

Our reference Aaron Gadiel 32609339
Direct line +61 2 9931 4929
Email agadiel@nsw.gadens.com.au
Partner responsible Anthony Whealy



Gadens Lawyers
Sydney Pty Limited
ABN 69 100 963 308

18 September 2012

Private and Confidential

Meriton Property Services Pty Ltd
Level 11, Meriton Tower
528 Kent St, Sydney 2000

77 Castlereagh Street
Sydney NSW 2000
Australia

DX 364 Sydney

tel +61 2 9931 4999
fax +61 2 9931 4888

www.gadens.com.au

By email: walterg@meriton.com.au

Attention: Walter Gordon, Manager Planning and Development

Dear Walter

Advice on the modification application for City of Ryde development consent LDA2011/0485

We refer to your instructions to advise you as to whether the above modification application would result in "substantially the same development as the development for which consent was originally granted".

Summary advice and recommendation

In our view, based upon the facts set out below, we advise that:

- The quantitative and qualitative similarities between the development as originally approved, and the proposed modified development, support a conclusion that the latter will be substantially the same as the former.
- No important, material or essential features of the development are significantly impacted by the modification application.
- The development, as modified, will be substantially the same development as the development for which consent was originally granted.
- We see no legal reason why the modification application should not be granted.

Our advice may change if any of the facts or assumptions we have made (as set out in this letter) are incorrect.

Background

In providing this advice, we have assumed and understand the facts to be as follows:

- Development consent LDA2011/0485 (**the development consent**) was granted in March 2012.
- The consent relates to land at 84-92 Talavera Road, Macquarie Park, also known as Lot 43 DP 1153360 (**the site**).

9816542.3 AAG AAG

- The development consent approved:
 - a nine storey hotel building comprising 168 hotel rooms/suites and ancillary facilities (this building is known as **Block D**);
 - 232 residential apartments in three buildings of eight storeys (known as **Block A**, **Block B** and **Block C**);
 - car parking for 384 vehicles, comprising 315 residential parking spaces and 69 hotel parking spaces; and
 - landscaping works.
- The consent has been modified on two occasions since:
 - in May 2012, where various conditions of approval were amended to allow for staging of the development; and
 - in August 2012, in relation to the ground floor and basement levels, including parking provision and layout, vehicular access, bicycle parking and storage and waste storage areas.
- A further modification application was made in July 2012 (**the modification application**) under section 96(2) of the *Environmental Planning and Assessment Act 1979*.
- The modification application sought approval for the use of Block D and Block A to be changed from hotel and residential apartments, respectively, to serviced apartments. Consequential changes to physical form of the buildings and car parking are also proposed.
- The modification application is currently being assessed and has not been determined.
- The key numerical details of the development authorised by the original consent and the modification application are as set out below:

Key numerical measure	As originally approved	As per the modification application
FSR	2:1	1.92:1
Height	28.45 metres – 31.5 metres	28.45 metres – 31.5 metres
Number of buildings	4	4
Car parking	69 hotel parking spaces 315 residential parking spaces (384 in total)	88 serviced apartment spaces 237 residential parking spaces (325 in total)
Non-residential unit mix		
Hotel rooms	168 rooms	nil
Serviced apartments – studio	nil	63
Serviced apartments – 1 bed	nil	123
Serviced apartments – 2 bed	nil	13
Total serviced apartments	nil	199

Key numerical measure	As originally approved	As per the modification application
Residential unit mix		
Residential apartments – studio	26	25
Residential apartments – 1 bed	82	75
Residential apartments – 2 bed	124	82
Total residential apartments	232	182

- The original development application was publicly exhibited in September and October 2011. During this time only one submission was received. The submission, from a neighbouring land owner, objected to the development.

Detailed advice

The Land and Environment Court describes the section 96 modification provision as "beneficial and facultative". It is designed to assist constructively the modification process rather than to act as a substantive impediment to it. It facilitates consent modifications and the changes may involve beneficial cost savings and/or improvements to amenity.

A consent authority's decision to modify a development application ultimately needs to be made on its own merits. However, before this decision is made, the modification application must pass two legal tests imposed by the legislation.

Firstly, a proposal can only be regarded a modification if it involves "alteration without radical transformation". This first test rarely causes confusion. We see no basis for the proposed modification being characterised a radical transformation. In any event a development that satisfies the second test will invariably satisfy the first test.

Accordingly, it is appropriate to focus on the second test. The consent authority must be "satisfied" that the modified development will be "substantially the same development" as authorised by the original development consent.

To perform this test properly, two evaluative exercises need to be performed:

- 1. Comparison of the proposed modified development against the development as it was originally approved**
 - 1.1 It is necessary to compare the proposed modified development against the development as it was originally approved under the consent (disregarding any other modifications that were subsequently approved).
 - 1.2 In the frequently cited 1992 case, *Vacik Pty Ltd v Penrith City Council*, the Land and Environment Court held that "substantially" in the phrase "substantially the same development" means essentially or materially having the same essence.
 - 1.3 In a 1999 case *Moto Projects (No 2) Pty Ltd v North Sydney Council* the Land and Environment Court gave some additional guidance. The Court said that any comparison exercise cannot be undertaken in a sterile vacuum. Rather, the comparison involves a consideration of the quantitative and qualitative elements of the development. These elements must be considered in their proper contexts - which include the circumstances in which the development consent was granted.

Quantitative differences

- 1.4 The numerical differences, between the development as originally approved, and the proposed modified development, are set out in the table in the background section above.
- 1.5 The height remains unchanged and the floor space ratio has been only marginally reduced (from 2:1 to 1.92:1). The number of buildings remains the same. Car parking levels have not changed appreciably (and we see no reason why the traffic impacts of the modified development would be any greater than those of the originally approved development).
- 1.6 The site will be used more intensively for non-residential uses, and less intensively for residential uses, however, the change in the uses is not great. That is, a reduction in the number of residential apartments from 232 to 182 is a 22 per cent reduction. In our opinion, that is a relatively modest change, particularly in light of the limited changes to overall building form.
- 1.7 Similarly, the replacement of 168 hotel rooms with 199 serviced apartments clearly represents an increased focus on a non-residential use, but it is not, in our opinion, a material shift from the originally approved development.
- 1.8 Overall, it can be said that the modified development will not use the site more intensely than the originally approved development.
- 1.9 **In our opinion, the numerical similarities between the development as originally approved, and the proposed modified development, support a conclusion that the latter will be substantially the same as the former.**

Qualitative differences

- 1.10 The development was approved as mixed use development, namely a nine storey hotel building and three residential buildings. The modified development will still be a mixed use development – two serviced apartment buildings (of the same height as the originally approved structures) and two residential apartment buildings.
- 1.11 In terms of land use, a hotel has been replaced with serviced apartments. These uses are very similar in nature. While the proportion of the development that is a residential apartment development has been reduced, the mixed used nature of the development has been retained; and there will still be a significant number of residential apartments on the site.
- 1.12 In *Peter Duffield and Associates Pty Ltd v Canada Bay City Council* (2002) 124 LGERA 349 the Land and Environment Court considered an application to modify a development consent. The development, as approved, comprised three buildings:
 - (a) Building A which was to contain 32 serviced apartments;
 - (b) Building B which was to contain 22 residential units; and
 - (c) Building C which was to contain 6 residential units.
- 1.13 The modification application sought to change the mix of serviced apartments and residential units within the development, by changing 28 serviced apartments to residential units.

- 1.14 The Court observed that there was, in that case, a “fundamental difference between development comprising residential flats and development comprising serviced apartments”. The Court said that:

the magnitude of the change in the mix of serviced apartments and residential flats in the overall development is so substantial as to involve a qualitative change in the essential character of the approved development and not merely a quantitative change in the mix of the separate components of that development (ie residential flats and serviced apartments). ...

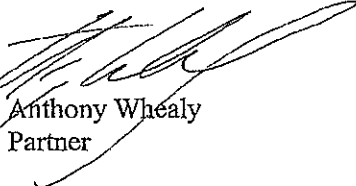

The change from an overall development comprising 32 serviced apartments and 28 residential flats (the original approval) to an overall development comprising 4 serviced apartments and 56 residential flats, involves both a qualitative and a quantitative change, in the approved development to such a **significant degree**, as to lead to the inevitable conclusion that the changed development is not substantially the same as the originally approved development (bold added).

- 1.15 The *Peter Duffield* case is an important authority for the proposition that ‘serviced apartments’ are a different land use from ‘residential flats’. It is **not**, in our view, an authority for the proposition that, in mixed use development, the mix between non-residential uses (such as serviced apartments) and residential uses must remain static.
- 1.16 In our opinion, central to the decision in *Peter Duffield* was the fact that the proposed modification **sought to replace 86 per cent of the serviced apartments with residential apartments**. This meant that the number of units devoted to a residential use would have increased from 47 per cent to 93 per cent of the overall development. This contrasts with the relatively modest 22 per cent reduction in the number of residential apartments proposed by the proposed modification in the present case.
- 1.17 In our view, the difference between *Peter Duffield* and the present case is clear. In *Peter Duffield*, a genuine mixed use development was to be converted into a largely residential development, while in the present case, residential and non-residential uses will remain well balanced.
- 1.18 **In our opinion, the qualitative similarities between the development as originally approved, and the proposed modified development, support a conclusion that the latter will be substantially the same as the former.**
2. **Identification of any important, material or essential features of the development that are impacted by the modification application**
- 2.1 While a consent authority will need to consider the whole of the developments being compared, a proposed modification may fail the “substantially the same” test if an **important, material or essential** feature of the originally approved development is changed in a significant way.
- 2.2 We have not identified any important, material or essential aspect of the originally approved development that will be so changed. In fact, the modification application has clearly sought to preserve the material elements of the originally approved development.
- 2.3 We note that there was only one objector when the original development application was assessed, and we have seen no evidence that the objection would have been any more credible had the original development application reflected the present modification application.
- 2.4 **In our opinion, no important, material or essential features of the development are impacted by the modification application.**

We see no legal reason why the modification application should not be granted

Please contact Aaron Gadiel on (02) 9931 4929 if you wish to discuss any of the issues raised in this letter.

Yours sincerely



Anthony Whealy
Partner
Aaron Gadiel
Director

Accredited Specialist Local Government & Planning