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WALES & ASSOCIATES
URBAN DESIGN PARTNERS

Ref: #078/2025
2nd November 2025

The General Manager
Central Coast Council
P.O. Box 20
WYONG 2259

Dear Sir,

**SECTION 4.55(2) MODIFICATION TO DA/37668/2009 Part 2
Upgrade & Extension of Existing Marina ("Machans Marina")
#5-7 Bilba Avenue at Booker Bay**

This application has been prepared by Wales & Associates on behalf of Prime Movers NSW Pty Ltd (ABN 14 675 405 077) and is made to Central Coast Council (Council), seeking amendment to DA/37668/2009 Part 2 dated 15th March 2021 which is approved as:-
"Upgrade & Extension of Existing Marina ("Machans Marina")"

The amendment is sought pursuant to Section 4.55(2) of the *Environmental Planning and Assessment Act 1979* (EP&A Act). The modification arises from an operational review of the marina resulting in the changes described in the submission including the number and location of the car parking spaces.

This submission describes the proposed modifications and provides a planning assessment of the relevant matters for consideration contained in Section 4.55(2) of the Environmental Planning & Assessment Act and is supported by the amended **Architectural Plans** prepared by **ADG Architects** (see attached).

1.0 THE SITE

The development application DA/37668/2009 Part 2 relates to land known as #5-7 Bilba Avenue at Booker Bay described as Lot 518 in DP727676, Lot 1 in DP1172287, Lot 2 in DP19839, Lot 1 in RP09037668, Lot 2 in DP1172287, Lot 2 in RP09037668, Lot 1 in DP19839 No. 5 Bilba Avenue, 5A Bilba Avenue, 5B Bilba Avenue, 7 Bilba Avenue Booker Bay (see **Figure 1** for aerial image). The site is level land occupied by the approved marina facility.

The site is subject of a detailed development approval (DA/37668/2009 – Part 2) dated the 15th March 2021 for the upgrade and extensions to the existing marina.

2.



Figure 1
Aerial Photograph
 (image courtesy of NSW Department of Planning – Spatial Viewer)

2.0 BACKGROUND

On the 24th September 2010, Central Coast Council granted consent for the upgrade and extensions to the existing marina known at the time as Machans Marina. This was assessed under DA/37668/2009. This was subsequently amended on the 24th September 2021 (see **Table 1**).

Table 1
Recent Development Consent History

Application	Description	Approved
DA/37668/2009	Upgrade & Extension of Existing Marina ("Machans Marina")	24 th September 2010
DA/37668/2009 Part 2	s4.55 Application to Modify Consent	15 th March 2021

3.0 PROPOSED MODIFICATIONS TO THE DEVELOPMENT

3.1 *General*

This modification application proposes the following amendments to the approved development as shown in **Table 2**. The modification arises from an operational review of the marina resulting in the changes described in the submission including the number and location of the car parking spaces.

Table 2
Proposed Modifications

Description of Departure	Cause/ Reasoning	Comments
Reduction and modifications to car parking arrangements	Operational review of marina facility and rationalisation of parking arrangements	Reduction in car parking numbers from eleven (11) spaces to five (5) spaces

The proposed modifications are assessed for environmental impact as shown in **Table 3**.

Table 3
Proposed Modifications and Environmental Assessment
Architectural Plans

Modification	Assessment of Environmental Impact
Drawing No. 13370B(1) “Plan showing jetty proposal and detail and long section – retention of remaining jetty”	Plan remains unchanged
Drawing No. A01 “Proposed Parking Plan” is a new plan	Drawing No. A01 “Proposed Parking Plan” is a new plan showing the amended car parking layout.

3.2 *Plan Modifications*

The following modifications are proposed as shown in **Table 4**:-

Table 4
Amendments to Approved Plans – Architecturals

Plan Title	Sheet No.	Revision	Date
Plan showing jetty proposal and detail and long section – retention of remaining jetty (Clarke Dowdle & Associates)	Drawing No. 13370B(1)	B	22 nd July 2009

4.

Table 4
Amendments to Approved Plans – Architecturals
(continued)

Plan Title	Sheet No.	Revision	Date
Proposed Parking Plan (ADG Architects)	A01	A	3rd November 2025

4.0 PLANNING ASSESSMENT

4.1 *Environmental Assessment*

Section 4.55(3) of the EP& A Act requires the consent authority to “take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application”.

The Statement of Environmental Effects submitted as part of original development application addressed:-

- (i) the site description;
- (ii) a full description of the proposal;
- (iii) the present use of the land;
- (iv) the assessment of the relevant planning standards under the Gosford Local Environmental Plan 2014 (in force at the time of the original consent);
- (v) the assessment of the relevant DCP controls under the Gosford DCP 2013 (in force at the time of the original consent); and
- (vi) any potential environmental impacts

Notwithstanding, the following review of the relevant planning instruments and development controls is made.

4.1.1 Central Coast Local Environmental Plan 2022

The following assessment is made in relation to the relevant clauses within the Central Coast LEP 2022 as detailed in **Table 5**.

Table 5
Compliance with Central Coast LEP 2022

Clause	Comment	Compliance
<u>Clause 2.7</u> – Demolition	Demolition is permissible. However, no demolition is required for the modification.	YES
<u>Clause 4.3</u> – Height of Buildings	The maximum building height is 8.5 metres. However, no alterations to the existing building are proposed.	YES

5.

Table 5
Compliance with Central Coast LEP 2022
(continued)

Clause	Comment	Compliance
<u>Clause 4.4</u> – Floor Space Ratio	The maximum floor space ratio is 0.5 to 1. However, no additions or alterations to the existing building are proposed.	YES
<u>Clause 5.10</u> – Heritage Conservation	The site is not heritage listed nor immediately adjacent to a heritage listed items. Nor is it subject to nor in close proximity to any known aboriginal heritage sites or objects.	YES
<u>Clause 5.21</u> – Flood Planning	The site is subject to the Council’s Flood Planning provisions. However, works are limited to the provision of car parking and has no impact on flood levels beyond that which was assessed as part of the original consent.	YES
<u>Clause 7.1</u> – Acid Sulfate Soils	The proposed amendments do not increase the impact on acid sulfate soils beyond that which has already been identified in the current approval. Works are limited to the provision of car parking spaces.	YES

4.1.2 Central Coast Development Control Plan 2022

The following assessment is made in relation to the relevant clauses within the Central Coast Development Control Plan 2022 as detailed in **Table 6**:-

Table 6
Compliance with the Central Coast DCP 2022

Clause	Comment	Compliance
<u>Chapter 2.5</u> – Commercial Development		
<u>Clause 2.5.2</u> – Character and Context	The proposed modifications do not alter underlying character of the marina precinct. The proposal simply relates to the reduction and re-orientation of the parking arrangements.	YES
<u>Clause 2.5.3</u> – Building Scale	The proposed modifications do not add or alter the existing buildings and therefore does not impact on building scale.	YES
<u>Clause 2.5.4</u> – Building Setbacks	The proposed modifications do not alter or impact on the approved building setbacks.	YES

Table 6
Compliance with the Central Coast DCP 2022
(continued)

Clause	Comment	Compliance
Chapter 2.5 – Commercial Development (continued)		
<u>Clause 2.5.5</u> – Built Form and Articulation	The proposed modifications do not alter or impact on the approved built form or the articulation of the approved building.	YES
<u>Clause 2.5.6</u> – Public Domain	The proposed modifications do not alter or impact on the public domain. Vehicle access to Bilba Avenue is maintained and is consistent with approved access arrangements.	YES
<u>Clause 2.5.7</u> – Services	The proposed modifications do not alter or impact on the provision of services.	YES
<u>Clause 2.5.7</u> – Design for Safety and Security	The proposed modifications do not adversely impact on safety and security. The proposed parking alterations retain clear lines of sight, adequate lighting and reduce opportunities for criminal activity.	
<u>Clause 2.13.2</u> – General Principles	The proposed modifications adequately address the likely parking demand and have minimal impact on the surrounding street network.	YES
<u>Clause 2.13.3</u> – Calculation of Car Parking Spaces	The proposed modifications seek to reduce the number of car parking spaces from eleven (11) spaces to five (5) spaces. In the absence of specific parking requirements for marina facilities, the commercial rate is applied. Based on the existing GFA = 238m ² and the commercial rate of 1 space/40m ² , the parking demand = 6 space (rounded up)	NO
Chapter 2.14 - Site Waste Management	The proposed modifications do not alter the approved site waste management arrangements.	
Chapter 2.17 – Character and Scenic Quality	The proposed modifications do not significantly impact on the character or scenic qualities of the locality. The proposal simply seeks to reduce the number of car parking spaces and modify the parking arrangements.	

Consequently, the assessment of the proposal against Section 4.55(3) remains largely unchanged with respect to the above considerations given:-

- (i) the proposed modifications maintain general compliance with the applicable environmental planning instruments and policies, including the Central Coast LEP 2022 and Central Coast DCP 2022;
- (ii) the impacts of each discrete element of the proposed modification has been assessed in **Table 1** (above). Cumulatively, these impacts are consistent with those envisaged under DA/37668/2009 Part 2 because:-
 - the proposed modifications will not materially alter the nature of the development. The use forming the approved development remains unchanged because of this application (ie: *Upgrade & Extension of Existing Marina ("Machans Marina")*);
 - the building envelope remains the same and is generally consistent with the approved plans;
 - the parking modifications do not significantly alter impacts on views or adjoining neighbour amenity to that which has already been approved;
 - the building remains visually consistent with that approved in terms of architectural language and materiality. The façade presentation remains unaltered and is generally the same to that which has been approved;
 - the proposal does not result in a detrimental impact on surrounding (approved) land uses, or the public domain along Bilba Avenue or the Booker Bay foreshore; and
 - the vehicle and pedestrian access arrangements are to be altered by reducing the number of vehicle spaces from eleven (11) to five (5) spaces
- (iii) consent was originally granted on the 24th September 2010 and amended on the 15th March 2021 whereby the site remains suitable for the proposed use as a marina facility, inclusive of the modifications sought by this application;
- (iv) there are no modifications proposed that would contravene the public interest. The proposal will in fact continue to meet a local demand for high-quality marine facilities. The proposal continues to facilitate the activation of the site, create local employment through the provision of marine services

4.2 *Substantially the Same Development*

Section 4.55(2)(a) of the EP&A Act requires the consent authority to be:-

“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)”.

The NSW Land and Environment Court has established several precedents as to what may be considered as being “substantially the same development” and what should be factored into the consideration of this basic threshold test.

Principles drawn from the various judgments include that:-

- (i) the term “substantially” means “essentially or materially having the same essence”;
- (ii) when a consent authority makes a determination as to whether a development is substantially the same, it is a question of fact and degree and is not a question of law;
- (iii) the term to “modify” means to “alter without radical transformation”;
- (iv) in comparing the approved development and the development as proposed to be modified it is necessary to undertake a qualitative and quantitative assessment of the developments in their proper context; and
- (v) to undertake a numeric or quantitative assessment of the modification only in the absence of a qualitative assessment would be flawed.

These considerations apply to the modification of a development through design modifications as well as amendments to conditions that impact the nature of the proposal.

Consideration of the substantially the same development test should not only include the physical characteristics of the approved and modified schemes, but also the nature and magnitude of the impacts of the developments. In these respects, the modified scheme should be “*essentially or materially*” the same as that originally approved.

It is also **instructive to note** the NSW Land & Environment Court’s decisions in *Realize Architecture (1) and (2)* which are a reminder for local Councils that it is important not overly focus on the “Quantitative” (numerical) differences as they appear in isolation and that it is entirely acceptable for there to be large numeric differences approved through the modification pathways that exist in s4.55 and s4.56 of the EP&A Act . Councils should take a more holistic and balanced approach to the test.

Equally, in the Court’s decision in *Realize Architecture (1) and (2)* are a reminder that for the purpose of interpreting the words and phrases of the “substantially the same” test in s4.55 and s4.56 of the EP&A Act as to their meaning, there is a real freedom for applicants/proponents and consent authorities to put forward whichever formula or test they consider to be most relevant and helpful. The decision is then one that can be an “instinctive” one which “need not be articulated expressly” (*Realize Architecture (2)* at [30])

In our view, there can be no doubt that the modified development will be substantially the same as the development as originally approved by the Council on the 24th September 2010 and amended on the 15th March 2021. When examining the approved plans compared to the proposed plans, the Consent as modified will result in a development that is substantially the same as the development as approved by the Consent before modification in terms of footprint, dimensions, height, site coverage, view impacts and in all other material respects.

The differences are detailed in **Table 2**. This will result in an improved design with no significant adverse environmental impact.

An assessment of the qualitative and quantitative elements of the development approved and as proposed to be modified are provided below.

4.3.1 Qualitative Comparison¹

The proposal is substantially the same development, in a qualitative sense, as set out below (responses in *italics*):-

- (i) How is the appearance of the existing building to be changed when viewed from public places? *The appearance will be the same as that approved by the existing Consent when viewed from both the Bilba Avenue and from the Booker Bay foreshore with modest changes to the car parking arrangements off Bilba Avenue.*
- (ii) To what extent, if any, will existing landscaping be removed and how will that affect the setting of the building when viewed from public places? *No change to the landscaping as approved by the Consent is proposed by the modification.*
- (iii) To what extent, if any, will the proposal impact on a heritage item, the curtilage of a heritage item or a heritage conservation area? *The site is not heritage listed nor immediately adjacent to any heritage listed items.*
- (iv) What additional structures, if any, in the curtilage of the existing building will be demolished or altered if the proposal is approved? *Not applicable. No additional structures are impacted by the proposed modifications. The attached plans show the proposed parking modifications.*
- (v) What is the extent, if any, of any proposed change to the use of the building? *The proposed use of the building as a marine facility is unaltered.*
- (vi) To what extent, if any, will the proposed development result in any change to the streetscape in which the building is located? *The modification does not propose any changes to the building façade or envelope and remains generally consistent with that approved by the Consent.*
- (vii) To what extent, if any, are the existing access arrangements for the building proposed to be altered? *No change to access arrangements is proposed. Access remains off Bilba Avenue.*
- (viii) To what extent, if any, will the outlook from within the existing building be altered as a consequence the proposed development? *Outlook from within the approved marine facility will remain generally the same as that approved by the Consent.*
- (ix) Is the proposed demolition so extensive to cause that which remains to lose the characteristics of the form of the existing structure? *Not applicable.*

4.3.2 Quantitative Comparison²

The proposal is substantially the same development, in a qualitative sense, as set out below (responses in *italics*):-

- (i) To what extent is the site coverage proposed to be changed? *There is no change to the approved site coverage.*

¹**Qualitative comparison** involves analyzing and contrasting qualitative data or cases to uncover patterns, themes and insights that inform research and decision-making.

²**Quantitative comparison** refers to the process of comparing two numerical quantities to assess which is greater, whether they are equal, or if the relationship cannot be determined based on the information provided.

- (ii) To what extent are any existing non-compliances with numerical controls either increased or diminished by the proposal? *Both building height and the floor space ratio will not alter and remain compliant with the maximum building height and maximum FSR. In relation to parking demand, the proposed modifications seek to reduce the number of parking spaces from eleven (11) spaces to five (5) spaces. In the absence of specific parking requirements for marina facilities, the commercial rate is applied. Based on the existing GFA = 238m² and the commercial rate of 1 space/40m², the parking demand = 6 space (rounded up). This is a departure from the numerical controls.*
- (iii) To what extent is the building envelope proposed to be changed? *The building envelope will remain the same as approved by the Consent.*
- (iv) To what extent are boundary setbacks proposed to be changed? *No change to the boundary setbacks as approved by the Consent are proposed.*
- (v) To what extent will the present numerical degree of landscaping on the site be changed? *No substantive change to the landscaping as approved by the Consent is proposed.*
- (vi) To what extent will the existing floor space ratio be altered? *There is no change to the floor space ratio which remains the same as that approved by the Consent.*
- (vii) To what extent will there be changes in the roof form? *The roof form remains generally consistent with the plans as approved by the Consent.*
To what extent will there be alterations to car parking/garaging on the site and/or within the building? *In relation to parking demand, the proposed modifications seek to reduce the number of car parking spaces from eleven (11) spaces to five (5) spaces. In the absence of specific parking requirements for marina facilities, the commercial rate is applied. Based on the existing GFA = 238m² and the commercial rate of 1 space/40m², the parking demand = 6 space (rounded up). This is a departure from the numerical controls.*
- (viii) To what extent is the existing landform proposed to be changed by cut and/or fill to give effect to the proposed development? *No change is proposed to the existing landform by any cut and/or fill.*
- (ix) What relationship does the proportion of the retained building bear to the proposed new development? *There is no significant change to the retained building proportions. The retained area of the building as approved by the Consent is generally the same as the proposed development as modified.*

4.3.3 Conclusion

The modifications will not result in any significant additional social and environmental impacts as previously assessed for the approved development. The Council describes the original proposal for which the Consent was granted as follows:-

“Upgrade & Extension of Existing Marina (“Machans Marina”)”

The current modification proposes no substantive change to the above descriptions.

Council’s attention is drawn to the relevance of the planning principle in *Coorey v Municipality of Hunters Hill [2013] NSWLEC 1187*. It is noted that what is proposed is not a new development application, but an application to modify an existing Consent.

Ipsa facto, if the planning principle in *Coorey* is relevant at all to this case, the comparison that is to be made is between the existing Consent and the modifications proposed. In other words, the consideration relates to whether the modified “*marina*” development will constitute alterations and additions to the “*marina*” development approved by the existing Consent, or a new building.

The proposal is for the same “*marina*” development in the same location and in substantially the same dimensions as for the “*marina*” development as approved in the Consent.

The planning principle in *Coorey* confirms that “*the greater the overall extent of departure from the existing position, the greater the likelihood the proposal should be characterised as being for a new building*” and requires a qualitative and a quantitative analysis of the relevant issues. This is set out previously under Qualitative and Quantitative Comparison.

5.0 NOTIFICATION AND SUBMISSIONS

As the proposed amendment is submitted under Section 4.55(2) of the EP&A Act, it is anticipated the application will require public exhibition. As per Section 4.55(2)(c) and (d), it is understood that any submissions received will need to be considered by Council in the assessment of the application.

6.0 CONCLUSION

This Section 4.55(2) modification application to DA/37668/2009 Part 2 seeks minor changes to the approved plans and changes to the Conditions of Consent.

It is proposed to amend Condition #1.1 so as to:-

- (i) retain Drawing No. 13370B(1) (Issue B)
- (ii) add Drawing No. A01 “Proposed Parking Plan”

In addition, it is proposed to amend Condition #1.3 to read:-

“1.3 This consent only relates to the provision of car parking (5 spaces) within the marina site”

It is also proposed to amend Condition #5.3 to read:-

“5.3 The driveway, vehicle manoeuvring area and 5 car parking spaces as shown on the approved plan must be properly constructed, graded, drained and line marked, in accordance with Australian Standard 2890.1-2004 Off Street Parking”.

It is also proposed to amend Condition #6.5 to read:-

“6.5. The existing concrete surface in the vicinity of the proposed angled car parking spaces (space) and underground petroleum storage system (UPSS) is not to be removed or resurfaced without further consent to minimise contact with the natural ground/soil surface and potential contaminates. The proposed car parking spaces #5 is to be line marked only”.

12.

Having regard to the above, it is our view that Central Coast Council may modify DA/37668/2009 Part 2 pursuant to Section 4.55(2) of the Environmental Planning & Assessment Act because the proposal represents substantially the same development for which the consent was granted and suitably mitigates environmental impacts.

Yours faithfully,

A handwritten signature in dark ink, appearing to read "Matthew Wales", with a horizontal line underneath the name.

Matthew Wales
Development Manager