

15 July 2022

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**

**Development Application No:** DA 2020/0028  
**Date of Determination:** 25 June 2020 (as subsequently modified)  
**Premises:** Lot 22 DP 11552, No. 9 Ocean Road, Palm Beach  
**Proposed Development:** Construction of a dwelling house

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 (as subsequently modified under Mod2021/0198 on 18 May 2022).

The proposed modifications sought under this application involve the following amendments :

- Installation of an inclinor to provide access to the upper end of the site for ongoing weed control and maintenance to achieve Council's requirements.

Condition 19 within the Notice of Determination dated 24 June 2020 required the rear portion of the site to be provided with locally native and characteristic species of the Littoral Rainforest vegetation community, and that weed maintenance be continuously controlled. In order to achieve access to the upper end of the site, it was envisaged that a stair would need to be provided, however as indicated on the plans accompanying this Modification Application, the extent of the stairs necessary to gain access to the rear portion of the site would have resulted in a significant visual impact. As a consequence, the proposal seeks to include a passenger inclinor for the occasional access necessary for maintenance of the rear portion of the site.

The proposed inclinor will be partially screened by the existing concrete buttress wall adjacent to the northern boundary and therefore the structure will not be prominently visible at the rear of the site.

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- The Consulting Structural Engineers for the site, NB Consulting Engineers have issued a Structural Design certificate, under Job No 190875 dated 9 July 2022 which suggests that a buttress wall is required to provide for support to the southern boundary retaining wall and this has been specified within the architectural plans.

NB Consulting Engineers advise that unforeseen additional loadings were identified during the piling of the southern wall and this has necessitated the additional structural work to provide for the buttress wall between the southern boundary and the southern wall of the dwelling.

As indicated within the attached architectural plans, the buttress wall is below ground level at the southern boundary and will provide for lateral support to the southern retaining wall, utilising the southern wall of the dwelling. The proposed buttress wall is set back towards the rear of the dwelling and will therefore not be visually prominent from the street or from any neighbouring properties.

The required landscape planting at the south-eastern corner of the site will further assist in visually screening the proposed concrete buttress wall.

## **BACKGROUND**

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

The original determination was subsequently modified by the Notice of Determination of Mod2021/0198 dated 18 May 2021.

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

- Amended architectural submission prepared by Map Architecture and Interiors, Sheets A-01 – A-04, Revision H dated 4 July 2022.
- Geotechnical Report – Section 4.55 Amendment prepared by Douglas Partners, Project No 86970.01 dated 6 July 2022
- Structural Design Certificate prepared by NB Consulting Engineers, Job No 1908975, dated 9 July 2022

## **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 access to the rear portion of the site by including an inclinor which would be partially screened by existing concrete buttress wall adjacent to the northern boundary and which will provide for access to the rear of the site. Additionally, a concrete buttress wall is provided to the southern boundary and is at or below existing ground level at the boundary, utilising the proposed dwelling for additional support.

By being set towards the rear of the dwelling and at or below existing ground level is at the boundary, the proposed buttress wall will be largely screened from public view and the use of appropriate finishes and materials to match the approved dwelling and retaining walls 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 & Structural Engineers.

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, consisting of the first name 'Vaughan' and the last name 'Milligan' written in a cursive style.

**VAUGHAN MILLIGAN**