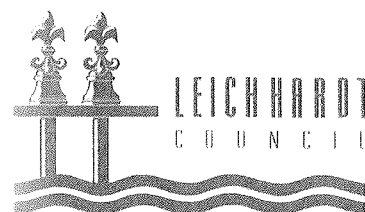


Contact: Peter Conroy
Phone: 9367 9298
Date: 5 February 2014



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Attn: Ms Natasha Harras

Director General
Department of Planning and Infrastructure
GPO Box 39
SYDNEY NSW 2000

Dear Dr Haddad

Re: MP06_0037 MOD 4 – Baileys Marine Refuelling & Supply Facility, White Bay

I am writing to advise you that Leichhardt Council officers have reviewed the Section 75 Application- MP06_0037 MOD 4 for the Baileys Marine Refuelling and Supply Facility, White Bay proponent Responses in the context of the 29 August 2013 Council submission on this application. Council would like to make the following points in relation to these Responses and proposed amendments to the MOD 4 application.

Council notes the reduction in scale of the proposed development and makes the following requests for action prior to the MOD 4 approval being granted:

1. a White Bay Masterplan should be prepared to address the cumulative impacts of Baileys, Cruise Liner Terminal, Super Yacht Marina and Expo.
2. building design and potential visual impact illustrations of the proposed development, supported by shade cloth screening to indicate the height of the re-located office buildings, should be provided and assessed.
3. provision of a cumulative traffic impact assessment of the proposed development and surrounding facilities.
4. agreement of ongoing noise assessment and monitoring arrangements with Council
5. confirmation that the proposed showroom has been deleted from the MOD 4 application should be provided.

Please contact Roger Rankin, Team Leader –Strategic Planning if you wish to discuss this submission in further detail.

Yours sincerely,

Peter Conroy

DIRECTOR ENVIRONMENTAL AND COMMUNITY MANAGEMENT



28 January 2014

Director – Industry, Key Sites and Social Projects
DEPARTMENT OF PLANNING AND INFRASTRUCTURE
GPO Box 39
SYDNEY NSW 2000

Attention: Natasha Harras

Dear Sir/Madam,

RE: Modification request to amend the approved marine refuelling and supply facility to allow for dry boat storage (MP06_0037 MOD 4)

I write with regard to Roads and Maritime Service's (RMS) previous letter concerning the above modification, specifically the request for an updated Vessel Movement Plan (VMP) that considers the impacts of the additional 150 dry stack storage berths.

In response to this request, the applicant provided RMS with an updated VMP. The Boating Safety branch of RMS has reviewed the revised VMP and are the opinion that it will have minimal impact upon navigation. RMS (Maritime) therefore raises no objection to the proposal.

Notwithstanding the above and given the nature of the proposal, the Boating Safety branch would appreciate the opportunity to comment on any navigational briefing brochure/documents that the operators intends to provide clients, particularly with regard to vessel movements to and from the facility. It would be appreciated if such documentation was forwarded to the Director of Maritime Branch of NSW Maritime.

If you have any further questions, please do not hesitate to contact Scott Schimanski on 9563 8853 or by email at scott.schimanski@rms.nsw.gov.au.

Yours sincerely

Scott Schimanski
A/ Senior Planner
Property, Strategy and Planning

Roads & Maritime Services

City Office | Level 11, 207 Kent Street, Sydney NSW 2000 | P: 02 9563 8511 | F 02 9364 2321

Rozelle Office | James Craig Road, Rozelle NSW 2039 | P: 02 9563 8511 | F 02 9563 8530

Postal Address | Locked Bag 5100, Camperdown NSW 1450 | Web | www.maritime.nsw.gov.au

HONESLAHOOD LAWYERS

Practical experience, specialist expertise

Our Ref: JBH:13225
Your Ref: Natasha Harras

5 February 2014

The Proper Officer
NSW Department of Planning
GPO Box 39
SYDNEY NSW 2001

By Email

Attention: Natasha Harras

Dear Ms Harras

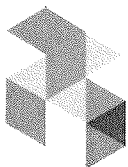
**Rozelle Bay Pty Ltd - Objection to Bailey's Marina Modification MP06_0037M004
Ppty: White Bay, 6 Marine Park**

We act for Rozelle Bay Pty Ltd ATF Rozelle Bay Trust and we rely upon this submission in objection to the above application, in addition to our letter dated 3 September 2013.

We refer to the above modification proposal, in particular the document titled "White Bay Berth 6 – Dry Boat Storage Section 75W Modification (06_0037 MOD4) response to Submissions prepared by AECOM (**Varied Modification Response**) and particularly the legal advice prepared by HWL Ebsworth dated 27 November 2013 (**HWL Advice**) on behalf of the proponent.

As we understand the Varied Modification Response, the following modification is now proposed:

- (a) The dimensions of Building 1 would remain as originally approved, but would now house the caretaker's accommodation;
- (b) The dimensions of Building 2 would remain as originally approved and would house up to 50 boats in dry storage;
- (c) Building 3A and Building 3B have been removed from the modification request;
- (d) The meet and greet facilities have been relocated along the northern boundary of the site within two office buildings, with a possible alternative configuration;



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Honesla Hood is a solicitor, not a lawyer, and is not a member of the Law Society of New South Wales.

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- (e) Relocation of the car park and gatehouse along the northern boundary of the site; and
- (f) James Craig Road would no longer be used by customers of the development during periods when cruise ships are at berth at the adjoining Cruise Passenger Terminal.

By the Varied Modification Request¹ we also note the admissions that the meet and great area will result in an increase in built form and that there would be increases in traffic (and presumably on our part, also parking) as a consequence of the boat storage.

Executive Summary

1. The Varied Modification Request involves a different use or an activity of a different nature being carried out to that originally approved. Consequently the environmental impact of that use or activity was never assessed in the grant of approval for the Approved Project. The current unlawful use of the site for dry boat storage is giving rise to boating safety/navigational issues and substantial assessment of the environmental consequences of the proposed dry boat storage use is required. Accordingly it cannot be said that the Varied Modification Request will have "limited environmental consequences beyond those which had been the subject of assessment" in the Approved Project.
2. Absent the modification having limited environmental consequences beyond those which had been the subject of assessment in the Approved Project there is no jurisdiction or power under s75W of the *Environmental Planning and Assessment Act 1979 (EPA Act)* to approve the Varied Modification Request. Accordingly, whether or not the Varied Modification Request is consistent with one or more of the objectives of the Port and Employment Zone under *Sydney Regional Environmental Plan No.26 – City West (SREP 26)* becomes irrelevant.
3. Irrespective of what is submitted at [2] above, the Varied Modification Request now proposes a decrease in employment from that originally approved (the first was down from 30 to 15 and with the Varied Modification Request that number must be decreased even further). It cannot therefore now be said that the modified land use will generate employment opportunities which is the cornerstone of the proponent's basis for consistency with the objectives of SREP 26.

No power or jurisdiction

4. In our previous submission dated 3 September 2013, we raised an objection that the proposed modification (as then proposed) was beyond the scope of the Minister's power under s75W. We now respond to the HWL Advice, which inadequately addresses the issues we raised.
5. It appears common ground that between ourselves and the HWL Advice that
 - (a) The leading authority on the scope of the modification power in section 75W is *Barrick Australia Ltd v Williams* [2009] NSWCA 275 at [[53] – [54];

¹ Page 2, last paragraph

- (b) The Minister is the relevant decision maker; and
 - (c) The Minister must be satisfied that the modified proposal will have only limited environmental consequences beyond those which have been the subject of assessment under the original approval.
6. However, we otherwise differ with the submissions in the HWL Advice that the Varied Modification Request is within the Minister's power.
7. Firstly, the submission at [15] of the HWL Advice that s75W is not a "jurisdictional fact" is irrelevant. The Court has made it clear that the Minister has an obligation to be satisfied that the request for modification of a project falls within the scope of s75W, as was stated by Basten JA in *Barrick* at [38]:

"38. The preferred construction of s75W is that it confers on the Minister an implicit obligation to be satisfied that the request falls within the scope of the section."

8. Secondly, the Minister's obligation to be satisfied that the request falls within the scope of s75W must not only be reasonably open on the facts but must also take into account all relevant considerations. The submissions at [18] – [21] of the HWL Advice commenting on whether the Varied Modification Request are within the scope of s75W, refer only to the visual impacts and traffic impacts of the Varied Modification Request. Critically, the HWL Advice fails to address the environmental consequences arising from the proposed changes to the **nature of the use of the approved project to include a dry boat storage facility**.
9. Despite the variations in the Varied Modification Request, the proposed modification to the approved project are beyond the scope of the power in s75W of the EPA Act as:
- (a) The only project to which Part 3A of the EPA Act applies is that project which was declared by the Minister pursuant to s75B of the EPA Act. Relevantly, the declared project was for a "marine refuelling and supply facility";
 - (b) The only project which can now be modified under s75W is the project which was approved by the Minister on 12 June 2009 ("Approved Project"). Relevantly, the approved project was described in the instrument of approval as the Construction of a Marine Refuelling and Supply Facility;
 - (c) The Approved Project did not include the provision for permanent dry boat storage²;
 - (d) The Varied Modification Request seeks to modify the Approved Project to include development for the purposes of permanent dry boat storage for up to 50 boats; and
 - (e) As we submitted in our letter of 3 September 2013, the environmental impact of the proposed use of the land as a dry boat storage has not been the subject of environmental assessment as part of the assessment process for the Approved Project. It is a different use of the land to that of a refuelling facility and is a use

² see Director General's Assessment Report dated February 2009 at p19

which is likely to have more than limited environmental consequences which require assessment.

10. For example, a dry boat storage facility could reasonably be expected to generate additional car movements for those customers coming and going from their boats.
11. Further, and more particularly, it can also reasonably be expected that the stored boats will involve additional boat movements – both in and out of the facility and potential safety/navigational issues given the proximity of the cruise ship terminal. The environmental consequences of these additional boat movements were not the subject of assessment of the Approved Project as they were not then proposed.
12. In our submission, substantial assessment is now required of the environmental consequences of the additional boat movements arising from the proposed dry boat storage facility in the Varied Modification Request. For example, the Director-General's Requirements for our client's approved dry boat storage facility at Rozelle Bay included assessment requirements for our client to undertake its EIS in accordance with, and taking account of the matters within, the Department's EIS Guidelines for Marinas and Related Facilities. Those guidelines include a range of items relevant for assessment but which have not been dealt with by the assessment in respect of the Project Approval or the Varied Modification Request. In particular under those guidelines our client was required to assess the impacts of a range of issues including water transport issues as follows:
 - a) *the effect of construction and operation including the increased boating activity generated by the proposal on:*
 - i) *commercial shipping, navigational lanes and markers; the need for changes to signage or markers*
 - ii) *naval waters and activities*
 - iii) *commercial fishing grounds and aquaculture*
 - iv) *ferries (vehicular and passenger); routes, terminals and pick-up points*
 - v) *sea planes; aerodromes, terminals, fuelling or parking areas*
 - vi) *recreational boating, fishing, swimming, baths, boat hire, boat ramps, public wharves*
 - b) *boating safety issues, including:*
 - i) *the navigable width of the marina entrance, layout and widths of interior channels, warning signs, speed limits, channel maintenance*
 - ii) *rescue and emergency services*
 - iii) *provision for educational and informational material such as signage, brochures, maps and notices detailing:*
 - *local aquatic hazards*
 - *safety measures and procedures relating to refuelling, spillage, rescue*
13. There having been no assessment of any those impacts referred to above it cannot be said, and the Minister could not reasonably form the requisite opinion, that the modified proposal will have only limited environmental consequences beyond those which have been the subject of assessment under the original approval.

14. In fact, somewhat misleadingly, the Varied Modification Request advances the proposition that the Varied Modification Request has less impact³. This claim by the proponent however needs to be noted that it is made in the context of comparing the modification as exhibited to that now proposed, as opposed to the approval versus the Varied Modification Request. Rather, the comparison must be made to the project as approved and as proposed to be modified.
15. In our view, properly considering what the changed nature of the proposed use, the Minister, and indeed any person in the Ministers position, acting reasonably and having regard to the relevant law and facts of this matter, would come to the same conclusion – that is that:
 - (a) The Varied Modification Request is not a request to modify the existing Approved Project; and
 - (b) The Varied Modification Request, involving a new and or different use of land which has not been the subject of any previous environmental assessment and the changed nature of the use cannot properly be said to have limited environmental consequences beyond those which have been the subject of assessment under the original approval.
16. In our submission, detailed environmental assessment is required and this is beyond the scope of a s75W modification application and, accordingly, a fresh application under Part 4 of the EPA Act is required.
17. It follows that, in our view, any approval of the Varied Modification Request is beyond power and would be susceptible to legal challenge by way of judicial review proceedings in the Land & Environment Court.

Continued unlawful use

18. In our previous submission we raised the fact that White Bay 6 has been used unlawfully to store boats. That use is either as a separate use (as dry storage) or in breach of the Approved Project, which did not include dry boat storage. Accordingly, the use of the subject land for dry boat storage constitutes a breach of the EPA Act
19. The HWL Advice at [32] states that they do not have any instructions as to the past unlawful use of the site referred to in our previous submission. It is surprising that the unlawful use of the site is not admitted given that boats are patently being stored on the land. We now **enclose*** with this letter an aerial photograph taken on 16 August 2013 depicting more than 50 boats stored on the subject land.
20. Whilst we accept that past unlawful use is not, of itself, a relevant consideration⁴, this does not mean, however, that past use – without any consideration of its unlawfulness – cannot ever be relevant⁵. Indeed, the Court has held that the environmental impacts of past conduct (regardless of whether it is unlawful) is a relevant consideration in assessing a prospective use for which consent is sought⁶.

³ See, for example, section 2.2, page 10, last sentence

⁴ See *Jonah Pty Limited v Pittwater Council* (2006) 144 LGERA 408

⁵ *Jonah* at [37]

⁶ *Jonah* at [38]

21. The site has been operating unlawfully as a dry boat storage in close proximity to the cruise ship terminal without the imposition of the appropriate regulatory controls or safeguards relating to navigation and in particular the Roads and Maritime Services "Big Ships" policy. We are instructed that, in the absence of the implementation of appropriate controls and safeguards, it is reasonable to expect that there has been boating safety/navigational issues arising from the unregulated use of the site for dry boat storage on the land. In our submission, these boating safety/navigational issues arising from the past unlawful use should be fully investigated and assessed consistently with the Big Ships policy and in a manner consistent with the assessment requirements for our client's dry boat storage facility (as outlined at paragraph 12 above).
22. Any safety and navigational incidences arising from the past unlawful use of the site in our submission are relevant and highlight that the the environmental consequences from the proposed change of use of the Approved Project for dry boat storage are not limited and substantial assessment is required.

Permissibility

23. We accept that, in terms of SREP 26, the permissibly of the Varied Modification Request depends upon a consideration of whether the Varied Modification Request is "*generally consistent with one or more of the zone objectives*" (which objectives are contained within clause 20C).
24. We also note that the proposal as originally approved relied upon the fourth bullet point to clause 20C, namely "*to encourage a mix of land uses which generate employment opportunities, particularly in relation to port and maritime uses*".
25. Whether or not the Varied Modification Request is consistent with one or more of the zone objectives is a condition precedent to the grant of approval to the Varied Modification Request⁷.
26. At [26] of the advice it is suggested that the test of general consistency is as propounded by Pearlman CJ (as she was then) in *Schaffer Corporation Ltd v Hawkesbury City Council*⁸. We respectfully disagree.
27. In our view, whether something is consistent with zone objectives is better served applying the reasoning of Bignold J in *Dem Gillespies*⁹, namely:

agreeing or accordant; compatible; not self-opposed or self-contradictory; 2. consistently adhering to the same principles, course etc
28. At this point is important to note that the proposal as originally approved proposed 30 full time staff¹⁰. In contrast the AECOM report that accompanied the initial modification request at section 5.1.3 advised that that number would be halved to 15.

⁷ *Dem Gillespies v Warringah Council* [2002] NSWLEC 224 at [2] citing *Schroders Australia Property Management Ltd v Shoalhaven City Council* (2002) NSWCA 74

⁸ *Schaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGRA 21

⁹ *Dem Gillespies v Warringah Council* [2002] NSWLEC 224 at [77]

29. Now however the Varied Modification Request suggests that there will, in fact, be 30 staff again. Notwithstanding that assertion, the Varied Modification Request goes on the say, *"Not all positions would be full time positions, with 27 employees associated with weekday operations, and 13 staff associated with weekend operations"*.
30. In our view a proposal that, in effect, halves its work force cannot conceivably be considered to agree with or be accordant with a proposal that generates employment opportunity. Put another way, a proposal that reduces employment is not consistent with a proposal that increases employment.
31. In our view, properly considering what is now proposed, the Minister, and indeed any person in the Ministers position, acting reasonably and having regard to the relevant law and facts of this matter, would come to the same conclusion, namely that the Varied Modification Request is not consistent with any of the objectives in clause 20C of SREP 26.
32. Accordingly, the Varied Modification Request not being consistent with any of the objectives in clause 20C of SREP 26, the Varied Modification Request is impermissible with the consequence that it must be refused.
33. Should the Minister approve the Varied Modification Request then that approval would be susceptible to legal challenge by way of judicial review proceedings in the Land & Environment Court.

We look forward to your response.

Should the Department receive a response to this letter/submission would you kindly let us know so that we might respond accordingly?

In the meantime should you wish to discuss this matter please do not hesitate to contact Jason Hones of our office.

Yours faithfully
HONES LA HOOD



Jason Hones
Partner
jhones@honeslahood.com.au

Encl.

¹⁰ This is conceded in the AECOM report that accompanied the initial modification request at section 5.1.3

