

25 January 2019

The General Manager  
Northern Beaches Council  
1 Belgrave Street  
Manly 2095

Dear Sir,

**DEVELOPMENT APPLICATION REFERENCE (482/2004)  
SECTION 4.55 (1A) MODIFICATION – PROPOSED MINOR DESIGN MODIFICATIONS TO DA  
APPROVAL (482/2004)  
STATEMENT OF ENVIRONMENTAL EFFECTS  
23 SPRING COVE AVENUE, MANLY**

**1.0 INTRODUCTION**

In 2007 Manly Council approved DA no. 482/04 which included several subdivisions and the construction of apartments, townhouses and detached dwelling on the created lots. In 2017, a section 96, as it was previously known, was approved at the subject site.

This modification application relates to minor design modifications to the Approved Drawings. The proposed modifications are highlighted on the accompanying architectural plans prepared by Woodhouse and Danks Architects.

Also accompanying this application is an amended BASIX Certificate and a Heritage Impact Statement.

**2.0 DETAIL OF THE MODIFICATIONS**

This proposed modification includes the following works:

- A stainless steel gas flue projecting one metre above the existing roof line to accommodate a new gas fireplace
- Solar Panels on the roof
- Concrete storage area to the north-west corner of the site
- New 'Barestone' concrete panelling to the elevations.

The revised details are contained within:

- Architectural drawings prepared by Woodhouse & Danks Architects
- Heritage Impact Statement by Anne Warr PhD
- Amended Basix Certificate Efficient Living

### **3.0 SECTION 4.55 (1A) ENVIRONMENTAL PLANNING & ASSESSMENT ACT 1979**

The application is made pursuant to Section 4.55 (1A) (Previously Section 96(1A) of the EP&A Act 1979 (as amended). Section 4.55 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 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 modified (if at all), and*
- c) It has notified the application in accordance with 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 not considered the proposed design modifications as approved substantially alters or changes the development as consented to an extent that it would not be considered to be the same, or substantially the same development. The land use outcome remains as per the approved land use. The building form, bulk and scale remain as per the approval. The chimney

flu extends above the established roof line but does not extend above the established maximum RL 24.31.

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 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 Baulkam 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 and dwelling house as approved is not substantially altered as a result of the proposed works and the development as consented as consented remains as per the approval.

There is considered to be no statutory impediment to the making and determination of this application.

#### **4.0 MATTERS FOR CONSIDERATION PURSUANT TO S4.15 (PREVIOUSLY S79C) 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 Manly Local Environmental Plan 2014**

##### **Zoning and Permissibility**

The site is located within the E4 Environmental Living zone. The proposed works will have little impact on the local environment requiring no excavation or earthworks. Solar panels are proposed with this application to improve the efficiency of the dwelling.

##### **Heritage**

This application is accompanied by a heritage impact statement prepared by Anne Warr PhD. The report concludes that the proposed works are compatible with the heritage significance of the area.

##### **Bushfire Prone Land**

The works do not significantly alter the built form of the existing dwelling. The proposed works will not impact on existing bushfire hazard safety measures associated with the dwelling or in the local area.

### **Scenic Protection Land**

The proposed works do not substantially change the existing built form of the dwelling. The cement panelling to the exterior of the dwelling will provide a natural cement finish that will weather and texture over time.

The works proposed will not impact on the visual amenity of the Harbour or coastal foreshore with there being no significant change to the existing built form.

### **Terrestrial Biodiversity**

It is considered that the proposed works will have no impact on the local biodiversity of the flora and fauna in the area.

## **4.2 Manly Development Control Plan 2014**

The overall bulk, scale and built form of the dwelling as assessed under the original DA approval is not substantially altered as a result of the proposed modifications.

The chimney flue is modest in its bulk and scale and will not extend above the existing maximum RL of the dwelling.

The proposed materials of barestone cement panelling to the exterior will be consistent within the local area. The heritage impact statements comments on the cement panelling are as follows:

*The 'Barestone cement panelling to selected areas of the elevations replaces the previous finish of render applied over concrete block. The 'Barestone' panels will provide a natural cement finish that will weather and texture over time, giving variation to the wall surfaces. It provides a subdued backdrop to the two natural finishes on the exterior – the sandstone facing and the stained timber*

## **5.0 CONCLUSION**

Pursuant to Section 4.55 (1A) of the Environmental Planning and Assessment Act 1979 (As Amended), 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.

The proposed modifications do not substantially alter or change the development as consented to an extent that it would not be considered, to be the same, or substantially the same development. The land use outcome remains as per the approved land use. The building form, bulk and scale of the dwelling remains as per the original approval.

Please do not hesitate to contact me to discuss any aspect of this submission.

Yours Faithfully



**Kate Fleming**  
BBF Town Planners  
**Director**