

Mills Oakley
ABN: 51 493 069 734

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Dear Alex,

Request for Advice: Modification Application

Property: 5 Canberra Avenue, 4-8 Marshall Avenue, 2-8 Holdsworth Avenue, St Leonards

We refer to the above property and your request for advice as to whether your proposed modification to the approved development would be substantially the same for the purposes of s 4.55(2) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).

On 17 April 2023 Sydney North Planning Panel granted development consent to DA79/2022 for the demolition of existing structures and construction of three (3) residential flat buildings (ranging from 12 to 19 - storeys) comprising a total of 232 apartments and basement parking for 348 vehicles on the Site (**Development Consent**).

You are proposing to rely on the infill affordable housing incentive provisions under *the State Environmental Planning Policy (Housing) 2021* (**Housing SEPP**) to increase the height and FSR of the development approved by the Development Consent.

Summary of Advice

Following the recent decision of the Chief Judge of the Land and Environment Court in *Canterbury-Bankstown Council v Realize Architecture Pty Ltd* [2024] NSWLEC 31 (**Realize**) we are of the view that it would be possible to seek to rely on the affordable housing incentive provisions under the Housing SEPP by way of a modification application.

In order to rely on section 4.55(2) of the EP&A Act the consent authority needs to be satisfied that the modified development is 'substantially the same' as the original approved development. This recent decision of the Chief Judge of the Land and Environment Court in *Realize* has simplified the approach to be taken by consent authorities in assessing modification applications, providing that a more 'balanced' approach should be taken, with consent authorities not to get bogged down in the quantitative (numerical) differences as they appear in isolation.

Using this method and for the reasons set out below, Council could be reasonably satisfied that the proposed modification to the Development Consent (in order to rely on the infill affordable housing incentive provisions) would be substantially the same for the purposes of section 4.55(2) of the EP&A Act.

Advice

Section 4.55(2)(a) of the EP&A Act provides:

"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)"

In Realize, the development consent which was the subject of consideration was for a 9- storey building containing two ground retail tenancies, 397 dwellings (95 studios; 161 x 1-bedroom units; 136 x 2-bedroom units; 5 x 3-bedroom units), with 432 parking spaces (Consent). In short, the Consent consisted of:

- (a) Maximum building heights of between 28.3-31m and up to 9-storeys (this already exceeded of the applicable maximum building height controls)
- (b) a 'blended' FSR of 3.08:1 (this already exceeded the applicable FSR control in the B2 zone)
- (c) 2 ground floor retail tenancies
- (d) 397 dwellings
- (e) 432 parking spaces
- (f) 2,085m2 of communal open space.

The Applicant in that case sought to modify the Consent for the following:

- (a) Removal of the ground floor visitor carpark entirely
- (b) Complete reconfiguration and relocation of the only driveway serving the 439 space carpark
- (c) More than **doubling of the size of the communal open space** and completely reconfiguring it
- (d) **Adding 2 extra floors** to the approved development (over 50% of the floor place)
- (e) **Adding 2,368m2 (9.8%)** of additional gross floor area (GFA)
- (f) Adding an additional 10 units (2.5%), with internal reconfiguration of all units and a significantly different unit mix

See below for a visual comparison:



Figure 1: Modification to approved development in Realize

It has been widely held that any assessment as to whether a modification application is substantially the same involves both a qualitative and a quantitative assessment (*Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280).

The Chief Judge in Realize noted that the consent authority was to continue to assess any modification application utilising this method, however he endorsed a 'balanced' approach to any assessment, based on 'instinct' or the 'look and feel' of the modified proposal. According to His Honour the consent authority should follow 3 simple steps:

1. Finding the primary facts – the first step involves identifying the aspects of the approved development which are to be modified.
2. Interpreting the law – the second step involves interpreting the words and phrases in the substantially the same test in section 4.55(2) and although this involves a comparison of the quantitative and qualitative differences between the approved development and the proposed modified development (including the consequences or environmental impacts), the Chief Judge said that section 4.55(2) of the EP&A Act does not refer to “critical elements” or even “elements”, of the two developments” (at [38]) and that in relation to the task of identifying “the material and essential features of the originally approved and modified developments”, in fact s4.55(2) “does not demand such an enquiry” (at [41] and [42]).
3. Categorising the facts – the final step involves determining whether the facts (found in the first step) fall within the ‘substantially the ‘same test’. Most critically the Court described this final step [at 30] as “an evaluative once” that “involves assigning relative significance or weight to the different facts and a balancing of the facts as weighted. This categorisation can be instinctive synthesis and not be articulated expressly.

The Commissioner (at first instance, with whom the Chief Judge later agreed on appeal) said that [at 62] that she accepted and adopts [the] qualitative conclusion of the Applicant’s town planning expert that the proposal as modified:

- a. Will not change the nature or the intensity of the use;
- b. Whilst improving the relationship to the public domain at ground level, this is similar with the intent established in the original approval;
- c. Will not change the relationship to surrounding developments as the modifications will maintain the character of the original approval;
- d. Where an increase in floor space and height is proposed on the upper levels, the development is consistent with the original approval as a whole, and the bulk and scale which establishes the streetscape character (from ground levels to levels 7/8) is unchanged per the original approval”

In the Commissioner’s judgement she said [at 61]:

“The ground plane modifications, envelope changes, provision of two additional levels and subsequent increase in apartment count is not considered to result in a radical transformation which will alter the essence of the overall development. That is, whilst the development will alter the building envelope and to a certain degree, the appearance, the development will remain as a multi-storey, mixed-use development with ground floor commercial uses and communal open spaces and residential floor area above. Importantly, the overall architectural character of the development will not be adversely modified and the proposed changes will maintain the approved design language. The improvements to the open spaces, building envelopes and additional built form does not materially change the fundamental nature of the development as viewed from the public domain.

Further, the Court acknowledged that although there were quantitative differences between the Subject Modification and the Original Consent that may appear in isolation to be significant, **the focus of the test in s.4.55(2)(a) is on the whole and on an overall balancing of the two developments. In this instance, the ‘qualitative’ similarities between the two schemes were enough to negate or override the large numerical (quantitative) differences described above.** This

is precisely the ‘balancing’ exercise that a consent authority is entitled to undertake, to then form its ultimate opinion.

The Development Consent for the subject site includes:

- a) Site preparation and excavation works.
- b) Construction of three residential flat buildings ranging between 12 storeys to 19 storeys, including:
 - (i) 232 residential dwellings (211 apartments and 21 townhouses);
 - (ii) 24,703.6m² of residential gross floor area; and

- (iii) 3403.3m² communal open space.
- c) Development of recreation areas in the form of a pocket park with a total area of 1,300m.
- d) Construction of four basement levels with 309 car spaces, 82 bicycle spaces, and 23 motorcycle spaces.
- e) Public domain, landscaping and associated infrastructure works.
- f) Extension and augmentation of physical infrastructure and utilities as required.

The Site is zoned High Density Residential (R4) under the Lane Cove Local Environmental Plan 2009 (LEP) and has a collective site area of 6727.5 square metres. The Site comprises a total of ten allotments, located at the northeastern entry to the St Leonards South Precinct.

The Site is situated between the commercial and mixed-use precinct of the St Leonards Town Centre to the north and east, and existing low to medium scaled residential development to the south and the west, which is zoned for higher density residential. The Site is located at Area 1, 2 and 4 within the St Leonards South Precinct and therefore, is subject to Part 7 of the LEP.

You are now looking to utilise the 30% uplift provision for infill affordable housing under the Housing SEPP to target the targeting the full uplift of 30% and 15% affordable housing which we are instructed would result in an additional 4-6 stories.

Your modification application to the Development Consent proposes the following specific changes:

HEIGHT AND STOREYS

Site	Approved (Original DA & Modification 2)		Proposed		Change	
	Height	Storeys	Height	Storeys	Height	Storeys
Area 1	65m	19 storeys	84.5m	24 storeys	+19.5m	+5 storeys
Area 2	53m	15 storeys	68.9m	22 storeys	+15.9m	+7 storeys
Area 4	44m	12 storeys	57.2m	18 storeys	+13.2m	+6 storeys

GFA

Site and Site Area	Approved Total GFA (Original DA & Modification 2)	Proposed Total GFA	Change (Mod 2 vs Proposed)
Area 1 – 2736.50m ²	10535.50m ²	13696.15m ²	+3160.65m ²
Area 2 – 2320.50m ²	8545.60m ²	11197.90m ²	+2652.30m ²
Area 4 – 1670.50m ²	5622.40m ²	7220.60m ²	+1598.20m ²
Area 2 & 4 – 3991.00m ²	14168.00m ²	18418.50m ²	+4,250.50m ²
Total Area 1 + Area 2 + Area 4	24703.50m²	32114.60m²	+7411.10m²

FSR

Site	Approved (Original DA & Modification 2)	Proposed	Change
Area 1	3.85:1	5:1	+30%
Area 2 & 4	3.55:1	4.615:1	+30%

Figure 2: Proposed Modification to Development Consent

We set out below the 3D massing showing the proposed increase in height to each of the 3 buildings approved by the Development Consent.

3D MASSING

Legend



Pre Upfit Building Extent



Post Upfit Building Extent

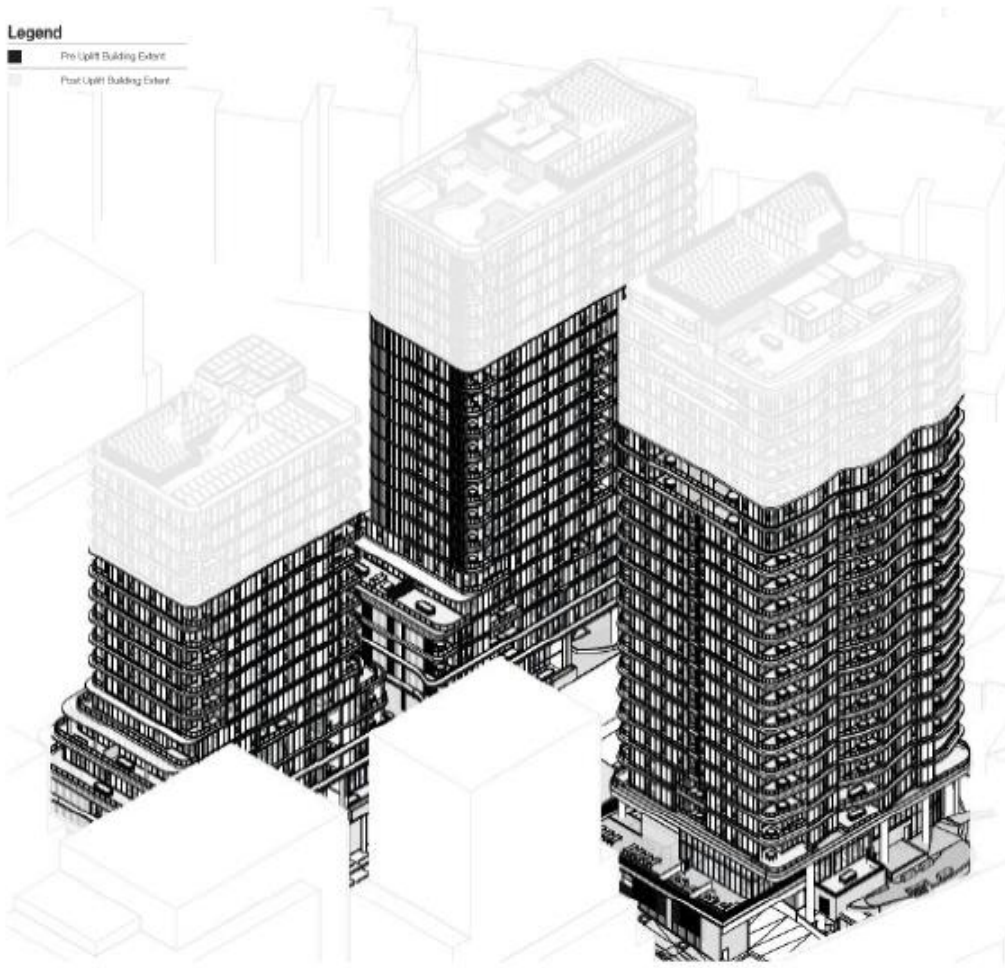


Figure 3: 3D Massing showing proposed increase in height as prepared by Urbis

Adopting the approach taken by the Court in *Realize* the modified development, when compared to the Development Consent, would be substantially the same for the following reasons:

- (a) The scheme remains a 3 tower residential development with communal open space, public infrastructure and associated landscaping.
- (b) There are no changes to side setbacks of buildings, so the footprint of the buildings is not being extended.
- (c) The additional stories do not create further adverse overshadowing or solar impacts to the development and the adjoining properties.

It follows that the consent authority can be reasonably satisfied that the proposed modification to the Development Consent will be substantially the same, for the purposes of section 4.55(2) and can be lawfully approved by Council.

If you have any questions, please call Anthony Whealy on direct line +61 2 8035 7848 or Emma Whitney on direct line +61 2 8035 7931.

Yours sincerely



Anthony Whealy
Partner

Accredited Specialist — Local Government and Planning