Development Consent 16-2013-757
Port Stephens Council

SEPP Seniors development

Advice
re
Modification of Consent

9 October 2019

prepared for
Perception Planning Pty Ltd

from
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Barrister

Background

1. Perception Planning Pty Ltd (PP) is assisting the owner of Lots 1 & 2 DP 627638 known as 118 and 118A Soldiers Point Road, Soldiers Point (the Site) in respect of modification to a development consent granted by Port Stephens Council (the Council) on 15 April 2014 for a seniors living development of 100 units (the Consent) on the Site.

2. The Consent was modified on 14 June 2016 changed the mix of units from 19 one-bedroom, 65 two-bedroom and 16 three-bedroom, to 0 one-bedroom, 83 two-bedroom and 17 three-bedroom amongst staging and other chamges not relevant to this Advice.

3. The development as approved has been partially constructed. The parts constructed consist of the buildings known as Block A and Block B in the plans approved by the Consent. The current approved plans included:
    - Blocks C, D and, E, each of which buildings was about the size of Block A, and
    - Block F which consisted of 4 separate buildings.

4. The proposed modification to the development will:

    - retain the existing constructed Block A and Block B, B being the Community Centre;
    - delete from the plans and not construct Blocks C D E and F;
    - decrease the number of dwellings from 100 to 94;
    - construct a new building to the north of Block B adjacent to the east boundary in the place where the 4 buildings for Block F and the eastern end of Blocks C, D and E would have been constructed.
    - The new building will involve:
        - a single building with 6 storeys or 7 levels (ground level parking with 6 residential levels above) with a flat/angled roof;
        - to be constructed in three stages known as Stage 2A, Stage 2B and Stage 2C;
            - Stage 2A 26 units
            - Stage 2B 21 units
            - Stage 2C 21 units.
        - The 94 units that will make up the development as modified will comprise:
            - 26 units already constructed in Block A and Block B being the Community Centre, and
            - 68 units to be built in the new building,
        - each unit being two or three bedrooms in self-contained dwellings;
        - a car parking area over part of where Blocks C, D and E would have been;

- communal bowling green or tennis court or equivalent;
- an adjustment to the landscaping plan for parts of the site no longer to be occupied by buildings.

5. PP met with Council to discuss the proposed modification. The Council has indicated that:
   (i) It would not be "satisfied that the development to which the consent as modified relates is substantially same development as the development which consent was originally granted" as required by s 4.55(2) of the *Environmental Planning and Assessment Act 1979* (EP&A Act);
   (ii) the site compatibility certificate (SCC) dated 15 November 2013 could not be relied upon and a new SCC would be needed to accompany the new DA.

6. Consequently my Advice is sought on these matters:
   1) Whether a new SCC is required for the proposed modified component of the approved (and partially constructed) development;
   2) Whether Clause 97 of the EP&A Regulation and Clause 4.17 of the EP&A Act could be utilised for the proposed modified component of the approved (and partially constructed) development; and
   3) Any other avenue to lodge the new DA for the modified component of the approved (and partially constructed) development without requiring a new SCC to be obtained.

7. The documentation I have available to me for the purpose of giving this Advice included:
   i. email instructions from Erin Daniel of Perception Planning 30 September 2019;
   ii. Certificate of Site Compatibility 15 November 2013 and letter from the Director General;
   iii. the Council's development assessment report in respect of the original grant of development consent;
   iv. the Council's development assessment report in respect of the modification in 2015;
   v. the SEE in support of the modification application;
   vi. 16 sheets of the approved plans;
   vii. 21 sheets of the proposed modified plans.

Site compatibility certificate

8. The Site is zoned 6(c) Special Recreation under the Port Stevens LEP 2000 (the LEP). Seniors housing is not permissible under the LEP in that zone. Permissibility is obtained via *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (SEPP Seniors). SEPP Seniors makes the development permissible provided there is in existence a current Site Compatibility Certificate (SCC). SEPP Seniors provides (my highlighting):

24 Site compatibility certificates required for certain development applications

(1) This clause applies to a development application made pursuant to this Chapter in respect of development for the purposes of seniors housing (other than dual occupancy) if—

(a) the development is proposed to be carried out on any of the following land to which this Policy applies—

(i) land that adjoins land zoned primarily for urban purposes,

(ii) ...

(2) A consent authority must not consent to a development application to which this clause applies unless the consent authority is satisfied that the relevant panel has certified in a current site compatibility certificate that, in the relevant panel's opinion—

(a) the site of the proposed development is suitable for more intensive development, and

(b) development for the purposes of seniors housing of the kind proposed in the development application is compatible with the surrounding environment having regard to (at least) the criteria specified in clause 25 (5) (b).

Note. Clause 50 (2A) of the Environmental Planning and Assessment Regulation 2000 requires a development application to which this clause applies to be accompanied by a site compatibility certificate.

(3) Nothing in this clause—

(a) prevents a consent authority from—

(i) granting consent to a development application to which this clause applies to carry out development that is on a smaller (but not larger) scale than the kind of development in respect of which a site compatibility certificate was issued, or

(ii) refusing to grant consent to a development application to which this clause applies by reference to the consent authority's own assessment of the compatibility of the proposed development with the surrounding environment, or

(b) otherwise limits the matters to which a consent authority may or must have regard (or of which a consent authority must be satisfied under another provision of this Policy) in determining a development application to which this clause applies.

9. The *Environmental Planning & Assessment Regulation 2000* (the Regulation) provides in cl 50(2A):

> (2A) A development application that relates to development in respect of which a site compatibility certificate is required by a State Environmental Planning Policy must be accompanied by such a certificate.

10. The Director General of the Department of Planning and Infrastructure issued a "Certificate of Site Compatibility" (a site compatibility certificate, SCC) on 15 November 2013 in respect of Lot 1 & 2 DP 627638 known as 118 and 118 a Soldiers Point Road, Soldiers Point (the site).

11. The Council's position is that the proposed modification to the development would require a new SCC. I do not think this position is correct at law.

12. Firstly, s 4.55 of the EP&A Act makes provision for modification of development consents generally and includes s 4.55(4) which provides in express terms:

> (4) 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 development consent includes a reference to a development consent as so modified.

13. The requirement of the Regulation is that the original development application be "accompanied by" an SCC: cl 50(2A) as referred to previously. Consequently there can be no requirement for a new SCC for the modification of a development consent if the question of satisfaction under cl 24(2) has already been formed so as to give the consent authority power to grant development consent in the first place. Modification is a separate procedure.

14. SEPP Seniors cl 25(9) provides that an SCC "remains current for a period of 24 months after the date on which it is issued by the relevant panel". Further, there is an advisory notation on the certificate itself to the same effect referencing cl 25(9). The fact that the SCC has expired and is no longer current has no impact for the proposed modification application. The SCC's work is done once the DA is accompanied by the SCC. The modification procedure under the EP&A Act is controlled by its own procedures including the test of "substantially the same development".

15. A new and separate SCC will be required to be obtained if a DA is lodged. Therefore the question of whether a modification application can be made rather than a new DA, which turns upon whether what is proposed will be substantially the same development as that which was approved.

Section 4.55(2): substantially the same development?

16. The approved development is described by the Council in the Development Assessment Report recommending approval for the original DA in this manner:

> The proposal comprises a three-staged development of six (6) separate Seniors Living building blocks which includes 100 (100) Seniors Living-Care Units and associated community facilities.
> Stage 1 involves the construction of Block A (three-storey, ground level parking)... includes twenty (20) two-bedroom units and Block B which includes the three-storey Community Building and Pool and six (6) one bedroom units ... The construction of thirty seven (37) car parks along the eastern edge of the development adjacent to the existing Bowling Club car park.
> Stage 2 involves the construction of Block D and E (stepped 3-storey buildings) ...
> Stage 3 completes the development and involves the construction of Block C and F (three storey semi-detached buildings)

17. Stage 1 has been constructed. Block A is located along the southern end of the site. It is a long 3-storey building consisting of undercover parking at ground level, and 2 living levels above, with a suburban style pitched roof (refer to north and south elevation of Block A in DA 1401 Rev CC). In plan view part of Block A is a separate building, but by reference to the elevations Block A has one continuous roofline making the two buildings appear as one. Block B is the Community Hall, which is also a 3-storey building with a pitched roof.

18. It is no longer proposed to construct what was previously Stage 2 and Stage 3 made up of Block C, Block D, Block E and the series of Blocks F. Each of these were to be 3 to 4 storey buildings with curved roof lines stepping with the contours of the site. The site rises significantly from the SE corner to the NW corner.

19. The question is whether that which is proposed is "substantially the same development" as that for which development consent was originally granted. That is the test set by s 4.55(2) EP&A Act which states:

> (2) **Other modifications**
> 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), and ...

20. Just what is "substantially the same development" is a matter of opinion upon which minds might differ. There have been many cases before the NSW Land & Environment Court (NSWLEC) where this question has been argued. The relevant legal principles have been usefully summarised by Pepper J in *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3)* [2015] NSWLEC 75 at [173][1]:

> The applicable legal principles governing the exercise of the power contained in s 96(2)(a) of the EPAA may be stated as follows:
>
> 1. first, the power contained in the provision is to "modify the consent". Originally the power was restricted to modifying the details of the consent but the power was enlarged in 1985 (*North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 at 475 and *Scrap Realty Pty Ltd v Botany Bay City Council* [2008] NSWLEC 333; (2008) 166 LGERA 342 at [13]). Parliament has therefore "chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity" (*Michael Standley* at 440);
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> 2. the modification power is beneficial and facultative (*Michael Standley* at 440);

[1] Section 96(2)(a) in the old EP&A Act is now s 4.55

3. the condition precedent to the exercise of the power to modify consents is directed to "the development", making the comparison between the development as modified and the development as originally consented to (*Scrap Reality* at [16]);

4. the applicant for the modification bears the onus of showing that the modified development is substantially the same as the original development (*Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8);

5. the term "substantially" means "essentially or materially having the same essence" (*Vacik* endorsed in *Michael Standley* at 440 and *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280; (1999) 106 LGERA 298 at [30]);

6. the formation of the requisite mental state by the consent authority will involve questions of fact and degree which will reasonably admit of different conclusions (*Scrap Realty* at [19]);

7. the term "modify" means "to alter without radical transformation" (*Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414 at 42, *Michael Standley* at 474, *Scrap Realty* at [13] and *Moto Projects* at [27]);

8. in approaching the comparison exercise "one should not fall into the trap" of stating that because the development was for a certain use and that as amended it will be for precisely the same use, it is substantially the same development. But the use of land will be relevant to the assessment made under s 96(2)(a) (*Vacik*);

9. the comparative task involves more than a comparison of the physical features or components of the development as currently approved and modified. The comparison should involve a qualitative and quantitative appreciation of the developments in their "proper contexts (including the circumstances in which the development consent was granted)" (*Moto Projects* at [56]); and

10. a numeric or quantitative evaluation of the modification when compared to the original consent absent any qualitative assessment will be "legally flawed" (*Moto Projects* at [52]).

21. In considering this question in the context of a predecessor to s 4.55(2)(a) in *Moto Projects (No 2) Pty Ltd v North Sydney Council* (1999) 106 LGERA 298 ("Moto Projects"), Bignold J observed (emphasis added):

> 55. The requisite factual finding obviously 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.
>
> 56. The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that 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 compared in their proper contexts (including the circumstances in which the development consent was granted)."

22. These principles need to be applied to the circumstances.

23. In terms of use, the development is unquestionably of the same material kind is that which was originally approved. It remains an SEPP Seniors development of self-contained dwellings in apartment style living with the community hall and other shared facilities available to all the residents.

24. The modification application in 2015 changed the mix of units from
    - 19 one-bedroom, 65 two-bedroom and 16 three-bedroom, to
    - zero one-bedroom 83 two-bedroom and 17 three-bedroom.

    It is to be remembered that the comparison is to be made between the development is proposed to modified to the original development application. If there was to be an argument either with the Council on or before the NSWLEC on the question of "substantially the same development" then the original design and number of one-bedroom apartments will no doubt be another factor which is pointed by the Council as indicating significant change. To my mind this change in mix does not affect the material nature of the development as proposed.

25. There are now 94 rather than 100 dwellings proposed. There are no additional uses, or ancillary development proposed that changes the nature of the development. It still remains a development for seniors living by way of self-contained private dwellings with shared community facilities, on the same parcel of land with the benefit of substantial open space areas. That the number of dwellings is reduced from 100 to 94 makes no difference to that qualitative assessment. The number of dwellings or the density of the development is not a fundamental aspect of why the development was approved. An objective qualitative assessment of the proposed development as approved compared to that proposed reveals no material difference. That is consistent with what was said in *North Sydney Council v Michael Standley and Associates Pty Ltd* (1998) 43 NSWLR 468 which found the word 'substantially' means 'essentially or materially or having the same essence'.

26. Is that enough to overcome the fact that the physical form of the development yet to be constructed is completely different?

27. Part of the development remains the same. The part that remains the same is Block A and Block B as constructed. In terms of site coverage those buildings consist of something around one third of the proposed built form. If the community facility in Block B is treated as a separate aspect, then Block A represents less than one quarter of the proposed built form for residential dwellings. Three quarters of the proposed development for dwellings is to completely change.

28. There are any number of ways one could approach quantifying the physical parts retained and the physical parts proposed to be constructed as compared to the physical parts as approved. For example:
    - 26 units in Block A out of 94 units now proposed can be quantified as 28% of dwellings remaining unchanged and 72% of dwellings being completely redesigned.
    - Whereas the approval is for 5 separate blocks of dwellings (8 separate blocks if you divide Block F up), the proposed modification will be for 2 blocks of dwellings.

29. When arguments are brought by Council officers or by lawyers in court supported by town planners against the proposition that this is substantially the same development, one can expect all sorts of quantifications to be dreamt up of this kind demonstrating by percentages, proportions, numbers and the like significant change in the physical form to the development.

30. What can be observed is that the changes are not minor adjustments.

31. The quantitative assessment is not proven one way or the other by clever construction of numbers and percentages. A more substantial analysis would take cognizance that a very noticeable proportion of the approved development is to completely change its location and architectural design. By reference to Drawing 15 Issue B (Section) of the architectural drawings, the proposed new form has almost no relationship to the approved form. Whilst what is proposed is still dwellings for seniors, every other aspect of that part of the development is changed. Comparing the new proposed block to the approved Blocks C D E and F finds only similarity in use. It is not just substantially different in its physical form, it is completely different.

32. It is relevant to take into account the circumstances in which the development consent was granted. The physical form of the development was not an essential aspect of the development in terms of what the essence of the development was. The Council's Development Assessment Report placed no significance at all on the physical form of the building. Indeed, the SCC placed no particular importance upon the physical form of development presented for the purpose of applying for the SCC. The SCC stated:

    Building height, bulk and scale are to be determined as part of the development assessment process, noting the need for the development to be compatible with surrounding development

33. The physical form of the original development was unimportant, except for the purpose of assessing environmental impacts. That is a factor pointing towards what is proposed being "substantially the same". However I do not think that the relative unimportance of the physical form to the original approval overcomes the complete change in design which I have referred.

34. The question of whether the proposed modification will result in substantially the same development has nothing to do with whether or not what is proposed ought be approved on its merits. The objective test of "substantially the same development" must be satisfied, otherwise there is no power to modify the consent, regardless of whether or not the application might be worthy of approval on the merits: *Woollahra Municipal Council v D'Albora Marinas Pty Ltd* (1992) 75 LGRA 46.

35. It is also necessary to factor in that the modification power is facultative. That means that the power is to be used to assist in development progressing, not used as a barrier or hurdle. The objects of the EP&A Act and SEPP Seniors support that approach as to the principles in the case law cited. I have difficulty in seeing even the most generous analysis by a court officer concluding that the changes are not substantially different.

36. As the cases observe, different minds might come to different conclusions on this question. It seems to me that even if it be acknowledged that physical form was unimportant to the original development for approval purposes, it does not overcome the different design, height, bulk and appearance of the proposed new building. The changes proposed represent a change in concept. The changes required a reappraisal of the site and the design response to it including a completely new building. Most of the dwellings and the larger building to house them in a single structure are of completely new design. The relationship to neighbours is changed.

37. A further argument against this proposed modification being "substantially the same" is the fact that the SCC was issued on the basis of information and plans provided for 100 serviced self-care housing units provide as a retirement village in a particular structural format, and that SCC was critical to the nature and form of the development. Even though it SCC is irrelevant at law to the modification one can expect that if there was a legal battle about the question of "substantially the same" that this contextual factor would be relied upon by the Council.

38. The term "modify" means "to alter without radical transformation": *Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414 at 42. The alteration proposed is too easily categorised as a radical transformation rather than a modification. Whilst it may be arguable and successfully argued before the right ears that what is proposed is substantially the same, I can predict that first the Council then the court (if there was an appeal) would find that what is proposed is not substantially the same development, it involves a radical transformation. It is that distinct physical difference of the new building replacing a series of smaller buildings that would make it difficult for the consent authority to form the view that what is proposed is substantially the same.

Is a new SCC required?

39. I am then asked whether there any other avenues to lodge the new DA for the modified component of the approved (and partially constructed) development without requiring a new SCC to be obtained. The SCC has expired and is no longer "current". I see no mechanism in SEPP Seniors for an extension of time on the currency of an SCC. Therefore a new SCC will be required to support a new DA.

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