
Legal opinion – Revised Beecroft Project

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Legal opinion

Revised Beecroft Project

Executive summary

Development consent has been obtained for the redevelopment of a consolidated site on the corner of Beecroft Road and Hannah Street in Beecroft. The consolidated lot excludes an isolated site with frontage to Beecroft Road for a distance of 15 metres. The formerly isolated site is now to be included in the redevelopment which has resulted in an amended proposal.

We have reviewed the amended proposal and in our view, the amended proposal is substantially the same development as the approved development. Therefore the amended proposal can be approved can be obtained by way of a modification of the current development consent pursuant to section 96(2) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.

Background

1 Development Consent

- 1.1 On 17 December 2014, Hornsby Shire Council (**Council**) granted development consent for development application DA/1006/2014 being for the demolition of the existing Beecroft Module Shopping Centre and adjoining commercial building and the construction of a mixed use commercial and residential development comprising a supermarket, speciality shops, commercial premises and 122 dwellings at 87-91 & 95 Beecroft Road and 16-24 Hannah Street, Beecroft (**Development Consent**).
- 1.2 The Development Consent did not include 93 Beecroft Road (the **Isolated Lot**) which at that time was under separate ownership and whose owners opposed the granting of the Development Consent.
- 1.3 Since Development Consent was granted, the Isolated Lot has been purchased by the developer of 87-91 & 95 Beecroft Road and 16-24 Hannah Street, Beecroft.
- 1.4 As a result the developer proposes to include development of the Isolated Lot as part of the approved development the subject of the Development Consent. To achieve the inclusion of the Isolated Lot as part of the development the Development Consent will have to be modified.

Instructions

2 Question

- 2.1 We are instructed to advise as follows:
 - (a) Can the Development Consent properly be modified to include the Isolated Lot?; and

- (b) If the answer to (a) is no, what is the appropriate approval pathway for obtaining consent for the inclusion of the Isolated Lot in the redevelopment?

3 Outline of amendments

- 3.1 We are instructed that the inclusion of the isolated lot will result in the following amendments to the approved development:

- (a) Inclusion of an additional parcel of land, being the isolated site which has an area of 147.1m² to the approved site area of 2,330m² (5% increase);
- (b) Additional floor space across the development as follows:
 - (i) additional 469 m² of residential floor space (5% increase);
 - (ii) additional 126 m² of retail floor space (2.5% increase); and
 - (iii) decrease of 64 m² of commercial floor space (6.4% decrease);
- (c) 32 additional car spaces;
- (d) 8 additional residential units; and
- (e) 2 additional retail units.

- 3.2 We note as a result of the proposed modification the mix of apartments between 1, 2 and 3 bedroom apartments is similar to that approved by the Development Consent, albeit with a slightly increased proportion of 1 bedroom apartments.

	Approved	Proposed
1 bedroom:	70 (57%)	80 (62%)
2 bedroom:	33 (27%)	30 (23%)
3 bedroom:	19 (16%)	20 (15%)

- 3.3 The principal physical difference between the approved development and proposed development will be the street frontage on the western elevation along Beecroft Road. The proposed development will result in an additional 15 metres of the new building presenting to Beecroft Road. It must be noted there is an existing building located on the isolated site and other parts of the approved development behind the isolated site would be visible from Beecroft Road if the development is constructed as currently approved.
- 3.4 We are instructed that that proposed development complies with all relevant provisions of the Hornsby Development Control Plan 2013, particularly in relation to setbacks and car parking.

Advice

4 Environmental Planning and Assessment Act 1979

- 4.1 Section 96(2) of the *Environmental Planning and Assessment Act 1979* (EPA Act) provides that:

'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)" (our emphasis).'*

- 4.2 The Land and Environment Court has considered the meaning of the phrase "*substantially the same development*" on many occasions as detailed below in paragraphs 5 and 6.

5 Inclusion of Isolated Lot

- 5.1 In *Scrap Realty Pty Ltd v Botany Bay City Council* [2008] NSWLEC 333, Preston CJ found that there is power under section 96(2) to modify a development consent by the inclusion of an additional parcel of land, provided the consent authority is satisfied that the development as modified is substantially the same development for which consent was originally granted.

- 5.2 His Honour said:

"There obviously will be questions of fact and degree in ascertaining whether the development before and after modification can be said to be substantially the same. Nevertheless, an expansion of the area on which development is carried out by adding land not the subject of the original consent is not inherently outside the concept of modification of the development under s 96."

6 Substantially the same development

- 6.1 There are many decisions of the Land and Environment Court relating to whether an amended development is substantially the same '*development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted.*' While these decisions provide useful guidance, it is important to note that modifications are a '*question of fact*' and each application must be assessed on its own merits and the subject matter of the modification and its effect: *North Shore Property Developments Pty Ltd v Lane Cove Council* [2013] NSWLEC 1140.
- 6.2 The finding of fact that a modified development is substantially the same as the original approved development requires a comparison between the development as approved and the development as proposed to be modified: *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280.
- 6.3 The comparative task involves both a quantitative and qualitative assessment of the differences. The comparative task needs to assess not only the physical features of the changes, but also the environmental impacts of the changes.

7 Comparison and assessment

Quantitative assessment

- 7.1 Section 3 of this advice is a comparison of the development as approved under the Development Consent and the development proposed to be modified by inclusion of the Isolated Lot. It also includes a quantitative assessment of the differences.
- 7.2 The development as proposed to be modified will still be a mixed use commercial and residential development comprising a supermarket, speciality shops, commercial premises and residential dwellings. The proposed modifications to the approved development do not in any way alter a material or essential aspect of the approved development.
- 7.3 The proposed increases in gross floor area are a maximum of 5% and are directly reflective of the inclusion of the additional site within the development envelope, which represents an additional site area of 5% or 147.1m².
- 7.4 Whilst the proportion of 1 bedroom apartments has increased, in our opinion this is not a material change and is substantially the same as the approved development the subject of the Development Consent.
- 7.5 In our view, on a quantitative assessment of changes, the proposed development is substantially the same as the approved development.

Qualitative assessment

- 7.6 A qualitative assessment must consider the environmental impacts of the proposed modifications
- 7.7 The key physical difference between the approved development and the proposed development is its presentation to Beecroft Road. The inclusion of the isolated site will result in additional building along the Beecroft Road frontage, although we note that there is already an existing building on the isolated site, albeit at a reduced height from that which is now proposed.
- 7.8 Although the proposed development will result in additional building along the frontage, this does not necessarily mean that the environmental impact of the additional building will be negative. In our view, the inclusion of the Isolated site in the proposed development is likely to have a positive effect on the Beecroft Road frontage when compared to the presentation of the existing building on the isolated site with the approved development built around it.
- 7.9 This conclusion is supported by the Assessment Report adopted by the JRPP which noted that *'the isolation of No. 93 Beecroft Road is not the preferred planning outcome, in this instance it is considered the applicant has undertaken actions to incorporate the site in the development.'* (at 2.12.3)

Other relevant matters

- 7.10 We note that the development application subject of the Development Consent also included indicative plans demonstrating the inclusion of the isolated site in the proposal, should it be incorporated into the development in the future. The amended plans which we have reviewed are generally consistent with those Indicative plans.
- 7.11 We also note that the Report to the JRPP prepared by Council Officers expressly states that *'[s]hould the application be approved and the isolated site be acquired by the applicant, the site could be included in the development, subject to a Section 96 Application to modify the development consent.'* (at 2.12.3)

- 7.12 Whilst this is obviously not determinative of the position at law, in view this statement from the Council in a report adopted by the JRPP supports our conclusion.

Recommendation

In our opinion, the modified development is substantially the same as the approved development and may be approved pursuant to section 96(2) of the EPA Act as an application to modify the existing Development Consent.

We recommend that an application to modify the Development Consent is lodged with Hornsby Council for assessment and approval pursuant to section 96(2) of the EPA Act.

We are happy to provide a short letter to Hornsby Council extracting the relevant sections of this advice for the purposes of lodgment with the modification application if required.

