

22 July 2019

The General Manager
Northern Beaches Council
PO Box 882
MONA VALE NSW 1660

Dear Sir,

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

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| Development Application No: | DA 2018/1305 |
| Date of Determination: | 5 December 2018 |
| Premises: | Lot 101 DP 869216/Lot 216 DP 15376 No. 256 Whale Beach Road, Whale Beach |
| Proposed Development: | Alterations and additions to an existing dwelling house |

On behalf of Mr and Mrs Matt and Liz Pancino, 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 2018/1305.

The application will seek to modify the form of the approved alterations and additions.

The modifications are detailed in the revised architectural plans prepared by Sue Connor Architects, Job No. 1802, Sheets N001, N002, S4.55 000, s4.55 100 – s4.55 103, S4.55 200, S4.55 300 – S4.55 S4.55 303, S4.55 400 – S4.55 402, dated 23 July 2019 which are discussed further in this submission.

The proposal provides for various minor modifications to the approved form of the development, with the general approved external configuration, height and the dwellings' location on the site remaining largely unchanged.

BACKGROUND

An application for consent for *"Alterations and additions to an existing dwelling house"* was approved by Council by Notice of Determination dated 5 December 2018.

The construction of the alterations and additions to the dwelling has commenced.

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The site is noted as Bushfire Prone Land. A letter has been prepared by Roger Fenwick Bush Fire Consultant (Author of report 1807.PAN.WHA.WHA1.0 from original DA 2018/1305) stating the proposed changes to the approved alterations and additions will comply with the recommended construction standard are accepted as the BAL rating will remain the same.

A Geotechnical Report and Letter has been prepared by White Geotechnical Group, Reference J1859D, dated 25 July, 2019 which concludes that the proposed changes are considered minor from a geotechnical perspective and do not alter the recommendations or the risk assessment in the original report.

PROPOSED MODIFICATIONS

The proposed revisions to the plans have been detailed in the amended details prepared by Sue Connor Architects, Job No. 1802 dated 23 July 2019.

The proposed changes include the following general modifications:

Architectural Modifications

1. New bath layout first floor
2. New internal stair
3. Extension of deck 300mm (cantilever, no additional footings to DA) and vergola
4. New 1800 privacy screen (in line with edge of deck)
5. New 2100 privacy screen to east neighboring property
6. New door to existing opening (D101)
7. New door to west off deck (D102)
8. Increased head height to existing window (W101)

Landscape Modifications

9. Remove landscape stair and screen to west boundary

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 DA 2018/1305.

The works seek to provide for the construction of additions and alterations to an existing dwelling, which maintain a scale and form which is generally consistent with the original approval.

The revised design does 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. The approved vergola is to be extended and appropriate privacy screens proposed to provide privacy for neighbouring properties.

Similarly, the application is substantially the same development when subjected to a “quantitative comparison”, as the works will continue to provide for a “*Alterations and additions to an existing dwelling house*” 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 additions to the dwelling 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 building.

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 5 December 2018.
- 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, flowing style.

VAUGHAN MILLIGAN