BBF TOWN PLANNERS

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20th October 2017

The General Manager
Northern Beaches Council
725 Pittwater Road,
Dee Why 2099

Dear Sir,

REQUEST FOR SECTION 96(1A) MODIFICATION OF STAGE 2 DEVELOPMENT CONSENT REFERENCE DA2014/1093

23-29 PACIFIC PARADE, DEE WHY

STATEMENT OF ENVIRONMENTAL EFFECTS

1. INTRODUCTION

The Sydney East Joint Regional Planning Panel (JRPP) granted Development Consent to DA2013/1519 for a Staged Development Application (DA) under Section 83 of the Environmental Planning and Assessment Act including:

- A concept approval for two residential flat buildings (one fronting Studee Parade and one fronting Pacific Parade) to be constructed in separate Stages on the site; and

- Consent for the re-subdivision of the land into two parcels (one with frontage to Sturdee Parade and one with frontage to Pacific Parade) and construction of the Stage 1 residential flat building comprising 98 Apartments and basement car parking, fronting Sturdee Parade as well as demolition of existing structures and tree removal over the entire site.

On the 24th March, the JRPP (JRPP No.2014/SYE127) resolved to approve a Stage 2 Development Application (DA2014/1093) at 23-29 Pacific Parade, Dee Why, pursuant to the Stage 2 Concept Approval (DA2013/1519). The Stage 2 development application proposed a six storey residential flat building comprising the following:

- 103 residential apartments comprising 2 x studio apartments, 80 x 1 bedroom apartments and 21 x 2 bedroom apartments;

- Two levels of basement car parking comprising 134 car spaces and 57 bicycle spaces.

A subsequent Section 96(2) Modification Application was granted consent on the 6th April 2016, for modifications to the approved floorplans, apartment mix, revised basement car parking and servicing layout and modified window locations and detailing. A further Section 96(1A) Modification Application was granted consent on the 20th April 2017 for minor design modifications to the approved drawings pursuant to Condition 1 of the Stage 2 DA Approval 2014/1093.

This S96 Application relates to the as constructed heights of the lift overruns, constructed roof parapet level and location of approximately sixty (60) air conditioning units as located on the roof of the building and seeks to resolve matters pertaining to Councils Order dated 2nd August 2017 (EPA 2017/0125). This application reflects the feedback provided and matters as discussed at the pre-lodgement meeting held with Council on the 10th August 2017 (PLM2017/0080).

2. PROPOSED MODIFICATIONS

The design modifications sought is to Condition 1 of the notice of determination (DA2014/1093) to refer to the modified drawings accompanying this application replacing the approved drawings within the schedule forming condition 1.

Specifically, the modifications relate to:

- Relocation of Air Conditioning Units from basement to the Roof Level;
- As constructed roof parapet level (approved at RL 42.90, constructed at 43.140);
- As constructed lift over-run's (Lift overrun identified as 01 approved at RL 42.90, constructed at RL 43.140 and Lift overrun 02 approved at RL approved at RL 42.90 constructed at RL 43.110) .

The revised details are contained within the architectural drawings prepared by Marchese Partners which are referenced as follows:

- Roof Plan Drawing DA 1.10, Revision O, dated 12/10/17
- North and South Elevation Plan Drawing DA2.01, Revision O dated 12/10/17
- East and West Elevation Plan Drawing DA2.02, Revision O dated 12/10/17
- Section Plan DA3.01, Revision O dated 12/10/17
- Section Plan DA3.02, Revision O dated 12/10/17

A presentation document with the proposed screening and views analysis prepared by Marchese Partners also accompanies the application, dated 20/10/17.

An acoustic report prepared by GHD details the noise emission from the operation of the rooftop mechanical plant, based on noise modelling and assessment should achieve the relevant noise emission criteria presented in Section 4 of the report and should not adversely affect the existing or future amenity of the surrounding sensitive receivers.

A mechanical services design report prepared by All Seasons Air Pty Ltd accompanies the S96 Application. The report demonstrates that all options, including locating the air conditioning units within the basement were explored by All Seasons Air Pty Ltd to avoid installing the air conditioning units on the roof of the building. Locating the air conditioning units within the basement was not feasible due to the heat generated from the units and car park head heights, which would have to increase to be able to increase the capacity of the carpark ventilation system. On this basis it was not feasible to locate the air conditioning units within the basement car park.

Where possible, air conditioning units were installed on the balconies, however this was not possible for the units which contain winter gardens. The air conditioning units require permanent natural ventilation, opened to the atmosphere to comply with the manufacturers specification and Australian Standard 1668.2(2012). The enclosed winter gardens do not meet the required ventilation for outdoor condensers.

For the reasons identified above as detailed in the mechanical services design report, the only option was to locate the air conditioning units on the roof of the building for the apartments that contain winter gardens.

3. APPLICATION FOR MODIFICATION

The application is made pursuant to Section 96 (1A) of the Environmental Planning & Assessment Act 1979. Section 96 (1A) of the Act provides:

> *(1A) Modifications involving minimal environmental impact*
>
> *A consent authority may, on application being made by the applicant or any other person entitled to act on a consent authority and subject to and in accordance with the regulations, modify the consent if:*
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> *a) It is satisfied that the proposed modification is of minimal environmental impact, and*
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> *b) It is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as modified (if at all), and*
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> *c) It has notified the application in accordance with the application in accordance with:*
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> *(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 any period prescribed by the regulations or provided by the development control plan, as the case may be.

In this instance, it is not considered the proposed minor modifications to the approved height of the lift overruns and roof parapet and location of the air conditioning units on the roof of the building substantially alters or changes the development as consented to an extent that it would not be considered to be the same, or substantially the same development. The land use outcome remains as per the approved land use. The building form, bulk and scale remain within the ambient of the approved DA.

A consideration of whether the development is substantially the same development has been the subject of numerous decisions by the Land & Environment Court and by the NSW Court of Appeal in matters involving applications made pursuant to S.96 of the Act. *Sydney City Council v Ilenace Pty Ltd (1984) 3 NSWLR 414* drew a distinction between matters of substance compared to matters of detail. In *Moto Projects (No.2) Pty Ltd v North Sydney Council (1999) 106 LGERA 298* Bignold J referred to a requirement for the modified development to be substantially the same as the originally approved development and that the requisite finding of fact to require a comparison of the developments. However, Bignold noted the result of the comparison must be a finding that the modified development is 'essentially or materially' the same as the (currently) approved development. Bignold noted;

"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 sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the development being compared in their proper contexts (including the circumstances in which the development consent was granted)."

In *Basemount Pty Ltd & Or v Baulkam Hills Shire Council NSWLEC 95* Cowdroy J referred to the finding of Talbot J in *Andari – Diakanastasi v Rockdale City Council* and to a requirement that in totality the two sets of plans should include common elements and not be in contrast to each other. In *North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468; 97 LGRERA 443* Mason P noted:

"Parliament has therefore made it plain that consent is not set in concrete. It has chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity. The consent authority can withhold its approval for unsuitable applications even if the threshold of subs (1) is passed.

I agree with Bignold J in Houlton v Woollahra Municipal Council (1997) 95 LGRERA 201 who (at 203) described the power conferred by s.102 as beneficial and facultative. The risk of abuse is circumscribed by a number of factors. Paragraphs (a), (b) and (c) of subs (1) provide narrow gateways through which those who invoke the power must first proceed. Subsection (1A) and subs (2) ensure that proper notice is given to persons having a proper interest in the modified development. And there is nothing to stop public consultation by a Council if it thinks that this would aid it in its decision making referable to modification. Finally, subs (3A),

coupled with the consent authorities' discretion to withhold consent, tend to ensure that modifications will not be enterprised, nor taken in hand, unadvisedly, lightly or wantonly. Naturally some modifications will be controversial, but decision making under this Act is no stranger to controversy."

Senior Commission Moore in *Jaques Ave Bondi Pty Ltd v Waverly Council (No.2) (2004) NSWLEC 101* relied upon *Moto Projects* in the determination, involving an application to increase the number of units in this development by 5 to a total of 79. Moore concluded the degree of change did not result in the a development which was not substantially the same, despite the fact that in that case the changes included an overall increase in height of the building. Moore relied upon a quantitative and qualitative assessment of the changes as determined by the Moto test.

In my opinion a quantitative and qualitative assessment of the application is that the development remains substantially the same. The approved land use is not altered and the modifications (form, bulk and scale) as consented remain within the ambient of the approval.

It is considered that there is no statutory impediment to the making and determination of this application.

4. MATTERS FOR CONSIDERATION PURSUANT TO SECTION 79C(1) OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 AS AMENDED

The following matters are to be taken into consideration when assessing an application pursuant to Section 79C of the Environmental Planning and Assessment Act 1979 (as amended):

"The provision of any planning instrument, draft environmental planning instrument, development control plan or regulations"

4.1 Warringah Local Environmental Plan 2011

Building Height

Pursuant to Clause 4.3 of the WLEP 2011, the height of any building on the land shall not exceed 21 metres. As demonstrated on the section plans prepared by Marchese and Partners, the lift overrun, roof parapet and air-conditioning units result in a very minor breaches of the 21 metre height limit, as the height plane intersects through the site.

The objectives of the building height control are identified as follows:

a) *To ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
b) *To minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
c) *To minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

d) To manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

Having regard to the stated objectives it is considered that strict compliance is both unreasonable and unnecessary for the following reasons:

- Despite the variation proposed to the building height control, the lift overruns and air conditioning units are not visible from the street. This is demonstrated in the street view photos contained in the Marchese Partners presentation document.

- The lift overruns, air conditioning units and roof parapet height does not unduly add to the overall bulk, scale and appearance of the building as presented to the street. The height is entirely consistent with the built form characteristics established by neighbouring developments and development generally within the sites visual catchment.

- The view loss analysis prepared by Marchese Partners demonstrates that a view sharing scenario is maintained to neighbouring residential apartments in Sturdee Parade and Dee Why Grand. Accordingly, we have formed the considered opinion that a view sharing scenario is achieved having regard to the Planning Principle in the matter of *Tenacity Consulting v Warringah [2004] NSW LEC 140*.

- Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council (2005) NSW LEC 191* I am of the opinion that the impacts arising from the building height to neighbouring apartments are acceptable and that most observers would not find the height of the proposed development offensive, jarring or unsympathetic in a streetscape context nor the built form characteristics of development within the sites visual catchment. Accordingly, it can be reasonably concluded that the proposal is compatible with its surroundings.

- Having regard to the planning principle established by *Veloshin v Randwick City Council [2007] NSWLEC 428* this is not a case where the difference between compliance and non-compliance is the difference between good and bad design.

- Having regard to *Four2Five Pty Ltd v Ashfield Council (2015) NSW LEC 1009* I am of the opinion that compliance with the height of building standard contained within Clause 4.3 of WLEP 2011 is unreasonable and unnecessary in the circumstances of this application and the site given the relationship of the proposed height of the building to its neighboring sites; the absence of environmental impacts associated with the view impact or sunlight access to neighbouring apartments.

Given recent Land and Environment Court caselaw and that this application constitutes a Section 96 Modification Application, a formal Clause 4.6 request to vary the building height development standard is not required.

4.2 Warringah Development Control Plan 2011

Building Envelope

The subject site is within the area of Part G Special Area Controls and to which the specific provisions of part G2 of the DCP apply. Clause G8 requires that:

> *"the building height is to fall within an envelope defined by a sight line taken from 1.5 metres above ground level at the footpath on the opposite side of the street, intersecting with the maximum street frontage height and on to where that line intersects with the maximum allowable height".*

As discussed above the section plans demonstrate minor breaches to the 21 metre building height plane, by virtue of the lift overruns, air conditioning units and roof parapet. As discussed above in relation to the building height control and demonstrated in Marchese Partners presentation document, the lift overruns and air conditioning units are not visible from the streetscape. By virtue of the location of the equipment on the roof, these elements to not adversely impact on the public presentation of the building as viewed from the streetscape. On this basis, we consider the minor variation to the building envelope control to be satisfactory.

View Sharing

Pursuant to Part D7 of the DCP all new development is to be designed to achieve a reasonable sharing of views available from surrounding and nearby properties.

An assessment of the impact of the lift overruns and air conditioning units on the established views from neighbouring apartments in Sturdee Parade and Dee Why Grand has been undertaken and is contained in the presentation document prepared by Marchese Partners.

Having regard to the principles established by the NSW LEC in Tenacity Consulting v Warringah an assessment with respect to view impact has been undertaken as follows:

Step 1 – Assessment of views to be affected

The judgement held that water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views.

It is considered that the established views constitute district, ocean and Long Reef headland views, obtained over the subject site. The majority of the established views to neighbouring apartments both in Dee Why Grand and Sturdee Parade will be impeded by the Meriton (Dee Why Town Centre) redevelopment, the building outlines as indicated in the Marchese Partners view analysis.

Step 2 – Consider from what part of the property the views are obtained

The second step in the judgement is to consider from what part of the property the view is obtained. Views are obtained from upper floor apartments within Studee Parade and Dee Why Grand over the subject site towards the ocean and Long Reef Headland. Photographs of these views are provided in the Marchese Partners View Analysis document.

Step 3 – To assess the extent of the impact

The impact of the proposed air conditioning units and lift overrun is considered to be negligible to minor, to both upper floor apartments situated within Dee Why Grand and Sturdee Parade. The proposed air conditioning units and lift overruns must be considered in context to the Meriton Town Centre redevelopment which poses a far more significant impact to view loss, than the air conditioning units and lift overuns.

Step 4 – To assess the reasonableness of the proposal that is causing the impact

On the basis the air-conditioning units and lift overruns do not impede on established views from neighbouring apartments the proposal is considered to be reasonable.

Noise

Pursuant to Part D3 of the DCP, An acoustic report prepared by GHD details the noise emission from the operation of the rooftop mechanical plant, based on noise modelling and assessment should achieve the relevant noise emission criteria presented in Section 4 of the report and should not adversely affect the existing or future amenity of the surrounding sensitive receivers.

Access to Sunlight

Pursuant to Part D6 of the DCP the location of the air-conditioning units and lift overrun will not cast additional shadow to any neighbouring developments. The shadow will be cast on the roof of the development itself. In this regard we are of the opinion that shadow diagrams are not warranted.

Visual Impact – Building Bulk

Pursuant to Clause D9, the proposed air conditioning units are to be screened by a perforated metal to match the screening already located around the stair cores in the central building courtyard and the lift over-runs located to the roof. This will provide a visual consistency in terms of materials and finishes on the building and screen the air conditioning units from neighbouring apartments located in Dee Why Grand and Sturdee Parade.

As mentioned previously, the air conditioning units and lift overruns are not visible from the streetscape and therefore do not add to the bulk and scale of the building as viewed from Pacific Parade. The proposal is considered to accord with the outcomes pursuant to Clause D9 of the DCP.

4.3 State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development and the Apartment Design Guide

The residential apartments and layout of the building, as constructed, remain unaffected as a consequence of the modifications as sought. The approved developments performance when assessed against the relevant provisions of SEPP 65 and the ADG are not compromised as a result of the proposed modifications.

5.0 CONCLUSION

Pursuant to section S.96(1A) of the Environmental Planning and Assessment Act 1979 the consent authority can be satisfied that the modified consent as sought by this submission is substantially the same development as referred to in the original application.

The proposed modifications do not substantially alter or change the development as consented to an extent that it would not be considered, to be the same, or substantially the same development. The land use outcome remains as per the approved land use. The building form, bulk and scale of remain within the intent of the original approval.

We would be pleased to clarify or expand upon this submission as maybe necessary.

Yours sincerely

Kate Fleming
Director
BBF Town Planners