PLANNING
INGENUITY

SECTION 4.55(2)
STATEMENT OF ENVIRONMENTAL EFFECTS

Section 4.55(2) for modification to increase the capacity of an approved Centre Based Child Care Centre

50 Highland Avenue
Bankstown

Prepared for: ES Designs

REF: M240340
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Contents

1. Introduction

This Statement of Environmental Effects (SEE) has been prepared on behalf of the applicant of the proposed development. The report is to accompany a development application to Canterbury-Bankstown Council, pursuant to Clause 4.55(2) of the Environmental Planning & Assessment Act 1979 (EP&A Act), seeking consent for modification to the development which was approved under DA420/2009 on 28 May 2009. The approved development is described as '*Alterations and Additions to Existing Dwelling and Use of Premises as Twenty-Nine (29) Place Childcare Centre'*.

The proposal seeks to formally increase the capacity of the existing child care facility from 29 to 39 in accordance with a service approval granted from the Department of Education and Communities on the 30 December 2013. The approval allowed for the child care centre to increase its capacity to 39 spaces without any works or additional indoor or outdoor play space required.

As such, in accordance with the previous service approval, the existing centre is capable of accommodating the proposed increase in capacity, and therefore there are no significant physical works proposed excluding minor internal works to provide additional internal play space, despite this not being required previously to accommodate the increased capacity. Furthermore, no changes are proposed to the approved hours of operation of the centre.

The purpose of this statement is to address the planning issues associated with the development proposal and specifically to assess the likely impact of the development on the environment in accordance with the requirements of Sections 4.15 and 4.55 of the Environmental Planning & Assessment (EP&A) Act, 1979.

This Statement is divided into five sections. The remaining sections include a locality and site analysis; a description of the proposal; an environmental planning assessment; and a conclusion.

2. Site Analysis and Context

2.1 THE SITE

The subject site is known as No. 50 Highland Avenue, Bankstown with a legal description of Lot 138 in DP 7708. The site has an eastern frontage to Highland Avenue. The location of the subject site is outlined in red in the aerial image provided at **Figure 1** below.

Figure 1 Aerial Image of the site (Source: NearMaps).

The subject site is rectangular in shape and has an eastern frontage to Highland Avenue, and a rear boundary of 20.2m. The subject site has a northern and southern side boundaries of 60.21m. The site has an area of approximately 1,212m^2.

Existing on the site is the child care centre which was previously a single storey dwelling house. The centre itself is setback from the street frontage with parking provided at the front of the site and separate vehicle entry and exit points provided. A total of six (6) parking spaces are provided, including one (1) accessible parking space.

The existing centre contains outdoor play space at the rear which is provided with shade sails, landscaping, decking, ramping and a shed.

A photograph of the existing child care centre is provided below in **Figure 2**.

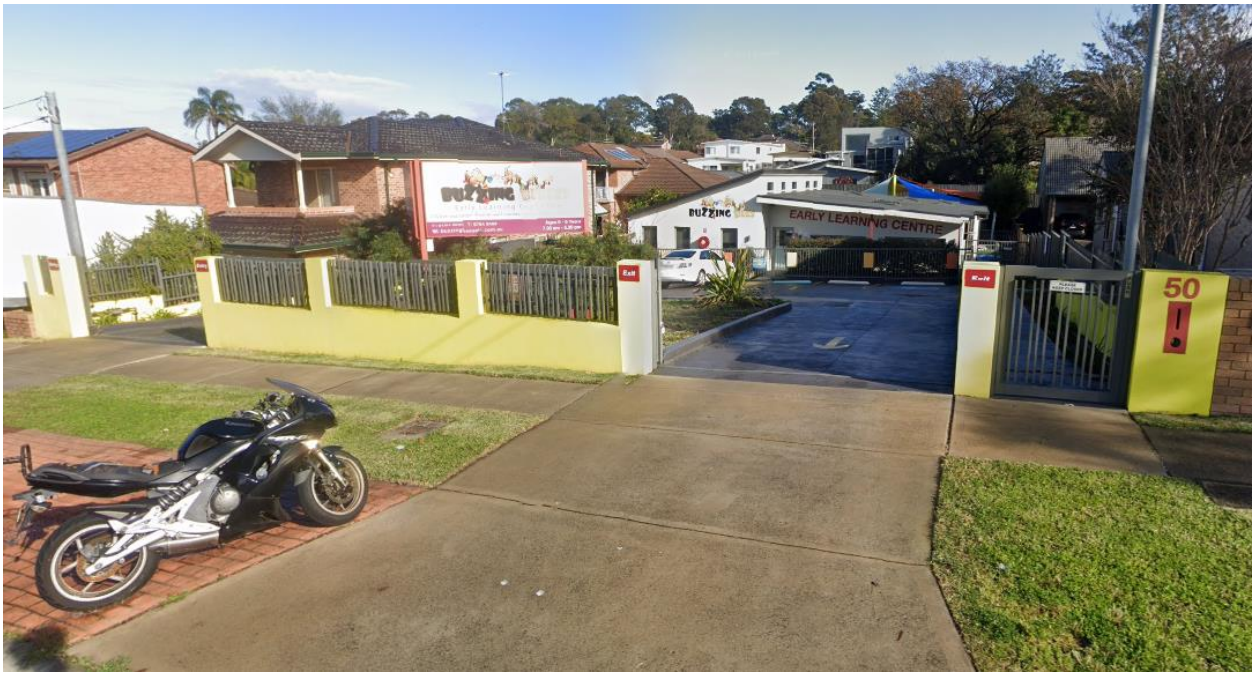

Figure 2 The subject site as viewed from Highland Avenue.

2.2 SURROUNDING DEVELOPMENT

The site is located in a predominantly residential area characterised by a mix of single and two storey dwellings. The site immediately adjoins two storey residential dwellings to the south located at No. 48 and 48A Highland Avenue (**Figure 3**).

Directly adjoining the site to the north is a small multi-dwelling complex comprising two-storey dual occupancy development fronting the street and single storey dwellings to the rear of the allotment (**Figure 4**).

Adjoining the site to the rear are two detached residential dwellings at Nos. 58 and 60 Dutton Street (**Figure 5**). No.60 Dutton Street contains a single storey detached dwelling whilst No. 58 Dutton Street contains a contemporary two storey dwelling.

Development to the east of the site on the opposite side of Highland Avenue consists of one and two storey dwelling houses, of varying architectural styles, as indicated in **Figure 6** below.

Figure 3 Nos. 48 &48A Highland Avenue (south of the subject site).

Figure 4 No. 52 Highland Avenue (north of the subject site).

Figure 5 Nos. 58 & 60 Dutton Street (rear of the subject site).

Figure 6 Development opposite the subject site, on the eastern side of Highland Avenue.

3. Description of the proposal

3.1 BACKGROUND

DA-420/2009 was lodged with Bankstown Council on the 28 May 2009 and sought consent for '*Alterations and Additions to Existing Dwelling and Use of Premises as Twenty-Nine (29) Place Childcare Centre'*. The application was approved by Bankstown Council on the 15 July 2010. An extract of the approved floor plan is provided in **Figure 7** below.

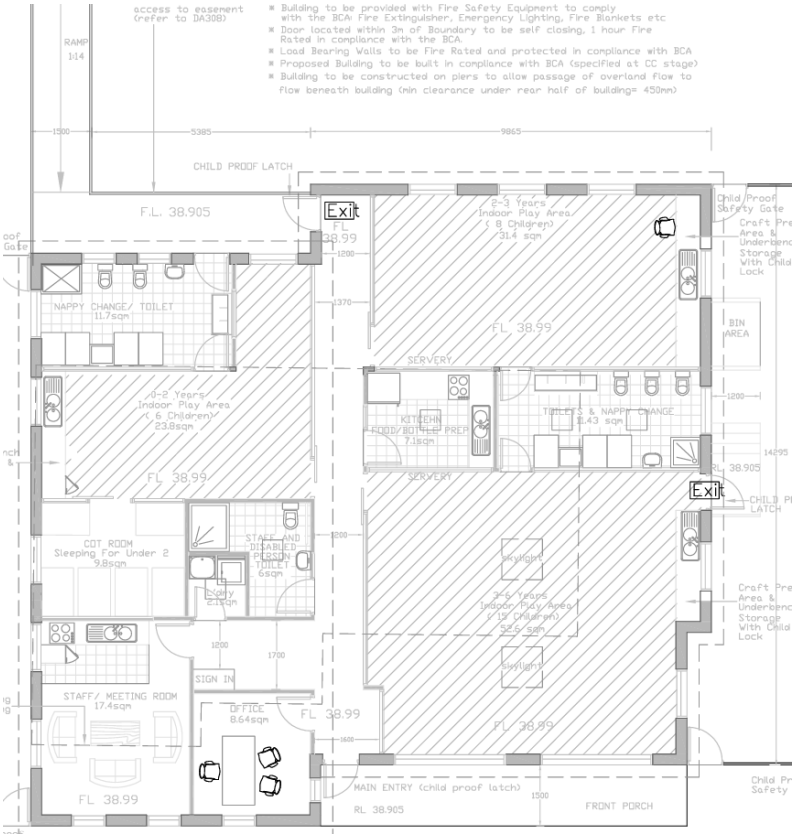

Figure 7 Approved floor plans under DA-420/2009

DA-420/2009/1 was lodged with Bankstown Council on the 12 July 2011 and sought consent to amend to approved application to include demolition in the development description and scope of works. The modification application was approved by Bankstown Council on the 25 July 2011.

APP-40044710 was lodged with the Department of Education and Communities for increase of the maximum number of children from 29 to 39. It is noted that no works were proposed within this application. A concurrence approval was received on the 30 December 2013 to allow the existing centre to provide education and care to a maximum 39 children.

Importantly, despite the Department permitting the increased capacity of 39 children within the existing centre, the development was not required to provide any additional indoor play space to accommodate the increase in the number of children.

3.2 PROPOSED MODIFICATION

The subject application seeks consent for the modification of the capacity of the existing centre based child care centre. The proposal seeks to formally increase the capacity of child care facility from 29 to 39, which was permitted by the Department of Education and Communities. Therefore, and consistent with the approval granted by the Department, the proposal will formally increase the capacity of the centre by 10 places. Consistent with the approval, the existing centre is capable of accommodating the proposed increase in capacity without any significant changes to the existing built form.

Notably, whilst the existing centre was permitted to accommodate 39 children by the Department of Education and Communities, the proposal will seek to provide additional indoor floor space within the existing built form to ensure all children are provided with a suitable amount of indoor play area.

As such, minor changes are proposed to the internal layout as shown on the Architectural Plans submitted with this application.

The centre will continue to operate between 7:00am and 6:00pm Monday to Friday.

The proposal will provide the following breakdown of children:

Approval under DA420/2009	**Proposed Amendment**
6 x 0-2 year old children	8 x 0-2 year old children
8 x 2-3 year old children	10 x 2-3 year old children
15 x 3-6 year old children	21 x 3-6 year old children

The proposal, as amended, will cater for the required number of staff in accordance with the educator to child ratios per the *Childcare Guidelines.* The following is noted:

Calculations (Child to Educator Ratios)

0-2 years:	8 children	2 staff	(1 staff per 4 children)
2-3 years:	10 children	2 staff	(1 staff per 5 children)
3-6 years:	21 children	2.1 (3) staff	(1 staff per 10 children)
Total:	**39 Children & 7 Staff**		

The centre will continue to provide high quality indoor and outdoor play spaces. The outdoor play area is unchanged from the approval under DA-420/2009, whilst minor internal changes are proposed to provide additional indoor play areas to support the increase in capacity. In relation to the indoor play space, the development under DA-420/2009 was approved with an unencumbered indoor play area which could accommodate 33 children, in accordance with the *Child Care Guidelines 2021*. Importantly, a service approval was granted by the Department of Education and Communities to accommodate 39 children within the existing centre. Consistent with the service approval, the proposal seeks to formalise the capacity of the centre as 39 places.

The indoor play areas are detailed as follows:

Calculation (Indoor Play Areas) (3.25m^2 per child – 126.75m^2 required for 39 children)

Play Area	*Age Group*	*Internal Area*	*Number of Children*	*Number of Staff*
Play Room 1	0-2 Years	21.19m^2	8	2

Play Room 2	2-3 Years	29.69m^2	10	2
Play Room 3	3-6 Years	48.85m^2	16	2
Play Room 4	3-6 Years	14m^2	5	1

Total Indoor Area: 113.73m^2 where 126.75m^2 is required.

Whilst the above calculations represent an overall shortfall of indoor play space by 13.02m^2 for the proposal total number of children, the proposal is considered acceptable since it follows a service approval which has been granted by the Department of Education and Communities. As such, it is considered that Section 3.22 of the SEPP (Transport and Infrastructure) 2021 applies to the proposal, which states the following:

> *3.22 Centre-based child care facility—concurrence of Regulatory Authority required for certain development*
> *(1) This section applies to development for the purpose of a centre-based child care facility if—*
> *(a) the floor area of the building or place does not comply with regulation 107 (indoor unencumbered space requirements) of the Education and Care Services National Regulations, or*
> *(b) the outdoor space requirements for the building or place do not comply with regulation 108 (outdoor unencumbered space requirements) of those Regulations.*
> *(2) The consent authority must not grant development consent to development to which this section applies except with the concurrence of the Regulatory Authority.*
> *(3) The consent authority must, within 7 days of receiving a development application for development to which this section applies—*
> *(a) forward a copy of the development application to the Regulatory Authority, and*
> *(b) notify the Regulatory Authority in writing of the basis on which the Authority's concurrence is required and of the date it received the development application.*
> *(4) In determining whether to grant or refuse concurrence, the Regulatory Authority is to consider any requirements applicable to the proposed development under the Children (Education and Care Services) National Law (NSW).*
> *(5) The Regulatory Authority is to give written notice to the consent authority of the Authority's determination within 28 days after receiving a copy of the development application under subsection (3).*

In accordance with the above it is assumed that concurrence from the Regulatory Authority will be sought, noting that a service approval has previously been received for the same centre capacity.

With regard to the outdoor play space provision, Regulation 108 – Space Requirements Outdoor space, the proposal will continue to provide 340.63m^2 of outdoor play area at ground floor, which meets the minimum required space for 39 children.

3.3 CONDITIONS OF CONSENT TO BE MODIFIED

The proposal will necessitate a change to Condition No. 2 of the development consent to reflect the revised Architectural Plans prepared by ES Design dated 19 September 2024.

Furthermore, the proposal requires the description of the development to indicate a capacity of 39 places instead of 29, as approved.

Notably, there are no conditions of consent which refer to a maximum capacity for the centre.

The proposal will continue to satisfy all other conditions of the development consent.

4. Environmental Planning Assessment

4.1 SECTION 4.55(2)

Section 4.55 of the EP&A Act contains provisions relating to the modification of a development consent. Section (2) relates to 'Other Modifications' and states the following:

> *(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 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of approval proposed to be granted by the approval body and the 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 any period prescribed by the regulations or provided by the development control plan, as the case may be.*
>
> *Subsections (1) and (1A) do not apply to such a modification.*

The proposed modification to the development is the subject of a Section 4.55(2) application. The proposal is limited to minor internal alterations to accommodate and an increase in capacity of the existing child care centre. The proposed modifications will not significantly alter the approved building envelope on the site, with only minor internal works proposed to provide additional indoor play area. Notably, whilst additional indoor play area is provided, it is important to acknowledge that the service approval previously granted by Department of Education and Communities was based on a lesser indoor play area provision.

Overall, the proposed modifications maintain the approved use of the site and operation hours of the centre and will not result in a significant increase in intensity beyond that of the existing scheme.

The proposal does not require a new development application as the proposal is substantially the same as the approved development given that the proposal does not seek to alter the use, or significantly materially change the appearance or form of the approved building. Furthermore, the proposed modification will have minor environmental impact as discussed in this Statement.

Importantly, 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

The traditional 'test' as to whether or not a development as modified will be "substantially the same" development as that originally approved was applied by J Stein and the Court of Appeal in *Vacik Pty Limited v Penrith City Council [1992] NSWLEC 8* and endorsed by J Bignold in *Moto Projects (No 2) Pty Ltd V North Sydney C [1999] NSWLEC 280*.

J Stein stated in the Vacik case: *"In my opinion 'substantially' when used in the section [s102, the predecessor of s4.55] means essentially or materially having the same essence".*

J Bignold expressed in the Moto case: *"The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified … not merely a comparison of the physical features or components of the development … rather … involves an appreciation, qualitative as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted)."*

J Bignold came to deal with the matter of "substantially the same" again in *Tipalea Watson Pty Limited v Ku-ring-gai Council [2003] NSWLEC 253*. From this Judgement, one can distil a list of matters or 'tests' to consider, being whether the modification involves the following:

> *(a) significant change to the nature or the intensity of the use;*
>
> *(b) significant change to the relationship to adjoining properties;*
>
> *(c) adverse amenity impacts on neighbours from the changes;*
>
> *(d) significant change to the streetscape; and*
>
> *(e) change to the scale or character of the development, or the character of the locality*

In 2015, the principles regarding Section 96(2)(a) (now Section 4.55(2)(a)) 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(2)(a) 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 Reality 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 [27]);

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]).

In the case of *Arrage v Inner West Council [2019] NSWLEC 85*, Preston J found that there was no legal obligation to consider the circumstances in which the development consent was granted when comparing the approved development and the proposed modified development, or to consider the material or essential elements of the original development consent, neither of which are mandatory relevant matters. Rather it is the statutory provision of Section 4.55 which provides the relevant test.

In *Hunter Development Brokerage Pty Limited trading as HDB Town Planning and Design v Singleton Council [2022] NSWLEC 64*, Duggan J stated that in determining whether a development is substantially the same, it is not only important to ascertain that a development is for the same use, but also to consider the way in which the development is to be carried out. Furthermore, Duggan J sets out the need to establish significance of an alteration to understand whether a development is substantially the same, as follows:

"The significance of a particular feature or set of features may alone or in combination be so significant that the alteration is such that an essential or material component of the development is so altered that it can no longer be said to be substantially the same development – this determination will be a matter of fact and degree depending upon the facts and circumstances in each particular case. Such an exercise is not focussing on a single element, rather it is identifying from the whole an element which alone has such importance it is capable of altering the development to such a degree that it falls outside the jurisdictional limit in s 4.56."

Furthermore, another key decision to consider is that of the Chief Judge of the Court in *Realize Architecture Pty Ltd v Canterbury-Bankstown Council [2024] NSWLEC 31* which seeks to apply a balanced approach to determining whether or not a development as modified will be substantially the same as that originally approved. The decision sets out the balanced approach that should be applied to answer the substantially the same test, which is as follows:

1. *In deciding whether or not the development as modified is substantially the same development as the development for which consent was originally granted, the Commissioner needed to undertake three tasks:*
   a) *Finding the primary facts: This involves drawing inferences of fact from the evidence of the respects in which the originally approved development would be modified. These respects include the components or features of the development that would be modified, such as*

height, bulk, scale, floor space, open space and use, and the impacts of the modification of those components or features of the development.

b) *Interpreting the law: This involves interpreting the words and phrases of the precondition in s 4.55(2) as to their meaning.*

c) *Categorising the facts found: This involves determining whether the facts found regarding the respects in which the development would be modified fall within or without the words and phrases of the precondition in s 4.55(2). American jurist, Karl Llewellyn termed such descriptions of words and phrases as "abstract fact-categories": Karl Llewellyn, The Bramble Bush: On Our Law and Its Study (Oceana Publication 1960) 80. In the Australian authorities, they are commonly referred to as "statutory descriptions" or "statutory criteria": see, for example, The Australian Gas Light Company v The Valuer-General (1940) 40 SR (NSW) 126 at 137-138; Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139 at 156; Randwick Municipal Council v Manousaki (1988) 66 LGRA 330 at 333. The decision-maker's task is to determine whether the facts found fall within or without the statutory description, "according to the relative significance attached to them" by the decision-maker: The Australian Gas Light Company v The Valuer-General at 138.*

Whether or not there will be increased environmental or neighbourhood amenity impacts under a proposed modified development is not a consideration as to whether or not a modification proposal is substantially the same under Section 4.55 of the EP&A Act. Authority for this position is set out in a decision of Talbot J in *Wolgan Action Group Incorporated v Lithgow City Council [2001] NSWLEC 199 [43]* in which he provides:

> *"Even if the present applicant is correct in that there will be a significant increase in the environmental impact … that, nevertheless, does not necessarily preclude a conclusion that the development, to which the consent as modified relates, is substantially the same development as that already permitted. The extension … alone does not change the inherent character of the development itself. There may be some additional environmental impact but that is a matter to be considered as part of the deliberations on the merits."*

Modification Principles Applied to the Proposal

The proposed modification, which seeks to formalise the capacity of the existing centre based child care centre, provides for a development that is substantially the same as the development for which consent was granted. In reaching this conclusion, we have considered the modifications against the above principles.

A comparison between the development as modified and the development that is the subject of the original consent, can conclude that there is no significant difference in the built envelope, visual or physical appearance of the building since only minor internal modifications are proposed, and therefore the extent of the modification will be *"essentially or materially having the same essence"* as the approved development *(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]).*

As detailed, the physical form of the building will be unchanged from the approved development under DA-420/2009. The proposed modification will not alter approved height, setbacks and envelope of the development, excluding minor changes to the internal layout. Accordingly, there will be no change to the density of the development approved under DA-420/2009. The proposed modification will still have the same essence as the original approval and the proposed modification will *"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 [27])*.

As detailed, the proposed modification does not alter the approved use of the land as a centre based child care centre, and only seeks to modify the capacity of the centre, to formalise the number of children in accordance with the previous approval from the Department of Education and Communities. The proposal will not alter the hours of operation and will retain the approved use of centre, only seeking to provide 10 additional childcare places within the existing built

form. The proposal will not alter the existing outdoor play space which achieves the minimum requirement to accommodate 39 children and will provide for staff in accordance with the regulations. The additional children will be suitably catered for and will not introduce any adverse impacts on the amenity of the locality, as discussed within this statement. Accordingly, the proposed modification is not overwhelming in relation to intensity of the use of the site. Whilst the nature and intensity of use, of itself, is not sufficient to conclude the development is substantially the same, it is a relevant consideration which adds to the above analysis.

With consideration to the tests identified in *Tipalea Watson Pty Limited v Ku-ring-gai Council*, the proposal as modified will:

(a) not change the nature of the use as a child care centre and not significantly change the intensity of the use as a centre based child care centre, and will not change the hours of operation or number of staff;
(b) not change the development's relationship to adjoining properties (maintains amenity, bulk and scale of the approved development);
(c) not lead to any adverse impacts on the amenity of neighbouring properties in terms of aural and visual privacy;
(d) not alter the development's relationship with streetscape since there are no changes proposed to building's visual bulk or scale; and
(e) not alter the development's form or appearance.

Importantly, *Moto Projects (No. 2) Pty Limited v North Sydney Council [1999] NSWLEC 280; (1999) 106 LGERA 298*, which outlines principles for determining whether a s4.55 application is 'substantially the same' as an originally issued development consent. The assessment of 'substantially the same' needs to consider qualitative and quantitative matters.

In terms of quantitative assessment, the proposed modifications will increase the capacity of the child care centre and indoor play area by 5.93m^2. Despite a short fall in the internal play space requirements concurrence approval has previously been granted by the Department of Education and Communities for the increase from 29 to 39, and therefore the centre has been considered appropriate to accommodate the greater capacity. The proposal will achieve the requirements for hours of operation, outdoor play space and number of staff to accommodate the 39 child care places proposed. As described, the bulk, scale and character of the development will be unchanged, as the proposed modifications are internal. Therefore, the proposal will maintain compliance with the building height and FSR prescribed by the LEP.

Whilst the increased capacity will result in a shortfall in off-street parking spaces, this is considered acceptable for the reasons provided at Section 4.2.3.1 of this Statement.

Qualitatively, the proposal will retain the relationship of the building to the street and the proposal will have no adverse impacts on the amenity of adjoining neighbours beyond those which have already been considered. The internal modifications will have no significant bearing on the building envelope form or design elements and will present to the surrounding locality as originally approved.

The proposed increase in capacity is not considered to introduce any impacts on the amenity of the surrounding locality, particularly with regard to acoustic and visual privacy and traffic.

On the basis of the foregoing, in qualitative terms, the modified development is substantially the same as the originally approved development. The proposal as modified is capable of complying with all operational conditions imposed under DA-420/2009.

With regard to *Hunter Development Brokerage Pty Limited trading as HDB Town Planning and Design v Singleton Council [2022] NSWLEC 64,* the way in which a development was carried out in regard to its use was identified as a consideration for determining whether a development is substantially the same, and whether this has a weight of significance so that it can no longer be said that it is substantially the same as that approved. Whilst the proposal will increase the capacity of the centre, the modification will not significantly change the intensity of the use. Indeed, the proposal will increase the capacity of the centre by only 10 additional places, in accordance with the approval granted by Department of Education and Communities. The additional places will not significantly alter the operations of the centre as approved. Indeed, the proposal will not alter the core or overarching use of the site and instead requests a minor increase in capacity, which the centre is more than capable of accommodating without any adverse impact on the surrounding locality, as detailed in this statement. In the consideration of the development as a whole, the proposal does not alter the approved use to a degree that would be considered outside the scope of a modification application.

Furthermore, as set out in *Realize Architecture Pty Ltd v Canterbury-Bankstown Council [2024] NSWLEC 31,* an important step of determining whether a development passes the substantially the same test, is an evaluative one to assign significance to different aspects of a development. As detailed above, the proposal will not alter the key quantitative aspects of the development in terms of built form, and as a result will not alter the key qualitative aspects of the development in terms of its environmental impacts on the site and locality. The proposal does seek to increase the capacity of the centre by 10 places, which the centre, as existing, can accommodate, in accordance with the approval granted by the Department of Education and Communities but the significance of this change is not considered to outweigh the retention of all other aspects of the development, including the overall use of the site as a centre based child care centre. As such, on a balanced approach, the proposal is considered to be adequately categorised as a modification given it is substantially the same as that approved on the site.

As noted in *Wolgan Action Group Incorporated v Lithgow City Council,* an increase in environmental impacts is not a consideration as to whether or not a modification proposal is substantially the same. Nonetheless, in our view, there will be no environmental impact from the proposed modification when set against the backdrop of the approved building envelope, in terms of design, solar access, privacy and views, since no external physical changes are proposed. Whilst the proposal will increase the capacity of the centre, the change will not have any adverse impacts in relation to acoustic privacy and traffic, as discussed in this statement.

For the reasons explained above, the modifications proposed by this application are considered to result in a development that is substantially the same as the development for which consent was originally granted. The proposed development will not have any significant or adverse environmental impacts on the locality and the application is appropriately categorised as a S4.55(2) application.

4.2 STATUTORY AND POLICY COMPLIANCE

4.2.1 State Environmental Planning Policy (Transport and Infrastructure) 2021

The *State Environmental Planning Policy (Transport and Infrastructure) 2021* provides planning controls for educational establishments and early education and care facilities. The SEPP requires a consent authority to consider any applicable provisions of the *Child Care Planning Guidelines* before determining a development application.

The proposed development will not alter the approved hours of operation, however, seeks to increase the capacity of the centre from 29 to 39.

The proposal will not make any physical changes to accommodate the additional capacity since the approved outdoor place space is capable of meeting the outdoor space requirements under Section 4.9 of the *Child Care Planning Guidelines*. Indeed, in accordance with Regulation 108 under Section 4.9, a minimum of 7m^2 of outdoor space is

required for every child equating to a minimum requirement of 273m^2 for 39 children. The proposal will continue to provide a total unencumbered outdoor space of 340.63m^2 and will comply with Regulation 108.

With regard to the indoor play space provision, Regulation 107 requires the provision of a minimum of 3.25m^2 indoor space is required for every child equating to a minimum of 126.75m^2. Whilst the proposal does provide additional floor space dedicated to indoor play, it will provide 113.73m^2, which falls short of the requirement for 39 children by 13.02m^2. Whilst this represents an overall shortfall for the proposed total number of children, a concurrence approval has been previously granted by the Department of Education and Communities for the provision of 39 children within the existing centre. It is important to note that whilst this approval was granted on 30 December 2013, prior to the commencement of *SEPP (Transport and Infrastructure) 2021*, the *Children's Service Regulation 2004*, which was in force at the time, contained the same requirements for indoor play space as the current provisions, being 3.25m^2 per child. As such, the Department of Education and Communities permitted the increase capacity despite the non-compliance. Therefore, the proposal simply seeks to formalise the capacity, which was previously considered appropriate for the existing centre, noting the internal changes have allowed for greater indoor play area to be provided compared to the approval.

Importantly, Section 3.22 of the SEPP states the following:

> ***3.22 Centre-based child care facility—concurrence of Regulatory Authority required for certain development***
>
> *(1) This section applies to development for the purpose of a centre-based child care facility if—*
>
> *(a) the floor area of the building or place does not comply with regulation 107 (indoor unencumbered space requirements) of the Education and Care Services National Regulations, or*
>
> *(b) the outdoor space requirements for the building or place do not comply with regulation 108 (outdoor unencumbered space requirements) of those Regulations.*
>
> *(2) The consent authority must not grant development consent to development to which this secaction applies except with the concurrence of the Regulatory Authority.*
>
> *(3) The consent authority must, within 7 days of receiving a development application for development to which this section applies—*
>
> *(a) forward a copy of the development application to the Regulatory Authority, and*
>
> *(b) notify the Regulatory Authority in writing of the basis on which the Authority's concurrence is required and of the date it received the development application.*
>
> *(4) In determining whether to grant or refuse concurrence, the Regulatory Authority is to consider any requirements applicable to the proposed development under the Children (Education and Care Services) National Law (NSW).*
>
> *(5) The Regulatory Authority is to give written notice to the consent authority of the Authority's determination within 28 days after receiving a copy of the development application under subsection (3).*
>
> ***Note—***
>
> *The effect of section 4.13(11) of the Act is that if the Regulatory Authority fails to inform the consent authority of the decision concerning concurrence within the 28 day period, the consent authority may determine the development application without the concurrence of the Regulatory Authority and a development consent so granted is not voidable on that ground.*
>
> *(6) The consent authority must forward a copy of its determination of the development application to the Regulatory Authority within 7 days after making the determination.*
>
> *(7) In this section—*
>
> ***Regulatory Authority** means the Regulatory Authority for New South Wales under the Children (Education and Care Services) National Law (NSW) (as declared by section 9 of the Children (Education and Care Services National Law Application) Act 2010).*

As previously stated a concurrence approval was granted by the Department of Education and Communities on 30 December 2013 for the increase in capacity from 29 to 39 children, despite the shortfall of indoor play area. The service

approval was conditioned in line with the Children (Education and Care Services) National Law (NSW). When the approval was granted the indoor play space was able to accommodate the provision of 33 children, in accordance with the requirements at the time which remain today. The proposal provides additional indoor play space and despite the minor shortfall in indoor unencumbered space, the proposal to formalise an increase in capacity of the existing centre is considered appropriate.

There are no other requirements under the SEPP which need to be considered in detail as part of this application.

4.2.2 Canterbury-Bankstown Local Environmental Plan 2023

The DA was originally assessed and determined under the former *Bankstown Local Environmental Plan 2001* (BLEP 2001) which was the former local environmental planning instrument in force for this site prior to the gazettal of the *Canterbury-Bankstown Local Environmental Plan 2023* (CBLEP 2023).

Notwithstanding the above, since there are no savings provisions which apply to the proposal, the CBLEP 2023 is the applicable planning instrument for this application.

Under the CBLEP 2023, Centre-based child care facilities remain permissible with development consent in the R2 - Low Density Residential Zone. The proposed modification achieves the objectives of the R2 Residential Zone in the following manner:

- *To provide for the housing needs of the community within a low density residential environment.*

The proposal does not reduce the amount of housing provided in the area since it maintains an existing non-residential use.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposed increase in capacity to the approved childcare facility will continue to meet the day to day needs of residents in the residing area and allows for an increased availability of child care places within the locality.

- *To allow for certain non-residential uses that are compatible with residential uses and do not adversely affect the living environment or amenity of the area.*

The built form of the approved childcare centre will remain the same despite the proposed increase in capacity. Accordingly, the proposed modifications to the approved development will continue to be carried out in a context and setting that minimise impact of the living environment or amenity of the area. Potential impacts with regards to amenity resulting from the proposed increase in capacity have been assessed and found acceptable within Part 4.2.3.1 of this Statement.

- *To ensure suitable landscaping in the low density residential environment.*

The proposed modifications do not seek to alter the existing landscaping.

- *To minimise and manage traffic and parking impacts*.

Despite non-compliance with the car parking rates prescribed within the DCP, the subject site is within close proximity to a number of bus stops and railway stations. Accordingly, it is expected that both staff and visitors will utilise forms of active transport, and traffic and parking impacts will be minimised.

- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*

The proposal does not seek to alter the approved use as a centre based child care centre. As such there will be no additional impacts in terms of conflict of land uses.

- *To promote a high standard of urban design and local amenity.*

The urban design of the approved childcare centre will remain unchanged within this proposal.

With regards to all other development controls prescribed within the CBLEP 2023, the proposed modifications to the approved childcare centre will remain compliant, as demonstrated in **Table 1** below.

Table 1 Bayside Local Environmental Plan 2021 Compliance Table

Clause / Control	Requirement	Proposal	Complies?
4.3 Height of Buildings	9m maximum building height.	The proposal will not alter the approved building height.	Yes
4.4 Floor Space Ratio	0.5:1 maximum FSR.	The proposal will not alter the approved FSR.	Yes
6.13 Special provisions for centre-based child care facilities	Development consent must not be granted for the purposes of centre-based child care facilities on land identified as "Area 1" on the *Clause Application Map* if the vehicular access to the land is from— (a) a classified road, or (b) a cul-de-sac road or a road where the carriageway between kerbs is less than 10m.	Vehicular access remains unchanged.	Yes

4.2.3 Canterbury-Bankstown Development Control Plan 2023

The DA was originally assessed and determined under the former Bankstown Development Control Plan 2001 (BDCP 2021) which was the former local environmental planning instrument in force for this site prior to the gazettal of the Canterbury-Bankstown Development Control Plan 2023 (CBDCP 2023).

Notwithstanding the above, since there are no savings provisions which apply to the proposal, the CBDCP 2023 is the applicable control plan for this application.

The proposed modification does not involve any external physical changes to the approved building envelope, and therefore there are limited DCP controls which are relevant to the proposal. Nevertheless, Chapter 10.1 contains provisions specific to child care centres, and as such are addressed in **Table 2** below.

Table 2 Canterbury-Bankstown Development Control Plan 2023 Compliance Table

Clause / Control	Requirement	Proposal	Complies?
2.1	Development for the purpose of child care facilities must not result in a street in the vicinity of the site to exceed the environmental capacity maximum. If the environmental capacity maximum is already exceeded, the development must maintain the existing level of absolute delay of that street.	The proposed increase in capacity will not result in the street to exceed its environmental capacity maximum. Sufficient on-site and street parking is available for the centre, particularly given its highly accessible location.	Yes
4.5	Child care facilities with more than 29 children in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone R4 High Density	The proposal does not seek to alter external design of the existing child care centre. The proposal is to formalise the increase in capacity	On Merit

Table 2 Canterbury-Bankstown Development Control Plan 2023 Compliance Table			
	Residential must locate in a purpose-built facility. The external building design must give the appearance of a dwelling house.	in accordance with the approval from the Department of Education and Communities.	
6.8	Child care facilities in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone R4 High Density Residential must provide: (a) a minimum 2m wide deep soil zone along the primary street frontage and secondary street frontage of the site; and (b) a minimum 1.5m wide deep soil zone around the perimeter of the outdoor play area, to act as a buffer to the fence, provide spatial separation to neighbouring properties and enhance the aesthetic quality of the space.	The proposal will not alter the existing landscaped conditions	N/A

Since there are no changes proposed to the approved built form, there no additional controls within the DCP that need to be addressed as part of this application, with the exception of the general provisions in Chapter 3.2 which relate to on-site parking provision and is discussed below.

4.2.3.1 Parking

When DA-420/2009 was originally assessed 6 car parking spaces were required, in accordance with the conditions of consent, including one accessible parking space. Chapter 3.2 of CBDCP 2023 contains a parking rate of 1 car space per 4 children. In accordance with the approved capacity of 29 children a total of 7.25 car parking spaces would have been required for the site under the CBDCP 2023.

The proposed increase in capacity to the centre requires 9.75 car parking spaces. The proposal will not alter the existing parking arrangements on the site, and therefore results in a parking shortfall of 3.75 spaces.

Notably, the existing capacity of the centre was required a total of 7.25 parking spaces, however, only 6 were provided.

The proposed parking provision is not considered to have any significant adverse impacts on the surrounding locality as the subject site is in close proximity to bus stops on Glassop Street and Marlon Street, and both Yagoona and Bankstown Railway Stations and commercial centres. As such, it must be acknowledged that both staff and visitors will utilise these forms of public transport to access the site, in addition to the available parking both on and off the street. Furthermore, it should be noted that some visitors may also live within walking distance of the centre and therefore will not require any parking.

It must also be acknowledged that the nature of child care centre use is that visitors only require parking for short stints in the morning and afternoon for the purpose of drop off and pick up. As such, the available on-site parking in conjunction with the available street parking is considered sufficient for visitor use.

Accordingly, despite the off-street parking shortfall, the proposed increase in capacity to the child care centre will not result in any unreasonable impacts to existing parking conditions and is considered acceptable on merit.

In addition, the Department of Education and Communities did not require any additional car parking spaces to be provided to the subject site when granting approval for the increase in capacity.

4.3 IMPACTS ON NATURAL & BUILT ENVIRONMENT

4.3.1 Natural Environment

The modification relates to changes to allow for an increase in capacity to the approved childcare centre and does not involve any material changes to the approved development which would impact the natural environment. Accordingly, no adverse impacts upon the natural environment are expected.

4.3.2 Built Environment

In terms of the relationship of the proposal to the adjoining properties, there is no change to the approved building envelope.

4.3.3 Flora & Fauna Impacts

The proposed modifications will have no adverse impact on the flora and fauna of the site.

4.3.4 Aural & Visual Privacy

The proposed increase in numbers will not introduce any significant acoustic impacts beyond those already existing. Importantly, the site is an existing child care centre which operates in a residential area with no complaints or issues raised by neighbours with regards to noise as a result of the management procedures in place. The child care centre will accommodate the additional children without any additional acoustic impacts as a result of the appropriate management of child play and noise. Furthermore, the site has been designed to mitigate acoustic impacts from the play areas, both indoor and outdoor, through the use of boundary fencing and vegetation.

It must also be noted that the increase in numbers was approved by the NSW Department of Education and Communities and therefore was considered acceptable for the site with regard to acoustic impacts.

In addition, the modification proposal makes no changes to the existing built form with visual privacy the same as approved.

4.4 ECONOMIC & SOCIAL IMPACTS

The proposal will increase the number of available childcare places within the locality therefore enhancing the approved use of the site and increasing the availability of the service for the local community. Thus, the increase in capacity will have a positive economic and social impact given the increase in centre business and services for the locality.

4.5 THE SUITABILITY OF THE SITE

4.5.1 Access to Services

The site is within an established area and is currently provided with electricity, telephone, water and sewerage services.

4.5.2 Parking and Access

The increase in child care places will not cause a greater demand for parking or more significant traffic impacts than the existing centre. The proposal will not alter the existing parking and access arrangements. Refer to the discussion in 4.2.3.1 with regard to parking provision.

5. Conclusion

The proposed modification seeks to formalise an increase in capacity of the existing centre based child care centre, improving the provision of the service to the local community. The proposed capacity does not significantly change the nature, use or operation of the child care centre. It is anticipated that the minor increase in capacity will not be readily obvious from an amenity perspective however supports the public interest through increasing a desirable local service.

The modification will result in the development being substantially the same, with no external built form changes.

The modification has been prepared in response to the service approval granted by the NSW Department of Education and Communities. The environmental impacts of the formalised increase have been considered within this application and will have no significant impact when compared to the existing centre.

For the reasons stated above we respectfully request that Council modify the development consent as requested to permit an increase in the capacity of the child care centre at the site as detailed within the Statement.