Mills Oakley
ABN: 51 493 069 734

28 April 2023

Our ref: AJWS/CYCS/3586298

All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215

Contact
Clare Collett +61 2 9121 9027
Email: ccollett@millsoakley.com.au

Partner
Anthony Whealy +61 2 8035 7848
Email: awhealy@millsoakley.com.au

Heworth Group || Grand Rozelle Pty Ltd
Suite 05, Level 41
Grosvenor Place
225 George Street
SYDNEY NSW 2000

By Email: paul.bermingham@heworth.com.au

Dear Paul

Advice concerning Modification Application No. MOD/2022/0447 relating to the former Balmain Leagues Club Site

We refer to Modification Application No**.** MOD/2022/0447 (**MOD**) lodged on behalf of Heworth Group || Grand Rozelle Pty Ltd (**Heworth**) which seeks consent to modify Development Consent No. D/2018/129 (**Original DA**). The MOD relates to the former Balmain Leagues Club site located at 138-152 Victoria Road, 697-699 Darling Street and 1-7 Waterloo Street, Rozelle (**Site**) and proposes changes to the approved mixed use development.

This advice has been prepared to respond to a query raised by the Sydney Eastern City Planning Panel (**Panel**) on 13 April 2023 as to whether the proposed changes in apartment mix would mean that the development as modified would be "***substantially the same****"* development and therefore, capable of approval pursuant to s 4.55(2) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**).

Summary Advice

For the reasons detailed below, we consider **that the MOD is capable of approval pursuant to s 4.55(2) of the EP&A Act as the proposed development as modified is substantially the same as what was originally approved.** The change to the unit mix does not change the essence of the approved development and as such the proposed development, with a modified apartment mix, would be substantially the same development. The fact that the development as modified would no longer comply with the unit mix outlined in cl 19(6) of the *Leichhardt Local Environmental Plan 2000* (**LEP**) does not prevent the development from being "substantially the same development". Non-compliance with any development standard or control is a completely separate matter to the "substantially the same" test and a matter for the consent authority to consider after the threshold of whether the development is substantially the same development has been met.

Background

We understand the relevant background facts to be as follows:

- On 1 May 2018, the Original DA was lodged with Inner West Council (**Council**) which sought consent for demolition of all existing improvements, site remediation and construction of a mixed-use development comprising:
    - 3 x basement levels for residential and commercial parking of 320 spaces;
    - 3 x buildings (part eleven / part twelve storeys) with retail, commercial and the new leagues club with 164 residential units above; and
    - 1 x building (part two / part three storeys) fronting Waterloo Street comprising 3 live / work units (bring total units to 167).

    (**Approved Development**)

- On 10 September 2020, the Original DA was approved by the Panel subject to conditions of consent, including deferred commencement conditions.
- On 25 March 2021 Council confirmed that the deferred commencement conditions were satisfied and that the Original DA Consent would operate from 23 March 2021.
- On 7 December 2022, the MOD was lodged with Council seeking consent for the following changes to the Approved Development:
    - Modified commercial, club and retail podium areas to improve design, layout and user experience.
    - Modified building facades.
    - Reduction in the number of apartments from 164 to 147 (<17 units) and **changes to the apartment mix**, including:
        - 2 x studio units (previously 7);
        - 11 x 1 bedroom units (previously 55);
        - 87 x 2 bedroom / 1 bedroom + study units (previously 63);
        - 47 x 3 bedroom units (previously 39);
        - reduction in the overall affordable housing requirement as per LEP.
    - Modified private and communal open space areas.
    - Increase in landscaped area from 20.4% to 38.9%.
    - Modified basement design to accommodate car park stacking and increase parking spaces from 320 to 324.
    - Incorporation of a construction staging condition of consent.

  (**Proposed Development**)
- On 13 April 2023, the Panel met to consider the MOD and requested that "*The Applicant is to provide legal advice to explain why the change in apartment mix satisfies the substantially the same development test pursuant to s 4.55 of the EP&A Act (despite many other aspects of the DA remaining similar).*"
- We understand that the Panel is meeting on 3 August 2023 to consider the MOD and issue a determination in relation to the same.
- Clause 19(6) of the LEP reads as follows:

  (6) Diverse housing Consent must not be granted for development that will provide 4 or more dwellings, unless it provides a mix of dwelling types in accordance with the following Table, to the nearest whole number of dwellings—

Dwelling Type	***% to be provided***
Bedsitter or 1 bedroom	*Minimum 25%*
Three or more bedroom dwellings	*maximum 30%*

You have asked for advice on whether the Proposed Development would still be substantially the same development as the Approved Development, despite the change in unit mix. Our advice is confined to this aspect of the MOD (rather than the MOD as a whole), as this was the area of concern for the Panel.

Substantive Advice

1. The proper approach to modification applications

1.1. Section 4.55(2) of the EP&A Act relates to modification of consents and 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).*

(our emphasis)

1.2. We note that where a proposed modification would have only 'minimal environmental impact', a s4.55(1A) modification application is appropriate. However, where proposed amendments may have an environmental impact that could be considered more than 'minimal', a s4.55 application should be made. As such, there is no threshold requirement that every s4.55 modification must be of 'minimal environmental impact'.

1.3. **Provided the consent authority is satisfied that the modified development would be 'substantially the same as' the original development, it will then further assess the proposal on its merits to decide whether the environmental impacts are acceptable in all the circumstances.**

1.4. The Courts have widely held that **the concept of 'modification' refers to 'alteration without radical transformation'** (*North Sydney City Council v Michael Standley and Associates Pty Ltd* (1998) 43 NSWLR 468 (***Michael Standley***) and *Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414). Hence, a power of a consent authority to 'modify' a 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) (***Scrap Realty***).

1.5. **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 for a full DA (*Michael Standley*). In that regard, the Court has said:

"The provisions of s96 (now s 4.55) *are facultative and not restrictive and are designed to assist constructively the modification process rather than to act as a substantive impediment to it."*[1]

"…s96 is a facultative, beneficial provision and one which is to be applied in a way that is favourable to those who are to benefit from the provision."[2]

2. What is meant by 'substantially the same' development?

2.1. The 'substantially the same' test is a legal threshold that must be satisfied before the modification can be dealt with on its merits by the relevant consent authority.

2.2. In applying the 'substantially the same' test, the focus is on 'the development' **as a whole**. A comparison must be made between the development as modified and the development that was originally approved (*Scrap Realty* at [16]).

2.3. Whether a modified development will be 'substantially the same' as the original approved development is a **factual** finding but with a **subjective** element of opinion. It requires a comparison between the two sets of plans. As such, there is no ready legal answer to this question as each application will depend upon its own set of plans and its own set of facts, but subject always to the subjective opinion of the consent authority.

2.4. To pass the 'substantially the same' test, the result of the comparison must be a finding that the modified development is '**essentially**' or '**materially**' the same as the approved development (*Moto Developments (No 2) v North Sydney Council* [1999] NSWLEC 280 at [55] (***Moto Projects***); *Vacik v Penrith City Council* [1992] NSWLEC 8) (***Vacik***)).

2.5. In *Michael Standley,* the Court of Appeal confirmed at [446] that 'substantially the same' in the context of modification applications means 'essential or materially or **having the same essence**'.

2.6. In *Moto Projects,* Bignold J held at [55]-[56] that a consent authority is to determine whether a modification application is 'substantially the same' based on the following:

*"The comparative task **does not merely involve a comparison of the physical features** or components of the development as currently approved or modified where the comparative exercise is undertaken in some type of sterile vacuum**. Rather, the comparison involves an appreciation,***

[1] *Bassett and Jones Architects Pty Limited v Waverley Council (No 2)* [2005] NSWLEC 530.
[2] *May v Warringah Council* [2004] NSWCCA 77.

qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development was granted).”

(our emphasis)

2.7. Ultimately, Bignold J in *Moto Projects* found at [59]-[60] that the modification sought (being a separate ingress for vehicular access), was a “*material and essential physical element of the approved development*” and “*[i]ts proposed elimination materially changes the approved development*”.

2.8. It is the ‘features’ or ‘components’ of the originally approved and modified developments that are to be compared in order to assess whether the modified development is ‘substantially the same’ as the originally approved development (*Arrage v Inner West Council* [2019] NSWLEC 85 at [25] (***Arrange***)). However, even if each of the proposed changes are individually significant in their own way, the modified development may still be substantially the same as the approved when considering it **as a whole** (*Tyagrah Holdings v Byron Bay Shire Council* [2008] NSWLEC 1420 at [12]) (***Tyagrah***).

2.9. Both a ‘**qualitative**’ and **‘quantitative**’ assessment of the application is therefore required. In that regard, the Courts have emphasised that a material change to **an essential feature** of a development may result in the development not being ‘substantially the same’ (*The Satellite Group (Ultimo) Pty Ltd v Sydney City Council* [1998] NSWLEC 244 (***Satellite Group***). In *Satellite Group*, a proposed change of use at ground level only, for a 9-storey building, was held to be a ‘**radical transformation**’ of the originally approved development, **even though the building envelope, size, shape and form would be identical**, because the mixed use nature of the development was an essential feature of the approved development. This was a classic example of a purely ‘qualitative’ change being too great to amount to a ‘modification’. It is clear that even when the quantitative differences are small, the ‘substantially the same’ test may not be satisfied for qualitative reasons.

2.10. In *Satellite Group*, the modification sought to replace almost all of the retail component of a development (8 out of 9 approved retail shops, all of which were at the ground level) with further residential gross floor area. This would have resulted in the development no longer retaining any real commercial/retail component. The Court held in this case that the mixed use nature of the development was an ‘essential feature’ of the approved development and, as such, the proposed change of use was a ‘radical transformation’ of what was approved.

2.11. Notwithstanding the decision in *Satellite Group*, even if each of the changes to be made are individually significant in their own way, the proposed modification **may still be substantially the same as a whole** (*Tyagrah* at [12]).

2.12. In practical terms, when considering the extent of the modification, the consent authority should:

a) consider the numerical differences of the development (e.g. typically GFA, FSR, height, parking numbers, unit mix etc.);

b) consider the non-numerical differences (e.g. visual impact, visual appearance and streetscape presentation etc.); and

c) consider any changes relating to a material and essential feature of the originally approved development.

2.13. Even if the ‘substantially the same’ test is satisfied, a proposed modification is still then subject to a separate and subsequent merit assessment by the consent authority, pursuant to the applicable statutory provisions and subordinate legislation, and the like. That is, a proposal may be ‘substantially the same’ but still be refused on its merits, for example on the basis that its additional impacts are unacceptable[3]. Finally, the consent authority must also consider the (written) reasons given for the grant of the original consent (s 4.56(1A) of the EP&A Act). We are not aware of any reason in the original consent which prevents a change to the unit mix.

3. Indicative case law

3.1. In addition to the numerous cases referred to above, the cases below give some guidance on how the Courts have viewed modification applications relating to mixed use development, including a change to unit mixes.

[3] *Tenacity Investments Pty Limited v Ku-ring-gai Council* [2010] NSWLEC 1263 at 21.

3.2. In *Marana Developments Pty Limited v Botany City Council* [2011] NSWLEC 1100 (***Marana***), the original approval was for the construction of five residential flat buildings, with basement car parking, comprising 76 units in total. The modification application sought 'significant changes to the external appearance and layout of the buildings' including an increase in unit numbers from 76 to 102, changes to the apartment mix type and an additional level of basement carparking. Marana Developments sought to change the unit mix from 62 x 2 bedroom and 14 x 3 bedroom to 3 x studio, 29 x 1 bedroom, 66 x 2 bedroom and 4 x 3 bedroom. **Not only did Marana change the unit mix, two new forms of units (being studios and 1 bedrooms) were introduced.**

3.3. **Despite the numerous modifications in *Marana*, the Court found that the changes were modest and capable of approval by way of modification application**. When considering the weight to be given each of the changes, Morris C held in this case that the modesty of the changes themselves (despite there being a number of them), is a relevant consideration that could be given weight when determining whether the modified development is 'substantially the same' as what is approved. Morris C also noted that, despite the changes such as the change to unit mix, the use of the development remained the same. In our opinion, the same can be said for your proposed modification.

3.4. In the case of *Eastview (Australia) Pty Ltd v Ryde City Council* [2005] NSWLEC 393 (***Eastview***), the modification application sought numerous changes to the approved development including an increase in GFA of 250m2 per floor, changes to the basement carpark, loading dock facilities, public space, a new cafe, realignment of two buildings and façade treatment of the same. Despite the number of changes, the Court found that the proposal, when considered **overall,** would still remain substantially the same development.

3.5. In *AG Kellyville Pty Ltd v The Hills Shire Council* [2020] NSWLEC 1205, the Court held that the following changes to an approved residential flat building (comprising two towers) was still substantially the same development: the addition of 2 units, +74sq m of communal space, two new lifts, an increase in height and height of floor levels, 5 additional car parking spaces, changes to the setbacks and basement levels. This shows that a change in unit numbers and other fairly significant changes (such as to building height and number of floors) can still be development which is substantially the same.

3.6. In contrast to the above authorities, in the case of *North Shore Property Developments Pty Ltd v Lane Cove Council* [2013] NSWLEC 1140, the Court held at [29] that the cumulative effect of a number of small changes resulted in the development not being substantially the same':

"The increased number of units and vehicles, as well as the changes to the unit mix, result in a different intensity of use. In addition, the different location of the windows, doors and balconies and communal open space, have different amenity impacts for both the occupants of the development and those in adjoining developments.

The cumulative effect of these changes resulted in a building which has a different overall scale, bulk, form, appearance and impacts. In physical terms, while the building remains a single residential building that steps down the site, its envelope, height, setbacks and landscaping are materially different*.*

The development is 'radically transformed' and does not retain the essence of the original consent. *For these reasons, it is not substantially the same development and cannot be approved."*

(our emphasis)

3.7. Although the Court in *North Shore Property* found that the development was not substantially the same as the approved development, this was not simply due to the change in unit mix. Rather, it was due to the large number of changes which changed the essence of the development. As discussed further below, in our view the change to the unit mix for your proposed development **does not** alter the essence of the originally Approved Development.

3.8. Another recent case where the Court determined that a minor quantitative change was not substantially the same as what was approved is the case of *Horseshoe Properties Pty Ltd v Tweed Shire Council* [2021] NSWLEC 1507. In this case, Clay AC held that though a 10% increase the yield of the development was acceptable in the circumstances, **the modification application sought to relocate an area of open space that was *"an essential element of the approved development"*** and accordingly the appeal was ultimately refused on the basis that it was not 'substantially the same development'.

4. Is the proposed development 'substantially the same' development?

4.1. The table below provides a comparison of the apartment mix in the Original DA and the Proposed Development (noting that the Panel was only concerned with the change in apartment mix and our advice is therefore limited to this issue).

Element	D/2018/219 (Original DA)	MOD/2022/0447 (Proposed Development)	Change
Apartment Mix and numbers	Total: 164 + 3 live work	Total: 147 + 3 live work	**Overall reduction of 17 units**
	7 x studio (4%)	2 x studio (1.4%)	**5 fewer studio units**
	55 x 1 bedroom (33.5% total)	11 x 1 bedroom (7.5% total)	**44 fewer one bedroom**
	63 x 2 bedroom / 1 bedroom + study (38% total)	87 x 2 bedroom (59% total)	**24 more two bedroom**
	39 x 3 bedroom (24% total)	47 x 3 bedroom (32% total)	**8 more three bedroom**
	3 x live work	3 x live work	No change

4.2. In the present circumstances from a **quantitative** perspective, we note the following in relation to the change in unit mix

a) The overall change in the total number of units is a reduction of 17 units;

b) There is no change to the number of the live to work units;

c) The majority of units remain 2 bedroom (compared to previous approved 2 bedroom and 1 + study);

d) The least number of units remain studio units;

e) There are fewer one bedroom units and more two and three bedroom units;

f) The mix of units changes from a fairly even mix of 1, 2 and 3 bedroom units to most units being either 2 or 3 bedrooms;

g) The units remain studio – 3 bedroom units. Whilst the number of different types of apartments change, the composition of apartments offered does not change (though some 1 bedrooms + study have been classified as two bedroom units); and

h) The development remains a mixed use development.

4.3. With regard to the **qualitative** assessment, on our review it is clear that:

a) The primary use, operation and function of the Site remains consistent with the approved mixed-use development. The residential component has been amended to reflect the growing demand for 2+ bedroom apartments in the area;

b) The development continues to offer a mix of apartments ranging from studio to three bedroom apartments;

c) The change in the residential apartment mix will not impact the essence or character of the Original DA, as the same outcomes and uses will be achieved;

d) The changes to the apartment mix type respond to the growing demand for these types of residences in the locality;

e) When viewed as a whole, the development remains generally the same.

4.4. In our opinion, the comparative analysis provided in the Architectural Design Report prepared by Scott Carver Architects clearly shows that the proposed modification **is not** substantially different from the Original DA as the change in the mix of apartments within the approved building is not a material change.

4.5. In our view, when considering the change to the unit mix in both a quantitative and a qualitative sense, the development remains substantially the same development.

4.6. The **proposed changes to the unit mix do not materially change the essence** of the approved development and the development remains materially the same (*Moto*).

4.7. **In *Marana*, the change in unit composition involved introducing two completely new unit types that were not in the original development and the Court still found that the**

development was substantially the same development. The modification in this case is much less significant, with the only change in this regard being the reclassification of some 1 + study units to 2 bedroom units. . In our opinion, for a mixed use development such as the Approved Development, a change in the unit mix within the approved types of units would clearly not cause the development to be so different that it is no longer substantially the same development.

4.8. **The unit mix, in the sense of the number of each of unit, is not an essential feature of the development** (*Satellite*). The unit mix in terms of the range of units provided remains the same. The fact that the LEP contains a control regarding certain unit types does not make the approved unit mix an essential feature of the approved development so that the unit mix cannot be changed by way of modification. We note that the Proposed Development remains a development which provides for studio to 3 bedroom units.

4.9. Even if the changes to the apartment mix types are considered a 'significant' modification from a quantitative sense (**which we do not consider the case**), when considering these changes within the context of the Approved Development as a whole, it is clear that the essence of the development as modified remains and that it is substantially the same development.

4.10. Finally, we have not seen anything in the Original DA which indicates that the specific number of studio, one, two and three bedroom apartments was an essential part of the approved development so that it could not be changed by way of modification application.

4.11. Based on the above, in circumstances such as these where **the proposed modifications do not change the essence of the development and are not considered a radical transformation**, the change to the unit mix proposed by the MOD is considered to satisfy the substantially the same development test and **can be approved** by way of a s 4.55(2) application.

5. Application of Clause 19(6) of the LEP

5.1. As detailed above, pursuant to cl 19(6) of the LEP, there is a diverse housing development control which requires a minimum of 25% of the residences to be studio / 1 bedroom and a maximum of 30% to be three or more bedrooms.

5.2. As the typical process for varying a development standard pursuant to cl 4.6 of the standard instrument **does not apply to modification applications** the departure from the standard which is proposed in the MOD does not need to be justified by way of a written request.

5.3. Therefore, in circumstances such as these, the proposed variation to cl 19(6) of the LEP will be assessed by the relevant consent authority on the merits of the proposal as a whole. This is a completely separate and distinct issue to whether the proposed development remains "substantially the same".

Conclusion

In our opinion, the changes to the unit mix clearly result in development which is 'substantially the same' as the Original DA. It is our view that the Proposed Development is capable of approval pursuant to s 4.55(2) of the EP&A Act.

Should you or Council have any questions regarding this letter, please do not hesitate to contact either Anthony Whealy on direct line +61 2 8035 7848 or Clare Collett at ccollett@millsoakley.com.au.

Yours sincerely

Anthony Whealy
Partner
Accredited Specialist — Local Government and Planning