscape will be protected and enhanced and development should not create buildings which dominate long distance views of the area"

The works remain within the ambit of the consent for the development of the land and are not antipathetic to the outcomes anticipated by the DCP. There are no specific built form controls or hazard affections impacting the site with the specific exception of a minimum 50% site landscaping obligation. The modifications do not derogated from the landscape outcome as consented to by DA 2006/0896.

5. CONCLUSION

The modification to the detail of the detail proposed by this application does not go to the landuse outcome as consented to nor change the component landuse approved for the site. It is considered the changes are minor and reasonable and do not give rise to issues of environmental impact.

If I can clarify or expand upon the issues discussed in this submission pleas contact me.

Yours faithfully

BOSTON BLYTH FLEMING

A handwritten signature in black ink, appearing to read 'Ross Fleming', with a stylized flourish at the end.

Ross Fleming

