

ADDENDUM TO NSLPP ITEM LPP04 REPORT OF ANDREW BEVERIDGE DATED 26 JULY 2024

SUBJECT: 6/18-20 CREMORNE ROAD, CREMORNE POINT
APPLICATION NO. D713/02/3
AUTHOR: ANDREW BEVERIDGE, SENIOR ASSESSMENT OFFICER
DATE: 6 AUGUST 2024

BACKGROUND & PURPOSE

This addendum should be read in conjunction with the following report:

- (a) LPP04 dated 26 July 2024, prepared by Andrew Beveridge, Senior Assessment Officer, concerning a s4.55 modification application (**DA713/02/3**) seeking NSLPP approval for the modification to condition I2 of DA713/02 to increase the permitted number of users on the rooftop terrace of Apartment No.6 to a maximum capacity of 84 people at certain times of the year.

The purpose of this addendum is to provide a clarification in response to a query on the status of the section of the *Environmental Planning and Assessment Act 1979* (EP&A Act 1979) under which this application is sought to be modified, as considered under the NSW Land and Environment Court case of *Buyozo Pty Limited v Ku-ring-gai Council* [2021] NSWLEC 2 and its subsequent appeal to the NSW Court of Appeal under *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177 ('the case').

COMMENTS

In the case, the Court of Appeal determined the following:

1. There is no power to modify a condition of consent which has been satisfied.
2. There is no power under sections 4.55(1A), 4.55(2) or 4.56(1) of the EP&A Act 1979 to modify a consent where the proposed modification does not effect a change to the development the subject of the consent.

In this regard, the subject application is a proposed s4.55(2) modification to an ongoing condition (Condition I2), which was originally imposed in the consent to restrict the numbers of persons able to use the approved roof terrace at any one time. The modification as proposed seeks to change the development that was subject of the consent by amending a condition that restricted use to allow for a greater occupancy at particular times through the year.

It is to be noted that Condition I2 is an ongoing condition with indefinite effect, and cannot be considered to have been satisfied, unlike the payment of required s7.11 infrastructure contributions which were the prime subject of the Buyozo judgement. In that case the money was paid, the condition satisfied and had no ongoing role to play.

Furthermore, the proposed modification under s4.55(2) of the EP&A Act 1979 (for 'other modifications') is considered to be in accordance with the meaning of the Act, as the proposal (i.e. an alteration to an ongoing condition regulating the use of the roof terrace approved under DA713/02).

The modifications sought cannot be regarded as a s4.55(1) as no error is being sought to be corrected and is not a 4.55(1a) as the change to the approved development may have greater than a minimal environmental effect. The majority of submissions raise concerns regarding potential impacts on current amenity.

The use of land, and any changes to it, falls under the meaning of development as defined in section 1.5(1)(a) of the EP&A Act 1979:

(1) For the purposes of this Act, development is any of the following—

- (a) the use of land,*
- (b) the subdivision of land,*
- (c) the erection of a building,*
- (d) the carrying out of a work,*
- (e) the demolition of a building or work,*
- (f) any other act, matter or thing that may be controlled by an environmental planning instrument.*

RECOMMENDATIONS:

THAT the addendum be noted.

ANDREW BEVERIDGE
SENIOR ASSESSMENT OFFICER

Endorsed by

ISOBELLA LUCIC
TEAM LEADER ASSESSMENTS

STEPHEN BEATTIE
MANAGER DEVELOPMENT SERVICES