5 June 2023

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Ms Nicole Bennett
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BY EMAIL: Nicole.Bennett@resourceco.com.au

Dear Ms Bennett,

Summary of Advice – Modification Application – DA20/0589 – MOD23/0058

1 Introduction

1.1 We refer to our previous advice dated 10 November 2022 regarding the proposed modification to DA20/0589 by Tyrecycle Pty Ltd to increase the handling capacity (**Proposed Modification**) at its facility located at 1-21 Grady Street, Erskine Park (**Site**).

1.2 This is supplementary advice to address specific concerns raised by the consent authority. In our initial advice we explained why the Consent Authority has the power to modify the original development consent, and why the Proposed Modification is not designated development. In this supplementary advice we explain why a modification application does not trigger the designated development requirements and the meaning behind 'Note 2' at section 48 of the *Environmental Planning and Assessment Regulations 2021* (**EPA Regulations**). We also provide caselaw which further justifies that the Proposed Modification is substantially the same development.

2 Why the modification application does not trigger the Designated Development requirements

2.1 It is important to distinguish from the outset that a modification application is **not** a development application. Section 4.56(1C) of the *Environmental Planning & Assessment Act 1979* (NSW) (***EPA Act***) states:

> '*The modification of a development consent in accordance with this section is taken not to be the granting of development consent under this Part, but a reference in this or any other Act to a development consent includes a reference to a development consent as so modified*.'

2.2 Accordingly, provisions in the EPA Regulations dealing with the steps to be taken with respect to the lodgement of a development application are different to those that apply to a modification application. Only a development application for designated development (and not a modification application) requires an Environmental Impact Statement. Specifically, section 4.12(8) of the EPA Act states:

> '*A **development application** for State significant development or designated development is to be accompanied by an*

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environmental impact statement prepared by or on behalf of the applicant in the form prescribed by the regulations.'

2.3 This issue was considered in the decision of *Concrite Quarries Pty Ltd v Wingecarribee Shire Council* [2000] NSWLEC 97 (**Quarries**) which related to a modification application for designated development in which Lloyd J stated at [12]:

> *'In my opinion s78A* [now s 4.12(8)] *has no application and neither does Schedule 3* [of the Regulations].*'*

2.4 The *Concrite* decision is attached at **Annexure A** to this advice. We draw your attention to paragraphs 10 to 12.

2.5 The 'Alterations and Additions' pathway is for development that may not be substantially the same, but also does not involve significant environmental impact. The modification application pathway (under s.4.55(1A)) is for development that is substantially the same, and involves minimal environmental impact. In the present case, the proposal could be achieved through either pathway. Both of these pathways switch off the designated development requirements because there is not a significant environmental impact.

2.6 The purpose of Note 2 is to identify that the requirements for alterations and additions (development application pathway) are not relevant to a modification application.

3 Section 4.55(1A)(a) – Minimal Environmental Impact

3.1 An application brought pursuant to s 4.55(1A) of the EPA Act, requires the consent authority to be satisfied that the proposed modification:

(a) is of minimal environmental impact (s 4.55(1A)(a)); and

(b) is substantially the same as the original consent (s 4.55(1A)(a)).

3.2 As outlined in the Modification Application, there is no substantial increase in the environmental impacts of the development, namely – there will be minimal traffic impact to the surrounding road network[1], no additional noise associated with the operations[2], and no discernible additional impact on air quality[3].

3.3 We also confirm that this view is supported by the NSW Environment Protection Authority who have given their approval to the proposed modification.

4 Section 4.55(1A)(b) - Substantially the Same Development

4.1 The legal test of what is meant by being 'substantially the same development' has been detailed in our advice of 10 November 2022. However, it is worth emphasising that in determining whether a development is substantially the same, a numeric or quantitative evaluation of the modification when compared to the original consent, absent any qualitative assessment, will be 'legally flawed'.[4]

4.2 In this regard, we refer to the decision of *Gunlake Quarries Pty Limited v The Minister for Planning and Public Spaces* [2021] NSWLEC 1333 at [17], in which an increase in the transportation movement from 2,000,000 tonnes to 2,600,000 tonnes was considered substantially the same on the basis it did not change the footprint of the quarry, and *'the*

[1] Page 2, Report of SCT Consulting dated 3 November 2022

[2] Page 5, report of Todoroski Air Sciences dated 10 November 2022

[3] Page 4, report of Todoroski Air Sciences dated 10 November 2022

[4] *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280; (1999) 106 LGERA 298 at [52].

change to the average daily number of truck movements, the averaging period and the daily limits, while different, will not radically alter the development from that approved.'

4.3 In circumstances where the proposed modification is essentially the same essence as the original development (meaning the operation of the facility, including times and types of material is unchanged), and there is minimal environmental impact, the consent authority should be satisfied, in line with existing authority, that the development is substantially the same.

5 For the above reasons, it is our view that the consent authority has the power to grant consent to the modification application.

6 Please let us know if you require further clarification on any part of our advice.

Yours sincerely

Matthew Cole

ANNEXURE A – CONCRITE DECISION

Land and Environment Court of New South Wales

CITATION :	**Concrite Quarries Pty Ltd v Wingecarribee Shire Council [2000] NSWLEC 97**
PARTIES :	APPLICANT: Concrite Quarries Pty Ltd RESPONDENT: Wingecarribee Shire Council
FILE NUMBER(S) :	11116 of 1999
CORAM:	Lloyd J
KEY ISSUES:	Development :- modification application - extension of existing quarry - whether substantially the same development - whether designated development - merit issue
LEGISLATION CITED:	Environmental Planning and Assessment Act 1979, s.96(2), s.96(6), s.78A(8), Sch 3
CASES CITED:	
DATES OF HEARING:	02/05/00, 03/05/00, 04/05/00
EX TEMPORE JUDGMENT DATE :	05/04/2000
LEGAL REPRESENTATIVES:	APPLICANT: W R Davison SC SOLICITORS: Minter Ellison RESPONDENT: J A Ayling (barrister) SOLICITORS: B. Bilinsky & Co

JUDGMENT:
IN THE LAND AND Matter No: 11116 of 1999
ENVIRONMENT COURT Coram: Lloyd J
OF NEW SOUTH WALES Decision date: 4 May 2000

Concrite Quarries Pty Ltd
Applicant

v

Wingecarribee Shire Council
Respondent

JUDGMENT

HIS HONOUR:

1. This is an appeal under s 96(6) of the Environmental Planning and Assessment Act 1979 against the deemed refusal of an application to modify a development consent. The development consent for which modification is sought is one which was granted by the respondent on 21 December 1993 to development application number DA001/93. That consent was for an extension to a hard rock quarry in accordance with plans prepared by Resource Planning Pty Limited dated December 1992 except where amended by a number of conditions.

2. Condition 4 of the existing consent imposes a time limit so that the consent is to operate for a maximum period of 13 years from the date of physical commencement of quarrying. Condition 5 imposes a maximum production of saleable product of 300,000 tonnes per annum.

3. The development consent was, I understand, implemented almost immediately after it was granted so that it will expire in accordance with condition 4 in about December 2006. The basalt resource within the approved extraction area is almost exhausted and production has dropped to its present level which, I am told, is between 20,000 and 25,000 tonnes of saleable material per month.

4. The application for modification is to extend the extraction area by approximately 5,450 square metres on the northern side of the approved area so as to extract approximately 100,000 tonnes of material at the existing rate of 20,000 to 25,000 tonnes per month. This means that the additional area will be exhausted of basalt resources within four to five months.

5. The purpose of the application is to enable the applicant to obtain supplies of basalt on an interim basis so as to sustain its operations until a determination is made on a separate application for a quarry on other land nearby and which has been the subject of a Commission of Inquiry.

6. The extended area of quarrying which is the subject of the present application will be carried out in the same manner and under the same conditions which apply to the development consent granted on 21 December 1993. It is clear however that quarrying operations will not continue until December 2006 as permitted by the existing consent but will cease in about four or five months, by which time when the whole of the basalt resource will have been exhausted. Thereafter the quarry will be rehabilitated in accordance with the existing consent. I should note that it is apparent from the view of the site, which I took in the presence of representatives of the parties, that rehabilitation of the existing quarry is already proceeding.

7. It is reasonably clear that the proposed modification will not result in any increase in the environmental impact of the total development compared with the approved development. There will be no extension of the time for which the consent runs. A condition proffered by the applicant as part of its application will limit the time to which the existing consent runs to a maximum period of six months, which is, of course, well short of the time for which the original development consent is operative.

8. Moreover, the total volume of material to be extracted including the material to be won from the additional area now proposed, namely a total of 1.9 million tonnes, will be considerably less than the volume of material approved for extraction under the original development consent, which was 2.3 million tonnes.

9. The volume of traffic generated by the proposed modification will be no greater than that generated by the original consent and will likewise cease well before the time for which the original consent runs. There will be no adverse impact by way of noise from the quarrying operations, neither will there be any adverse visual impact, as conceded by the respondent's expert witness Mr R E Darney. That is to say, the merits of the proposal are all one way: there is no merit consideration which would justify a refusal of this application, in my opinion.

10. The respondent however raises two legal questions. The first is one which arises under s 96(2) of the Act. That subsection permits the modification of a consent if the consent authority is satisfied that the development to which the consent as modified relates is substantially the same development. The question raised by the respondent is whether or not the modified proposal relates to substantially the same development as presently being carried out, or substantially the same development as approved. In my opinion the distinction is, in this case, irrelevant. The present operations are at present still continuing pursuant to the original development consent of 21 December 1993. The application for modification was made in November 1999 and this appeal was lodged in December 1999 when quarrying activities were still continuing pursuant to the original consent. At the present time they are still continuing pursuant to the original development consent. Indeed any activities on the site at present could only be pursuant to the original development consent. In my opinion the requirements of s 96(2) are satisfied. That is to say, the development for which the modification is sought is substantially the same development within the meaning of that provision.

11. The second legal issue raised by the council is whether this is development which requires the submission of an environmental impact statement. In particular, Mr J A Ayling, appearing for the respondent, has referred me to the definition of designated development in Schedule 3 to the Act and submits that this

development falls fairly and squarely within the definition of an extractive industry; and it is thus designated development requiring the submission of an environmental impact statement. Part II of Schedule 3 provides that in the case of alterations or additions to designated development, if in the opinion of the consent authority, the alterations or additions do not significantly increase the environmental impacts compared with the existing or approved development, then it is exempted from the provisions of Schedule 3. The requirement for an environmental impact statement arises from s 78A of the Act. Subsection (8) provides:

> *(8) A development application must be accompanied by:*
>
> *(a) if the development application is in respect of designated development - an environmental impact statement prepared by or on behalf of the applicant in the form prescribed by the regulations, or*
>
> *(b) ... .*

12. In my opinion sub-s 78A(8) does not apply in this case. The requirement for an environmental impact statement in the case of designated development applies only in the case of a development application. This is not a development application. This is an application for modification of an existing development consent. In my opinion s 78A has no application and neither does Schedule 3. The present application does not need to be accompanied by an environmental impact statement. The application is valid.

13. There being no merit considerations which lead to a refusal of the application, it follows, in my view, that the application must be granted; and it will be granted subject to the conditions set out in the draft conditions of consent proffered by the applicant and contained in Exhibit H. Those conditions include conditions limiting the consent to a maximum period of six months from the date hereof, limiting the production of saleable product to 100,000 tonnes of material from the area the subject of the modification and other conditions of a subsidiary nature. One of the conditions requires the retention of an existing bund wall parallel to Rockleigh Road, which will provide a visual and acoustical shield to the activities within the quarry. Another condition requires the planting of vegetation around the perimeter of the area to be excavated which will provide a further visual shield to the quarrying operations.

14. I note that one of the issues raised as a merit issue is the question of dust generation. Evidence was given by an objector, Mrs Dorothy Sears of “Lantern Hill” in Werai Road, Exeter, to the effect that she had experienced dust on her property from time to time. The evidence discloses however that the quarry is not the only dust source in the area. There is, of course, dust from normal agricultural activities in the area; and I have been told the nearby railway line is utilised by open railway trucks used for the carrying of limestone in an uncovered form and that Mrs Sears' residence is in fact closer to the railway line than it is to the quarry. I cannot be satisfied that the dust she experiences is generated by the quarry or crushing activities in the absence of any monitoring station on her property.

15. The formal orders are:

1. The appeal is allowed.

2. The development consent number 001/93 issued 21 December 1993 is modified

to extend extractive operations into an area of approximately 5,450 square metres on lot 2 deposited plan 537292 as shown in figure 1 of the statement of environmental effects dated November 1999, to allow for 100,000 tonnes of basalt to be extracted over a period of six months subject to the conditions set out in exhibit H.

3. The exhibits may be returned other than exhibits A and H.

16. There remains one other question, namely the question of costs. Mr Davison SC, appearing for the applicant, submits that there are exceptional circumstances in the present case which justify the making of an order for costs in favour of the applicant. It is the practice of the Court, pursuant to its publicly notified practice direction, that orders for costs will not be made in planning appeals unless the circumstances are exceptional. Mr Davison points to two exceptional circumstances, namely the fact that a preliminary point was set down for hearing on 23 February 2000, being a preliminary point sought to be raised by the respondent, and being the legal questions which it has raised in these proceedings. Apparently some two days before 23 February the respondent agreed that it was proper for the preliminary point to be raised at the merits hearing rather than as a separate issue because it involved the making of findings of fact as well as of law. Mr Davison seeks an order for the applicant's costs thrown away by the abandonment of that hearing date. In my opinion that is an exceptional circumstance and there will be an order that the respondent pay the applicant's costs thrown away by reason of the vacating of the hearing date of 23 February.

17. The second matter raised by Mr Davison which is said to be an exceptional circumstance is that there was no real issue on the merits of the proposal. He has referred to a report prepared by an officer of the respondent in which that point is apparently conceded. That in my opinion is not an exceptional circumstance. The continuation of the impacts is not one upon which the respondent was required to call evidence. It was entitled, in my view, to require the applicant to satisfy both it and this Court at this hearing, which is a rehearing, that the merit considerations justified an approval of the application for modification. Accordingly, there will be no order for costs in relation to the general hearing of the matter.
