

20 December 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 10th 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 of the rear garden terrace.

The proposed works are considered to be substantially the same development as approved. The modifications to the terrace is minor 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:

- Revised floor level to rear garden deck to be RL 22.13.
- Amended the geometry of the deck
- Amended location of external staircase
- Modification to the pool fence along the side boundary which is proposed to be 1.2m height and setback 900mm to meet compliance standards. A planter box is proposed to sit on top of the slab below within the 900mm.

The stair relocation has been guided by further site investigations with regard to existing levels, rock outcrops and trees which will be discussed further in this statement. The modifications to the geometry of the deck is due to the relocation of the stairs. The change in floor level of the deck removes the need for excavation and facilitates the retention of trees.

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 amended terrace does not give rise to any additional amenity impacts with the privacy outcome not diminished due to the change in terrace floor level.

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 terrace 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

The modifications do not raise any geotechnical concerns with the recommendations of the geotechnical report continuing to apply to the deck amendments.

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 amendments to the deck are not considered significant that it would now result in having adverse impacts on the conservation area.

4.2 WARRINGAH DEVELOPMENT CONTROL PLAN 2011

Landscape Open Space – D1

The works to the terrace makes minor changes to the approved scheme which will not impact on the approved landscape plan or level of soft landscaping across the site. The deck is elevated above ground level. The difference between the approved scheme and the proposed modification is demonstrated below and considered a negligible change.

Further site investigations during the construction have guided the modifications proposed. Closer investigation of the existing levels, rock outcrops and trees have resulted in the stairs to the lower deck to be relocated adjacent to the rockface to create a more viable access arrangement.

The changes in levels to the deck have resulted in additional trees (T18 and T19) being able to be retained to the west of the deck which were previously approved for removal and reduces the need for excavation. A tree was proposed to be removed from within the footprint of the deck which is now proposed to be retained with the deck built around the tree. The increased retention of trees and reduction in excavation is a positive outcome with regard to the landscape quality of the foreshore area and maintains canopy tree coverage.

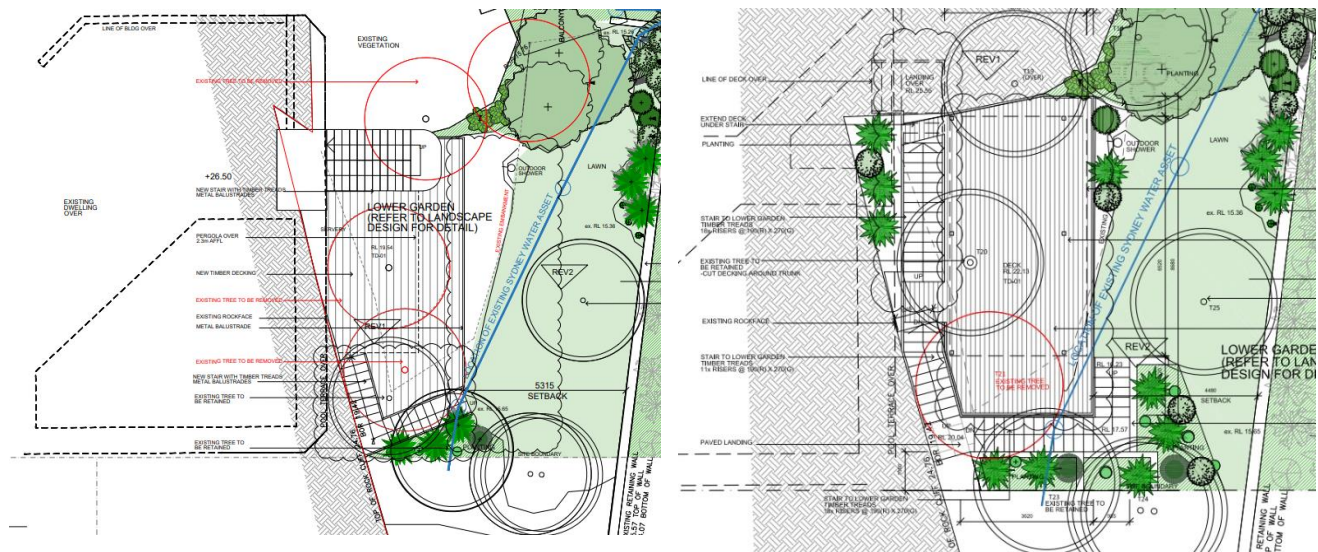


Image 1: Left is the approved scheme and right is the proposed modification.

Privacy

The privacy outcome is not significantly altered with the changes to the floor level of the terrace. The use as private open space will not change and the increased floor level does not give rise to any additional privacy impacts on adjoining properties.

The retention of trees around the deck will provide additional privacy screening. The tree retention will achieve further softening and screening of the built form generally when viewed from the public domain and adjoining dwellings.

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