APPLICATION FOR MODIFICATION OF DEVELOPMENT CONSENT
DA2014/023
AT
10-28 REDMYRE ROAD,
STRATHFIELD,
MERIDEN SCHOOL FOR GIRLS

MODIFICATION OF CONDITIONS.

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November 2015

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1 INTRODUCTION ............................................................................................................. 3
2. BACKGROUND ............................................................................................................ 3
3 SECTION 96 .................................................................................................................. 4
4. SECTION 96 TEST ...................................................................................................... 5
5 THE PROPOSAL .......................................................................................................... 6
6 JUSTIFICATION FOR THE PROPOSED MODIFICATION .................................. 8
7 SUBSTANTIALLY THE SAME DEVELOPMENT .......................................................... 13
8 SOCIAL AND ECONOMIC BENEFITS ..................................................................... 13
9 ASSESSMENT UNDER SECTION 79C (1) EPAA 1979 (as amended) .................... 14
10 CONCLUSION ............................................................................................................ 15
1 INTRODUCTION

The site is presently used for an educational establishment for Meriden School for Girls.

Consent number DA2014/023 dated 16 September 2014 approved the “Alterations and additions to Meriden School including an extension to the existing auditorium, demolition of the dwelling at 3 Margaret Street and construction of a new three (3) storey sports facility with basement parking”, subject to conditions.

This application relates to the conditions relating to the Plan for the awning of the sports complex in condition 1, hours of operation of the Sports complex in condition 6, location of Tree 2 the Canary Island Date Palm conditions 52 & 53 and height of the tennis court fencing condition 85.

This application seeks to amend the wording of the conditions to make the conditions more practical by modification of the existing consent.

This application is made under Section 96(1) and 96 (1a) of the Environmental Planning and Assessment Act, 1979 (as amended) (the Act).

The proposal does not include any increase to the hours of operation of the development as approved or reduce car parking.

All other matters relating to the consents remain as approved.

2. BACKGROUND

The development application was lodged with Council on 14 February 2014 and following assessment and reporting was approved in principle by Council’s Planning Committee on 19 June 2014 and final approval granted on 16 September 2014.

Amendment No. 3 to the Strathfield LEP 2013 for the delisting of 3 Margaret Street, Strathfield as a heritage item was published in the Government Gazette of 24th October 2014.

Council on 19 June 2014 resolved to agree to the request by the school to amend the hours of operation of the Sports complex as follows:

2. That Condition No. 6 be amended as follows:

“6. (a) The auditorium and outdoor sports facility are permitted to be used between the hours of 7am to 9pm, Monday to Sunday;

(b) The indoor sports facility, including the maintenance staff room and underground car park are permitted to be used between the hours of 6am to 9pm, Monday to Sunday;

(c) With the exception of (a) and (b) above, the auditorium, sports facility and underground car park are permitted to be used until 11 pm a maximum of four (4)
times per school term. Written notification is to be provided to Council and the residents of 6-8 Redmyre Road, 1 Margaret Street, 15 Margaret Street, 17 Margaret Street and 30-32 Redmyre Road a minimum of seven (7) days prior to the event.”

(d) The facility be used for the benefit of Meriden students, and not for other purposes.”

However when the consent was issued this amended condition was not included.

Condition 52 of the consent required tree 2 *Phoenix canariensis* (Canary Island Date Palm) to be transplanted (from the frontage of 3 Margaret Street) and relocated as per the landscape plan. This location is within the school grounds in between the Wallis Building and the Science Building.

The tree was transplanted to the frontage of 16 Margaret Street being the school property Lingburn Campus and a heritage item as an interim location before again relocating to the approved location.

The School wishes to retain the tree in this more prominent location in the Margaret Street frontage and not relocate it again.

Condition 1 of the consent as issued includes plans showing a 5m high fence around the upper level tennis court of the Sports complex. This fence height is acceptable to Council in this location however Condition 85 being a standard condition applied to tennis courts, generally in residential situations, includes a maximum height of 3.6m being in contrast to the approved plans. The 5m high fencing is required in this location and this application seeks to rectify the conflict in conditions and provide for the intended height of the applicant and Council.

3 SECTION 96

Section 96 of the Act states in part;

“(1) Modifications involving minor error, misdescription of miscalculation

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 a development consent granted by it to correct a minor error, misdescription or miscalculation. Subsections (1A), (2), (3), (5), (6), (6A) and (7) do not apply to such a modification.

(1A) Modifications involving minimal environmental impact

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 proposed modification is of minimal environmental impact, and

(b) it is satisfied that the development to which the consent as modified relates is 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), and
(c) it has notified the application in accordance with:
   (i) the regulations, of the regulations so require, or
   (ii) a development control plan, if the consent authority is a council
        that has made a development control plan under section 72 that
        requires the notification or advertising of applications for
        modification of a development consent, and
(d) it has considered any submissions made concerning the proposed
    modification within any period prescribed by the regulations or provided
    by the development control plan, as the case may be.

Subsections (1), (2) and (5) do not apply to such a modification.

"(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
(b) it has consulted with the relevant Minister, public authority or approval
    body (within the meaning of Division 5) in respect of a condition imposed
    as a requirement of a concurrence to the consent or in accordance with the
    general terms of an approval proposed to be granted by the approval body
    and that Minister, authority or body has not, within 21 days after being
    consulted, objected to the modification of that consent, and
(c) it has notified the application in accordance with:
   (i) the regulations, if the regulations so require, or
   (ii) a development control plan, if the consent authority is a council
        that has made a development control plan under section 72 that
        requires the notification or advertising of applications for
        modification of a development consent, and
(d) it has considered any submissions made concerning the proposed
    modification within the period prescribed by the regulations or provided
    by the development control plan, as the case may be.

Subsections (1) and (1A) do not apply to such a modification."

It is considered the matter is an s 96 (1) and 96 (1a) application as the proposal part
rectification of errors and omissions and part design changes.

4. SECTION 96 TEST
The test to be applied to any application under s 96 can be generally stated as follows;
“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),”

Whether or not the modified development is “substantially the same” as the originally approved development is essentially a finding of fact (Moto Projects (No2) Pty Ltd v North Sydney Council (1999) 106 LGERA 298), which must be asked and answered with respect to the particular circumstances of the individual modification application (Bechara v Plan Urban Services Pty Ltd and Others (2006) 149 LGERA 41)).

The meaning of “substantially “is not “identical” or the “same”. The Court held it to mean “essentially or materially or having the same essence” in Vacik Pty Ltd v Penrith City Council unreported, NSWLEC Stein J. 18 February 1992 and North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468)). In Moto Projects, Bignold J states the following:

“The relevant satisfaction required by s 96(2)(a) to be found to exist in order that the modification power be available involves an ultimate finding of fact based upon the primary facts found. I must be satisfied that the modified development is substantially the same as the originally approved development.

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 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).

The proposal meets this test by being the same development for the relevant conditions 1 and 52. Conditions 6 and 85 are not subject to that test as these are errors or omissions under s 96 (1).

5 THE PROPOSAL

The proposal is to vary Conditions 1, 6, 52 and 85.

Conditions 6 and 85 are errors or omissions and Conditions 1 and 52 relate to further consideration of aspects of design and location of elements of the development.

**Condition 1.**

This condition lists the plans and documentation for the approval. The plans are proposed to be altered in two aspects. Firstly by removal of the Tree 2 from the internal landscaping of the site between the Wallis Building and the existing Science building and changes to the landscaping and secondly by change in the design of the awning of the Sports Complex on Margaret Street from a wave form to a straight form.
It is proposed to amend Condition 1 by adding to the end of the condition the words:

"Plans the subject of Modification No. XXXXXXX as follows:

Sports Complex & Auditorium Upgrade Cover sheet + Location Plan + Site Plan Dwg No. 12404-DA000-02 prepared by NBRS+ Partners dated 24/11/2015.


Sports Complex & Auditorium Upgrade Sports Complex Elevations Dwg No. 12404-DA300-01 prepared by NBRS+ Partners dated 13/02/2014."

Condition 6:

Condition 6 as existing in the consent states:

6.  (a) The auditorium and sports facility are permitted to be used between the hours of 7am to 9pm, Monday to Sunday;

(b) With the exception of (a) above, the auditorium and sports facility are permitted to be used until 11pm a maximum of four (4) times per school term. Written notification is to be provided to Council and the residents of 6-8 Redmyre Road, 1 Margaret Street, 15 Margaret Street, 17 Margaret Street and 30-32 Redmyre Road a minimum of seven (7) days prior to the event."

It is proposed to delete this condition and replace with the adopted condition of the Planning Committee of 19 June 2014 as follows:

“6.  (a) The auditorium and outdoor sports facility are permitted to be used between the hours of 7am to 9pm, Monday to Sunday;

(b) The indoor sports facility, including the maintenance staff room and underground car park are permitted to be used between the hours of 6am to 9pm, Monday to Sunday;

(c) With the exception of (a) and (b) above, the auditorium, sports facility and underground car park are permitted to be used until 11 pm a maximum of four (4) times per school term. Written notification is to be provided to Council and the residents of 6-8 Redmyre Road, 1 Margaret Street, 15 Margaret Street, 17 Margaret Street and 30-32 Redmyre Road a minimum of seven (7) days prior to the event.”
(d) The facility be used for the benefit of Meriden students, and not for other purposes.”

**Condition 52.**

Condition 52 as existing states:

52 Tree 2 Phoenix canariensis (Canary Island Date Palm) shall be transplanted and relocated as per Landscape Plan 12404-LDA01-8. The palm is to be transplanted in accordance with the specifications as set out in the Statement of Environmental Effects (p40-42) as prepared by Chris Young Planning Pty Ltd.

It is proposed to delete this condition and replace with the words:

"52 Tree 2 Phoenix canariensis (Canary Island Date Palm) shall be transplanted and relocated to the frontage area of the Meriden School Lingwood Campus 16 Margaret Street, Strathfield. The palm is to be transplanted and maintained in accordance with the specifications as set out in the Statement of Environmental Effects (p40-42) as prepared by Chris Young Planning Pty Ltd."

**Condition 85.**

Condition 85 as existing states:

85. The tennis court shall be enclosed to a maximum height of 3.6m with plastic coated chain wire on suitable galvanised iron pipe frame. The colour of the chain wire shall be black or dark green.

It is proposed to delete the figure 3.6 from the condition and replace it with the figure 5.0.

The proposed condition to read:

85. The tennis court shall be enclosed to a maximum height of 5.0m with plastic coated chain wire on suitable galvanised iron pipe frame. The colour of the chain wire shall be black or dark green.

**6 JUSTIFICATION FOR THE PROPOSED MODIFICATION**

**Condition 1.**

The changes to the plans are shown "clouded" on the following plan list accompanying the application. The variations on each plan are described by the project architect as:

- DA000 -Landscape courtyard detail added
- Roof at Level 1 between administration and Tennis courts amended in profile
DA002  - Landscape courtyard detail added
- Roof at Level 1 between administration and Tennis courts amended in profile

DA001  - Landscape courtyard detail added

DA110  - Landscape courtyard detail added
- Roof at Level 1 between administration and Tennis courts amended in profile

DA300  - Color of entry wall
- Profile of street entry awning is changed from curved to flat.

The changes to the landscaped areas relate to the omission of the Canary Island Date Palm and more efficient landscape treatment of this internal area while the change to the awning and roof result in a more pleasing architectural line to the Margaret Street facade.

Condition 6

This is an omission in the consent as issued. Council adopted this condition at the Planning Committee of 19 June 2014 however the original staff recommended condition was issued.

Condition 52.

This condition is proposed to be altered to retain the Canary Island Date Palm in the location it was first relocated to as an interim location pending further relocation to that outlined in the consent conditions.

The Palm has been transplanted in accordance with the condition in regards maintenance and movement.

The location proposed is in the frontage of the Schools Lingwood Campus also a heritage listed site item number I176 under Council's LEP.

The location is considered superior to that of the original location as the Palm is relocated from a street frontage location in Margaret Street to another equally prominent frontage location in Margaret Street as shown below.
The Palm is listed in Councils significant tree register and the proposed location retains that significance when viewed from the public place of Margaret Street rather than obscured from the public place in the original location within the school.

The Heritage Assessment report accompanying the original development application makes reference to the Palm as follows:

*Canary Island date palm (Phoenix canariensis) west of No. 3 Margaret Street (Element No. 15). This palm is on the Strathfield Significant Tree Register. The palm is likely to date from the period 1907 (when the house at No. 3 Margaret St was built) into the 1920s. This is the only remaining feature of the early setting of the house at No. 3 Margaret Street."

The Heritage Assessment report further states:

"On the Margaret Street frontage of the site, the buildings are not distinctive and are largely a disparate group of brick buildings erected from the 1950s through to the 1990s. The identified significant trees: the Canary Island date palm on the significant tree register (Element 15) and the 3 Ficus trees on the street frontage in front of Turner house (Element 16) are prominent in the street view of the site (see Figure 63 below). The only earlier building visible from Margaret Street is the house at No. 3 Margaret Street, which has been heavily altered as outlined above."

And later:

*Canary Island Date Palm (Element 15)*

The Canary Island Date Palm is listed on the Strathfield Significant Tree Register and is considered to be an element of high heritage significance on the site. It is considered that in view of its significance, the Date Palm should be relocated elsewhere on the site. As there is evidence for a similar palm to the north of Wallis...
House in a 1940 photo (Figure 9 above), it is considered that this is a possible site for relocation of the palm, however other locations within the school site may also be suitable."

Photo of Palm from the Heritage Assessment report in the location of 3 Margaret Street prior to relocation.

Present and proposed location of Palm at 16 Margaret Street
The suggested possible location would take the Palm out of the context of Margaret Street where it formed part of the streetscape. The proposed location and present location remains within the School site (Lingwood is part of Meriden School site in Margaret Street) in a setting for the Victorian period item which equates with the suggested period of the Palm than the much later construction of the existing Wallis Hall.

Further 3 Margaret Street was not purchased until 1955 by the School and the Palm predates any school association but not the importance in the Margaret Street landscape and streetscape.

Previous location of the Palm from Margaret Street.

Present and proposed location of Palm.
It is considered the proposed location is a better location for the Palm.
Condition 85.

This condition is an error as the plans for the development as approved show the tennis court fencing to be 5.0m in height to provide greater protection from tennis balls being hit over the fencing and escaping the court.

7 SUBSTANTIALLY THE SAME DEVELOPMENT.

This test applies only to the proposed modification of conditions 1 and 52

(a) it is satisfied that the proposed modification is of minimal environmental impact, and
(b) it is satisfied that the development to which the consent as modified relates is 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), and
(c) it has notified the application in accordance with:

(i) the regulations, of the regulations so require, or
(ii) a development control plan, if the consent authority is a council that has made a development control plan under section 72 that requires the notification or advertising of applications for modification off a development consent, and
(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

It is considered the change in location of the Palm tree and the changes architecturally to the sports complex are of minimal environmental impact.

It is considered that the development proposed is substantially the same development.

The essence of the original application was the construction of a new 3 storey Sports facility with basement parking, the extension to the existing Wallis Hall auditorium and the demolition of the dwelling at 3 Margaret Street

The essence of the application remains.

The proposal is substantially the same development.

8 SOCIAL AND ECONOMIC BENEFITS

The proposed development will involve a number of benefits that are entitled to be considered. These include the practical construction of works, the location of the Palm tree is a more relevant heritage context in Margaret Street in a location with a heritage item of similar date and amendment of conditions to reflect Council intentions and community interest.
9 ASSESSMENT UNDER SECTION 79C (1) EPAA 1979 (as amended)

The following is a summary assessment of the proposed development under the heads of consideration contained in Section 79C(1) of the Environmental Planning and Assessment Act.

Section 79C(1)(a)(i) – The provisions of any environmental planning instrument
The proposal is permissible with consent and conforms with the relevant provisions of the environment planning instrument applying to this land the Strathfield LEP 2012.

Section 79C(1)(a)(ii) – The provisions of any draft environmental planning instrument
No draft LEP applicable.

Section 79C(1)(a)(iii) – The provisions of any development control plans
Relevant provisions of the Strathfield Development Control Plan do not apply to this proposal.

Section 79C(1)(a)(iiia) – Any planning agreement or draft planning agreement under S 93F.
No planning agreement entered into.

Section 79C(1)(a)(iv) – Matters prescribed by the Regulations
There are no relevant matters prescribed by the Regulations applicable to this matter.

Section 79C(1)(b) – Likely impacts of the development

- the proposal will have no adverse or identifiable impact in terms of:
  - context and setting;
  - access, transport and traffic;
  - the public domain;
  - utilities;
  - heritage;
  - other land resources;
  - water;
  - soils;
  - air and microclimate;
  - flora and fauna;
  - waste;
  - energy;
  - noise and vibration;
  - natural hazards;
• technological hazards;
• safety, security and crime prevention;
• social impact;
• site design and internal design;
• construction; or
• cumulative impacts.

**Section 79C(1)(c) – Suitability of the site for the development**

The proposal is suitable for the site in accordance with the requirements of the Strathfield Local Environmental Plan 2013 and the existing development consent except as proposed to be modified.

**Section 79C(1)(d) – Submissions**

Not available at this stage.

**Section 79C(1)(e) – Public interest**

There is no issue of public interest that should preclude the approval of this proposal.

**10 CONCLUSION**

The proposed modification is substantially the same development for which consent was originally granted.

The application relates to the conditions relating to the plan for the awning of the sports complex in condition 1, hours of operation of the Sports complex in condition 6, location of Tree 2 the Canary Island Date Palm conditions 52 & 53 and height of the tennis court fencing condition 85.

This application seeks to amend the wording of the conditions to make the conditions more practical by modification of the existing consent.

The proposal has no discernable impacts either on site or external to the site.

It is therefore submitted that Council may approve the proposed amendments under Section 96(1) and (1A) of the Environmental Planning and Assessment Act 1979 as amended.

Chris Young