

25 September 2023

Northern Beaches Council
PO Box 82
WARRINGAH, NSW

**REQUEST FOR SECTION 4.55 (1a) MODIFICATION OF THE CONSENT (DA2021/1522) –
DEMOLITION & CONSTRUCTION OF A NEW DWELLING**

189 RIVERVIEW ROAD, AVALON BEACH

STATEMENT OF MODIFICATION - STATEMENT OF ENVIRONMENTAL EFFECTS

1. INTRODUCTION

On the 3rd of March 2022 the Northern Beaches Council's approved the demolition of the existing dwelling and the construction of a new dwelling at 189 Riverview Road, Avalon Beach. The application was recommended for approval to the Local Planning Panel who subsequently approved the application.

The construction of the dwelling is currently underway and minor areas have been identified as requiring changes after developing construction certificate drawings and through further site investigations. The proposed modifications are considered to be of a minor scale and an improvement from the originally approved scheme.

2. APPROVED CONSENT AND DETAILS OF MODIFICATIONS PROPOSED

The original consent to be modified approved a new dwelling and associated landscaping on site. The modifications proposed are identified on the plans prepared by Silvester Fuller Architects and include, specifically:

Garage Level:

- Delete timber battens within the garage
- Delete window panels above garage door
- Delete hit and miss wall to provide additional space around tree 8

Entrance Level:

- Reduce roof size to provide additional space around Tree 22
- Delete glazing to open the entry level and increase ventilation
- Delete bridge connection

Mezzanine Level:

- Minor modification to internal stairs
- Reduction in floor area to allow additional space around Tree 22
- Enclose space below slab to the cloak/storage space and courtyard
- Delete window on northern elevation

Living Level:

- Delete sunken lounge
- Minor modification to internal stairs
- Align shoring wall both above and below as per geotechnical and structural advice
- Delete window to northern elevation
- Reduce floor space to increase space around Tree 22
- Delete window to southern elevation
- Reduce size of planter to provide more space around Tree 27
- Reduce planter size to the southern end of the pool

Bedroom Level:

- Modifications to shoring wall so that it aligns to geotechnical and structural advice
- Relocate window to northern elevation
- Reduce house footprint to the north-western corner to provide additional space around Tree 27 and to satisfy DA condition 26
- Relocate and enclose external stairs
- Reduce floor area to align with pool structure above
- Relocated windows to bed 3 & 4
- Internal staircase modification

Gym Level:

- Delete northern elevation window
- Align rock face with pool structure as per geotechnical and structural advice
- Reduce planter size around Tree 27

Guest Room:

- Align rock face will pool structure above
- Modifications to layout to provide more space around tree 27

The modifications seek to make refinements to the design in response to further site investigations during construction, and structural and geotechnical advice. The changes seek to improve amenity and function while also representing a minor reduction in scale and site coverage.

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.

Subsections (1), (2) and (5) do not apply to such a modification.

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 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 is not altered as a consequence of the changes as proposed. The works relate to refinements of the design in response to engineering advice due to the steep nature of the site, providing additional clearances around retained trees and minor modifications to windows and internal adjustments. The works represent an improvement from the approved scheme with regard to bulk and scale, increased soft landscape areas and improved privacy outcome.

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.

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 PITTWATER LOCAL ENVIRONMENTAL PLAN

Land Use and Zoning

The site is zoned C4 Environmental Living. This application relates to modifications to an approved dwelling. Dwelling houses are permissible with consent in the zone.

Height of Buildings

No change to the height of the dwelling as approved.

Terrestrial Biodiversity

The proposed modifications will see an increase in soft landscaping as well as further space provided for existing trees that are being retained. The measures will contribute positively to the biodiversity value of the area.

Foreshore Building Line

No works proposed within the foreshore building line

Geotechnical Hazards

Modifications have been sought with regard to advice received from engineers relating to shoring walls and rock outcrops. The modified plans have been reviewed by AscentGeo Geotechnical consultants and do not require any changes to the recommendations provided within the original report.

4.2 PITTWATER DEVELOPMENT CONTROL PLAN 2011

Control	Requirement	Proposed	Compliance
General Controls			
B3.1 Landslip Hazard	All development on land to which this control applies must comply with the requirements of the Geotechnical Risk Management Policy	The modifications have been reviewed by AscentGeo and the determined that the changes are acceptable provided the recommendations of the original report are followed.	
B4 Flora and Fauna	The long-term viability of locally native flora and fauna and their habitats in the Pittwater Local Government Area.	Reduction in the footprint of the dwelling and refinements to structures around trees ensure the biodiversity value of the area is protected.	Yes
Section C: Development Type Controls – Residential			
C1.1 Landscaping	<p>A built form softened and complemented by landscaping.</p> <p>Landscaping reflects the scale and form of development</p> <p>Retention of canopy trees by encouraging the use of pier and beam footings.</p>	The works will reduce the footprint of the dwelling and increase landscaped area.	Yes
C1.3 View Sharing	The proposal must demonstrate that view sharing is achieved through the application of the Land and Environment Court's	The works will not result in any additional view impacts accessed from surrounding properties.	Yes

Control	Requirement	Proposed	Compliance
	<p>planning principles for view sharing.</p>		
<p>C1.4 Solar Access</p>	<p>The main private open space of each dwelling and the main private open space of any adjoining dwellings are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21st.</p> <p>Windows to the principal living area of the proposal, and windows to the principal living area of adjoining dwellings, are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21st (that is, to at least 50% of the glazed area of those windows).</p>	<p>The approved envelope will not be altered significantly and will be reduced in areas.</p>	<p>Yes</p>
<p>C1.5 Visual Privacy</p>	<p>Habitable rooms and outdoor living areas of dwellings optimise visual privacy through good design.</p> <p>A sense of territory and safety is provided for residents</p>	<p>Visual privacy will be improved with the deletion of windows proposed.</p>	<p>Yes</p>
<p>C1.6 Acoustic Privacy</p>	<p>Noise is substantially contained within each dwelling and noise from any communal or</p>	<p>No unreasonable acoustic impacts are anticipated.</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
	private open space areas are limited		
C1.7 Private Open Space	Minimum 80m2 of private open space per dwelling at ground level	>80m2	Yes
Section D: Locality Specific Controls – North Narrabeen			
D11.1 Character as viewed from a public place	<p>To achieve the desired future character of the Locality.</p> <p>To ensure new development responds to, reinforces and sensitively relates to the spatial characteristics of the existing built and natural environment.</p> <p>To enhance the existing streetscapes and promote a scale and density that is in scale with the height of the natural environment.</p>	The character of the dwelling within the streetscape and when viewed from Pittwater will not substantially change. The works proposed seek to remove and reduce structures which increases soft landscaping opportunities. As such, the character of the dwelling and its relationship with the bushland character is enhanced by the modifications.	Yes
D11.3 Building colours and materials	External colours and materials shall be dark and earthy tones	No change	Yes
D11.6 Front building line	Land zoned R2 Low Density Residential or E4 Environmental Living adjoining Pittwater Road or the Wakehurst Parkway.	No change	Yes

Control	Requirement	Proposed	Compliance
	10m or established building line, whichever is the greater		
D11.7 Side and rear building line	2.5 to at least one side; 1.0 for other side 6.5 rear (other than where the foreshore building line applies)	No change Foreshore building line applies.	Yes
D11.9 Building envelope	Planes are to be projected at 45 degrees from a height of 3.5 metres above ground level (existing) at the side boundaries to the maximum building height	No change	Yes
D11.10 Landscaped Area - General	60%	The changes proposed will decrease site coverage by 29m ² and pick up an additional 18m ² in deep soil landscaping.	Yes – increased soft landscaping from approved

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