

DA2016/017/02
22 November 2018

20 November 2018

Our Ref: HSK:LEC GAZ002/4007

Henry Wong
General Manager
Strathfield Municipal Council
65 Homebush Road
Strathfield NSW 2135

Attention: Louise Mansfield

Dear Mr Wong

Legal Opinion - Proposed s4.55 modification application - 27-35 Punchbowl Road, Belfield

Site: 27-35 Punchbowl Road, Belfield

1. Introduction

- 1.1 We act for Gazcorp Pty Ltd (**Gazcorp**) in relation to the proposed modification application pursuant to section 4.55(2) of the *Environmental Planning and Assessment Act 1979 (Act)* to modify Development Consent 2016/017 (**Development Consent**) relating to the mixed-use development at 27-35 Punchbowl Road, Belfield (**Site**).
- 1.2 We have been engaged to provide a legal opinion as to whether Council can be satisfied that the modification application under section 4.55(2) of the Act for the modification of the Approved Development (**Proposed Modification**) is capable of being approved under that section of the Act - that is, whether the Proposed Modification is "*substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified.*"
- 1.3 The Proposed Modification will modify Buildings A and B in Zone A of the Site by adding an additional storey comprising of 5 apartments, split and reconfigure apartments in Level 2 and 3 of Building D resulting in two additional apartments, and add 8 carparking spaces in the building basements (**see Figures 1 and 2**).
- 1.4 Justice Pepper in *Agricultural Equity Investments Pty Ltd v Westlme Pty Ltd* (No 3) [2015] NSWLEC 75 at [173] confirmed that the comparison under the former section 96 of the Act, now section 4.55, is between the development as modified and the development as originally consented to.
- 1.5 Therefore for the purposes of this advice, we must disregard the first modification to the Development Consent (discussed in clause 2.3 below) and consider whether the Proposed Modification is *substantially the same development* as the Development Consent.
- 1.6 By way of summary, and based on the case law principles outlined in detail below, the Proposed Modification is 'substantially the same' development as the Development Consent for the following reasons:
 - (a) the Proposed Modification is essentially and materially the same as the Development Consent;
 - (b) if the Proposed Modification is approved, the development of the Site will have the same essence as the Approved Development;

- (c) the Proposed Modification alters the Approved Development without radical transformation; and
- (d) as outlined in the below qualitative and quantitative assessment, the Proposed Modification is essentially or materially the same as the Approved Development.

1.7 Based on the above, it is our view that Council can be satisfied that the Proposed Modification is substantially the same as the Approved Development, and therefore can lawfully approve the section 4.55(2) application for the Proposed Modification.

2. Background

2.1 On or about 15 June 2017, the Sydney Central Planning Panel granted consent to Development Application DA2016/017 for the demolition of the existing structures and the construction of a 4-7 storey mixed use building comprised of:

- (a) five (5) retail suites;
 - (b) 111 residential apartments; and
 - (c) basement parking for 221 cars,
- (the **Approved Development**) at the Site.

2.2 Strathfield Council (**Council**) supported the granting of the Development Consent.

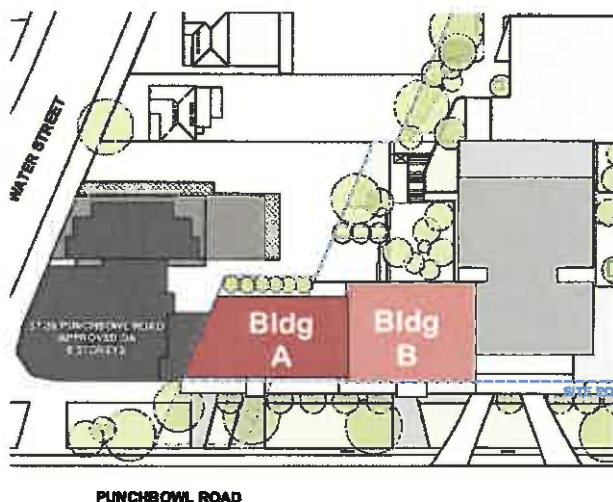


Figure 1 - Site Plan showing the Adjoining Site and Buildings A and B

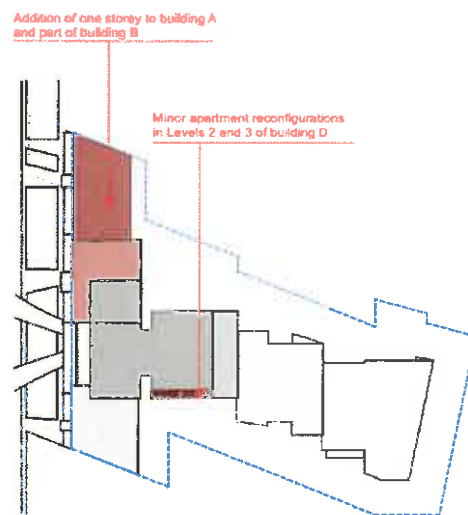


Figure 2 Plan showing location of Proposed Amendments

2.3 On 13 June 2018, Strathfield Council granted consent to DA2016/017/01, an application under section 4.55(2) of Act (**Mod 1**) to modify the Development Consent. Mod 1 only related to Zone B of the Site (see clause 3.1 and Figure 3 below), and approved an increase of the Zone B building footprint by 50 square metres, allowing the addition of 4 residential apartments comprising 211 square metres of gross floor area (**GFA**) and an extended basement, amongst other internal changes.

2.4 On 15 May 2018, Council approved Development Application DA2017/101 for development on the adjoining property located at 37-39 Punchbowl Road, Strathfield (**Adjoining Site**). This approval allowed the demolition of the existing structures and the construction of an eight (8) storey mixed use development comprising 61 residential apartments, 270m² of commercial/retail floor space at ground floor and three (3) storeys of basement car parking (**Adjoining Development**).

- 2.5 The Adjoining Development breaches the maximum building height of the Adjoining Site pursuant to clause 4.3 of the Strathfield Local Environmental Plan 2012 (**SLEP**), being 22m at the corner of Punchbowl Road and Water Street, and 16m for the remainder of the Adjoining Site. The Adjoining Development, at the boundary to Site, is 8 storeys high.

3. Proposed Modification Application

- 3.1 We understand that in the Approved Development and Proposed Modification documentation, the Site is referred to as two zones – Zone A generally corresponds with the area marked “V” in Figure 3, and Zone B generally corresponds with the area marked “R1” in Figure 4.

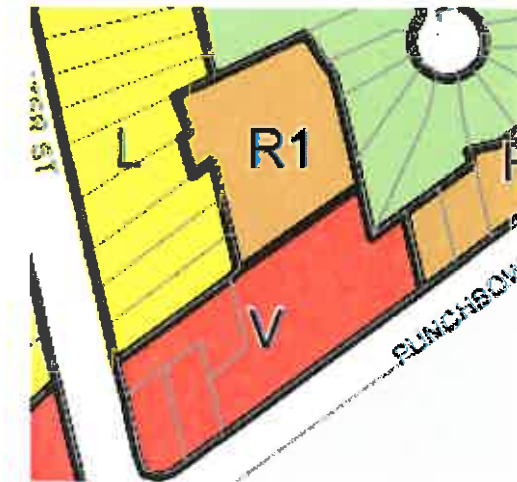


Figure 3 FSR map extract (FSR_006_010) (Source: SLEP)

- 3.2 We have reviewed:

(a) Approved Development:

- (i) Development Application - Statement of Environment Effects (**SEE**) 27-35 Punchbowl Road, Belfield prepared by JBA dated November 2015;
- (ii) Plans prepared by Olsson & Associates Architects dated 26 April 2017; and
- (iii) Notice of Determination dated 15 June 2017.

(b) MOD 1:

- (i) SEE prepared by Ethos Urban dated 1 March 2018;
- (ii) Plans prepared by Olsson & Associates Architects dated 28 February 2018; and
- (iii) Notice of Determination dated 13 June 2018.

(c) Proposed Modification:

- (i) Letter from Ethos Urban to Council dated 9 November 2018 (**Ethos Letter**);
- (ii) Architectural Drawings prepared by Olsson & Associates Architects dated 20 November 2018 (**Modification Plans**);
- (iii) SEPP 65 Report and Compliance Statement prepared by Olsson & Associates Architects dated 29 October 2018;

- (iv) Streetscape Study prepared by Olsson & Associates Architects dated 23 October 2018;
- (v) Urban Design Statement prepared by Olsson & Associates Architects dated 29 October 2018; and
- (vi) Traffic and Car Parking Statement prepared by SCT Consulting dated 29 October 2018;

3.3 The amendments to the Development Consent as a result of the Proposed Modification can be summarised as follows:

- (a) an increase in the total GFA from 11,040 m² to 11,661 m²;
- (b) the addition of a storey onto Buildings A and B, which will comprise additional 5 apartments. This results in an increase from 111 apartments to 122 units (noting that 4 additional apartments were approved in Mod 1);
- (c) splitting and reconfiguring apartments on Levels 2 and 3 of Building D, resulting in the addition of two (2) apartments; and
- (d) amendments to layouts of basements 1 and 2 resulting in 10 additional residential and 2 additional visitor car parking spaces. This will result in an increase from 172 residential and 23 visitor car parking spaces to 184 residential and 25 car parking spaces (noting that an amended basement footprint and 4 additional residential car parking spaces were approved Mod 1).

3.4 We set out in Annexure A a table of the numerical controls which apply to the Site, and the amendments between the Development Consent and the Proposed Modification.

4. Legal requirements - Modification Application under the *Environmental Planning and Assessment Act 1979*

4.1 Section 4.55 (2) (a) 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)*

[emphasis added]

5. Is the Proposed Modification “substantially the same”?

Key Case Law

5.1 The below cases were decided prior to the amendment of the Act on 1 March 2018, when the former section 96 became section 4.55. For the purposes of this advice, a reference to (the former) section 96 should be taken to be a reference to (the current) section 4.55 of the Act.

5.2 In *Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8, Stein J found that the word 'substantially' in the context of the comparison pursuant to section 96(2) of the Act means '...essentially or materially or having the same essence'.¹

5.3 The Court of Appeal observed in *North Sydney Council v Michael Standley and Associates Pty Ltd* (1998) 97 LGERA 433 (**Michael Standley**) at paragraph 474, that in the context of section 96, to 'modify' means 'to alter without radical transformation'.²

5.4 Bignold J observed at paragraph [54]-[56] of *Moto Projects (No 2) Pty Ltd v North Sydney Council* (1999) (**Moto**) 106 LGERA 298 that:

'...the requisite factual finding requires a comparison between the development, as currently approved, and the development as proposed to be modified.'

The result of the comparison must be a finding that the modified development is "essentially or materially" the same as the (currently) approved development.

The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified...undertaken in a sterile vacuum...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).'³

(emphasis added)

5.5 Council (or any consent authority for that matter) are required to undertake a comparative analysis between the whole of the Proposed Modification and the whole of the Approved Development.⁴

5.6 Preston CJ in *Dravin Pty Ltd v Blacktown City Council* [2017] NSWLEC 38 at paragraph [57] stated that the comparative assessment was to be undertaken with both a "qualitative as well as quantitative" appreciation of the developments and their environmental impacts.⁵ As outlined by Bignold J in *Moto*, to focus purely on the quantitative would be a 'legally flawed' exercise.⁶

5.7 The key case law principles can be summarised as follows:

- (a) 'substantially' in the context of section 4.55 of the Act means '...essentially or materially or having the same essence';
- (b) 'modify' means 'to alter without radical transformation';
- (c) the result of the comparison must be a finding that the Proposed Modification is "essentially or materially" the same as the Approved Development;
- (d) a comparison for the purposes of section 4.55 requires a comparison between the Approved Development and the Proposed Modification, which must involve:
 - (i) a quantitative comparison of the physical features or components of the Approved Development and Proposed Modification; and

¹ Endorsed in *Agricultural Equity Investments Pty Ltd v Westlime Pty Limited (No 3)* [2015] NSWLEC at [173]; *Michael Standley and Associates Pty Ltd* (1998) 97 LGERA 433 at [440] and *Moto* at [30]

² *Michael Standley* at [474]; *Scrap Realty Pty Limited v Botany Bay City Council* [2008] NSWLEC 333 at [13] per Preston CJ.

³ Approach adopted in *FPG No. 2 Pty Ltd v Randwick City Council* [2018] NSWLEC 1300 per Smithson C; *Dravin Pty Ltd v Blacktown City Council* [2017] NSWLEC 38 per Preston CJ; *Pozzobin v City of Canada Bay Council* [2014] NSWLEC 1143 per Dixon C.

⁴ *Tipalea Watson Pty Ltd v Ku-Ring-Gai Council* [2003] NSWLEC 253 at [40] per Bignold J.

⁵ *Dravin Pty Ltd v Blacktown City Council* [2017] NSWLEC 38 at [57] per Preston CJ.

⁶ *Moto Projects (No 2) Pty Ltd v North Sydney Council* (1999) at [52].

- (ii) a qualitative assessment of the Approved Development and Proposed Modification being compared in their proper contexts (including the circumstances in which the development consent was granted).

6. Analysis of proposed modifications

- 6.1 In our opinion, the Council will be able to conclude that the Proposed Modification is not essentially or materially different to the Approved Development, and as such should be comfortable in granting consent to a section 4.55 application seeking consent to amended the Approved Development, for the following reasons.

Quantitative Assessment

- 6.2 As outlined in paragraph 3.3 above, the following increases will occur as a result of the Proposed Modification:

- (a) Height: 18% increase in Building A, 3% increase in Building B;
- (b) FSR: 6% increase in Zone A, 5% increase in Zone B (which was approved in Mod 1);
- (c) GFA: 6% increase overall;
- (d) Apartment Numbers: 10% increase; and
- (e) Parking: 6% increase (noting that an amended basement footprint and 4 additional spaces were approved in Mod 1, and the additional parking in the Proposed Modification is being provided within that approved footprint).

- 6.3 Further to the above, we understand that:

- (a) the Proposed Modification does not propose any amendments to the buildings in Zone B, however Zone B was amended pursuant to Mod 1;
- (b) the maximum height breach in Zone A has not increased with the Proposed Modification – this maximum height breach, a 6.8m breach of the 16m height limit in Building D in Zone A, was approved in the Development Consent;
- (c) the Proposed Modification will only increase the highest RL of the Approved Development by 300mm; and
- (d) the Proposed Modification does not result in any change to the communal open space, landscaped area, or deep soil areas approved in the Development Consent.

- 6.4 In relation to Apartment Design Guide (**ADG**) Requirements, as shown on Plan A010 - Project Summary in the Modification Plans, the Proposed Modification results in a minor increase in the apartments that receive direct sunlight in winter (70.45% to 71.30%), and a minor reduction in the cross ventilation (60.85% to 60.65%). Considering that these changes are minor, we consider that the Proposed Modification is substantially the same as the Approved Development in relation to sun access and cross ventilation.

- 6.5 If the Proposed Modification is approved, the development on the Site will continue to be a mixed use building (albeit of 6 storeys in Building A and Part of Building B rather than 5 storeys) comprising retail and commercial spaces, 122 dwellings (instead of 111) and it will still comprise 2 levels of basement car parking albeit with 209 car parking spaces (instead of 195 as originally approved).

- 6.6 If the Proposed Modification is approved, the development on the Site will still function in essentially the same way, and no essential element of the development on the Site is proposed to be changed in any material aspect.

- 6.7 Based on this quantitative assessment, it is our view that the Proposed Modification is 'substantially the same development' as the Approved Development.

Qualitative Assessment

- 6.8 A qualitative assessment involves a consideration of whether the key impacts of the Proposed Modification are substantially the same as those of the Approved Development.

- 6.9 The assessment undertaken in relation to the Proposed Modification takes into account, amongst others, the following impacts:

- (a) Streetscape and Built Form: As noted above, the Proposed Modification has in part been prepared as a result of the approval of the Adjoining Development.

The Adjoining Development was not approved at the time of the Development Consent, and as such Gazcorp was required to consider the future interface with the Adjoining Site by reference to the LEP height controls.

As outlined in the Ethos Letter, the Development Consent sought a streetscape which gently stepped down in form from Water Street to the north-east, matching the topography of the street and transitioning to existing low-rise residential dwellings or future developments up to four storeys high closer to Elliot Street. This consistent streetscape would have been achieved had the Adjoining Development been compliant with the LEP height control.

However, due to the breach of the height control on the Adjoining Site, there is a 3-storey drop from the Adjoining Development to the Approved Development on the Site, resulting in a disjointed form in the streetscape rhythm.

The Proposed Development seeks to resolve this issue, by way of an additional storey on Building A and part of Building B.

Accordingly, comparing the Approved Development and Proposed Modification in the context in which the Development Consent was granted, the Proposed Modification is substantially the same as the Approved Development from a streetscape and built form perspective.

- (b) Overshadowing: As shown on *Plan A-801 - Shadow Diagrams* in the Modification Plans, the additional height in the Proposed Modification results in only minor additional overshadowing on adjacent dwellings.

As discussed in the Urban Design Statement, the additional overshadowing as a result of the Proposed Modification impacts five (5) dwellings on the southern side of Punchbowl Road at 2.00 and 3.00 pm on the winter solstice; however those dwellings still receive 5 hours of direct sunlight. At all other times, the additional shadows caused by the Proposed Modification do not impact any nearby buildings.

As a result, the Proposed Modification is substantially the same as the Approved Development from an overshadowing standpoint.

This position is supported by Olsson & Associates Architects in the Urban Design Statement.

- (c) Privacy and Overlooking: As shown on *Plan A-820 - Massing Diagrams* in the Modification Plans, the additional storeys on Buildings A and B do not result in any additional overlooking impacts, onto either the Adjoining Site or onto the dwellings on the southern side of Punchbowl Road.

As a result, the Proposed Modification is substantially the same as the Approved Development from an overlooking standpoint.

This position is supported by Olsson & Associates Architects in the Urban Design Statement.

- (d) **Traffic and Basement Configuration:** Although the consideration of "substantially the same development" under section 4.55 of the Act must compare the Proposed Development with the original Approved Development, we note that the basement footprint was amended in Mod 1 and as such the basement footprint in the Proposed Modification differs from the Approved Development. However in approving Mod 1, Council confirmed that it considered Mod 1 to be "substantially the same" as the Approved Development.

As it is now only the layout of the basements which are amended in the Proposed Modification, and there will be no further excavation or expansion of the building envelope to accommodate the additional carparking proposed in the Proposed Modification, we are of the view that the Proposed Modification is substantially the same as the Approved Development in relation to the basement.

In relation to traffic generation, as outlined in the Traffic and Car Parking Statement, the additional apartments and car parking spaces will result in only a minor change in the traffic generation resulting from the development on the Site. In our view, this minor change means that the Proposed Modification is substantially the same as the Approved Development from a traffic generation standpoint.

7. Conclusion

- 7.1 By way of summary, and based on the above case law principles, the Proposed Modification is 'substantially the same' development as the Development Consent for the following reasons:

- (a) the Proposed Modification is essentially and materially the same as the Development Consent;
- (b) if the Proposed Modification is approved, the development of the Site will have the same essence as the Approved Development;
- (c) the Proposed Modification alters the Approved Development without radical transformation; and
- (d) as outlined in the above qualitative and quantitative assessment, the Proposed Modification is essentially or materially the same as the Approved Development.

- 7.2 Accordingly, the Proposed Modification is "substantially the same development" as the Development Consent, and as such Council can be satisfied that the Modification Application is capable of approval under section 4.55 of the Act.

Yours sincerely



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Annexure 1

	Control	Approved Development	Proposed Modification 2	Change	% Increase (rounded)
Max Height	Zone A – 16m	Zone A –	Zone A –		18% increase
		Bldg A - 17.5m (1.5m breach)	Bldg A - 20.6m (4.6m breach)	3.1m	3% increase
		Bldg B – 20.2m (4.2m breach)	Bldg B – 20.8m (4.8m breach)	0.6m increase	Nil
		Bldg C – 17.4m	Bldg C 17.4m	No increase	Nil
		Bldg D 22.8m	Bldg D 22.8m	No increase	
	Zone B – 13m	15.5m	15.5m	No increase	nil
FSR	Zone A – 3:1	Zone A – 2.68:1	Zone A – 2.84:1	0.16:1 increase	6% increase
	Zone B – 1.4:1	Zone B – 1.4:1	Zone B – 1.47:1 (approved in Mod 1)	0.07:1 increase	5% increase (approved in Mod 1)
GFA	Zone A – 8124 m2 <i>(Site area 2708 m2)</i>	Zone A – 7,263m2	Zone A – 7,677m2	414 m2 increase	
	Zone B – 3787 m2 <i>(Site area is 2705 m2)</i>	Zone B – 3,777 m2	Zone B – no change in current application <i>(approved in Mod 1 to be 3,984 m2)</i>	207 m2 increase <i>(approved in Mod 1)</i>	
	Total: 11,911 m2 <i>(Note – total site area is 5413m2)</i>	Total: 11,040 m2	Total: 11,661 m2	621 m increase	6% increase
Apartments	-	Zone A - 71	Zone A - 78	7 units	
		Zone B - 40	Zone B – 44 <i>(approved in Mod 1)</i>	4 units <i>(approved in Mod 1)</i>	
		Total - 111	Total - 122	11 units	10% increase

Retail/ Commercial Floorspace	-	Zone A Only 616	Zone A Only 616	No change	nil
Parking	172 residential 23 visitor Wash bay	174 residential 23 visitor Wash bay	184 residential 25 visitor Wash bay	10 residential 2 visitor	6% overall