

9 April 2021

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

Dear Sir/Madam,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT,  
SECTION 4.55(2) ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

<b>Development Application No:</b>	<b>DA 2020/0028</b>
<b>Date of Determination:</b>	<b>25 June 2020</b>
<b>Premises:</b>	<b>Lot 22 DP 11552, No. 9 Ocean Road, Palm Beach</b>
<b>Proposed Development:</b>	<b>Construction of a dwelling house</b>

On behalf of Mr John Bubb & Mrs Christina Neumann-Bubb, this submission has been prepared to assist Council in the consideration of an application pursuant to Section 4.55(2) of the Environmental Planning & Assessment Act 1979 to alter the development as approved by Development Consent DA2020/0028.

The proposed modifications sought under this application involve alterations to the approved retaining walls associated with the excavation of the site to facilitate the construction of the dwelling, which as outlined in the attached submission prepared by the Consulting Geotechnical Engineers – Douglas Partners, dated 7 April 2021 are considered to be essential due to the unanticipated nature of the site and potential instability.

The proposal includes revised architectural plans to detail the necessary modifications to the retaining walls to support the site conditions at the rear of the dwelling, together with the revised structural design prepared by NB Consulting Engineers and the permanent anchor design recommended by Douglas Partners.

In accordance with the recommendations of Douglas Partners and as a direct result of the site conditions and the identified potential for further significant instability, the urgent works to stabilise the site have commenced.

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## **BACKGROUND**

An application for consent for construction of a dwelling house was approved by Council by Notice of Determination on 25 June 2020.

The approved design for the new dwelling involved excavation of the site to provide for the stepped floor levels of the dwelling together with outdoor entertainment space, and incorporated vertical retaining walls which traversed the rear of the site and were located to the rear of the dwelling.

The approved retaining wall across the rear of the site extended to a height to RL 19.060m and was supported by a Report on Geotechnical Investigation prepared by Douglas Partners, Project Number 86970 dated January 2020.

The commencement of the construction works was carried out in January 2021.

As discussed in the Douglas Partners' submission dated 7 April 2021, the excavation works revealed that the foundation material anticipated in the original Report on Geotechnical Investigation as prepared by Douglas Partners and dated January 2020 was found to be different to that encountered during the excavation, with 2-3m of firm clay found to be underlying three very large detached sandstone blocks. As a result of the extensive heavy rainfall exposed in March 2021, the firm clay was softening and considered to be a significant hazard.

Accordingly, as discussed in the Douglas Partners' submission of 7 April 2021, it was envisaged that these blocks were thought to be part of the stable cliff line underlain by weathered rock.

As a consequence of the unanticipated inadequate foundation material and the need to stabilise the sandstone blocks and the upper slope, the recommendation of Douglas Partners is that the height of the rear retaining wall be raised to RL 23m and permanent anchors be installed to a height of RL 22.5m. These anchors are to be installed wholly within the subject site.

In response to the directive from Douglas Partners that the works be carried out as soon as possible to ensure that the sandstone boulders and the upper slope of the site is appropriately stabilised, the required raising of the retaining wall and installation of the permanent anchors has commenced.

The proposed raising of the retaining wall has been documented in the amended architectural submission prepared by Map Architecture and Interiors, Drawings No s4.55, Sheets A012 – A06 dated 29 March 2021.

The revised architectural design confirms that notwithstanding the raising of the height of the rear retaining wall by 3.940m from the approved level of RL 19.060 to the proposed height of RL 24m, the proposed increase height to retaining wall will not be visually prominent when viewed from Ocean Road, due to the screening afforded by the construction of the future dwelling.

The proposed deep soil planting zone between the dwelling and the retaining wall is to be retained which provides for the inclusion of screening planting to assist in softening the visual appearance of the vertical wall.

As detailed in the original Development Application submission, the face of the wall will be treated with recessive colours and finishes to reduce its visual impact when viewed from the surrounding public spaces and from the ocean.

The original submission was supported by an assessment under the State Environmental Planning Policy (Coastal Management) 2018 which concluded that the works would not unreasonably impact on the coastal location of the site. The raising of the retaining wall for the necessary site stabilisation will not introduce any significant change to the visual appearance of the site and subject to the visual softening of the wall through planting and recessive colours, it is further contended that the works asks consistent with the provisions of the Coastal Management SEPP.

The design of the approved dwelling including its location on the site and its overall height to the ridge level together with the layout of the outdoor living spaces directly associated with the dwelling are otherwise unchanged.

As a result of the proposed modifications to the approved design, we request that Council amend the terms of the Notice of Determination of DA2020/0028 dated 25 June 2020 to modify Condition 1 to reference the amended architectural submission prepared by Map Architecture and Interiors, Drawings No s4.55, Sheets A01 – A06 dated 29 March 2021. All will

In support of the proposed modifications, the following additional information is provided:

- Amended architectural submission prepared by Map Architecture and Interiors, Drawings No s4.55, Sheets A01 – A06 dated 29 March 2021.
- Geotechnical Report - Emergency Works prepared by Douglas Partners, Project No 86970.02 dated 7 April 2021
- Structural design including shoring and footing plan and details and garden wall sections prepared by NB Consulting Engineers , Job No 1908975, Drawings S02 & S04 issue C dated 25 March 2021
- structural design – Permanent Anchor Section prepared by Douglas Partners, Project No 86970.02, Drawing No 1 dated 30 March 2021

## JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under S4.55(2) which notes:

### *(2) Other modifications*

*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 development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and*

*b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval*

*body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, 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 the period prescribed by the regulations or provided by the development control plan, as the case may be.*

*Subsections (1) and (1A) do not apply to such a modification.*

Accordingly, for the Council to approve the S4.55 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 Honour states:

*[54] The relevant satisfaction required by s4.55(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 a raising of the rear retaining wall to support the upper slope of the site and the detached sandstone blocks and is considered to be necessary works in accordance with the recommendations of the consulting Geotechnical Engineer – Douglas Partners and which do not substantially alter the approved form of the development.

The raising of the rear retaining wall will be largely screened from public view by the construction of the new dwelling and the use of appropriate finished finishes and materials will ensure that the works are not visually prominent in the locality.

The proposed changes will ensure that the stability of the site and that of the surrounding neighbouring properties is appropriately achieved in accordance with the directions of the Consulting Geotechnical Engineer.

When viewed from the public domain or from the neighbouring properties, the building will largely

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 provide for “*Construction of a dwelling house*” in a location and to a form which is consistent with the consent.

In my view, this application is substantially 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 S4.55 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 proposed alterations to the dwelling, the minor nature of the changes ensures that the design remains consistent with the approved form.

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.

As the proposal will retain the dwelling and its immediate surrounds in accordance with the approved form, the proposed revisions to the approved plan relate only to the raising of the rear retaining wall.

On the basis that the significant majority of the existing approval is unchanged, this application is appropriately made under the provisions of section 4.55 of the Act.

The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as approved and will not comprise the amenity of the subject or neighbouring properties.
- The proposal is “substantially” the same development, as defined by the Environmental Planning & Assessment Act 1979.

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,

A handwritten signature in black ink, reading "Vaughan Milligan". The signature is written in a cursive, flowing style.

**VAUGHAN MILLIGAN**