FOUNDATION
LAW GROUP
LAWYERS. PLANNERS. DEVELOPMENT CONSULTANTS.

6 April 2023

Our Ref: ADK:20/005
Your Ref: DS22/1239

The General Manager
Shoalhaven City Council
32 Bridge Road
NOWRA NSW 2541

By email: **council@shoalhaven.nsw.gov.au**
Development@shoalhaven.nsw.gov.au

Dear General Manager,

RE: DS22/1239 – SERVICE STATION AT 75 & 79 QUEEN STREET BERRY (SITE) | LEGAL ISSUES FOR COUNCIL TO BE ABLE TO DETERMINE THE MODIFICATION APPLICATION

1. We act for the Berry Forum, a community consultative body for the Berry region in relation to the above matter.

2. We refer to previous submissions to Council regarding the proposed application to modify DA11/1386 (**the Original Consent**), being DS22/1239 (**Mod**), which seeks a modification of the Original Consent to demolish the existing service station building and ancillary structures, remove the underground fuel storage tanks and construct a new service station.

3. The Mod is made under section 4.55(2) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**).

4. In addition to the merit issues that the Berry Forum has previously raised in relation to the Mod, we want to reiterate two jurisdictional issues which may mean that Council does not have the ability to determine the application.

5. We invite Council to seek legal opinion as to whether Council has the ability to determine the application. Alternatively, Council may require the Applicant to provide a legal opinion as to why they believe Council has the power to determine the application.

6. The first issue is whether the proposed development is substantially the same development as the development for which the Original Consent was granted and before that consent as originally granted was modified by DS15/1291.

7. The second issue is whether the development consent granted by Council for DA11/1386 has lapsed because the development was not 'physically commenced' prior to the lapsing date of 15 June 2017.

8. Unless Council satisfies itself as to these two issues, it does not have the power to determine the Mod, and it can only determine the application by way of refusal. We consider the onus is on the applicant to satisfy Council as to these two issues.

9. We also note that the applicant has not yet (as far as we are aware) addressed the previous requests for further information issued by Council's assessing officer. Unless and until Council is satisfied that these requests for further information have been addressed, Council should refuse the application on the basis that it does not have sufficient information to adequately assess the Mod.

Issue 1: Not Substantially the Same Development

10. In our view, the proposed modification is not substantially the same as the development that was originally granted and before that consent as originally granted was modified. We understand that Council has the power to grant a modification of consent if it is satisfied that the modification sought is essentially or materially the same as what was originally approved. This includes a qualitative and quantitative analysis of the developments including the circumstances in which the development consent was originally granted.

11. In undertaking this comparative exercise, we suggest that Council could not find the development to be substantially the same. This is due to the number of changes between the development that was approved in the Original Consent, and the development sought in the Mod. Accordingly, the proposed development should be considered a new original application and not a modification to the Original Consent.

12. If Council cannot be satisfied that the development is substantially the same, then it does not have the power to determine the application by way of modification. We understand that Council as requested further information on this point from the Applicant, and that legal advice has not been provided to address this point to date (as far as we are aware).

13. The applicable legal principles governing the exercise of the power contained in s 4.55(2) of the EPA Act were summarised by Pepper J in *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd* (No 3) [2015] NSWLEC 75 ("***Westlime***") at [173] as follows [emphasis added]:

> *"(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);*
>
> *(2) the modification power is beneficial and facultative (Michael Standley at 440);*
>
> *(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])."

14. An assessment for the purposes of section 4.55(2) of the EPA Act requires a qualitative and quantitative comparison of the development for which consent was granted and the development as proposed to be modified. However, in order to conduct this analysis, it is necessary to first identify the material and essential features of the development, both as approved and as proposed to be modified (see *Garbourg v Ku-ring-gai Council* [2022] NSWLEC 1429 at [31] (***Garbourg***))

15. The development as approved is comprised of the following material and essential features, having regard to the description of the approved development and conditions applicable to that consent:

- *installation of five new underground fuel tanks;*
- *seven fuel dispenser pumps;*
- *a 185.95m² pay-point kiosk;*
- *a 285.85m² canopy;*
- *a 28.8m² attached retail shop;*
- *one 72.1m² manual carwash bay;*
- *a 21m² car wash plant room;*
- *eleven (11) on-site car parking spaces;*
- *landscaping; and*
- *erection of a 3.5m high solid (without gaps) noise attenuation barrier must be erected along the entire length of the northern boundary and part of the western boundary of the subject site generally in accordance with the recommendation contained in the submitted Environmental Noise Impact*

report No: 4591 prepared by consulting acoustical engineers Day Design Pty Ltd and dated 13th April 2011.

16. The proposed modification, if approved will result in the following:

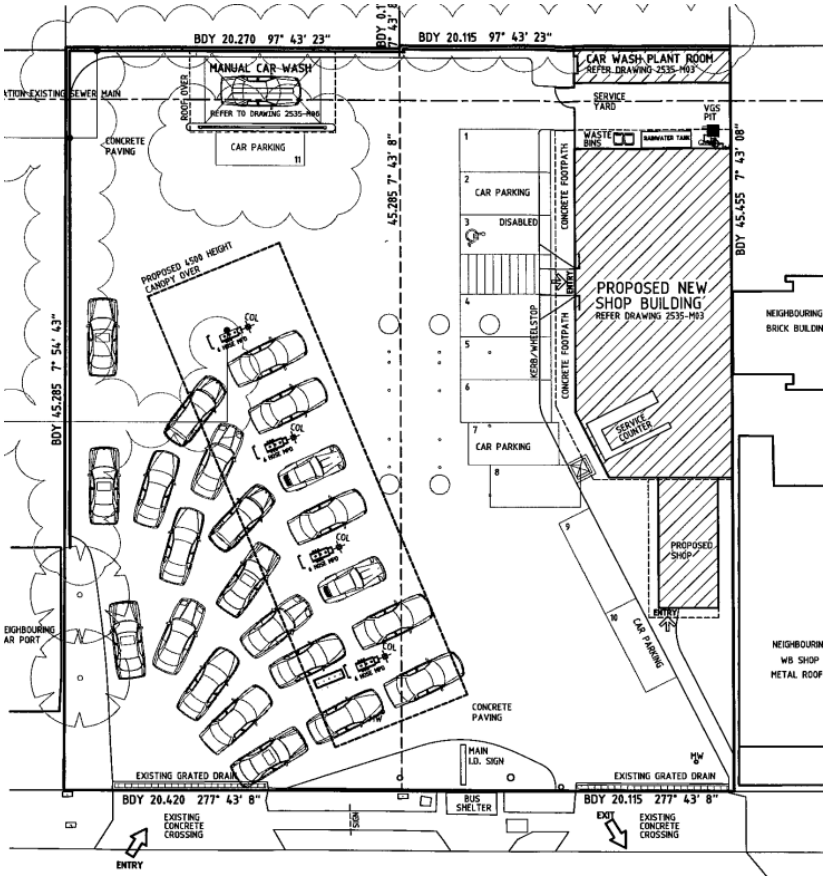
- Installation of only two (2) underground fuel tanks (reduced from 5);
- Thee (3) fuel dispenser pumps (reduced from 7);
- Removal of pay point kiosk and replacement with control building, which over 93 square metres larger in footprint;
- Removal of attached retail shop;
- Larger manual car wash bay;
- Larger car wash plant room;
- Thirteen (13) on site car parking spaces (increased from 11);
- Removal of noise attenuation barrier to be replaced with a colorbond fence.

17. Almost every material and essential features of the original development consent is proposed to be changed. One of the essential features, being the attached retail shop, is proposed to be removed entirely. A comparison of the two development site plans suggests a radical transformation in layout, orientation, amenity, and most importantly, development outcome (see Figures below).

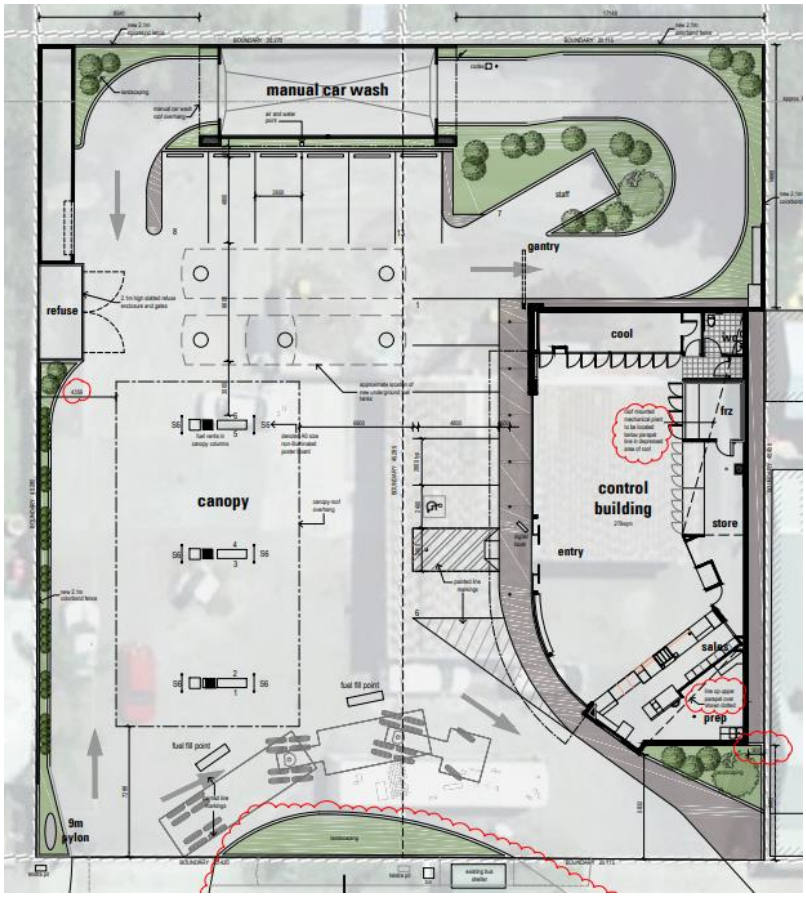
18. Even where it can be said "*at the highest level of generality*" that the proposed service station, if modified, will continue to be a service station, the multitude of modifications together with the significant change to the character, and function of the development, causes it to no longer be substantially the same development.

19. This was how the Court viewed a modification application submitted for a dwelling house and parking area in *Garbourg*. In that case, the Court found that a 22% increase in floor area of the dwelling, and altering the house from 4-bedroom home to a 5-bedroom home, was sufficient grounds for a finding that the development as proposed to be modified was not substantially the same.

20. Here, most critically, the use of the proposed development is also proposed to be changed, from a service station with an attached retail shop, to simply a service station. This fundamentally changes not only an essential feature of the development, but also the use of the land.



Design as approved



Design as proposed to be modified

21. The attached retail shop is part of an '*integrated set of activities'*, rather than simply a service station. Removal of one of those integrated components of activity would alter the development in a fundamental manner, such that Council cannot be satisfied that the development, as proposed to be modified, can be substantially the same development (see *Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council* (2019) 101 NSWLR 1; and *Hunter Development Brokerage Pty Limited trading as HDB Town Planning and Design v Singleton Council* [2022] NSWLEC 64).

Issue 2: Consent Has Lapsed and No Power to Extend or Modify

22. The Original Consent for DA11/1386 was granted on 15 June 2012 and stated that the consent would lapse on 15 June 2017.

23. We understand that Council approved an application to modify the Original Consent on 4 September 2015, which was numbered DS15/1291. When Council issued the notice of determination, it stated that the development consent was approved to operate from 4 September 2015 and would now lapse on 4 September 2020.

24. In Kinder Investments Pty Limited v Sydney City Council [2005] NSWLEC 737, Chief Justice Preston of the Land and Environment Court determined that the power to modify a consent cannot operate to prevent the effect of the lapsing of a development consent. His Honour said at [42]:

> *"Even if the power to modify a consent under s 96 of the Act were to be available, an exercise of that power would not prevent a consent from lapsing in accordance with the statutory means and timings which operate in relation to the unmodified consent."*

25. In effect, this decision means that even though Council issued a modification by approving DS15/1291 purporting to extend the lapsing date to 4 September 2020, such an extension would be void and of no effect. As such, the lapsing date for the Original Consent of 15 June 2017 remained in effect.

26. It appears that physical works on the Site did not occur until around 11 November 2019. These works occurred more than 2 years after the Consent would have lapsed. We have attached extracts from Nearmaps that shows when works appear to have commenced on the Site.

27. In our view, the onus is on the Applicant to prove that they physically commenced works prior to 15 June 2017 to demonstrate that the Original Consent (as modified) has not lapsed. If the development consent has lapsed, then Council does not have the power to determine this modification.

28. Accordingly, we object to the development being approved as Council does not appear to have the requisite power to approve it. Please do not hesitate to contact Peter James, should you wish to discuss this letter. I am instructed that Council staff have Mr James' contact details.

Yours sincerely,

Alex Kelly
Director and Principal
Accredited Specialist – Planning and Environment Law

Office: (02) 4244 0555
Email: alex@foundationlaw.com.au

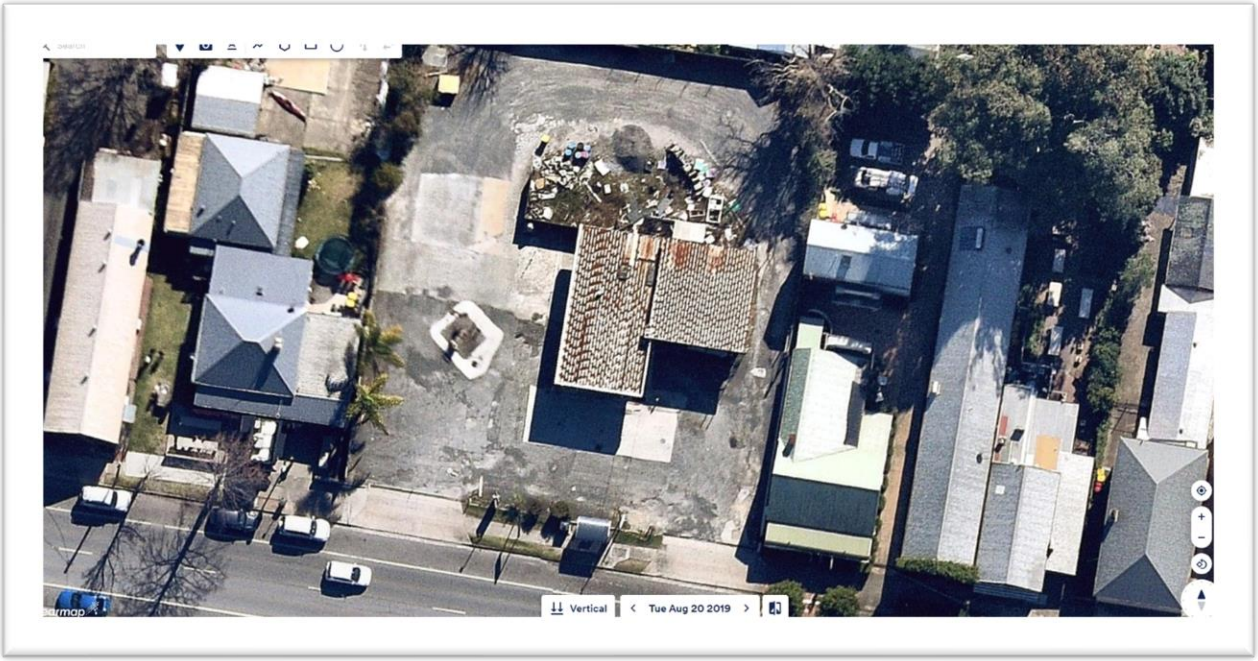


Figure 1 - extract from Nearmaps of the Site dated 20 August 2019

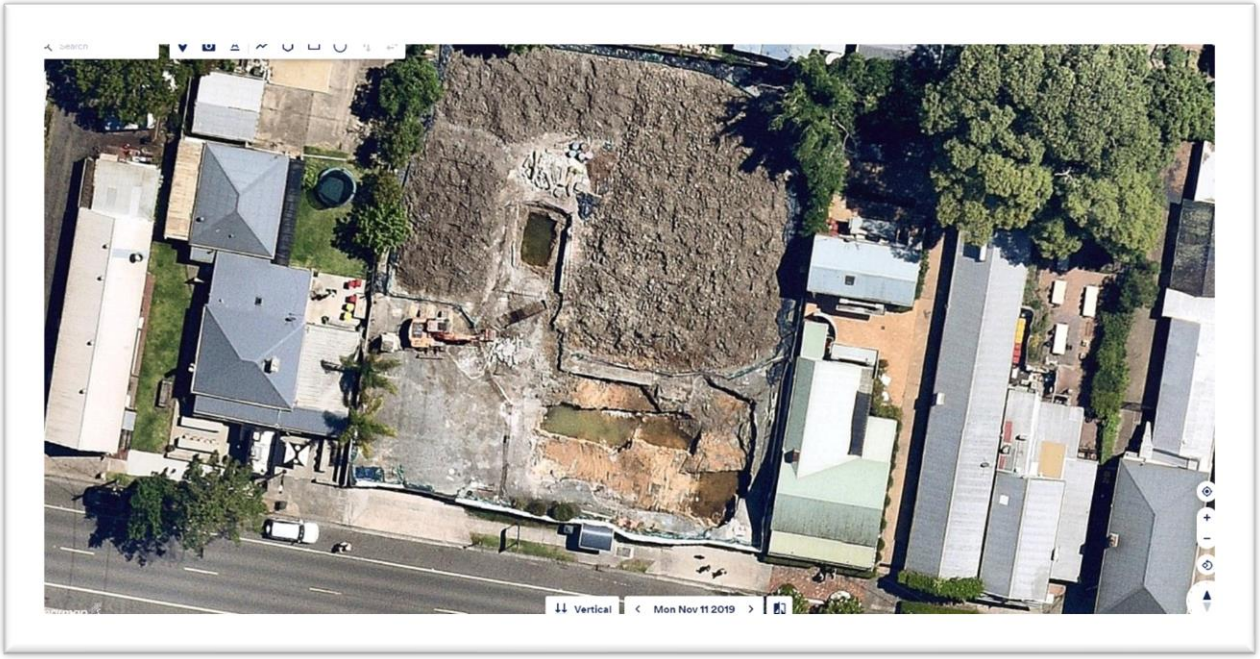


Figure 2 - extract from Nearmaps of the Site dated 11 November 2019