

14 April 2016

Our Ref: BER004/4001

Stephen J Beattie
Manager Planning and Development Services
North Sydney Council
200 Miller Street
North Sydney, NSW 2060

Dear Mr Beattie

Berrys Bay Marina Development - Development Application 010.2015.260.001

We act for Berrys Bay Marina Company Pty Ltd (**Applicant**) in relation to Development Application 010.2015.260.001 (**the DA**) for the proposed marina development and associated facilities at Balls Head Road, Waverton and the adjoining Berrys Bay waterway.

The Applicant seeks to amend the DA proposal in a minor way to include a boardwalk that will connect the main part of the proposed marina to the existing Dolphin Wharf and to delete an access point from the marina to Carradah Park (Lot 22 in DP1048933). Accordingly, we refer to amended architectural drawings DA002 – Proposed Site Plan, DA 1111 – Proposed Marina Plan Zone 1A, DA 1112 – Proposed Marina Plan Zone 1B and DA4000 – Site Plan – Presentation DA and kindly request that Council agree to assess the amended plans as a replacement to the plans previously lodged with Council as part of the DA. We note that the Applicant has also prepared updated technical marina drawings prepared by Stenaid Services and a Supplementary Statement prepared by Clouston Associates which form part of the amended proposal.

Pursuant to clause 55(1) of the *Environmental Planning and Assessment Regulation 2000 (EP&A Reg)*, a development application may be amended or varied by the applicant at any time before the application is determined. As the DA is yet to be determined, we consider it is open to Council to accept the amended plans and assess the amended proposal.

Clause 55(2) of the EP&A Reg requires that if an amendment or variation results in a change to the proposed development, the application to amend or vary the development application must have annexed to it written particulars sufficient to indicate the nature of the changed development. To satisfy this requirement, the letter from JBA provides greater detail and clarifies the minor nature of the changes proposed. The JBA letter concludes that due to the minor nature of the changes, there is no requirement for Council to advertise the amended proposal.

Although it is a discretionary matter for Council as to whether it will agree to accept the amendment to the DA, the Land and Environment Court has consistently applied a wide and facilitative interpretation of the scope of the power conferred by clause 55 of the EP&A Reg. For example, in *Ebsworth v Sutherland Shire Council* [2005] NSWLEC 603, in considering whether a development application should be allowed to be amended, Talbot J said at [40]

[40] It is my view that reg 55 is beneficial and facultative and intended to facilitate the making of amendments on two accounts. Firstly to enable the applicant for consent to respond to any issues identified by the council or objectors and secondly to encourage a consent authority to solicit a better outcome. A broad approach to the application of reg 55 is therefore appropriate.

In *Radray Constructions Pty Limited v Hornsby Shire Council* [2006] NSWLEC 155, Jagot J quoted the above extract from Ebsworth and said at [8] and [9]:

[8] I also consider that a broad approach to both the scope and application of cl 55 is appropriate. Clause 55 enables any application to be amended or varied with the agreement of the consent authority at any time prior to determination. An amendment or variation, as cl 55(2) contemplates, may result in change to the proposed development. The extent of change able to be authorised by agreement of the consent authority or by the Court exercising that function on appeal (and which does not result in the conversion of the application into an original application) will depend upon the facts of the particular case (including, for example, the nature of the site and the nature and characteristics of the proposed development).

[9] The availability of the power is to be determined having regard to the beneficial and facultative nature of the provision. That is, I consider that cl 55 ought to be construed so as to give "the widest interpretation which its language will permit" (Bridge Shipping Pty Ltd v Grand Shipping SA(1991) 173 CLR 231at 260–261 per McHugh J referring to Holmes v Permanent Trustee Company of New South Wales Ltd(1932) 47 CLR 113at 19 per Rich J).

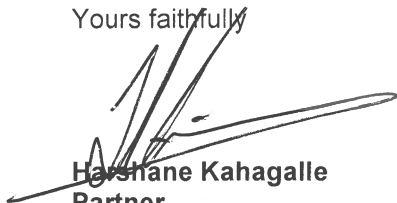
It is clear from the amended plans that the amended proposal does not alter the nature of the proposed development such that it becomes an original application. This is further clarified in the letter from JBA.

By agreeing to accept the amended plans, Council would allow the Applicant to respond to an issue that was raised at the JRPP meeting held on Thursday 7 April 2016, namely the potential for conflict between users of the Dolphin Wharf who may use buggies or trolleys to access the Dolphin Wharf through Carradah Park and recreational users of Carradah Park. The amended proposal provides a single access point to the Dolphin Wharf via a boardwalk from Arm C of the proposed marina and removes the potential for conflict. Accordingly, allowing the amended plans to be assessed as part of the DA would result in a better outcome that responds to and addresses the concerns of the community and Council.

We therefore consider that it is both within the power of Council to accept the amended plans and assess the amended proposal and that it is a reasonable and appropriate exercise of the functions of Council to do so.

Please do not hesitate to contact us if you have any questions in relation to the above.

Yours faithfully



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