

Ryan Lennox
DA/1176/2017/A

14 June 2022

Bathla Group
137 Gilba Rd
GIRRAWEE NSW 2145

Dear Vandana

Property: 94 Sparks Road, HAMLYN TERRACE NSW 2259
Description: Residential Subdivision (88 Lots) including Small Lot Housing Clearing, Earthworks, Retaining Walls & Associated Roads, Other Infrastructure & Servicing (Amended Application)

An assessment of the above-mentioned application has revealed the following issues.

1. Substantially the same development
The subject application under assessment has been lodged by virtue of the provisions of Section 4.55(2) of the Act.

The provisions of 4.55(2) require that the consent authority be satisfied that the development is substantially the same as the development for which consent was originally granted.

The Statement of Environmental Effects provides the following in relation to the matter of substantially the same:

"The development, as proposed to be modified, is substantially the same development as approved since:

- *The proposal does not change the purpose for which development is being carried out and provisions cited in Wyong Local Environmental Plan 2013 and Wyong Shire Development Control Plan 2013.*
- *The built form of the development on the other portion of approved Stage 1, 2, and 3 remains essentially the same as the approved development;*
- *The proposal does not result in any significant environmental impacts on the surroundings.*

We do not believe that any further explanation of the proposed amendments is required as the changes are minor in nature and well-identified on the submitted Architectural & Engineering plans and we confirm that the proposed development, with the approval of the requested modification, will substantially result in the same development – no significant change will occur."

The proposal has been considered against the relevant caselaw in relation to "substantially the same".

In *Moto Projects (No. 2) Pty Ltd v North Sydney Council* [1991] 106 LGERA 298, Bignold J said (at 309 [56]):

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 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 developments being prepared in their proper contexts.

The reference of Bignold J to "essentially" and "materially" the same is derived from Stein J in *Vacik Pty Ltd v Penrith City Council* (unreported), Land and Environment Court NSW, 24 February 1992, where his Honour said (in reference to Section 102 of the *Environmental Planning and Assessment Act 1979*) that "Substantially ... means essentially or materially or having the same essence".

Upon comparison between the original development and the amended development, the following observations are made in relation to the test of "essentially or materially" the same:

- There will be a change in use of the land being altered originally approved for the purpose of residential accommodation (dwelling houses) and now being vacant.
- There will be a reduction in total lots from 88 Lots to 57 Lots.
- There will be a reduction in total number of housing (small lot housing) provided from 75 to 43.
- The loss of the small lot housing developments will result in changes to the development's floor space ratio, building height, setbacks, landscaped areas, parking requirements, access, and streetscape presentation from the original proposal.
- There will be changes to the location and possibly function of Road 6 (public vs

- private road?)
- There will be changes to the location and functions of the approved temporary basin.
- There will be changes to the staging process that have not been considered by the applicant under this application.

Given the above, it is considered that it has not been adequately demonstrated that the proposed development is substantially the same development as was approved under DA/1176/2020.

2. **Inadequate Statement of Environmental Effects (SEE)/Insufficient Information**

Notwithstanding the above, the submitted Statement of Environmental Effects is inadequate to enable proper assessment of the proposal. Any future SEE must include the following:

- Full description of the proposal including specific details of all elements being altered.
- Details of any conditions of consent that will likely be required to be amended/removed as a result of the proposed works.
- The numbering of the lots on the modification plans do not align with the numbering on the approved plans e.g., there are duplicate lots (lots 1 and 2), lot 88 has now become proposed lot 55 etc. This makes it difficult to understand, nor is it clear, what is being proposed under the modification application.
- Detailed assessment of the environmental/social impacts of the proposed development specifically having regard to the loss of 32 small lot houses.
- Identification and discussion of how the proposed works will impact the rest of the site and surrounds in terms of infrastructure, the temporary basin, the land dedicated for Asset Protection Zones (APZ), and the staged process.
- An amended assessment against the relevant sections of the WLEP 2013 WDCP2013 and any relevant State Environmental Planning Policies (SEPP's).
- Documentation submitted with the modification application consistently references, and in some cases, documents have been prepared, based on the construction of a residential flat building on the land containing approved lots 54-86.
- Despite the fact an application has been lodged on the land for a residential flat building, this is still under assessment and no approval has been granted. Accordingly, Council cannot assume the land will contain a residential flat building and the reference to such in the modification application is premature, inconsequential and results in confusion in the assessment of this application.
- All reference to any proposed future development of the land, that is not related to the development consent, shall be removed from the modification application.

- The engineering plans show a diversion bund/mound along the eastern property boundary. The applicant needs to cater for the upstream developed catchment where surface runoff travels overland through the site due to the natural topography of the land.
- Property owners are required to accept natural overland flows from adjoining properties and must not divert/redirect or concentrate the flow from its natural path on to neighbouring properties.
- Road 6 is proposed to be a private road. It is understood that the adjoining land has an APZ that impacts proposed Lot 1 along the boundary. Road 6 would then become a perimeter road and would need to meet the requirements of Planning for Bushfire Protection 2019.
- Inadequate information/discussion has been provided regarding the downsizing of the basin.

3. **NSW Rural Fire Service**

The application was referred to the NSW Rural Fire Service (NSW RFS) who cannot support the proposed development for the following reason:

Previously requested information was not received within the legislative timeframe to allow for assessment of the application against the Aims and Objectives of *Planning for Bush Fire Protection (2019)*.

Notwithstanding the above, the Bushfire Threat Assessments that have been prepared refer to a Residential Flat Building being the 'proposed' development however this application does not include an RFB development.

4. **Traffic Engineering**

Road 6

The SEE states the intention is to lodge a future Residential Flat Building (RFB) on the area on which the lots are proposed to be consolidated into one lot. Modifying Road 6 to be a private driveway to access a future RFB development will not be supported. The entry road is to be dedicated as a public road.

Having regard for the number and nature of the issues raised above, Council is unable to support the application in its current form. Given the extensive changes and associated time delays that would be required to address the above identified issues, it is strongly recommended that you withdraw your modification application.

It would be appreciated if you could please advise your intention with regard to the application within seven days from the date of this letter. Alternatively, you may elect to have Council determine the application on the information available.



It is recommended you seek planning law advice from a suitably qualified professional to assist in determining the most appropriate way to progress future development and any change to the use of the land.

For any further enquiries, please contact the undersigned on 0418 128 990 or **ryan.lennox@centralcoast.nsw.gov.au**

Yours faithfully,

A handwritten signature in black ink, appearing to read "R. Lennox", with a stylized flourish at the end.

Ryan Lennox
Senior Development Planner
DEVELOPMENT ASSESSMENT

