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6 February 2019

Mr Peter Debnam
Chair
Sydney North Planning Panel
GPO Box 39
SYDNEY NSW 2001

Our ref: MBP
Matter no: 9596144

Dear Panel Members

Matter Deferred: 2018SNH047 - Northern Beaches
MOD2018/0412 at 210 Headland Road Dee Why

The Panel has requested the applicant to make submissions on the following by 6 February. The question is:

> *The panel agreed to defer the determination of the matter to resolve legal questions in relation to the (sic) whether the MOD2018/0412 (the Modification) can amend the original consent (DA2011/0446) which applied to land being lot 2122 DP 752038 (210 Headland Road Dee Why). Whereas the Modification applied to 210 Headland Road Dee Why described in the Statement of Environmental Effects as land being lot 2112 in DP 752038, Lot 1 in DP749109 and Lots 3 and 4 in DP 8139, and all supporting documentation refers to all four lots.*

Applicant's response

1. The address of the School is 210 Headland Road, Dee Why. That address encompasses the 4 lots referred to in relation to the Modification. DA Consent 272DA dated 1999 for the junior school over the 4 lots provided in Condition 12:

   > *This approval relates to the proposed enrolment (sic) numbers as specified in the applicant's letter dated 20 November 1998. Should the school seek additional enrolments for the Junior School (ie Pre-school – year 6) over 390 students or the senior school (Years 7-12) over 450 students, separate approval is required to be obtained from Council.*

   That is: 840 students in total from Pre-school to year 12.

2. DA2011/0446 dated 4 August 2011 specifies the consent as applying only to Lot 2112 in DP752038. However, the development application included all 4 lots so this appears to be an error on the face of the document. At the Panel hearing on 30 January Mr Alex Keller or Council explained the error on the face of the document in words to the effect of: Council did not have the facility in its computer system to list more than one reference to title. Whether that is in fact the case does not change the fact that the 2011 consent only refers to Lot 2112 and not the remaining 3 lots which should have been included.

3. The Statement of Environmental Effects by Ingham Planning dated March 2011 (Job 22012) clearly included the 4 lots in the development application, and Figure 2 of the Ingham Report identifies the area in a Near Maps aerial. Part of the SEE stated:

   > *The subject site is located at 210 Headland Road, Dee Why on the southern side of the Stony Range Flora Reserve, approximately 500 metres south-west of the Dee Why Town Centre. The land title is described as Portion 2112 in DP*

*752038, Lot 1 in DP 749109 and Lots 3 and 4 in DP 8139 and is currently used as an independent school catering for classes from Kindergarten through to Year 12 (see **Figure 1 - Location** and **Figure 2 – Aerial Photo**).*

The site is irregular in shape with a total area of 15,209.51m2. The site is in an elevated location with a gentle fall predominantly to the south-west and has a primary street frontages to Headland Road and secondary street frontages to Quirk Street and Tango Avenue. Site boundary dimensions are summarised as follows:

Southern front boundary to Headland Road 140.955 metres

South-eastern boundary to Quirk Road 48.280 metres

Eastern boundary to Tango Avenue 140.180 metres

Northern Side boundary 90.525 metres

Western side boundary 145.430 metres

*The existing school on the site currently has 899 students accommodated in a number of school buildings configured around a central courtyard and extending south-east to Quirk Street. The northern portion of the site, adjoining Stony Range Flora Reserve contains a grassed playground and fronting Tango Ave., a new school building currently under construction and due for completion in July 2011. Existing development on the site is illustrated in the **Aerial Photo** at **Figure 2** and the **Site** drawing at **Figure 3**.*

4. Council imposed a student limit in Condition 3 of DA 2011/0446 as follows:

*The maximum number of students to be enrolled at the school is **884** at any time. In this regard, any proposal to increase student numbers as part of a future development application will not be approved without a corresponding increase in onsite parking and pick up and set down capacity.*

5. DA2011/0446 was modified by the Panel on 8 March 2018 to increase **the total number of students to 992**. And the Consent references the 4 lots.

6. Did the Panel have power to modify DA2011/0446 on 8 March 2018, if on the face of the Consent it only applied to Lot 2112 and excluded the remaining 3 lots. The Panel had power but it did not explicitly exercise it because it, like the applicant, was unaware that DA2011/0446 was confined on its face to Lot 2112.

7. Does the Panel have power to modify DA2011/0446 to increase the total student numbers to 1092? Yes for the following reasons as set out in the judgment of Preston J in *Scrap Realty Pty Ltd v Botany Bay City Council [2008] NSW LEC 333.* Preston J was relying on the power in s. 96 (2) of the former *Environmental Planning & Assessment Act* 1979, and for the sake of completeness I set out both s. 96 (2) and the current provision in s. 4.55(2).

8. 96(2) in December 2008 provided:

(2) **Other modifications**

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), and

(b) 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, and

(c) it has notified the application in accordance with:

(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 the period prescribed by the regulations or provided by the development control plan, as the case may be.

Subsections (1) and (1A) do not apply to such a modification.

This has been translated into the current s. 4.55(2):

(2) **Other modifications**

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), and

(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) 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, and

(c) it has notified the application in accordance with:

(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 the period prescribed by the regulations or provided by the development control plan, as the case may be.

Subsections (1) and (1A) do not apply to such a modification.

The sections are identical.

9. In *Scrap Realty* Preston J held, inter alia:

[2] The power of a consent authority to 'modify' a consent is a power to alter without radical transformation the consent.

[5] In terms, neither the concept of 'modify' applied to a consent or the concept of 'development' in the condition precedent exclude amendment of a consent to permit the carrying out of development on land that was not the subject of the original development consent.

[6] The consent being modified may extend the development approved by the consent to other land. This still entails a modification of the consent – it alters the description of the land to which the consent applies so as to permit the carrying out of development on that land as well.

[7] The 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 of the EPA Act.

I rely on all the findings in *Scrap Realty*.

10. Clearly in the present situation an error has occurred on the face of Consent DA2011/0446. With respect the Panel has the power to correct that error by granting including in the current modification the "extra lots" and specifically naming the extra lots so as to avoid confusion in the future.

Yours faithfully
Hunt & Hunt

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Partner

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