Our Ref: Project 603
Your Ref: DA193/2015

28 May 2018

Mr Bruce Macdonnell
General Manager
Burwood Council
Suite 1, Level 2, 1-17 Elsie Street
Burwood NSW 2134

Attention: Mr Brian Olsen, Manager Building and Development

(By email: Brian Olsen <Brian.Olsen@burwood.nsw.gov.au>)

Dear Mr Olsen,

Re: Section 4.55(2)
Property: 39-47 Belmore Street, Burwood (Burwood Grand), Lot 11 in DP 790324 will be amalgamated with Lot 100 in DP 1185255

This letter is in support of an application under section 4.55 (previously section 96) of the *Environmental Planning and Assessment Act* 1979 (Act) and in compliance with clause 115 of the *Environmental Planning and Assessment Regulation* 2000 (Regulation) sets out the proposed amendments and the impacts of those amendments.

The 2018 changes to the Act made one seemingly small but very important change, section 4.55(3) states:

> "The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified."

We address the requirements of clause 115 of the Regulation, the historic section 96 requirements (Moto test) and this new requirement below.

Background

The JRPP approved DA193/2015 being a $166,938,000.00 mixed use development. DA193 of 2015 was subject to a section 96 application approved 12 May 2017. The section 96 modified Building A of the approved development with internal alterations to B2, B 1/Lower Ground, Levels 1 & and 11 (roof) extension of plant room to Building A, Alterations to Ground & Level 1 of buildings B & C.

The most important element of the approval of the existing consent was that the building not exceed the height plane under Burwood LEP 2012 Building Height Plane Map_Sheet BHP_001 - 1300_COM_BHP_001_010_20120718 ("**the height plane**").

The approved plans are detailed by the modified conditions 1 with all other conditions remaining unaltered. Construction of the approved development is now well advanced.

Kapau Holdings Pty Ltd have entered into a commercial arrangement with Burwood Council to purchase Lot 11 in DP 790324 being a 213m^2 lot (Council lot), effectively isolated by the approval of DA193 of 2015. Subject to the approval of this section 4.55(2) application, Lot 11 in DP 790324 will be amalgamated with Lot 100 in DP 1185255.

The site, subject to this section 4.55(2) application, is Lot 11 in DP 790324 and Lot 100 in DP 1185255. (Figure 1 - Six Aerial - The Site).

Figure 1 - Six Aerial - The Site

In this respect, we submit that Council may lawfully assess and determine the section 4.55(2) application subject to a condition that:

> "Prior to the issue of any Construction Certificate with respect to the two additional levels on Building B that Lot 11 in DP 790324 and Lot 100 in DP 1185255 must be consolidated as a single registered lot."

Annexure 6 is a legal opinion that confirms that section 4.55 can apply to a development that seeks to, by amendment, include an additional lot provided that the development still meets the *substantially the same development* test. *Scrap Realty Pty Ltd v Botany Bay City Council* [2008] NSWLEC 333 refers to the "*fact and degree in ascertaining whether the development before and after modification can be said to be substantially the same.*"

The fact and degree of the proposed change is most accurately quantified by reference to the existing site area 10,149m^2 and the proposed additional site area 213m^2. The proposed increase in the site area is a 2.1% increase in the site area. Quantitatively, this is minor. Qualitatively this is a better outcome as it removed the anomalous and isolated Lot 11 in DP790324 to include it in the site.

This resolves the issue of what is the site for the amended DA193/2015. In the unlikely event that the sale of Lot 11 in DP 790324 to Kapau Holdings Pty Ltd does not proceed, Building B can only be erected in accordance with the existing Construction Certificate under the existing development consent (as modified 12 May 2017).

Proposed Modification

The additional site area (Lot 11 in DP 790324 being a 213m^2) provides additional Gross Floor Area of 1,171.5m^2 at an FSR of 4.5:1. The proposal is an additional 895m^2 of additional GFA, which the section 4.55(2) seeks to distribute as an additional two residential levels upon Building B. The architectural plans and architectural design report addressing SEPP 65 and the 80 ADG objectives details the proposal.

This is a summary of the numeric changes:

Approved GFA

Building A: 11821m^2

Building B: 36640m^2

Total: 48461m^2

Proposed GFA

Building A: 11821m^2

Building B: 37535m^2

Total: 49356m^2

Net change in GFA

+ 895m^2 or a 1.85% increase in the GFA of the development

Height of Building HOB

Approved Building B Roof: RL95.900 (HOB = 72.37m)

Proposed Building B Roof: RL102.300 (HOB = 78.77m)

Net change in the HOB

+6.4m or a 8.84% increase in HOB of Building B.

Clause 4.6 does not apply to as a condition precedent to the merit assessment. Nevertheless the zone, HOB and FSR objectives are relevantly achieved by the skilful distribution of the additional GFA attained from the addition of Lot 11 in DP 790324. There being no condition precident to the merit assessment and proceeding to a merit assessment, critically, and as rigorously enforced by Council, the distribution of the additional GFA has been designed with increased setbacks so not to encroach on the southern sun access plane.

The additional proposed levels are recessive and the bulk of the additional shadows cast by the additional two levels falls upon the roofs of the existing Building B.

In the AM and PM a fast moving shadow from the additional two levels is extend to impact developments to the south-west (AM) and south-east (PM) of the site. These impacts do not cause any unsatisfactory loss of solar access as modelled. The minor changes in the shadows cast are detailed by the comparative shadow diagrams (pp.15 to 25 of the architectural design report) addressing SEPP 65 and the 80 ADG objectives.

Classification under section 96

There are three (3) possible types of section 96 applications;

- Section 4.55(1) - Corrections of minor error, misdescription or miscalculation
- Section 4.55(1A) - Modification involving minimal environmental impact
- Section 4.55(2) – Other modifications

Having regard to *ACM Landmark Pty Limited v Cessnock City Council* [2005] NSWLEC 645 wherein Watts C found that development consent can be validly modified under s96(1A) [4.55(1A)] of the *Environmental Planning & Assessment Act* 1979 (EPA Act) in circumstances where there would not be any adverse impact on amenity, the proposed modification application is considered to be of such minimal environmental impact, that the original development consent can be validly modified under s96(1A) of the EPA Act (as then in force).

As there is some very small areas of additional shadows, albeit very fast moving shadows that are of minimal environmental impact, the application is lodged and should be determined under section 4.55(2) of the EPA Act in any case.

The relevant case law

In *Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8, the threshold test of determining as to whether a proposed development is "*substantially the same development*" was considered by Justice Stein, as follows:

> "*In assessing whether the consent as modified will be substantially the same development one needs to compare the before and after situation. In approaching the exercise one should not fall into the trap of saying the development was for a certain use and as amended will be for precisely the same use and accordingly is substantially the same development*."

In Moto Projects (No2) Pty Ltd v North Sydney Council [1999] NSWLEC 280 (17 December 1999), Justice Lloyd held:

> "*that the comparative task does not merely involve a comparison of a physical features or components of the development as currently approved and modified where the comparative exercise is undertaken in some type of sterile vacuum. Rather the comparison involves an appreciation qualitative as well as quantitative of the development being compared in their proper context, including the circumstances in which the development consent was granted*."

In North Sydney Council v Michael Standley (1998) 43 NSWLR 468,:

> "*modify has been held to mean to alter without radical transformation and substantially the same to mean essentially or materially the same*."

The Four Fold Test

The case law[1] emphasizes that each case must be considered on its own facts, and therefore the Court has not provided a definitive formula, which is universally applicable to test if development is substantially the same.

However, it is possible to distil from the case law the following questions that you ought to ask when determining whether proposals are properly dealt with under section 96 of the EPA Act.

Before proceeding to the Moto tests we direct the assessing planner's attention to **Annexure 6**. Legal advice was obtained and discussed above already with respect to the addition of the Council Lot (Lot 11 in DP 790324) and Lot 100 in DP 1185255 the existing site. We submit the Council site does not radically transform the original proposal, development essentially or materially the same, the way in which the development is to be carried out essentially or materially the same and the addition of the Council lot does not affect an aspect of the development that was important, material or essential to the development when it was originally approved.

With respect to the additional 2 levels upon Building B we submit as follows.

Question one: Is the proposal a modification of the original proposal, in that it does not radically transform the original proposal?

Submission: In the case of a modification to a building or work, consideration ought to be given as to whether the building or work as proposed to be modified is so different to that originally approved that it cannot be said to be the same building or work as originally approved. This can be done quantitatively and qualitatively. Quantitatively the increased GFA is + 895m^2 or a 1.85% of the approved GFA. The increased HOB is +6.4m or a 8.84% of the approved HOB.

These numeric changes given the scale of the development are considered de minimis.

Qualitatively, the addition height and bulk has been distributed is a recessive form that is not visible from the immediate vicinity of the site (public domain or private property) as it has been distributed below **the height plane**.

Question two: Is the proposed development essentially or materially the same development as the development for which consent was originally granted?

Submission: Consideration ought to be given as to whether the proposed modified development is for the same land use and intensity as originally approved. Often this question will overlap with the first question. The outcome adding the GFA derived from the additional site area results in the same land use and the same intensity allowing that the additional site area would properly developed generate the additional GFA in any case. The 1.85% in the approved GFA derived from the additional site area does not make any material change to the land use or intensity as originally approved.

Question three: Is the way in which the development is to be carried out essentially or materially the same?

[1] Vacik Pty Limited v Penrith City Council [1992] NSWLEC 8 and Moto Projects No 2 Pty Limited v North Sydney Council [1999] 106 LGERA 298

Submission: A change to the staging or method of construction might have a substantial planning impact. Consideration ought to be given to whether there is any change of planning significance in the way in which the development will be carried out. There is no change in the way the buildings will be physically constructed or accessed.

Question four;

Does the proposed modification affect an aspect of the development that was important, material or essential to the development when it was originally approved?

Submission:

a) If the need for access to be from a particular street was a key issue, is it proposed to move the access to a different location? There is no change to the way the development will be accessed.

b) If the retention of views was a key issue, does the proposed modification affect that view? There is no change to view to or from the development.

c) If the appearance of the development was of significance, does the proposed modification materially alter the appearance? The additional levels have been skilfully design to be a recessive element under the height plane. There is no discernible change to the appearance of the development from the immediate vicinity of the site (public domain or private property) as it has been distributed and setback below the height plane.

Bignold J in Houlton v *Woollahra Municipal Council* (Unreported, 30 July 1997) *(at 203) described the power conferred by s 102* [equivalent to s96 & now section 4.55] *as beneficial and facultative.*

The section 4.55 application seeks to make changes that are necessary to deliver better outcomes for and from the consent. The addition of Lot 11 in DP 790324 addresses the unintentional isolation of this lot, allows the GFA attributable to this lot to be distributed in a most skilful way in which it has not unacceptable amenity or urban design impacts unpon neighbours of the public domain.

Firstly, a proposal can only be regarded a modification if it involves "alteration without radical transformation" (Sydney City Council v Ilenace Pty Ltd [1984]). The proposal seeks to make modification arising from more detailed structural and mechanical and hydraulic service requirements. Further the changes address the unintended negative consequence upon the architectural integrity, arising from the modifying conditions framed by Council the evening of the DCC meeting. The changes proposed do not radically transform the building and retain the intent of the modifying conditions.

Secondly, if the proposed modification is doing more than simply correcting minor errors, the consent authority must also be "satisfied" that the modified development will be "substantially the same development" as authorised by the original development consent.

This means that, among other things comparing the proposed modified development against the development as it was originally approved. That is a factual exercise. The environmental impacts of the proposed modification are relevant to the legal question of whether it is

"substantially the same development". This means it is possible for some issues that might be characterised as "merit" issues, to also arise in addressing the "substantially the same" test.

The extent of the proposed modifications is both quantitatively and quantitatively - minor given the approved scale of the existing approved development. The change demonstrates better outcomes for and from the development.

In *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) the Court of Appeal held that s.96 is *"a free-standing provision"*. Arising from this, to the extent that the existing development consent required a clause 4.6 exception to HOB and FSR, there is no requirement for a further clause 4.6 exception under a section 4.55 amendment. The only legal tests and preconditions before proceeding to the merit assessment of the proposal is the substantially the same development test under section 4.55.

Having regard to section 4.55(3) of the Act we note the original independent assessment report of Planning Ingenuity Pty Ltd noting that the previous HOB and FSR exceptions were accepted on the basis that the proposal was consistent with the objectives for building height and density of development envisaged by the controls that apply to the Burwood Town Centre and is generally considered to display a high quality of architectural design and consistency with the design principles and criteria of the ADG.

The additional GFA and HOB proposed results from the inclusion of Lot 11 in DP 790324. The distribution of this permissible additional GFA has been skilfully designed to be placed upon Building B where it maintains a built form outcome consistent with achieving the objectives for building height and density of development envisaged by the controls that apply to the Burwood Town Centre and the design maintains a high quality of architectural design and consistency with the design principles and criteria of the ADG.

Impacts of the Modification

As required by clause 115(1)(f) of the *Regulation* the expected impact of the modification is a minor increase in the fast-moving shadows in the early AM and late PM around the winter solstice.

It must be noted that having regard to *North Sydney Council v Michael Standley & Associates Pty Ltd* [1998] NSWSC 163) that section 4.55 is a 'free-standing provision', meaning that "*a modification application may be approved notwithstanding the development would be in breach of an applicable development standard were it the subject of an original development application*".

The applicant need only meet the substantially the same development test as a statutory bar, there is no legal requirement for an exception under clause 4.6 of the LEP.

Having passed the statutory bar, the application must then be assessed on its merits and having regard to the relevant considerations under section 79C of the Act, relevant SEPP, LEP and DCP objectives.

Despite the proposal exceeding the HOB and FSR as approved and adding two additional levels as proposed, the proposal remains under the height plane and there are no adverse amenity outcomes nor any external impacts caused by the amendment that warrant refusal of the proposal. All relevant SEPP, LEP and DCP objectives have been satisfied.

Summary of Impacts

Consistent with the Senior Commissioner, now Justice of the Land and Environment Court, The Hon. Tim Moore, found in *Davies v Penrith City Council* [2013] NSWLEC 1141, when revising the Planning Principal in *Pafburn v North Sydney Council* [2005] NSWLEC 444, that in assessing impacts upon neighbours one of the questions is "How necessary is the proposal causing the impact?"

The modifications are necessary to:

- **Allow the consolidation of the isolated site, Lot 11 in DP 790324 with Lot 100 in DP 1185255**
- **Allow the most skilful distribution of GFA arising from the inclusion of Lot 11 in DP 790324 into the site, in a form with the least impacts upon the base design, neighbours and the public domain.**
- **Ensure that shadows cast, fall predominantly upon the existing roof of Building B and the proposal remains within the height plane.**

Conclusion

The extent of the proposed modification is minor in the context of the larger and already approved development, lacks any unacceptable impacts, and is in the public interest, such that the original development consent can be validly modified under s4.55(2) of the EPA Act.

In respect of traffic and parking the assessment (**Annexure 3**) concludes, the development will not present any adverse traffic implications, the proposed parking provision will be quite appropriate and adequate for the uses and the vehicle access, internal circulation and servicing arrangements will continue to be quite suitable and satisfactory

The comparison between the consent as originally granted and the proposed amendment in a qualitative as well as quantitative assessment, in the context and the circumstances of this case, are relatively minor in scale and will produce a better environmental amenity outcome for future occupants and have acceptable impacts upon neighbours, such that the proposal is properly considered *substantially the same development*.

There are no reasons for approval (section 4.55(3)) that conflict with the proposed amendment.

There are better amenity outcomes for future occupants, upper apartment providing high levels of amenity, without any significantly different impacts upon neighbours or when viewed from the public domain.

Noting the better outcomes and the lack of any significant adverse amenity impacts, it is submitted that Council and the Panel should, on merit, favourably consider the amendments proposed, and, on any safe assessment, the proposal is substantially the same development.

Please don't hesitate to contact me on 0408 463 714 or by email brett@daintry.com.au.

Yours faithfully,

Brett Daintry, MPIA, MAIBS, MEHA
Director

Annexures:

1. Architectural Drawings
2. Architectural Design Report (SEPP 65 and 80 ADG Objectives)
3. Traffic and Parking Assessment
4. Waste Management Plan
5. BASIX Certificate
6. Legal Opinion – addition of Lot 11 in DP 790324 (outstanding)
7. Land Owners Consent to Lodgement of section 96 (4.55) Application