14 February 2025

Email: anita.burgermeister@oohmedia.com.au

Private & Confidential

Anita Burgermeister
Commercial Director
oOh!media

NORTON ROSE FULBRIGHT

Norton Rose Fulbright Australia
ABN 32 720 868 049
Level 5, 60 Martin Place
SYDNEY NSW 2000
AUSTRALIA

Tel +61 2 9330 8000
Fax +61 2 9330 8111
GPO Box 3872, Sydney NSW 2001
DX 368 Sydney
nortonrosefulbright.com

Direct line
+61 2 9330 8677

Email
krista.macpherson@nortonrosefulbright.com

Your reference:

Our reference:
3138768

Dear Anita

Advertising Signage on Glebe Silos – proposed modification of development consent DA 21/131182

Introduction

1 You have instructed us that oOh!media (**oOh!**) is proposing to lodge an application under section 4.55(2) (the **Modification Application**) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) to modify condition A5 of development consent identified as DA 21/131182 (**Consent**).

2 The purpose of the Modification Application is to permit the continued display of third-party advertising on the billboard for a period beyond the three-year limit currently provided for under the Consent.

3 We have been asked to provide legal advice as to whether the Modification Application, being an application to extend the duration of the Consent, is 'substantially the same development' as the original development, such that the consent authority's power under s 4.55(2) of the EP&A Act is enlivened.

4 In summary, in our opinion, the modification to the development proposed by the Modification Application is 'substantially the same development' as the original development for which the Consent was granted.

5 This is because the *development* proposed by the Modification Application contains the same essential and/or material components as the development approved under the original Consent, being the display of third-party advertising on two faces of the Glebe Silos.

6 As such, we consider that the consent authority's (which in this case would be the Independent Planning Commission (**IPC)**) power under section 4.55(2) of the EP&A Act would be enlivened in order to determine the Modification Application.

Background

7 Third-party advertising has been displayed on the Glebe Silos under various consents granted under the EP&A Act prior to and after the Sydney Olympics.

8 The Consent is the current consent which applies to the third-party advertising and was granted by the IPC, as delegate of the Minister for Planning, on 9 September 2022.

9 The Consent authorises the use of the Glebe Island Silos for the continued display of third-party advertising on two faces of the silos. Condition A5 of the Consent (extracted below) provides the Consent will expire three days from the date it commences operation.

> **DURATION OF CONSENT**
>
> A5. This development consent is issued for a limited period of three years. The consent will cease to be in force/expire three years after the date of consent.
>
> *Note: a new Development Application must be submitted prior to that date for assessment and determination if it is intended to continue the use beyond the cessation date.*

10 Prior to the Consent being granted, the third-party advertising operated under a consent granted in 2012 and similarly contained a condition that the consent had a duration of 3 years. That consent was modified in 2016 to extend the term of the consent for a further period of four years and again in 2018 to extend the term for a further three years.

11 The effect of the modification was to amend the 2012 consent to enable third-party advertising to be displayed for a total period of 10 years, being the maximum statutory period permissible under clause 21(2) of the former State Environmental Planning Policy No 64 – Advertising and Signage (now clause 3.19(2) of the State Environmental Planning Policy (Industry and Employment) 2021 (NSW) (**Industry and Employment SEPP**).

12 As the maximum term permissible was reached in 2021, this required a new development application to be lodged which was eventually approved on 8 September 2022 and is due to lapse on the 18 September 2025. oOh! is now seeking to similarly modify the Consent in order to extend its duration for a further period. This is consistent with previously approved modifications in 2016 and 2108.

Advice

Modification of development consents

13 The modification of a development consent issued under Part 4 of the EP&A Act is dealt with under Part 4, Division 4.9 of the EP&A Act. In that Division, section 4.55 sets out the circumstances in which the relevant consent authority's power will be enlivened to modify a consent. The relevant provision for the purposes of the Modification Application is section 4.55(2) of the EP& Act.

Section 4.55(2) and applicable principles

14 Section 4.55(2) of the EP&A Act, previously s 96(2), provides:

> ***(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*.

15 Section 4.55(2) empowers the consent authority to modify a development consent if it is satisfied that the modified development for which consent is being sought is the "substantially the same" as the originally approved development: *Feldkirchen Pty Ltd v Development Implementation Pty Ltd* [2022] NSWCA 227 [23] (Preston CJ) (***Feldkirchen***). This power has been described as "beneficial and facultative", in that it seeks to avoid the necessity of obtaining a further development consent to secure a modification of an existing development consent (*Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177, [53] (***Buyozo***), citing *Houlton v Woollahra Municipal Council* (1997) 95 LGERA 201 at 203).

16 The relevant line of enquiry to determine whether a consent authority's power to modify a development consent has been enlivened is therefore whether the modified development is 'substantially the same' development as that which was originally approved. This position was confirmed by Preston CJ in *Arrage v Inner West Council* [2019] NSWLEC 85 (***Arrage***) (see [19])

17 In *Arrage*, Preston CJ clarified the correct "test" to be applied in determining whether a modified development is "substantially the same development" as the originally approved development involves the following (see [25] – [28]):

(1) A comparison between the two developments in question, being the development as originally approved and the development as modified;

(2) In undertaking that comparison, the *features* and *components* of the originally approved development are to be compared against the modified development, as opposed to the circumstances of the grant of the original development consent; and

(3) The features and components which inform the comparison should be the *material* or *essential* (both qualitative and quantitative) features of the originally approved development and the modified development and a comparison as to whether those elements are materially similar or "have the same elements": see *Feldkirchen* at [80]; *Moto Projects*, [56] and *Arrage*, [33] relating to the quantitative and qualitative features.

18 In relation to subparagraph (3) above, Preston CJ noted that this was the primary, but not the only way, in which to identify whether originally approved and modified developments are "substantially the same". His Honour noted that another way to undertake this exercise could be to consider the consequences of the development, such as the environmental impact of carrying out the modified development as oppose to the originally approved development: citing *Moto Projects (No 2) Pty Ltd v North Sydney Council* (1999) 106 LGERA 298 (***Moto Projects*** at [58], [59] and [64]); *Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8, 2; *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468. 475). However, if this approach was to be taken, it must be done by considering the essential features or elements from the originally approved and modified development, not from the circumstances in which the original development consent was originally granted (whether, for example, it was granted by agreement under a Court process).

19 For completeness, and in addition to the above, in *Buyozo*, the NSW Court of Appeal confirmed that the power to modify a development consent under section 4.55 of the EP&A Act only arises where some change is proposed to the *development* for which consent was granted (rather than the terms of the consent only). In *Buyozo*, the proponent sought to modify the consent by substituting a condition providing for a lesser amount for monetary contributions which it was required to pay pursuant s 7.11 of the EP&A Act. The Court of Appeal held that this proposed modification did not

effect any change to the *development* that was the subject of the development consent and therefore did not engage s 4.55(2): at [64].

Application of principles to Proposed Modification

20 The Modification Application proposes to amend Condition A5 of the Consent to permit the sign to be displayed for a longer term than currently permitted.

21 For the purposes of section 4.55(2), applying the principles in summarised in *Arrage*, we consider that the development as proposed to be modified by the Modification Application is clearly and uncontroversially "substantially the same" development as originally approved on the basis that:

(1) Both the development as currently approved under the Consent and as proposed to be modified under the Modification Application are structurally the same;

(2) Save for the duration of the Consent, both developments are also qualitatively the same in that they both relate to the same billboard in the same location with the dimension and the same third-party advertising content

(3) The material and/or essential feature or component of the development approved by the Consent is the ability to display third-party advertising on the billboard structure on the Glebe Silos. No change is proposed to this material and/or essential component of the development in the Modification Application; and

(4) In answer to the matters raised by the Court of Appeal in *Buyozo*, the Modification Application seeks to modify the physical development approved under the Consent by extending its duration. Such a modification proposes physical changes to the development rather than simply amending an administrative condition of the Consent.

22 Therefore, the development (as modified if consent was granted to the modification application) would be substantially the same as the original development in the sense that, but for its duration, it would share the same physical and qualitative features or nature as well as environmental impacts.

23 The conclusion that the development proposed in the Modification Application is "substantially the same" as the development approved in the Consent is consistent with the conclusion reached by the Land and Environment Court in the case of *LDC Opco Holding Company Pty Ltd v North Sydney Council* [2020] NSWLEC 1352 (***LDC***).

24 In that case *LCD* concerned a proposed modification of a time-limiting condition for a third-party advertising sign at 55 Lavender Bay Road, Milsons Point. In LCD, the Applicant sought to modify the consent to extend its duration. Applying *Arrage*, Commissioner Horton confirmed the Court's power to grant the modification under section 4.55(2) of the EP&A Act, holding:

> 69. The Applicant now seeks, as it has once before, to extend the period of time set out in Condition A2, not in a new development application, but in the form of a modification application. The parties are agreed, as am I, that the wording of a condition cannot displace the Applicant's rights to seek a modification in accordance with s 4.55 of the EPA Act.
>
> 70. **While I consider the time-limitation to be an essential feature or element in the development, the Applicant does not seek to modify those aspects of time that would modify the development itself.** Instead, the Applicant seeks to modify an aspect of the condition that would, in effect, **permit the continuation of the development in its current form**.
>
> 71. No change of hours of operation are proposed. No change in size, materials, colour, orientation, level of illumination or media is proposed.
>
> 72. For the reasons above**, I am therefore satisfied that the development to which the consent as modified relates is substantially the same development as the development for**

7 February 2025

NORTON ROSE FULBRIGHT

which consent was originally granted and before that consent as originally granted was modified.

25 Please let us know if you have any questions or would like to discuss any aspect of this advice.

Yours faithfully

Dr Nick Brunton
Partner
Norton Rose Fulbright Australia
Contact: Krista MacPherson