

16 February 2022

The General Manager
Pittwater Council
PO Box 882
MONA VALE NSW 1660

Dear Sir,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT,
SECTION 4.55 (2) ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

Development Application No: DA No. 2020/1723
Date of Determination: 20 April 2021 (as subsequently modified 5 August 2021)
Premises: Lot 74 within DP 7310, No. 48 Johnson Street, Freshwater
Proposed Development: Demolition works and construction of a dwelling house including a swimming pool

On behalf of Mr James and Mrs Tara McDougall, 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 DA No. 2020/1723 (which was subsequently modified on 5 August 2021).

The application involves a change to the form of the approved dwelling and approved swimming pool, together with an amendment to the conditions of consent as detailed in the Notice of Determination dated 20 April 21 and as subsequently modified.

BACKGROUND

An application for consent for demolition works and construction of a dwelling house including swimming pool was approved by Council by Notice of Determination dated 20 April 2021.

The approval was subsequently modified to amend the conditions detailed within the Notice of Determination in particular, **Condition No. 6 Stormwater Disposal from Low Level Property.**

The consent was subsequently notified under Mod2021/0572, which was determined 5 August 2021. The approved works have not commenced.

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PROPOSED MODIFICATIONS

The application involves proposed minor changes to the form of the approved development which will be detailed further within this submission, together with the rectification of an error within Condition 15 i) in relation to the description of the tree located within the proposed driveway footprint. The tree has been incorrectly noted as T2, when as described in the Arboricultural Impact Assessment prepared by Hugh The Arborist, the tree should be noted as T3.

It is requested that Council amend Condition 15 to read:

15. Tree Removal Within the Property

This consent approves the removal of the following tree(s) within the property (as recommended in the Arboricultural Impact Assessment):

Reason: To enable authorised building works.

- i) Callistemon viminalis, currently located within proposed driveway footprint, T3*
- ii) Cupressus torulosa, currently located within the footprint of the proposed driveway, T4*
- iii) Syragus romanzoffiana, within the footprint of proposed hard surfacing, exempt species T5*
- iv) Jacaranda mimosifolia within the footprint of proposed dwelling T7*
- v) Viburnum odoratissimum located in rear yard and within footprint of proposed pool T8*

Note: Exempt Species as listed in the Development Control Plan or the Arboricultural Impact Assessment do not require Council consent for removal

Reason: to enable authorised building work.

In addition to the amendment to Condition 15, the following minor architectural changes and have been detailed in the revised Architectural Plans prepared by MCK Architecture + Interiors, Project No 2004, Drawings No's DA 00 – DA 31, variously revised and dated 24 November 2021.

- 1. Pool awning deleted. Swimming pool increased in size & moved away from rear boundary to allow for open landscaped area behind. New pool plant enclosure below deck.*
- 2. Ground Floor planning reconfigured. Courtyard wall thickness increased.*
- 3. Planning reconfigured, changes to fenestration, retaining wall relocated to boundary.*
- 4. Window W14 deleted, new skylight SK3 added.*
- 5. Internal walls reconfigured.*
- 6. Internal glass partition deleted.*
- 7. Awning extended*
- 8. Solid walls to ends of carport screen deleted*

Other than the various minor modifications to the approved form of the development, the general approved external configuration, height and the dwellings' location on the site remaining largely unchanged. The approved landscaped area is also unchanged at 40%.

The proposal is also supported by a revised BASIX Certificate – No 1273438S dated 1 February 2022.

JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under Section 4.55(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 4.8) 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 Honours states:

[54] The relevant satisfaction required by s96(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 within Consent DA2020/1723.

The works continue to provide for the demolition of the existing structures the construction of a new dwelling and swimming pool, with no substantive change to the external configuration height and impact of the development to the public domain or to the neighbouring properties.

The revised design with the altered internal configuration will not introduce any significant issues for the neighbouring properties in terms of view loss or privacy.

When viewed from the public domain or from the neighbouring properties, the development 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 will continue to provide for “*demolition works and construction of a dwelling house including a swimming pool*” in a location and in 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 changes to the originally approved development, the works which are the subject of the application are minor and do not inherently alter the nature and form of the subdivision as originally approved by Council.

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 development.

Consistent with the Court decision in **Moto**, the Council would be satisfied that the development as modified would remain essentially or materially the same as the approved development.

This Court decision also makes clear that the Council has the power to approve the Modification Application.

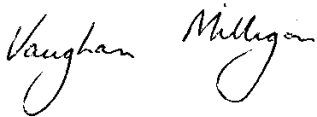
The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as initially lodged and as detailed under the original Notice of Determination dated 20 April 2021 and as subsequently modified by Council.
- The proposal is “substantially” the same development, as defined by the Environmental Planning & Assessment Act.

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, reading "Vaughan Milligan". The signature is written in a cursive style with a large initial 'V' and 'M'.

VAUGHAN MILLIGAN