

28th January 2025

STATEMENT OF ENVIRONMENTAL EFFECTS

SECTION 4.55(2) MODIFICATION TO DEVELOPMENT APPLICATION

DA-1103/2019/A

No. 83-87 Ninth Ave & 2A Third Ave, Campsie

The proposal before Canterbury Bankstown Council seeks to modify the development consent granted pursuant to Development Application DA-1103/2019, under the provisions of Section 4.55(2) of the Environmental Planning and Assessment Act 1979. The approved development is described as *“The demolition of all existing structures and the construction of an infill Affordable Housing Development in the form of a three-storey residential flat building with basement car parking under the State Environmental Planning Policy (Affordable housing) 2009”*.

The proposed modification seeks to adjust the extent of the development dedicated to *affordable housing*. This submission is accompanied by revised floor plans illustrating the 10 (ten) proposed units to be the affordable component of the development.

1. DEVELOPMENT HISTORY: DA-1103/2019

- The development application was granted a deferred commencement on the 3rd June 2021;
- The development application was granted operational consent on the 28th September 2022;
- The development application was the subject of a Section 4.55(2) Modification (DA-1103/2019/A) to lower the basement level, internal alterations to the unit dwellings and changes to the balcony treatment and external finishes. DA-1103/2019/A was approved on the 27th August 2024.
 - In the determination of DA-1103/2019/A, the consent authority (Council) forced the position that savings provisions do not apply to the development application. Consequently, conditions of consent were imposed on the development to be in accordance with SEPP (Housing) 2021, Section 21, including that the affordable housing component was to be for 15 years instead of 10 years.
 - The proposed modification sensibly seeks to align the development and provide consistency in the application of the SEPP (Housing) 2021 provisions.

■ **Sydney Office**
Suite 15, Level 1
469-475 Parramatta Rd
Leichhardt NSW 2040

■ **Brisbane Office**
3A Cambridge Street
West End QLD 4101

t. 02 9569 1100
f. 02 9569 1103
e. gat@gatassoc.com.au
w. www.gatassoc.com.au

2. SUBJECT SITE

The subject site is commonly known as 83-87 Ninth Avenue & 2A Third Avenue, Campsie and is legally defined as Lot B in DP 100213, Lot 1 in DP 966857, Lot A in DP 100213 and Lot 1 DP 125327. The site is located on the northern side of Ninth Avenue and the western side of Third Avenue. It is bound by Eighth Avenue to the north and Second Avenue to the west. The southern, primary street frontage to Ninth Avenue and northern side boundary measures 40.23 metres, with the eastern, secondary street frontage to Third Avenue and western side boundary measuring 50.29 metres. The combined site is rectilinear with a total site area of 2,023.4m².

Existing improvements upon the subject site include:

- 83 Ninth Avenue is a single storey brick dwelling house with a tile roof, a metal carport and a brick garage accessed off Third Avenue;
- 85 Ninth Avenue is a single storey weatherboard dwelling house with a fibro shed and single storey secondary dwelling at the rear of the site;
- 87 Ninth Avenue contains a single storey weatherboard and fibro house with rear metal shed;
- 2A Third Avenue is occupied by a single storey brick dwelling house with a brick garage.

Adjoining the site are residential properties. To the north at 2 Third Avenue and to the west at 89 Ninth Avenue are two storey older residential flat buildings. The site is located within an established residential area, which is characterised by traditional detached dwellings, two storey multi-dwelling housing and two and three storey residential flat buildings. Contemporary developments in the area include a three storey residential flat buildings at 86-88 Ninth Avenue, 75 Second Avenue and 59-67 Second Avenue. The zoning of this area is R4 High Density Residential, with the approval of DA-1103/2019 being reflective of this desired future character and the aforementioned developments within Second Avenue.

Figure 1 illustrates the subject site within its immediate context.



Figure 1 Site Location Map (Source: SIX Maps)

The site is within an *accessible location*, as it is within 700m walking distance of Campsie Train Station. Several bus services are also available within 550m of the site along Beamish Street to the east of the site, which provides direct access to Hurstville, Rockdale, Ashfield and the CBD. Together, they allow for access to nearby commercial centres and the broader public transportation network.

3. PROPOSED MODIFICATIONS TO DA-1103/2019/A

Description

The application seeks an adjustment to the approved affordable housing component of the development. Seventeen (17) units with a total gross floor area of 1,260.84m² have been approved and nominated by a condition of consent to be used for the purpose of affordable housing in accordance with Clause 21(1) of the State Environmental Planning Policy (Housing) 2021.

The adjustment will result in a reduction to 10 (ten) units with a total gross floor area of 743.74m². Units G04, G05, G06, G08, 102, 103, 104, 107, 108 and 204 are proposed as affordable housing, and achieve 743.74m² of floor area.

There are no other fundamental or physical changes to the approved built form otherwise sought by this application.

Conditions of Consent

To accommodate the proposed modification, the following conditions of consent will need to be modified:

- Condition 1 – Details of approved plans;
- Condition 4 – The specific units and the minimum floor space to be used for affordable housing;
- Condition 5 - The specific units and the minimum floor space to be used for affordable housing.

4. SECTION 4.55 OF THE ENVIRONMENTAL PLANNING & ASSESSMENT ACT 1979

It is considered that the development can be determined under Section 4.55(2) of the Environmental Planning & Assessment Act 1979, which 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 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.*

Subsections (1) and (1A) do not apply to such a modification”.

In order to have the ability to modify a development consent under Section 4.55 of the Environmental Planning and Assessment Act 1979, Council must be satisfied that the development as modified would be substantially the same as the development for which the development consent was originally granted.

The planning merits of the modification are not relevant to the determination of the threshold question of whether the development to which the consent relates would be **substantially the same** as the development for which consent was originally granted.

In this regard, Council must apply the “**substantially the same development test**” to any Section 4.55 Application lodged. Case law in **Vacik Pty Ltd v Penrith City Council** (Stein J, 10242 of 1991, 24 February 1992) stated this test in the following terms:

“... ‘substantially’ when used in the section means essentially or materially or having the same essence”.

In relation to determining whether the proposed modified development is “essentially or materially” the same as the approved development. Justice Bignold in **Moto Projects No. 2 Pty Ltd v North Sydney Council (1999)** 106 LGERA 298 (“**Moto Projects**”) at 309, states:

“The relevant satisfaction required by s 96(2) (a) to be found to exist in order that the modification power be available involves an ultimate finding of fact based upon the primary facts found. I must be satisfied that the modified development is substantially the same as the originally approved development.

The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is “essentially or materially” the same as the (currently) approved development.

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 type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared....”

In **Tipalea Watson Pty Limited v Ku-Ring-Gi Council [2003] NSWLEC 253** ("**Tipalea Watson**"), Bignold J further considered the substantially the same test. In the judgement, the following matters were weighed in the consideration of the application being substantially the same:

- (a) *is there significant change to the nature or intensity of the use?*
- (b) *Is there significant change to the relationship to adjoining properties?*
- (c) *Are there any adverse amenity impacts on neighbours from the changes?*
- (d) *Is there significant change to the streetscape?*
- (e) *Do the modifications change the scale or character of the development, or the character of the locality?*

In **Arrange v Inner West Council [2019] NSWLEC 95**, 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 modification proposal, or to consider the material or essential elements of the original development consent, as they are not contained within the statutory provisions of Section 4.55.

In the decision of **Canterbury-Bankstown Council v Realize Architecture Pty Ltd [2024] NSWLEC 31** ("**Realize Architecture**"), Preston CJ summarised at [7] three tasks to be undertaken by a consent authority in deciding whether or not the development as modified is substantially the same. These tasks are:

- (a) *Finding the primary facts*
- (b) *Interpreting the law*
- (c) *Categorising the facts found*

At [29]-[31], the tasks are elaborated to state:

*"The first task includes finding what are the differences, including **quantitative and qualitative differences**, between the developments. These might include that the modified development is higher or bulkier, has greater floor space or less open space, or has different uses, than the originally approved development. By themselves, those findings of fact are uninformative of whether the modified development is or is not substantially the same development as the originally approved development. That question can only be answered by undertaking the third task of categorising the facts found in the statutory description of the precondition in s 4.55(2)(a).*

*This third task of categorising the facts in the statutory description is an evaluative one. It involves **assigning relative significance or weight to the different facts and a balancing of the facts, as weighted**. This categorisation can be an instinctive synthesis and need not be articulated expressly.*

A decision-maker could, for example, give greater significance or weight to quantitative differences than to qualitative differences between the two developments, or the reverse, or give greater significance or weight to some quantitative differences than other quantitative difference or to some qualitative differences than other qualitative differences. This evaluation of the facts in undertaking the categorisation of the facts in the statutory description is an essential task in deciding whether or not the decision maker is satisfied of the precondition in s 4.55(2)(a)."

Further, it was stated by Preston CJ in **Realize Architecture** at [26] that *"The opinion of satisfaction that s 4.55(2)(a) requires is that the two developments being compared are substantially the same development, not that either the quantitative features or the qualitative features of the two developments are substantially the same."*

This first step of finding the primary facts simply serves to articulate the quantitative and qualitative differences between the development as approved and the development as modified. These differences are discussed below within this statement ([Page 6](#)). While there may be quantitative and qualitative differences between the approved and modified development, this itself is not determinative of whether the development is ***substantially the same***.

The second step, being the exercise of interpreting the law has been undertaken above, with respect to understanding and extrapolating the key means of determining the ***substantially the same test***.

The third and final step involves assigning relative significance or weight to the different facts and a ***balancing*** of the facts. To assist in the structure of the balancing of the facts, the matters weighed in [Tipalea Watson](#) are referred to below.

SUBSTANTIALLY THE SAME DEVELOPMENT

In light of the above interpretation of the law, the Section 4.55 proposal is considered to be “essentially or materially” the same as the development that was initially approved by Council.

There are no physical changes to the built form in terms of its building envelope, landscaped areas, private open spaces, parking arrangements, internal layouts, setbacks, height or overall floor area.

The following assessment aligns with the tests identified in [Tipalea Watson](#):

The nature and intensity of the use

No change to the nature or intensity of the use is proposed. The use of the land and approved development remains for *residential accommodation*, specifically a *residential flat building*. The development will continue to provide affordable housing. While the extent of the floor area dedicated to affordable housing will reduce, it will be no less than the required floor area for the purpose of affordable housing under the SEPP (Housing) 2021, and is in fact greater than what is required under the SEPP (Housing) 2021 to provide the balance between the floor area approved, and the affordable component that is required to apply the floor area bonus under Section 16 of the SEPP (Housing) 2021.

Further, the total number of approved units (i.e. 31) has not been modified.

Relationship with adjoining properties & amenity impacts

There are no changes sought to the approved building envelope or external appearance of the building. Therefore, the relationship between the approved development, the public domain and adjoining properties does not change.

No amenity impacts will arise as a result of reducing the extent of gross floor area dedicated to affordable housing.

Streetscape, scale and character

As above, there are no internal or external physical changes proposed. The scale and character of the development remain the same, and there is no impact on the streetscape or public domain.

The following assessment aligns with the qualitative and quantitative tests identified in *Moto Projects*:

Qualitative Aspects of the Development

- The development continues to provide affordable housing, and aligns with the minimum required gross floor area (i.e. 15%), based on the bonus acquired, under the SEPP (Housing) 2021.
- There is no physical or material change to the development as approved.
- All environmental outcomes remain the same as approved.

Quantitative Aspects of the Development

- The only quantitative change is the number of unit dwellings (and therefore the m² of gross floor area) that will be specifically dedicated to affordable housing.
 - The development has been approved with 17 (seventeen) unit dwellings as affordable housing.
 - The proposed modification reduces the number of unit dwellings to 10 (ten) as affordable housing.
 - This is an equivalent reduction from the approved 1,260.94m² (46% of the approved GFA) to 743.74m² (27% of the approved GFA) dedicated to affordable housing.

The modified dedication of gross floor area combines the minimum required affordable housing component under Section 16 of the SEPP (Housing) 2021 (that is, 355.11m²) in addition to the surplus gross floor area otherwise approved (that is, 372.17m²) to achieve both the minimum required affordable housing component and to provide an economic and social benefit from the otherwise approved gross floor area. Thus, the development continues to be substantially the same in terms of the outcomes and benefits achieved by the development.

The full methodology for calculating this dedication of floor area to affordable housing is detailed under **Part 5.4** of this report ([Page 8](#)).

In balancing the modified aspects of the development, the development remains consistent with what was originally approved. It is therefore concluded that the proposal is substantially the same development as approved by Council initially under DA-1103/2019/A, and as such satisfies the ‘*substantially the same development test*’ under Section 4.55 of the EP&A Act. Thus the proposal is consistent with Clause 4.55(2) of the Environmental Planning & Assessment Act 1979.

An assessment of the proposal against the key provisions of the applicable legislation is within the following pages.

5. CONSIDERATIONS OF THE PROVISIONS OF SECTION 4.15 OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979

(1) *Matters for consideration – general*

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development, the subject of the development application.

(a) *The provisions of:*

(i) *any environmental planning instrument*

5.1 STATE ENVIRONMENTAL PLANNING POLICY (SUSTAINABLE BUILDINGS) 2022

Relevant energy efficiency reports were provided for the original development application. The proposed modification does not require any amendment to the Certification as approved, or require any amendment to the relevant conditions of consent.

5.2 STATE ENVIRONMENTAL PLANNING POLICY (RESILIENCE AND HAZARDS) 2021

The proposed modifications do not introduce any new considerations for contamination that have not otherwise been covered by the current consent (DA-1103/2019). Consequently, per Chapter 4 of the SEPP, Council can conclude that no further assessment of the contamination is necessary, and there are no amendments to the relevant conditions of consent.

5.3 STATE ENVIRONMENTAL PLANNING POLICY (BIODIVERSITY AND CONSERVATION) 2021

Chapter 6 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 relates to the protection of water catchments, including the Georges River Catchment. The subject site falls within the Georges River Catchment and therefore the provisions apply. Appropriate sediment and control devices will be placed on the site during site works to ensure that pollutants and runoff from the site will not impact the Georges River. All waste produced as part of the development will be managed during all stages of construction and throughout the life of the building.

The proposal is therefore not contrary to the provisions of Chapter 6, nor does it require any amendment to the relevant conditions of consent.

5.4 STATE ENVIRONMENTAL PLANNING POLICY (HOUSING) 2021

- **Section 16 | Floor Space Ratio**

DA-1103/2019/A was approved with a floor space ratio of 1.35:1, being a total approved gross floor area of 2,739.55m². The maximum permissible FSR and GFA under the Canterbury Bankstown Local Environmental Plan 2023 are 0.90:1 and 1,821.06m² respectively. The development as approved therefore relied on the bonus to floor space ratio offered by providing affordable housing under the SEPP.

The proposed amendment to the dedication of affordable housing has been calculated as follows:

Section 16 of the SEPP (Housing) 2021 permits an additional floor space ratio of up to 30%.

- 30% of the maximum FSR (0.90:1) is a maximum potential additional gross floor area of 546.318m².
- In consideration of the additional maximum 30% floor space ratio allowance under Section 16, a total gross floor area of 2,367.38m² is permitted on the site (or an FSR of 1.17:1).
- The minimum affordable housing component of the additional floor space ratio, on the assertion that all of the 30% of the bonus gross floor area is utilised, is the additional floor space ratio as a percentage (i.e. 30%), divided by two.
 - Thus 15% of the additional floor space is required to be affordable housing.
- 15% of the total permissible gross floor area (2,367.38m²) is 355.11m² as a minimum to be provided as affordable housing.

The approved development provides 2,739.55m² of gross floor area (or an FSR of 1.35:1), being 372.17m² above the maximum of the permissible 2,367.38m² outlined above. The 2,739.55m² gross floor area is already approved, and it is not subject to further variation, or any requirement for a written request to vary the standard.

The proposed amendment to the dedicated affordable housing will achieve the base minimum requirement (355.11m²), plus the additional gross floor area otherwise afforded by the approved development (372.17m²), for a nominated total area of 727.27m² considered for the dedication of affordable housing for 15 years.

The adjustment to ten (10) units dedicated to affordable housing is proposed at 743.74m² of floor area, being Units G04, G05, G06, G08, 102, 103, 104, 107, 108 and 204 – thus exceeding both the minimum required gross floor area required to be affordable housing, and further accommodating the nominated surplus gross floor area otherwise granted by the original consent. This dedication to affordable housing is consistent with the current approval and resulting conditions of consent under DA-1103/2019/A and the requirement to be in accordance with Section 21 of the SEPP (Housing) 2021. The most recent application to modify the approval had amended the consent so that the development is required to include the affordable housing component for 15 years.

The number of units detailed in Conditions 4 and 5 of the consent will require amendment: A minimum of 743.74m² of floor area, being Units G04, G05, G06, G08, 102, 103, 104, 107, 108 and 204 are to be used for the purpose of affordable housing.

- **Section 21 | Must be used for affordable housing for 15 years**

The adjustment to 10 (ten) unit dwellings will continue to provide dedicated to affordable housing for fifteen (15) years. This is consistent with the prior amendments and resulting conditions of consent under DA-1103/2019/A and the

requirements outlined within the conditions of consent to be in accordance Section 21 of SEPP (Housing) 2021.

In the determination of DA-1103/2019/A, the consent authority (Council) imposed the position that savings provisions do not apply to the development application. Consequently, conditions of consent were imposed on the development to be in accordance with SEPP (Housing) 2021, Section 21, including that the affordable housing component was to be for 15 years instead of 10 years. The proposed modification sensibly seeks to align the development and provide consistency in the application of the SEPP (Housing) 2021.

The number of units detailed in Conditions 4 and 5 of the consent will require amendment.

A minimum of 743.74m² of floor area, being Units G04, G05, G06, G08, 102, 103, 104, 107, 108 and 204 are to be used for the purpose of affordable housing. There is no requirement in this instance to assess the loss of affordable housing, as the development has not completed construction and its use is not operational.

- **Other Numerical Standards and Design Requirements**

With respect to other design standards and controls (site area; landscaped area; deep soil zones; solar; parking; design principles for residential apartment development) the development as approved does not change the extent of numerical compliance that these standards were approved as. There are no physical internal or external changes proposed to the building envelope.

5.5 CANTERBURY BANKSTOWN LOCAL ENVIRONMENTAL PLAN 2023

83-87 Ninth Avenue and 2A Third Avenue, Campsie are located within the R4 High Density Residential land zone, with *residential flat buildings* a permissible land use. The objectives of the R4 zone will continue to be satisfied as the modification will not change the approved use or density of the site:

- *The proposed residential flat building is indicative of the desired density on the site in terms of zoning, permissibility, height and FSR, and is reflective of the general character of the area that is transitioning to residential flat building and multi-dwelling housing. The development will serve the housing needs of the community.*
- *The residential flat building provides a mixture of 1, 2 and 3 bedroom units with several adaptable to account for and accommodate a variety of persons and family sizes.*
- *The site is adjoined by properties within the same land use zone.*
- *The proposal, as approved, provides for an increased density on the site which is within walking distance of Campsie Train Station.*
- *The proposal is considered to be of a high architectural standard and provides for excellent amenity as it achieves the design objectives for solar access, natural cross ventilation and generous areas of common open space.*

The proposed modification does not change the extent of gross floor area approved overall. It is acknowledged that the development technically exceeds the FSR standard,

however, the proposed adjustment to the required gross floor area dedicated to affordable housing encompasses the minimum required under SEPP (Housing) 2021 [355.11m²], plus the additional gross floor area above the permissible FSR [372.17m²] variation to the standard, thus resulting in a mutual environmental outcome and continued social benefit; thus enforcing that the development remains substantially the same as approved.

No other numerical or permissibility matters arise pursuant to the Canterbury Bankstown LEP 2023.

(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved)

There are currently no draft environmental planning instruments that would affect this proposed modification.

(iii) any development control plan

5.6 CANTERBURY BANKSTOWN DEVELOPMENT CONTROL PLAN 2023

The proposed modifications do not result in any change to the environmental or amenity outcomes of the approved development.

(iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4

Not applicable.

(iv) the regulations (to the extent that they prescribe matters for the purpose of this paragraph)

There are no prescribed matters which affect this proposal.

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality

(i) Impact on the natural environment:

The proposed modification will have no impact on the natural environment. No further existing vegetation will be required to be removed and all landscaping remains as approved.

(ii) Impact on the built environment:

The proposed modification will not cause an impact on the built environment. The building will remain as approved.

(iii) Social and Economic impacts in the locality:

The proposed modification will have no negative social or economic impacts on the locality in comparison to the approved development. While there is a reduction to the extent of affordable housing that was approved, the development continues to achieve the minimum required dedication of gross floor area to affordable housing per the SEPP (Housing) 2021.

(c) the suitability of the site for development

Per the original approval and previous modification, the land is appropriately zoned to permit development for the purpose of a residential flat building, whilst meeting the long-term objectives of the zone.

(d) any submissions made in accordance with this Act or the regulations

Not relevant at this time.

(e) the public interest

The public interest will continue to be served by the approval of the proposed modification as the proposed modifications in no way undermine the attributes of the development that has been granted consent. The development will continue to benefit the local community in terms of the provision of residential accommodation in an area zoned to permit it, with the provision of affordable housing for 15 years.

6.0 CONCLUSION

There are no negative environmental or amenity impacts resulting from the proposal. The reduction to the affordable component achieves the minimum requirement. There is no requirement in this instance to assess the loss of affordable housing, as the development has not completed construction, and its use is not operational.

The proposed modification to the minimum gross floor area dedicated to affordable housing is consistent with the current approval (DA-1103/2019/A), which adjusted the timeframe in conditions 4 and 5 to be 15 years instead of 10 years and outlines the requirement to be consistent with the SEPP (Housing) 2021.

The proposed modifications can therefore be supported by the consent authority.

Should you require any additional information please do not hesitate to contact me.

Kind regards,

Krystal Narbey
Town Planner
GAT & Associates
Plan 3357