

8 February 2023

Northern Beaches Council  
PO Box 82  
WARRINGAH, NSW

**REQUEST FOR SECTION 4.55 (1a) MODIFICATION OF THE CONSENT (DA2021/1636) –  
ALTERATIONS AND ADDITIONS TO DWELLING**

**7 CROWN ROAD, QUEENSCLIFF**

**STATEMENT OF MODIFICATION - STATEMENT OF ENVIRONMENTAL EFFECTS**

**1. INTRODUCTION**

On the 10<sup>th</sup> of June 2022 the Northern Beaches Council's Development Determination Panel approved alterations and additions to the dwelling at 7 Crown Road, Queenscliff. In the development of construction drawings and further investigations on site some minor amendments are required with regard to functionality and amenity.

The proposed works are considered to be substantially the same development as approved. The bulk and scale of the dwelling will remain as approved and the modifications do not give rise to any additional unreasonable amenity impacts. The works are minor and warrant favourable consideration.

**2. APPROVED CONSENT AND DETAILS OF MODIFICATIONS PROPOSED**

The original consent to be modified approved alterations and additions to the existing dwelling. The extent of the proposed modifications are as follows:

**Level 01 Plan:**

- Revised lift shaft size
- Revised stair location
- Delete window to western elevation
- Revised internal layout
- Window and window seat deleted to the east elevation
- Revised design of planter box to the terrace

**Level 00 Plan:**

- Continuation of revised lift shaft size
- Revised stair location

- Revised internal layout
- Fire rating of masonry wall to BBQ area

**Pool Level Plan:**

- Cellar relocated from the level below to be adjacent the stairs
- Window to west elevation deleted
- New fire rated wall to western elevation to the existing terrace. This is required to satisfy NCC fire protection due to the adjoining property to the west being built across the boundary.
- Revised internal layout

**Cellar Level Plan:**

- As mentioned, the cellar is relocated to the level above
- Revised internal layout
- Deck levels have been revised to suit existing rock level. Glazing to deck to be deleted.

**Landscaping:**

- Lower level deck to be deleted
- Revised stair access to lower garden area
- Green roof to mid-level (RL39.70) above the gym

**3. APPLICATION FOR MODIFICATION**

**SECTION 4.55(1a) ENVIRONMENTAL PLANNING & ASSESSMENT ACT 1979**

The application is made pursuant to Section 4.55 (1a). Section 4.55(1a) of the Act provides:

*(1A) Modifications involving minimal environmental impact 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 this instance it is considered the proposed modifications do not substantially alter or change the development as consented. The land use outcome remains within the ambit of the approved land use as referred to within the notice of determination.

A consideration of whether the development is substantially the same development has been the subject of numerous decisions by the Land & Environment Court and by the NSW Court of Appeal in matters involving applications made pursuant to the former S.96 of the Act. *Sydney City Council v Ilenace Pty Ltd (1984) 3 NSWLR 414* drew a distinction between matters of substance compared to matters of detail. In *Moto Projects (No.2) Pty Ltd v North Sydney Council (1999) 106 LGERA 298* Bignold J referred to a requirement for the modified development to be substantially the same as the originally approved development and that the requisite finding of fact to require a comparison of the developments. However, Bignold noted the result of the comparison must be a finding that the modified development is ‘essentially or materially’ the same as the (currently) approved development. Bignold noted;

*“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 sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the development being compared in their proper contexts (including the circumstances in which the development consent was granted).”*

In *Basemount Pty Ltd & Or v Baulkham Hills Shire Council NSWLEC 95* Cowdroy J referred to the finding of Talbot J in *Andari – Diakanastasi v Rockdale City Council* and to a requirement that in totality the two sets of plans should include common elements and not be in contrast to each other. In *North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468; 97 LGRERA 443* Mason P noted:

*“Parliament has therefore made it plain that consent is not set in concrete. It has chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity. The consent authority can withhold its approval for unsuitable applications even if the threshold of subs (1) is passed.*

*I agree with Bignold J in Houlton v Woollahra Municipal Council (1997) 95 LGRERA 201 who (at 203) described the power conferred by s.102 as beneficial and facultative. The risk of abuse is circumscribed by a number of factors. Paragraphs (a), (b) and (c) of subs (1) provide narrow gateways through which those who invoke the power must first proceed. Subsection (1A) and subs (2) ensure that proper notice is given to persons having a proper interest in the modified*

*development. And there is nothing to stop public consultation by a Council if it thinks that this would aid it in its decision making referable to modification. Finally, subs (3A), coupled with the consent authorities discretion to withhold consent, tend to ensure that modifications will not be enterprised, nor taken in hand, unadvisedly, lightly or wantonly. Naturally some modifications will be controversial, but decision making under this Act is no stranger to controversy.”*

Senior Commission Moore in *Jaques Ave Bondi Pty Ltd v Waverly Council (No.2) (2004) NSWLEC 101* relied upon *Moto Projects* in the determination, involving an application to increase the number of units in this development by 5 to a total of 79. Moore concluded the degree of change did not result in the a development which was not substantially the same, despite the fact that in that case the changes included an overall increase in height of the building. Moore relied upon a quantitative and qualitative assessment of the changes as determined by the Moto test.

In my opinion a quantitative and qualitative assessment of the application is that it remains substantially the same. The approved land use is not altered as a consequence of the changes as proposed. The works relate to refinements of the design to improve functionality, amenity and reflects challenges identified on site through the construction certificate process. The works do not give rise to any additional amenity impacts and will improve privacy in area with the deletion of windows and new boundary walls to the terrace.

It is submitted the Council can be satisfied that the proposal to changes remain substantially the same and within the ambit of the consent as issued. The modifications proposed to the dwelling results in a negligible environmental impact.

#### **4.0 MATTERS FOR CONSIDERATION PURSUANT TO S4.15 OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 AS AMENDED**

The following matters are to be taken into consideration when assessing an application pursuant to S4.15 of the Environmental Planning and Assessment Act 1979 (as amended):

**The provisions of any environmental planning instrument, proposed instrument that has been the subject of public consultation under this Act and any development control plan.**

#### **4.1 WARRINGAH LOCAL ENVIRONMENTAL PLAN**

##### **Land Use and Zoning**

The site is zoned R2 low density zone. This application relates to modifications to an approved dwelling. Dwelling houses are permissible with consent in the zone.

The site also includes RE1 public recreation land to the rear. No works are proposed in that zone.

**Height of Buildings**

The height of the dwelling is to remain as approved

**Landslip Risk**

A letter has been provided with this application from AscentGeo who have reviewed the modifications plans and do not require any changes to the recommendations of the original report provided with the DA.

**Heritage Considerations**

The site is located within the Coastal Cliffs conservation area. The previous heritage referral did not raise any significant concerns with the original DA. The lower level deck to the rear garden is to be deleted which will provide even greater separation from the existing stone retaining wall feature. The amendments are consistent with the heritage conservation provisions.

**4.2 WARRINGAH DEVELOPMENT CONTROL PLAN 2011****Wall Height – B1**

The resultant wall heights as approved will not be changed with the modifications proposed. The terraces to the mid-level and low (pool) level propose fire rated walls to the terrace. The adjoining property to the west encroaches over the boundary which has resulted in the two dwellings lacking adequate spatial separation. The lack of adequate separation raises NCC fire protection non-compliances which will be addressed with the proposed fire rated walls.

**Side Boundary Envelope – B3**

The overall envelope and bulk and scale of the dwelling is to be preserved and not result in any additional unreasonable amenity impacts to adjoining properties.

**Side Boundary Setbacks – B5**

The extension of the walls to the terraces will have an 800mm setback which is a continuation of the existing side setback.

**Rear Boundary Setback – B9**

Condition 9 of the consent required the lower level section of the rear decking to be deleted. This is now shown on the plans provided and will be replaced with lawn.

**Excavation and Landfill – C7**

The level of excavation required will be reduced from the approved scheme. The relocation of the stairs and cellar will utilise existing sub-floor void space. A supplementary geotechnical report has reviewed the modifications and determines that no changes are required to the recommendations provided within the original report.

**Landscape Open Space – D1**

The works will delete the lower level deck area to replace with lawn. As such, the modifications will increase the availability of soft landscaping within the R2 zoned portion of the site. Notwithstanding that if the entire site was included it would be comfortably in compliance with landscaped area.

**Privacy**

The modifications seek to delete windows from the scheme which will improve privacy outcomes for neighbouring dwellings. The terrace wall works will also improve privacy.

**5.0 CONCLUSION**

Pursuant to section S.4.55(1a) of the Environmental Planning and Assessment Act 1979 the consent authority can be satisfied that the modified consent as sought by this submission is substantially the same development as referred to in the original application. For the reasons outlined above we consider the amendments to the details of the consent are reasonable.

Yours sincerely  
William Fleming  
Director  
Boston Blyth Fleming Pty Ltd