

16 October 2025

The General Manager
Northern Beaches Council
PO Box 82
MANLY NSW 1655

Dear Sir/Madam,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT,
SECTION 4.56 OF THE ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

Development Application No: DA 2018/0628
Date of Determination: 3 December 2019 (Land & Environment Court Judgment)
Subsequently modified 20 June 2024 (Mod2024/0109)
Premises: Lot 34 DP 8075
No. 8 Bower Street, Manly
Proposed Development: Alterations and additions to an existing dwelling house
and a swimming pool

On behalf of Mr David Duckworth & SketchArc Architects, this submission has been prepared to assist Council in the consideration of an application pursuant to Section 4.56 of the Environmental Planning & Assessment Act 1979 to alter the development as approved by Development Consent DA2018/0628 (subsequently modified 20 June 2024 (Mod2024/0109)).

BACKGROUND

The subject development was approved on 3 December 2019 in accordance with the Land and Environment Court Judgement dated 3 December 2019 (subsequently modified 20 June 2024).

The approved development provided for the construction of alterations and additions to an existing dwelling house including a swimming pool.

The original dwelling within the site had a ridge level of RL 30.59.

The approved additions and alterations to the existing dwelling at a ridge height of RL 29.120, being up to 1.47m below the existing ridge. The proposed modifications sought within this application will increase the ridge height to RL 29.670, remaining 0.92m below the ridge of the existing dwelling.

The Development Consent remains valid until 3 December 2024 however it would also benefit from the COVID incentives under section 4.53 of the Environmental Planning and Assessment Act 1979 and having been issued prior to the amendment of the prescribed period within S4.53, the consent would benefit from additional two-year extension to the date on the original expiry, expiring 3 December 2026.

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The works which of the subject of the original consent have commenced under Construction Certificate CC2024/0447.

PROPOSED MODIFICATION

This submission under S4.56 of the EP&A Act seeks to modify the design of the dwelling and the swimming pool, with the proposed modifications discussed below.

Fundamentally, the proposal seeks to raise the approved flat roof and parapet height to provide for an increase in the internal ceiling height to improve the function of the habitable space together with raising of the parapet level to facilitate the construction methodology.

The revised architectural plans prepared by SketchArc, Project No 1617, Sheets No's. S4.56-1 – S4.56 – 26, dated 11 September 2025 note the following changes to the approved development, primarily comprising a minor increase in the depth of the roof members to provide for more appropriate construction tolerances for the proposed flat roof with perimeter parapet, together with a minor increase in the internal floor to ceiling height of the entry floor level.

The modifications to the approved design will provide for ridge level of RL 29.670, which is an increase of 550 mm above the approved ridge level of RL 29.120.

As discussed, the proposed raising of the roof level will still maintain height of 920mm below the existing ridge of the dwelling.

The general floor plan layout of the dwelling is otherwise unaltered and the overall position of the dwelling will be unchanged. The streetscape presentation of the dwelling and the presentation to the neighbouring properties will be marginally altered through the inclusion of the additional increase in height of 550 mm largely unchanged.

With the lowering of the existing roof and notwithstanding the minor increase in the approved roof level from RL 29.120 to RL 29.670, (increase in height of 550mm), views over and past the structure will be generally improved for properties on the south-eastern side of Bower Street when compared to the existing dwelling roof form on the site..

The architectural submission prepared by SketchArc Architects notes that there will be a minor change to the shadow cast by the development however it is primarily over the front setback and road reserve area forward of the neighbouring property at 10 Bower Street and the subject site.

As noted below, the proposal will not see any change to the approved floor space ratio of the development. As a result of changes to the layout and paved areas, the total open space and landscaped area will see minor increases and represent improvements above the approved indices.

The proposed modifications to the reform do not introduce any change to the approved BASIX Commitments and therefore a revised BASIX Certificate is not considered necessary in this instance.

The modified proposal will present the following development indices (see over):

Site Area	973.77m²
Permissible FSR	0.45:1 or 437.85m ²
Approved FSR	0.448:1 or 436.85m ²
Modified FSR	0.448:1 or 436.85m ² (unchanged)
Required Total Open Space	535.57m ² or 55%
Approved Total Open Space Area	632.80m ² or 64.98%
Proposed Total Open Space	694.39m ² or 71.31%
Required Landscaped Area	187.45m ² or 35% of TOS
Approved Landscaped Area	417.81m ² or 78.01%
Proposed Landscaped Area	424.24m ² or 79.21%

In support of the application, the following documentation is provided to assist Council in its deliberations:

- Revised Architectural Plans prepared by SketchArc Architects, Project No 1617, S4.56-1 – S4.56 – 26, dated 11 September 2025
- Revised Geotechnical Comments prepared by White Geotechnical Group, Report Reference J1676N dated 24 September 2025
- Updated Bushfire Assessment Report prepared by Building Code and Bushfire Hazard Solutions, Report Reference 260299 dated 8 October 2025

JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under S4.56 and notes:

(1) A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court and subject to and in accordance with 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 the consent was originally granted and before that consent as originally granted was modified (if at all), and*
- (b) 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*
- (c) it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last dress known to the consent authority of the object or other person, and*

(c) 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.

Accordingly, for the Council to approve the s4.56 Modification Application, the Council must be 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.

LEGAL TESTS

To assist in the consideration of whether a development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted, Justice Bignold established the following test in the *Moto Projects (No 2) Pty Ltd v North Sydney Council (1999) 106 LGERA 289* where His Honours states:

[54] The relevant satisfaction required by s96(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 (currently) approved 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).

In my opinion, in terms of a “qualitative comparison”, the Modification Application is substantially the same development as that which was approved.

The works seek to provide for minor alterations to the form of the approved building to provide for minor architectural changes and reuse of the lower floor level of the dwelling, together with a reorientation of the swimming pool and the inclusion of an open cabana and a revised landscape treatment to the rear yard.

The approved height of the additions and alterations to the dwelling, and general bulk and form of the dwelling as viewed from the street and from the adjoining will be otherwise unchanged and will be consistent with the height and location of the approved design initially considered within DA2018/0628 (subsequently modified 20 June 2024 (Mod2024/0109)).

When viewed from the public domain or from the neighbouring properties, the building will present the same visual impact and appearance to that originally approved.

Similarly, the application is substantially the same development when subjected to a “quantitative comparison”, as the works will continue to provide for the construction of alterations and additions to an existing dwelling house and a swimming pool in a form which is generally consistent with the original consent.

In my view, this application is fundamentally the same as the original application when considered in the context of the Bignold J determination and the application can be reasonably assessed by Council under S4.56 of the Act.

Conclusion

The test established in **Moto** requires both a quantitative and a qualitative assessment.

In terms of the quantitative extent of the changes to the originally approved development, the works which are the subject of the application are minor and do not inherently alter the nature and form of the approved residential development as originally approved by Council.

The proposal also satisfies the qualitative assessment required by the Moto test. The modifications will result in a development which remains generally as approved, for the same purpose and with no substantive modifications to the physical appearance of the approved building.

Consistent with the Court decision in **Moto**, the Council would be satisfied that the development as modified would remain essentially or materially the same as the approved development.

This Court decision also makes clear that the Council has the power to approve the Modification Application.

The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as initially lodged and as detailed under the original Notice of Determination dated 3 December 2019 (**subsequently modified 20 June 2024**).
- The proposal is “substantially” the same development, as defined by the Environmental Planning & Assessment Act.

Council’s support of the modification to the form of the proposed development is sought in this instance.

Please contact me on 9999 4922 or 0412 448 088 should you wish to discuss these proposed amendments.

Yours faithfully,



VAUGHAN MILLIGAN