

19 July 2022

Our Ref: PLM:MIR002/4004

Mirvac
Level 1, 2 Davy Road
EVERLEIGH NSW 2015

By Email:
nathan.mccoy@mirvac.com

Attention: Nathan McCoy

Dear Nathan

**Section 4.55(1A) Modification Application
SSD 7317 – South Eveleigh**

We understand Mirvac Projects Pty Ltd is seeking to lodge an application under section 4.55(1A) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* to modify development consent SSD 7317 by amending:

1. the approved public domain development; and
2. Condition A16 to reflect the removal of the western side of Innovation Plaza from the public domain works.

You have asked whether the modification application can lawfully be approved in light of the NSW Court of Appeal's decision in *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177 (*Buyozo*).

It is our view that the modification application clearly proposes to modify the form of the development approved in SSD 7317 such that the consent authority has the power to grant the application. This is consistent with the *Buyozo* decision.

In the *Buyozo* decision, the principal finding in the case was that a condition relating to developer contributions cannot be modified under the EP&A Act section 4.55(1A), 4.55(2) or 4.56 to require retrospectively the payment of a lesser amount of contributions than has already been paid. Relevant extracts from the *Buyozo* decision are below:

Justices Basten and Payne said:

[10] ... although both sections speak of modifying a development consent, the conditions for the exercise of the power demonstrate that it is "the development to which the consent as modified relates" which is modified: s 4.56(1).

[11] ... s 4.56(1), read as a whole, demonstrates that a modification is only available where some change is proposed with respect to the development for which consent was granted. None was proposed in the present case, so that the power to modify was not engaged.

[12] This reasoning is supported by the absence from the sections conferring the power of any timeframe within which an application for modification can be made. That absence is telling: it implies that a consent can only be modified in respect of steps which have not been undertaken, or at least not completed.

The third judge, Preston CJ of the Land and Environment Court said:

[37] Starting with the general, although the modification of a development consent is taken not to be the grant of a development consent (s 4.55(4) and s 4.56(1C) of the EPA Act), the modification of a development consent shares with the grant of a development consent the essential characteristic of only operating prospectively so as to authorise the doing of something in the future. A development consent authorises the carrying out of development. The concept of development has expanded since the enactment of the EPA Act but it has always involved, and still does involve, the doing of something in the future. The current definition of development in s 1.5(1) of the EPA Act includes the use of land, the subdivision of land, the erection of a building, the carrying out of a work and the demolition of a building or work. These are all acts to be done in the future.

[55] The constraints on the exercise of the four powers vary between the powers and define the type of modification that can be effected by exercise of the powers. The constraints on three of the powers, s 4.55(1A), s 4.55(2) and s 4.56(1), indicate that the modification of the development consent sought needs to effect some change to the development the subject of the development consent, while the constraints on one of the powers, s 4.55(1), indicate to the contrary that no change to the development the subject of the development consent needs to be effected.

[56] The most obvious indicator is that three of the powers are subject to the constraint that the repository of the power, the consent authority, is satisfied that the development to which the consent as modified relates is substantially the same as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all) (in s 4.55(1A)(b), s 4.55(2)(a) and s 4.56(2)(a)), while one of them has no such constraint (s 4.55(1)). This is an indicator that the modification of the development consent that is able to be made by exercising the three powers under s 4.55(1A), s 4.55(2) and s 4.56(1) must change in some way the development the subject of the development consent, while the modification of the development consent that is able to be made exercising the power under s 4.55(1) need not change the development the subject of the development consent.

[57] These same three powers are subject to other constraints that also indicate that modification of the development consent under these powers must change in some way the development the subject of the development consent.

[63] The upshot of this analysis is that the power in s 4.56(1), as with the powers in s 4.55(1A) and s 4.55(2), can only be exercised to modify a development consent if the modification will effect some change to the development the subject of the development consent. This need not be the only effect of the modification but it must be at least one of the results of the modification of the development consent.

[64] Turning to the modification of the development consent sought by Buyozo, it was limited to substituting in condition 30 a lesser amount for a greater amount of the monetary contributions required to be paid by the condition. This modification could not effect any change to the development the subject of the development consent. In this circumstance, the preconditions to the exercise of the power in s 4.56(1) could have no application. If the development is not changed, no question can arise of whether the development as modified is substantially the same development as originally granted; there is no utility in publicly notifying the proposed modification and considering any public submissions on the proposed modification as there is no change to the development in respect of which the public could make submissions; and there is no utility in notifying persons who made submissions on the development the subject of the original development application to invite them to make submissions on the proposed modification, for the same reason.

[65] As a consequence, the power in s 4.56(1) was not available to make the modification sought by Buyozo only to amend condition 30 so as to reduce the amount of contributions required to be paid by the condition as modified.

The proposed modification application to SSD 7317 clearly proposes an amendment or change to the development the subject of the development consent. That is, it will be removing an aspect of the approved development being the western side of Innovation Plaza public domain works. This is not akin to the decision in *Buyozo* where only a condition of consent relating to contributions was the basis of the amendment.

We note that the modification does propose a change to condition A16, but that is as a consequence of the main purpose of the modification, which is to change the development to reduce the extent of the public domain works. We expect that as a condition of any modified consent, condition A2 will be amended to indicate the reduced size of the public domain plan. That is, that there will be a reference in that condition that the public domain works on the western side of Innovation Plaza is not approved as shown in Mod 20.

Accordingly, as required by *Buyozo*, the development to be carried out on the land is proposed to be changed in some way and therefore the consent authority has the power under section 4.55(1A) to approve it.

Yours faithfully



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