

29 August 2022

Northern Beaches Council
PO Box 82
MANLY, NSW

**REQUEST FOR SECTION 4.55 (1a) MODIFICATION OF THE CONSENT (DA2019/0152) –
DEMOLITION AND CONSTRUCTION OF A DWELLING HOUSE INCLUDING SWIMMING
POOL AND REFURBISHMENT OF AN EXISTING BOATSHED**

78 HUDSON PARADE, CLAREVILLE

STATEMENT OF MODIFICATION - STATEMENT OF ENVIRONMENTAL EFFECTS

1. INTRODUCTION

On the 23 August 2019 Council approved the construction of a new dwelling with swimming pool with associated landscaping and boat shed refurbishment. The application was approved under Council's delegated authority.

There have been four section 4.55 (1a) modification applications (MOD2020/0337; MOD2020/0343; MOD2021/0421; MOD2022/0180) that have been approved since the original consent which relating to minor amendment with little to no environmental impacts.

The proposed works seek to refine the waterway access stairs, decking surrounding the pool, including new decking between the existing rails.

2. APPROVED CONSENT AND DETAILS OF MODIFICATIONS PROPOSED

The original consent to be modified approved a new dwelling with swimming pool and landscaping. The existing boat shed was retained and refurbished. The extent of the proposed modifications are as follows:

- New decking is proposed between the existing slip rails.
- Additional decking to the north of the boat shed
- Reconfiguration of the waterway access stairs and extension to the pool decking.
- Minor addition to the storage area in the carport

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 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 minor additions to existing decking areas, new waterway access staircase reconfigurations and the replacement of existing slip rails.

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 PITTWATER LOCAL ENVIRONMENTAL PLAN 2014

Land Use and Zoning

The site is zoned C4 Environmental Living. This application relates to a minor amendments to the approved new dwelling with associated landscaping works. Dwelling houses are permissible with consent in the zone.

Height of Buildings

The works relate predominately to decking and landscape stairs. No change to the existing dwelling.

Terristrial Biodiversity

The proposed amendments to the landscape plan will not impact on the biodiversity value of the local area. The landscape plan is substantially the same as approved with configurations to external access stairs and decking areas. No impacts to the biodiversity value of the local environment are anticipated with the works.

Geotechnical Hazards

The site is mapped within a geotechnical hazard area. A geotechnical report has been provided with this application and details the suitability of the works with regard to potential risks.

Limited Development on Foreshore Area

The works propose do encroach, in part, within the foreshore building line. Clause 7.8 of the LEP states that:

(2) Development consent must not be granted for development on land in the foreshore area except for the following purposes—

- (a) the extension, alteration or rebuilding of an existing building wholly or partly in the foreshore area, but only if the development will not result in the footprint of the building extending further into the foreshore area,*
- (b) boat sheds, sea retaining walls, wharves, slipways, jetties, waterway access stairs, swimming pools, fences, cycleways, walking trails, picnic facilities or other recreation facilities (outdoors).*

The works within the foreshore building line relate to waterway access stairs and decking related to outdoor recreation associated with the swimming pool and boat shed. The works proposed are permissible with consent within the foreshore area.

The works will not have any impact on the natural foreshore processes or impact on the amenity of the area. The applicants have been mindful to ensure the public have reasonable access along the foreshore area by proposing stairs giving access across the slip rails, in front of the boat shed, to facilitate easy public access despite technically being private property.

4.2 PITTWATER DEVELOPMENT CONTROL PLAN 2014

Controls Relating to the Natural Environment

The site is located within a terrestrial biodiversity area. The landscaping treatments and the replacement of the slip rails do not give rise to any unreasonable impacts to flora and fauna or the local environment.

Landslip Hazard

Pursuant to clause B3.1, landslip hazard, a geotechnical report has been provided with this application. The report states that the proposed modifications do not significantly alter the geotechnical aspects of the development as approved and the works raise no concerns provided the recommendations of the original report are followed.

Built Form Controls

The dwelling setbacks and envelope will be retained as approved. No amenity impacts are associated with the modifications.

The decking and landscaped stairs are consistent with the numerical controls as they reasonably apply. The stairs proposed to the boat shed to provide access across the foreshore for the public. The stairs will be located adjacent to the side boundary with a nil setback. This is seen as a benefit to the public amenity.

Landscaped Area – Environmentally Sensitive

The minor addition to the decking to the north of the pool increases the impervious area on the site by 0.7%. The approved landscape area was measured at 60.1% which included 6% of the

site area which is impervious and used for outdoor recreation. As such, the landscape area is very minorly non-compliant at 59.4% of the site area with the minor increase to the impervious area.

Visual & Acoustic Privacy

The minor works relating to additions to the pool decking, stairs and slip rails do not pose any additional visual or acoustic amenity impacts. The existing privacy relationship with neighbouring dwellings will be maintained with the uses of these areas to continue as private recreational spaces.

5.0 SEPP (Resilience and Hazards) 2021

Chapter 2 – Coastal Management The site is subject to Chapter 2 of the SEPP. Accordingly, an assessment under Chapter 2 has been carried out as follows:

Division 3 Coastal environment area

2.10 Development on land within the coastal environment area

1) Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following:

- a) the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,*
- b) coastal environmental values and natural coastal processes,*
- c) the water quality of the marine estate (within the meaning of the Marine Estate Management Act 2014), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,*
- d) marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,*
- e) existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,*
- f) Aboriginal cultural heritage, practices and places,*
- g) the use of the surf zone.*

The works are highly unlikely to result in any adverse impacts on the coastal environment, its processes or marine habitats.

Division 4 Coastal use area

2.11 Development on land within the coastal use area

1) Development consent must not be granted to development on land that is within the coastal use area unless the consent authority:

- a) has considered whether the proposed development is likely to cause an adverse*

impact on the following:

- i) existing, safe access to and along the foreshore, beach, headland or rock*
- ii) platform for members of the public, including persons with a disability,*
- iii) overshadowing, wind funnelling and the loss of views from public places to foreshores*
- iv) the visual amenity and scenic qualities of the coast, including coastal headlands,*
- v) Aboriginal cultural heritage, practices and places, cultural and built environment heritage, and*
- b) is satisfied that:*
 - i) the development is designed, sited and will be managed to avoid an adverse*
 - ii) impact referred to in paragraph (a), or*
 - iii) if that impact cannot be reasonably avoided—the development is designed sited and will be managed to minimise that impact, or if that impact cannot be minimised—the development will be managed to mitigate that impact, and*
- c) has taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.*

Safe access to and from the foreshore area is achieved and the development does not have any adverse impacts on the scenic quality of the coastal area.

5.0 CONCLUSION

Pursuant to section S.4.55(2) 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
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Planner
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