



12 September, 2018

Northern Beaches Council
Belgrave Street
MANLY NSW 2095

RE: DA 129/2016 - Proposed Residential Development
Section 96 Application
1 Fairlight Crescent FAIRLIGHT

1.0 INTRODUCTION

This statement has been prepared to accompany an application pursuant to s4.55(1A) of the EP&A Act, for proposed modifications to an approved dual occupancy development at 1 Fairlight Crescent, FAIRLIGHT.

The development application (DA129/2016) was originally approved by the Manly Independent Assessment Panel (MIAP) 15 December, 2016.

The approved development (as modified) is defined as residential accommodation (dual occupancy) comprising three (3) levels.

The principal changes under this application include:

- Extension and change of design to approved front awning

The proposed changes as sought for approval are encompassed in the following architectural plans prepared by *Woodhouse + Danks Architects*, dated March, 2016:

D01C – 11.09.18	Site Plan
D11C – 11.09.18	First Floor Plan
D20C – 11.09.18	N and S elevations
D21C – 11.09.18	W and E elevations



Section 4.55(1A) of the Act provides as follows:

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, 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 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.*

In the circumstances, the application must therefore be able to fulfil the test of being substantially the same. This issue is discussed in detail below.

2.1 Substantially the same

The requirement for a modified development application to be ‘*substantially the same*’ as the original development arises from the requirements of s.4.55(1A)(a) of the *EP and A Act 1979*:

The nature of Section 4.55 of the *EP and A Act 1979* assumes, as did s96 as it was previously known, that there is likely to be some change between an originally proposed (and approved) development and a modified one. The decision of *North Sydney Council – v – Michael Standley & Associates Pty Ltd*, (97 LGERA 433, 12 May 1998, Mason P), added to the understanding of the appropriateness of permitting a modification as follows:

“Parliament has therefore made it plain that a consent is not set in concrete – it has chosen to facilitate the modifications of consents, conscious that such modifications may involve beneficial cost savings and / or improvements to amenity.”

The main consideration under Section 4.55 is what constitutes “*the same development*” and what are the parameters defining “*substantially*”. In the case of *Vacik Pty Limited and Penrith Council* (unreported 24 February 1992, Stein J), the Court held that substantially means “*essentially or materially or having the same essence*” and that the substance of determining these matters rests with a comparative analysis between the consent being varied and the modification and this approach is supported by the decision of Bignold J in *Moto Projects (No 2) Pty Ltd and North Sydney Council* (NSWLEC 280, 10741A of 1997).

When considering **material** impact it is our opinion that the proposed modifications are not of such significance to warrant a new application. By way of assistance, the Macquarie Concise Dictionary defines **material** to mean, amongst other things: *of such significance to be likely to influence the determination of a cause*. Other common meanings of material in relation to impacts would include *real, not incidental or slight*.

The word to *modify* means ‘to alter without radical transformation’ as confirmed in *Sydney City Council v Ilenace Pty Ltd* (1984) 3 NSWLR 414. The addition to the front is a simple extension of the walling and roofing to infill a void created by an excision of the subject element, and reinstates the proposal to what was originally proposed. In our opinion the addition does not constitute a radical transformation.

The relevant attributes of the proposal is so concluding include:

- The proposal before Council is in essence the same development which is defined as residential accommodation, specifically an attached dual occupancy
- The development will appear and function and operate ostensibly the same as the approval.
- The exterior appearance of the building retains the essential ingredients in terms of form, aesthetic, colours, textures, etc;
- The building footprint does not fundamentally change except for the extended lightweight awning;
- The number of units does not change,
- The number of carspaces does not change;
- There are no additional material impacts created

Accordingly, there is no impediment to the assessment of the application on its merits.

3.0 Discussion on Proposed Modifications

3.1 Awning

The subject awning has already been constructed and the minimal impacts are clearly assessable on site. It is a lightweight structure affording cover and protection to occupants and in particular the entry lift and stairs. The structure is not readily perceptible notwithstanding that it is within a side/street setback area given the relationship and shielding provide by the approved front fencing.

It is commonly accepted that there is no bar to the grant of a modification approval for retrospective works. (*Windy Dropdown v Warringah Council*)

4.0 CONCLUSION

The proposed development has been assessed in accordance with the provisions of Section 79C and s96 of the Environmental Planning and Assessment Act, 1979, and deemed to be satisfactory.

Given:

- ❑ The proposal does not create any breach of any relevant planning controls in respect of height, floor space ratio, and landscaped area;
- ❑ The external footprint remains essentially the same as the approved building;
- ❑ The proposed changes are minor in the context of the existing approval and have negligible if any environmental impact;
- ❑ The proposed development remains substantially the same;
- ❑ The modification will have minimal environmental impact on the streetscape and will be in character with the form and aesthetics of the surrounding locality,

it is concluded that the proposal warrants approval.

A handwritten signature in dark ink, appearing to be 'Joe Vescio', with a stylized, cursive script.

Joe Vescio