

SECTION 96(2)

Address: Lot 4012 Driftway Drive, Pemulwuy

Proposal: Multi Dwelling Housing

24 NOVEMBER 2017

No. 6 Forestwood Crescent
WEST PENNANT HILLS
NSW 2125 AUSTRALIA

m: 0409 990 464
e: dmps@me.com
w: dmps.com.au

24 November 2017

Cumberland Council
PO Box 42
MERRYLANDS NSW 2160

Attention: Sohail Faridy

**DEVELOPMENT CONSENT NO. DA/2014/616/1
LOT 4012 DRIFTWAY DRIVE, PEMULWUY**

Dear Sohail,

Minutes of the Cumberland Independent Hearing & Assessment Panel Meeting of 8 November 2017 are reproduced as follows:

Resolved unanimously by the Cumberland Independent Hearing and Assessment Panel (CIHAP) that the Panel does not consider the modification to fall within section 96 (1A) of the Environmental Planning and Assessment Act 1979 as being “of minimal environmental impact”. Therefore the Panel does not have the power to determine it.

Following consultation with Council officers, we wish to amend the nature of our application and request that the subdivision component of our application be withdrawn from consideration and request that our application be considered pursuant to Section 96(2) of the Environmental Planning and Assessment Act 1979 (EPAA). The principle aims of the modifications is to:

- Stage conditions of the development consent, allowing construction of the approved multi dwelling housing development to be undertaken in stages;
- Reduce the number of visitor parking spaces servicing the proposed development; and
- Reconfigure the proposed at grade carriageway to service the intended development staging.

Proposed Modification

Section 96(2) of the EPAA enables Council to consider and consent modifications to development consents if:

- 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*
- it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) 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*

Staging Development Consent Conditions

The primary purpose of this modification is to seek the staging of conditions relating to the development consent, not being staging of the development consent consistent with the meaning of Section 83B of the EPAA.

It is proposed to insert a condition of development consent that permits the staging of construction according with the attached Staging Report (Revision C) and Staging Plan (Revision C). The Staging Report would enable issue of separate Construction and Occupation Certificates for each stage of development, consistent with the following:

Stage 1: Construction of a multi dwelling housing development comprising 16 x 3 storey dwellings, driveway and at grade level parking for 32 cars. Stage 1 would have the ability to commence construction and be occupied prior to the commencement of works relating to Stage 2.

Stage 2: Construction of a multi dwelling housing development comprising 41 x 3 storey dwellings and basement level parking for 86 cars.

Details of the relevant conditions of development consent applicable to each stage are provided in the attached Staging Report.

Section 94 Contributions

It is requested that Council modify as appropriate the Section 94 contributions applicable to each stage of the proposed development (Condition No. 10).

Carraigeway Reconfiguration

It is proposed to reconfigure the at grade parking arrangements and to construct four (4) visitor parking spaces as part of Stage 1, consistent with the prescribed minimum number of visitor parking spaces for 16 townhouses as contained in Holroyd Development Control Plan 2013 – Part A General Controls (0.2 visitor spaces per dwelling).

The carriageway and turning head provided will be constructed and permit continued use by residents and visitors of Stage 1 of the development, and any service vehicles that would by necessity attend this site.

Fifteen (15) additional visitor spaces will be constructed at grade adjacent the carriageway in proposed Stage 2.

Impact of Proposed Modifications

Construction Nuisance

The staging of development consent might have the effect of elongating the period of construction work contemplated by the existing development consent. However, the applicant would be well within their rights to subdivide the land into smaller lots (minimum prescribed lot size is 900m²) and submit separate development applications for the development of smaller 'stages' of development extending over a much greater period of time.

The modification proposed is substantially the same development and will have minimal environmental impact. Suitable conditions have been imposed upon the development consent to control the impacts of construction, including the requirement for a Construction Management Plan to be prepared by a suitably qualified consultant to address such issues as hours of work, traffic control, noise and dust during construction.

Car Parking

Despite reconfiguration of the carriageway as proposed, car parking for development within both Stage 1 and Stage 2 will continue to satisfy the minimum prescribed requirements of the DCP, despite a decrease in visitor parking availability upon the site. This will however reduce the area of hardstand upon the site and increase the area available for infiltration of rainwater and the provision of open space and landscaping.

It is further contended there is ample on street parking available to cater for visitors attending the proposed multi dwelling housing development owing to the site's large frontage.

The modification proposed is considered to be substantially the same development. The amended proposal provides a total of only 23 visitor spaces in lieu of the 29 approved spaces:

- 4 of the spaces will be provided at grade and available to the townhouses in proposed Stage 1.
- 15 of the spaces will be provided at grade and available to the townhouses in proposed Stage 2.
- 4 visitor spaces will be provided within the basement in proposed Stage 2.

Part A of Holroyd Development Control Plan 2013 requires a minimum of 0.2 visitor spaces per dwelling. It is further noted that Part P of the DCP (Pemulwuy Residential Controls) has the objective of 'encouraging the reduction in the level of vehicular traffic by reducing car parking requirements'.

A total of 57 dwellings are approved, requiring the provision of a minimum 11.4 (12) visitor parking spaces. A total of 23 visitor parking spaces will be provided by the modified proposal, which is double the minimum required provision.

Communal Open Space

Communal open space is not required to be provided for the townhouses in Stage 1 of the approved development, as there is no prescriptive requirement in Part P of the Holroyd Development Control Plan 2013. Staging of the development consent conditions will therefore have no impact upon the amenity of residents within Stage 1 of the development concerning the availability of communal open space. Similarly, there is no minimum prescribed requirement for communal open space to be provided for Stage 2 of the proposed development.

The application remains compliant with the prescribed requirements of the DCP.

It is however envisioned, consistent with the design criteria provided by Objective 3D-1 of the Apartment Design Guide (ADG), that should Lot 2 be developed for the purpose of a residential apartment development, any such development would provide a minimum 25% of the site area as communal open space, with 50% direct sunlight to the principal usable part of the communal open space for a minimum of 2 hours between 9am and 3pm at mid winter.

Garbage Collection

The individual owners or body corporate, as may be appropriate, for each stage of development will be responsible for movement of the waste and recycling containers to the footpath or approved temporary waste holding area for collection, and the return of waste and recycling containers to designated waste storage areas according with Council's direction and requirements.

Section 96(2) of the EPAA

The effect of Section 96 of the EPAA is that an approved development may be modified, provided the development as modified will remain 'substantially the same development' as originally approved. If so, the application is legally capable of being approved, but must also be assessed on a merit basis in accordance with the heads of consideration mandated by Section 79C of the EPAA, including the provisions of any applicable planning instruments or development control plan.

The comparison for the purposes of the Section 96 'substantially the same development' threshold test is between the approved development (DA/2014/616/1) and the proposed modification (DA/2014/616/2).

The changes sought by this application relate to modifying the conditions of the development consent to allow construction in stages; minor amendments to the carriageway configuration; and a reduction in the number of visitor parking spaces.

As a general principle, the Courts have consistently held that the question of whether a development is substantially the same is a question of fact and degree, 'an ultimate finding of fact based upon the primary facts found' (*Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280).

In the matter of *Sydney City Council v Ilenace Pty Ltd* (1984) 3 NSWLR 414, Mason P accepted (at 421) that the verb 'modify' means 'to alter without radical transformation'.

Similarly, in *Vacik Pty Ltd v Penrith City Council* (unreported 24 February 1992), Stein J held that 'substantially' means 'essentially or materially or having the same essence'. As such, the threshold question

has been held to require a comparison of the approved and modified developments. In this case, Stein J held that 'in assessing whether the consent as modified will be substantially the same development one needs to compare the before and after situations'.

This indicates that the question is a factual one, based on the details and circumstances of each particular development. Specifically, it requires consideration of what has been approved, what aspects are proposal are to be modified, and what manner or form such modification will take. Therefore, there is no standard answer that applies to all situations, but rather a test to be applied to each case based on its individual merits and factual matrix.

Taking a qualitative and quantitative approach, the proposed modification seeks to stage construction of the proposed development, to reconfigure the carriageway servicing the at grade visitor car parking and service vehicles, and to reduce the number of visitor car parking spaces from 29 to 23, which equates to a 17% reduction in visitor car parking spaces available upon the site.

In *Moto* (at 52) the Court held that the assessment must not look only at the end result to see whether, as a matter of percentages and the like, the development will remain substantially the same. Rather, a qualitative assessment must be undertaken:

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

Although it is well established that the comparative task required to be undertaken to satisfy the requirement of s.96(2)(a) involves a comparison of the whole of the developments being compared, that fact does not eclipse or cause to be eclipsed a particular feature of the development, particularly if that feature is found to be important, material or essential.

Accordingly, the test is whether the modifications proposed will alter or remove 'a material and essential feature of the approved development' (*Moto*, at 68). Modification to the conditions of development consent to facilitate the staged construction of development has no impact on any material or essential feature of the approved development. The change to the configuration of the proposed carriageway is negligible in nature, and the remaining visitor parking provision is still double the minimum number of visitor car parking spaces required to be provided on site as prescribed by the DCP. No essential feature of the approved development is therefore compromised by the proposed modification.

The Courts have also confirmed that the modification power is to be construed broadly and 'facultatively'. In other words, it is generally to be interpreted in a way that is favourable to applicants, because the purpose of the provision is to enable development to be modified without the need for a full development application. In that regard, the Courts have said in *Bassett and Jones Architects Pty Limited v Waverley Council* (No 2 [2005] NSWLEC 530) that:

It is clear from the decision of the Court of Appeal in North Sydney Council v Michael Standley and Associates Pty Ltd (1998) 97 LGERA 433 that the provisions of s 96 are facultative and not restrictive and are designed to assist constructively the modification process rather than to act as a substantive impediment to it".

And, in *Moy v Warringah Council* [2004] NSWCCA 77:

The Court of Appeal has recently restated the proposition that s96 is a facultative, beneficial provision and one which is to be construed and applied in a way that is favourable to those who are to benefit from the provision.

It is therefore clear that appreciable visual and quantitative differences in the carriageway configuration and volume of visitor car parking can nevertheless meet the Section 96(2) test, and where the issue is finely balanced, which is not even suggested in this case, Section 96 should be construed in favour of an applicant.

The proposed modification will not radically transform the development, nor alter or remove a material and essential feature of the approved development.

The proposed development as modified is therefore contended to be substantially the same as the approved development.

Supporting Information

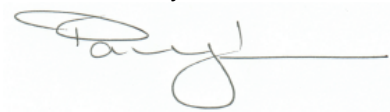
The following information is submitted in support of this application:

- Staging Plan (Issue C) prepared by IDRAFT Architects, dated 14 November 2017;
- Staging Report (Issue C) prepared by dmgs, dated 24 November 2016;
- Architectural Plans (Drawing Nos. 0003, 1002 & 1003) prepared by IDRAFT Plans, dated 20 November 2017;
- Stormwater Concept Design (Issue F) prepared by ING Consulting Engineers, dated 6 March 2017; and
- Landscape Plan (Issue C) prepared by Canvas Landscape Architects, dated 5 March 2017.

Conclusion

The proposed modifications will have a minimal environmental impact, and the development to which the consent as modified relates is substantially the same development as that for which the consent was originally granted.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Daniel', with a long horizontal line extending to the right.

Daniel McNamara
Director