
response correspondence to public submission

21 January 2021

The NSW Department of Planning,
Industry and Environment
Attention: Keiran Thomas

Dear Sir/Madam,

Re: MP07_0179-Mod- 6 - Cabarita Mixed Use Development - Lots 184 – 187 & 191-194 DP 259164 and Lots 20-23 DP 31208, Tweed Coast Road and Hastings Road, Cabarita Beach/Bogangar (Now known as Lot 1, DP 1185345, 39 Tweed Coast Road, Bogangar)

I refer to the subject development and the public exhibition period. The Dept. of Planning, Industry and Environment (DPIE) have advised that one submission was received during the notification period.

The purpose of this correspondence is to provide a response to the matters raised in this submission as required by the regulatory provisions of State Significant development within the Environmental Planning and Assessment (EPA) Act 1979.

The submission relies upon a draft document of the DPIE titled 'Modifying an Approved Project'. This document appears to remain in draft form and was never adopted by the DPIE.

The test for modifications under Part 4 of the EPA Act apply to this project, now being a State Significant Development as declared by the Director of Regional Assessments on 8 October 2020.

The subject application for modification to MP07_0179 has been assessed and considered to be consistent with the provisions of Clause 4.55(1A) of the EPA Act being of minimal environmental impact and 'substantially the same' development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all). The modification is therefore considered to fall under the ambit of Section 4.55(1A) of the Act.

The submission lodged by a member of the public during the exhibition period refers to comparative tasks to assess if the development meets the 'minimal environmental impact' and 'substantially the same' provisions of Clause 4.55(1A) of the Act, as prescribed by the draft DPIE document.

In response to this public submission, the application of legal tests that apply to Clause 4.55(1A) modifications to State Significant Development (SSD) are to be undertaken, before the consent authority can be ultimately determine the application on its merits. It is also noted that the

modification process is intended to be a **beneficial and facultative** process to avoid the full Development Application process and caution should be exercised in demanding a new full DA be lodged. That is, there is a place for modifications to SSD, subject to any modification meeting the 'substantially the same' tests that have evolved during multiple test cases in the Land and Environment Court.

A proposal can only be regarded as a modification if it involves alterations without radical modification. While this statement provides a wide scope and broader interpretation, the second test for modifications that must be satisfied is; will the development be substantially the same development as authorized by the original consent.

It is noted that the development has been modified on 5 previous occasions. However, this test will be applied to the development as originally approved to avoid a progressive departure from the original approved development.

For clarity, the modifications to the development prescribed by this application that can be regarded as consistent with Clause 4.55(1) i.e. to correct a minor error, misdescription or miscalculation are as follows:

Condition A1 – the subject modification requests this condition is amended correct reflect the approved (as modified) number of Residential Units. Therefore this component of the modification is to correct an error.

Condition B29 – This condition refers to Section 94 Contributions payable for the approved development. It is requested that the contribution schedule be modified to reflect the correct number of Units (as approved by a previous modification), within Stage 2 being the uncompleted residential component of the development. Therefore, this component of the modification is to correct an error.

Condition B30- This condition refers to Section 64 Monetary Contributions applicable to the development. It is requested that the schedule of contributions applicable to the development be reviewed to reflect the correct number of residential units. (i.e. 38 not 40). Therefore this component of the modification is to correct an error.

In addition to these requests for corrections to the issued consent, modification/deletion of these conditions do not/will not relate to any modification of the approved design, as modified

Condition B2 – This is an administrative condition. The condition requires changes to Stage 2 of the project (the subject residential component of the development) as detailed within **Conditions B3** and **B4**. Given these changes have been undertaken as detailed within the submitted amended architectural set, this condition becomes redundant and can be deleted.

The remaining conditions that are requested to be changed in accordance with Clause 4.55(1A) of the EPA Act 1979 are:

Condition A2- Relates to the approved plan set and needs modification to reflect the proposed changes to the design, partly prompted by conditions B3 and B4 below.

Condition B3 - This condition requires the proponent to submit a Design Verification Statement to the Certifying Authority. This statement has been provided. This condition also required Units 1-7, 13-27 and 33-40 to be reduced in overall length by 1000mm.

Condition B4- This condition requires the reduction in the Unit lengths of 1000mm as mentioned within Condition B3 above resulting in an increase in the landscape podium area.

In regards to the proposed range of modifications, the consent authority must be satisfied that the proposed development will be 'substantially the same' development to that originally approved. The 1999 Land and Environment Court Case *Moto Projects (No 2) Pty Ltd v North Sydney Council* provided additional guidance in regards to this 'substantially the same' test. This comparison exercise involves the consideration of 'quantitative and qualitative' elements of the development. These elements are to be considered in their proper context which include the circumstances in which the development consent was granted. This is a critical consideration for the subject modification, given Conditions B2, B3 and B4 of the original consent in fact prescribe that changes to the development are required prior to the issue of a construction certificate. Notwithstanding, the proposed changes to mostly satisfy these conditions do not result in a development that cannot be considered subject to Clause 4.55(1A) of the EPA Act, 1979.

Initially, the comparison of the approved plans with the modified plan provides a factual or threshold assessment of the development.

In this regard, it is pertinent to note that the changes are limited to Stage 2 of the approved development, with Stage 1, or the ground floor portion of the development being constructed and operating. No changes to this component of the approved development are proposed.

The changes to the approved plans have been detailed within the Section 4.55(1A) Report provided with the application. However, for convenience, numerical details relating to the development, as a result of the modified development **that will not change** are summarised below:

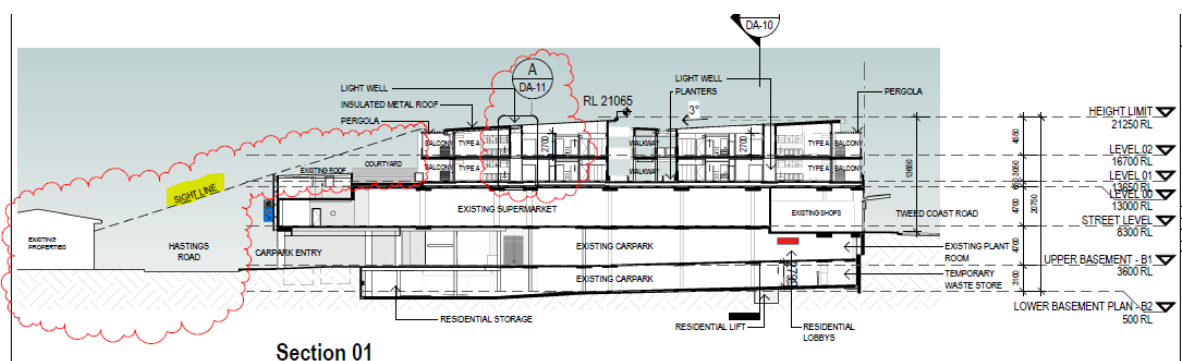
- No changes to Stage 1 of the development as approved and constructed
- No change to the proposed development uses
- No changes to the number of bedrooms within the approved residential Units
- No change to the overall height of the approved development (RL 21.5m)
- No change to the floor space ratio of the development or site coverage
- No additional storey's proposed as approved as part of Stage 2
- No changes to the number of carparking spaces or driveways as approved and constructed.
- No change to the approved pedestrian accessways for the residential component of the development
- No changes to existing traffic flows or rates will occur.

Having regard to the numerical aspects of the development, the proposed modification clearly meets the numerical 'substantially the same' test.

The merits of the proposed modification in regards to environmental impact and non-numerical factors must also be considered to determine if in fact the development is 'substantially the same'.

In regards to non-numerical factors, the proposed development is considered substantially the same for the following reasons;

- The operation and use of the approved Stage 1 of the development will not change. Stage 1 is a significant commercial operation with ancillary underground carparking for Stages 1 and 2 over a greater proportion of the large site.
- The modified development will not generate increase noise levels as a result of the proposed changes, including the substantial commercial component of development, given the approved number of units will not change, nor will the number of bedrooms or the overall floor areas.
- The modified development will not result in any increased overshadowing to adjoining properties given the approved building heights and footprints will not change.
- The area of private open space provided to each unit will increase.
- Areas of landscaping will only be reduced by 13m² in total.
- Residential properties across Hasting road will not be visible from either residential floor of the proposed development as demonstrated below. The visual amenity of these properties will therefore not be compromised, despite the modification of the setback of Levels 1 and 2 of Stage 2.



Accordingly, these matters contribute to the development meeting the non-numerical 'substantially the same test'. These matters provide further evidence to enable the DPIE to reach the conclusion provided by the modification report that the development can be determined pursuant to Clause 4.55(1A) of the EPA Act, given the development is substantially the same and is of minimal environmental impact.

The single public submission, contrary to the modification report states that the development does not meet the 'substantially the same' test and therefore cannot be considered as a modification of consent pursuant to Clause 4.55(1A) of the EPA Act 1979.

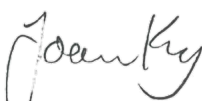
The reasons provided within this single submission are summarised and discussed below;

Matters that result in a development that is not substantially the same	Response
Creation of New Development -The submission states that the development creates private open space requiring the creation of a lot or reconfiguration of a lot which is subdivision – this is new development	This application does not seek any consent for subdivision of the development in any form.
The modified development creates accessible open space, altering the approved inaccessible open space	Despite the recognised change from inaccessible to private open space (POS), the submission rightly states that this area is still open space and therefore it is reasonable to provide that the intended use of this area is substantially the same. Despite the area now being accessible, this area will be retained within a combined ownership, given no subdivision of the Units is proposed. Notwithstanding, any future strata subdivision would ensure the POS remains part of the Body Corporate and any restrictions applied by this Strata subdivision
The proposed modified development, involves an “additional and distinct land use”, replacing “landscaped area” with “private open space” and it is not substantially the same development.	The approved landuses upon the site are commercial and residential. Open space in any form is ancillary to the approved landuses. This is an incorrect interpretation of the TLEP 2014. The modification does not seek any additional landuses, merely modification of the use of an area of the building for landscaping.
The proposed modified development creates environmental impacts that are not assessed, entirely altering the environmental impact and does not result in a development that is “substantially the same”.	<p>The modification report and additional supplementary documentation has clearly detailed that the development will not have any adverse environmental impacts. The primary concern of the submission appears to be the impact of the development on properties across Hastings Road to the west, given that the property is bound by commercial properties to the north south and east. To alleviate these concerns, additional plans have provided evidence that adjoining residences will not have a sight line to the Level 1 or 2 units despite the removal of the landscape podium.</p> <p>Notwithstanding that the approved units will not be visible from the Hastings Road properties, nor will the approved Units have a sightline to the windows of adjoining properties over Hastings Road, additional controls can easily be imposed to improve the perceived and actual visual impact of the approved development in lieu of the landscape podium. The landscape podium that will now be accessible can easily include large</p>

	<p>planter boxes for landscaping, particularly on the western edge to create a landscape buffer to the Hastings Road residential area. This would have a twofold benefit, improving the visual amenity of the development from Hastings road (despite the evidenced sight lines) but also ensure residents cannot access the western edge, further enhancing separation distances between the private open space areas on Level 1 and residential properties to the west.</p> <p>No objection would be raised to the provision of a landscaping plan to be provided and approved prior to the Construction Certificate and a restrictive covenant being included on the development to ensure these planter boxes and landscaping remain in perpetuity. It is noted that such a restriction would likely also be applied to the development if it was to retain the landscape podium as approved.</p> <p>Again, given the development will mostly retain the overall combined area for landscaping (793m² reduced to 780m² - page 36 of the modification report), despite a portion of the landscaped area being private open space rather than communal. Typically private open space is landscaped and the imposition of landscaping into these areas by way of appropriate conditions of consent is completely reasonable. Accordingly, these private open space areas are not considered to significantly divert from the intended use of the inaccessible landscape podium i.e. landscaping, and will not have a significant environmental impact on the overall development.</p> <p>The potential for any increase an adverse environmental impacts is subject to the range of changes proposed. Given the range and extent of material changes to the development as approved and amended, and the provided extended commentary addressing the requested changes, there is in fact negligible potential for adverse impacts.</p>
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Having regard to the initial modification report, the accompanying suite of plans, additional commentary and additional plans, the public submission does not correctly assess the development against the relevant SSD and EPA Act provisions and should not have determining weight. The modified development is considered to meet the substantially the same test and will have minimal environmental impact on the locality and broader region. The development is considered worthy of support and conditional consent is requested.

Yours faithfully



Joanne Kay

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