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12 June 2024

Attn: Warren Duarte
East End Projects Pty Ltd
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By Email: warren@iriscapital.com.au

cc: nryan@urbis.com.au

Dear Warren

Legal Opinion: Division 8.2 Review re determination of s.4.55(2) concept modification application no. MA2023/00175 at 121 Hunter Street, Newcastle

We refer to your Division 8.2 Review submitted to Newcastle City Council ('**Council**') on 30 May 2024 pursuant to the *Environmental Planning and Assessment Act 1979* ('***EPA Act***') in response to the determination (refusal) of your s.4.55(2) concept modification application no. MA2023/00175 ('**Concept Modification**') by the Hunter and Central Coast Regional Planning Panel ('**Panel**') at 121 Hunter Street, Newcastle ('**Site**').

You have asked us to consider the Panel's reasons for determining the Concept Modification and provide legal advice as a letter of support to the Division 8.2 Review Report, prepared by Urbis dated May 2024 ('**Urbis Report**'). Specifically, you have asked us to consider whether your Concept Modification is '*substantially the same*' development as the development approved by the concept development application no. DA2017/00701 ('**Original Consent**') in relation to the Site.

Summary Advice

In our legal opinion, **the Concept Modification is readily capable of being considered 'substantially the same' development as the development approved by the Original Consent**.

When appropriately considering the Concept Modification from a macro 'precinct perspective', there are only changes proposed to the Original Consent in respect of Stages 3 and 4 and **there are no changes proposed to Stages 1 or 2, at all**. This is a compelling reason for the Concept Modification to be considered as 'substantially the same' development as the development approved by the Original Consent.

When a finely balanced and instinctive synthesis of the changes proposed to Stages 3 and 4 of the Original Consent by the Concept Modification are then considered, those changes are **not** significant enough 'radically transform' the entire Concept Modification. This is particularly so when it is understood that the fundament changes proposed are simply the relocation of building mass to enable the 'Harbour to Cathedral Park' link / view corridor, and incorporation of the 10% design excellence height bonus achieved by the architectural design competition. The essence of the Original Consent remains the same.

The fact that the Concept Modification proposes to "*increase yield, FSR and height*", as commented on by the Panel, **is not a sufficient blanket reason** to consider it as being not substantially the same development as the Original Consent. In contrast, and as correctly identified by the Council in its assessment report, "*the consideration of the 'substantially the same' test is not to be limited to a quantitative exercise alone… and, the assessment needs to be undertaken having regard to overall context of the approved development*"

We provide our substantive advice below.

Background

- The relevant background facts are set out in the Urbis Report and are not repeated verbatim in this advice.
- On 2 January 2018, the Panel granted consent to the Original Consent, being a concept development application across the totality of the Site, for "*a major redevelopment of Hunter Street Mall, a mixed-use development comprising retail, commercial, public spaces, residential (563 apartments), associated car parking & site works*".
- The Original Consent approved 4 'stages' of concept development across distinct parts of the Site, known as Stages 1 to 4.
- Between 2018 and 2020, detailed development consents were granted in respect of Stage 1 and 2 of the Original Consent. Since that time construction has commenced and is nearing completion. We are instructed that the Stage 1 and 2 detailed development consents were consistent with the Original Consent and although modifications were required to the Original Consent, each modification was approved, including 2 modifications that were supported and approved by the Panel.
- On 31 May 2023, in response to the request of Council and following a successful architectural design competition, the Concept Modification along with a detailed development application was lodged in respect of Stage 3 and 4 of the Original Consent.
- On March 2024, Council issued its assessment report in relation to the Concept Modification, which included a recommendation for approval and relevantly provided:

  > *"The proposed changes are such that the modification application is considered to constitute substantially the same development as the originally approved development."*

- The Concept Modification was refused on 15 May 2024. Relevantly, the Panel provided 4 reasons for determining the Concept Modification by way of refusal. The first of those reasons provides as follows:

  > *"1. The consent authority is not satisfied that the modification application is substantially the same development as the concept approval pursuant to Section 4.55 (2)(a) of the Environmental Planning and Assessment Act 1979."*

- We are instructed that in the 'consideration' section of the Determination, the only comment made by the Panel in relation to this matter was:

  > *"The Panel was not satisfied that the modification application has met the threshold test for being substantially the same development given the increased yield, FSR and height increases proposed."*

Substantive Advice

1. The proper approach to modification applications under the *EPA Act*

1.1 There are 3 specific modification pathways available under s.4.55 of the *EPA Act*, including:

(a) Modifications involving minor error, misdescription or miscalculation (s.4.55(1));

(b) Modifications involving minimal environmental impact (s.4.55(1A));

(c) Other modifications (s.4.55(2)).

1.2 Each of those pathways contain certain statutory preconditions that must be considered by a consent authority before a development consent can be modified.

1.3 Your Concept Modification has appropriately been dealt with under the 'other modifications' pathway, that is, pursuant to s.4.55(2) of the *EPA Act*.

1.4 Put simply, the proposed modifications to the Original Consent are outside the scope of subsections (1) or (1A). This is because generally, where proposed modifications will have an environmental impact that could be considered more than 'minimal', the modification

pathway pursuant to s.4.55(2) is the most appropriate.

1.5 The relevant statutory preconditions in s.4.55(2) of the *EPA Act* must then be considered and satisfied before the Original Consent can be lawfully modified. This includes satisfying the 'substantially the same' test contained in subclause (a), which provides as follows:

> *(2) 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)

1.6 Provided the relevant consent authority is satisfied that the development as proposed to be modified is 'substantially the same' development as the development for which consent was originally granted, it will then go on to assess the proposed modifications on their merits pursuant to subclause (3) and s.4.15(1) of the *EPA Act*, to decide whether the environmental impacts are acceptable in all the circumstances.

2. The proper approach to the 'substantially the same' test

2.1 The proper approach to the 'substantially the same' test was recently confirmed by the Chief Judge of the Land and Environment Court in *Canterbury-Bankstown Council v Realize Architecture Pty Ltd* [2024] NSWLEC 31 ('***Realize Architecture***')

2.2 In *Realize Architecture*, the Chief Judge acknowledged and confirmed a 3-step formula for approaching the 'substantially the same' test, which includes:

(a) The First Step: Finding the primary facts: This first step involves simply identifying the respects in which the originally approved development is proposed to be modified. For example, these respects could include identifying any changes to height, bulk, scale, floor space, open space and land use. They are factual matters, not subjective ones;

(b) The Second Step: Interpreting the law: This second step involves interpreting the words and phrases of the 'substantially the same' test in s.4.55(2)(a) of the *EPA Act* as to their meaning. In this sense, there is long established case law that suggest 'ways' in which the relevant comparison might be undertaken. The most commonly invoked ways have traditionally included the following:

(i) Comparing the "*quantitative*" and "*qualitative*" differences between a proposed modified development against the original approved development (*Moto Projects (No 2) Pty Ltd V North Sydney Council* [1999] NSWLEC 280 ('***Moto Projects***') at [56];

(ii) Comparing the "*material and essential features*" (*Moto Projects* at [55] and [58] and *Arrage v Inner West Council* [2019] NSWLEC 85 ('***Arrage***') at [26]) or "*critical elements*" (*The Satellite Group (Ultimo) Pty Ltd v Sydney City Council* [1998] NSWLEC 244 (unreported 2 October 1998) at [29]) of the proposed modified development against the original approved development;

(iii) Comparing the "*consequences, such as the environmental impacts*" (*Moto Projects* at [62] and *Arrage* at [28]) of carrying out the proposed modified development against the original approved development.

Importantly, although the above 'ways' will often be instructive and helpful to identify the differences between a proposed modification application and the original development consent, the Chief Judge expressly ruled that **they are not exhaustive, and they are not mandatory to consider**. This is because these

traditional ways, even if helpful, do not displace the statutory test in s.4.55(2)(a) of the *EPA Act* for a consent authority to consider and form am opinion in relation to whether the relevant developments are 'substantially the same' as one another, which does **not** demand that the comparison be undertaken in any particular way (*Feldkirchen Pty Ltd v Development Implementation Pty Ltd* [2022] NSWCA 227 at [112] and *Arrage* at [27] and [28]).

(c) The Third Step: Categorising the facts found: This third (and final) step involves determining whether the facts found (determined as part of the first step) fall within or without the words and phrases of the 'substantially the same' test in s.4.55(2)(a) of the *EPA Act* (determined as part of the second step). Most critically, the Court described this final step in *Realize* at [30] as an "***evaluative one***" that *"involves **assigning relative significance or weight** to the different facts and **a balancing of the facts**, as weighted. This categorisation **can be an instinctive synthesis** and not be articulated expressly*" (our **emphasis**). This step is plainly a more evaluative and therefore **subjective** one.

2.3 We go on to address this 3-step formula in relation to your proposed modification of the development approved by the Original Consent below.

3. The First Step: Finding the primary facts

3.1 As mentioned above, this first step involves identifying the respects in which the Original Consent is proposed to be modified.

3.2 For this purpose, we note that the Urbis Report neatly provides:

(a) a comparison of the building envelopes approved on the Site by the Original Consent and as proposed to be modified by the Concept Modification (see: Section 3 on pages 10 to 15);

(b) a substantial comparison of the Original Consent and as proposed to be modified by the Concept Modification in respects of site area, number of apartments, floor space, height and car parking, vision, objectives, land use, access and road network, number of envelopes, heritage approach, through site link, solar access, cross ventilation, separation (see: Section 6.1 on pages 20 to 29).

3.3 Furthermore, we note that:

(a) the development approved by the Original Consent is illustrated on the architectural plans (Rev 00), prepared by SJB Architects dated 15 May 2017;

(b) the development proposed by the Concept Modification is illustrated on the architectural plans (up to Rev 7), prepared by SJB Architects dated 23 February 2024.

3.4 In our view, clearly the real point of (factual) differences between the development approved by the Original Consent and the development proposed by the Concept Modification, in a succinct list, is as follows:

(a) Relocation of building mass to enable the 'Harbour to Cathedral Park' link / view corridor;

(b) Incorporating the 10% design excellence height bonus achieved by the architectural design competition.

4. The Second Step: Interpreting the law

4.1 As mentioned above, there is long established case law that suggest a number of 'ways' for interpreting the words and phrases of the 'substantially the same' test in s.4.55(2)(a) of the *EPA Act*. Although these ways are **not** mandatory for the purpose of the third step (because they are not expressly used or mentioned in the actual words of the statutory test), they can nevertheless be helpful to undertake the necessary factual comparison and we address each of the most commonly invoked ways in relation to the development approved by the Original Consent and the development proposed to be modified as follows:

Comparing the "*quantitative*" differences

(a) For this purpose, we note that the Urbis Report adequately provides a comparison of the quantitative changes proposed by the Concept Modification and the development approved by the Original Consent (see: Section 6.1.3.1). Accordingly, we have adopted that comparison for the purpose of our opinion.

Comparing the "*qualitative*" differences

(b) For this purpose, we note that the Urbis Report adequately provides a comparison of the qualitative changes proposed by the Concept Modification and the development approved by the Original Consent (see: Section 6.1.3.1). Accordingly, we have adopted that comparison for the purpose of our opinion.

Comparing the "*material and essential features*" or "*critical elements*"

(c) For this purpose, we note that the Urbis Report adequately provides a comparison of the material and essential features and critical elements proposed by the Concept Modification and the development approved by the Original Consent (see: Section 6.1.3.2). Accordingly, we have adopted that comparison for the purpose of our opinion.

Comparing the "*consequences, such as the environmental impacts*"

(d) For this purpose, we note that the Urbis Report adequately provides a comparison of the consequences and environmental impacts proposed by the Concept Modification and the development approved by the Original Consent (see: Section 6.1.3.2). Accordingly, we have adopted that comparison for the purpose of our opinion.

(e) It is important to observe that an environmental consequence of the Original Consent was view loss and for this reason, a consent authority ought not to be overly critical of the Concept Modification causing view loss when undertaking its 'substantially the same' assessment, particularly in circumstances where the public domain view loss approved by the Original Consent is proposed to be reduced (and in fact, drastically improved) by the Concept Modification.

5. The Third Step: Categorising the facts found

5.1 As mentioned above, this third (and final) step involves determining whether the facts found (as part of the first step) fall within or without the words and phrases of the 'substantially the same' test in s.4.55(2)(a) of the EPA Act (as considered part of the second step).

5.2 This final step is an "*evaluative one*" that "*involves assigning relative significance or weight to the different facts and a balancing of the facts, as weighted*." In this sense, the final step involved a subjective element of opinion.

5.3 In our view, having regard to the factual differences and the comparative assessment set out above and within the Urbis Report (drawing guidance from the traditional 'ways' established by longstanding case law), **the Concept Modification is readily capable of being considered 'substantially the same' development as the development approved by the Original Consent** for the following primary reasons:

(a) when answering the 'substantially the same' test it is important to consider the development as approved and as proposed **in context, on balance and the whole**. Conceptually, that exercise is to be undertaken differently for a small-scale development and a large-scale development. In this sense, when dealing with a large-scale residential development (i.e. 11-storeys) in *Realize Architecture Pty Ltd v Canterbury-Bankstown Council* [2023] NSWLEC 1437, the Court acknowledged at [57] and [65] that whilst there may be a number of quantitative differences between 2 developments which on face value alone and without any further consideration may appear to be significant, when a **macro** (not micro) **approach** is undertaken, the modified development **can still be substantially the same development as the originally approved development**;

(b) accordingly, the fact that the Concept Modification proposes to "*increase yield, FSR and height*", as commented on by the Panel, **is not a sufficient blanket reason** to consider it as not being substantially the same development as the Original Consent. In contrast, and as correctly identified by the Council in its assessment report, "*the consideration of the 'substantially the same' test is not to be limited to a quantitative exercise alone… and, the assessment needs to be undertaken having regard to overall context of the approved development*";

(c) when looking at the Concept Modification from a macro 'precinct perspective', there are only changes proposed to the Original Consent in respect of Stages 3 and 4 and **there are no changes proposed to Stages 1 or 2, at all**. As provided on page 20 of the Urbis Report "*the argument regarding 'substantially the same' is related to approximately 20% of the East End precinct.*" This is a compelling reason for the Concept Modification to be considered as 'substantially the same' development as the development approved by the Original Consent;

(d) when a finely balanced and instinctive synthesis of the proposed changes to Stages 3 and 4 of the Concept Modification are then considered, which include fundamentally the relocation of building mass to enable the 'Harbour to Cathedral Park' link / view corridor and incorporation of the 10% design excellence height bonus achieved by the architectural design competition, those changes are **not** significant enough 'radically transform' the development approved by the Concept Modification. This is particularly relevant because the power of a consent authority to 'modify' an earlier consent is a power **to alter without radical transformation** the consent (*Scrap Realty Pty Limited v Botany Bay City Council* [2008] NSWLEC 333 at [14];

(e) if one were to conduct a review of the before and after situations by looking at the relevant sets of plans, one can see that **the Concept Modification is not substantially different from the Original Consent**. The comparison building envelope drawings which are provided at Figures 1 and 5 of the Urbis Report clearly show this. We note that in the 'substantially the same' assessment, a consent authority is to look at substance, not form (*Gordon & Valich Pty Ltd v City of Sydney Council* [2007] NSWLEC 780 at [19]). In that respect, the essence of the Original Consent remains the same and the Concept Modification is not so large as to render it something other than 'substantially the same' development;

(f) ultimately, 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 to completely re-assess a new development application (*North Sydney v Michael Standley and Associates Pty Ltd* (1998) 97 LGERA 43).

Conclusion

In our legal opinion, **the Concept Modification is readily capable of being considered 'substantially the same' development as the development approved by the Original Consent**. Please do not hesitate to contact either Anthony Whealy on (02) 8035 7848 or James Oldknow on (02) 8035 7875 should you wish to discuss this matter further.

Yours sincerely

Anthony Whealy
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