

**STATEMENT OF MODIFICATION - APPLICATION TO MODIFY CONSENT UNDER
S4.55 (2) OF THE ENVIRONMENTAL PLANNING & ASSESMENT ACT 1979**

**FOR THE ALTERATIONS AND ADDITIONS TO A DWELLING HOUSE INCLUDING A
CARPORT AND SWIMMING POOL**

AT

5 KOOLOORA AVENUE, FRESHWATER

FOR

ANTHONY & MICHELLE YEATES

**Prepared
March 2023**

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1.0 Introduction

This Statement of Modification accompanies details prepared on behalf of Michelle and Anthony Yeates by Rachel Hudson, Sheets No. YH-01 -DA – YH-16-DA, Job No. 199, dated 24 February 2023, which seek to modify the development consent issued under Notice of Determination (DA2021/1233) dated 5 November 2021 to detail minor amendments to the design of the approved *“Alterations and additions to a dwelling house including carport and swimming pool”* at **5 Kooloora Avenue, Freshwater**.

The amendments which are the subject of this application respond to Council’s Request for Additional Information correspondence dated 6 March 2023 under Application No. Mod2023/0105.

A revised list of proposed modifications is provided within **Section 3.0**.

The proposed modifications to the dwelling have been highlighted within the revised architectural plans and do not result in any increase in the overall height of the dwelling or the general building footprint and envelope of the dwelling on the site.

This Statement reviews the proposed development by assessing the relevant matters for consideration under Section 4.15 of the Environmental Planning and Assessment Act 1979, (as amended) including:

- *State Environmental Planning Policy (Resilience and Hazards) 2021*
- *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004*
- *Warringah Local Environmental Plan 2011 (WLEP 2011)*
- *Warringah Development Control Plan (WDCP)*

2.0 Background

An application for consent (DA2021/1233) for *“Alterations and additions to a dwelling house including carport and swimming pool”* was approved by Council by Notice of Determination dated 5 November 2021.

The works subject of the application have NOT commenced.

Modification No. 2023/0053 was lodged with Council seeking to modify Development Application DA2021/1233 and was later withdrawn.

3.0 Proposed Modifications

The application involves a change to the form of the approved alterations and additions to a dwelling house including a carport and swimming pool, which was recently considered under the Notice of Determination of DA2021/1233.

Specifically, the proposed modifications involve the following changes:

Lower Ground Floor Level

- Approved single car garage to remain as storeroom at existing finished floor level
- Omit approved storeroom and bathroom
- Modify approved single carport to allow for 2.4m clearance to underside of soffit
- Modify proposed gradient of single carport hardstand to assimilate with natural ground level and existing store room, gradient is compliant with 1:20
- Omit approved 0.4m(h) retaining walls to lawn area around approved media room
- Approved media room to remain as store room at the existing finished floor level
- Finished floor level of the proposed laundry to allow for 2.1m ceiling heights
- Modify size of W1 & W2
- Delete W18
- Include new timber gate within existing fence line along Murray Road boundary
- Increase soft landscape area from 46.9% to 49.6%.

Mid Floor Level

- Slight modification to size of windows W14, W15, W20, W21 and W22
- Delete the approved swimming pool
- Delete the sidelight windows in Bedroom 2 bay window
- Raise FFL by 0.3m from RL 8.73 to RL 9.03

Upper Floor Level

- Utilise approved roof space for study and robe joinery
- Raise FFL by 0.3m from RL 11.78 to RL 12.08

Roof

- Extend approved pergola over Kooloora Avenue side terrace across the entry stairs
- Minimise the pitch of the gable roof over the Master Bedroom and Ensuite from 24 degree to 14 degrees.
- Minor increase in the ridge-line over the mid floor living room from RL 13.62 to RL 14.11
- Minor increase in the upper ridge-line from RL 15.50 to RL 15.80 to allow for raising the mid and upper floor levels by 0.3m.

The following documentation has been prepared to support the proposed modifications:

- Revised Architectural Plans prepared by Rachel Hudson, Sheets No's. YH-01 -DA – YH-16-DA, Revision A, Issue dated February 2023

- Revised BASIX Certificate

4.0 Zoning and Development Controls

4.1 State Environmental Planning Policy (Resilience and Hazards) 2021

Chapter 4 – Remediation of Land

Chapter 4 – Remediation of Land and in particular Clause 4.6 suggests that a consent authority must not grant consent to the carrying out of any development on land unless it has considered whether the land is contaminated.

Given the history of residential use of the land, the site is not considered to be subject to contamination and further investigation is not required at this stage.

4.2 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

The proposed modifications have been designed to respect the water, thermal and energy standards required by BASIX. The modified works remain consistent with the original BASIX certificate submitted with the development application.

4.3 Warringah Local Environmental Plan 2011

The land is zoned R2 Low Density Residential under the provisions of the WLEP 2011.

Development for the purposes of alterations and additions to a dwelling house are permissible in this zone under the WLEP 2011.

The development of and use of the land for residential purposes is consistent with the R2 Low Density Residential objectives, which are noted as:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

It is considered that the proposed modification will continue to achieve the zone objectives and are consistent with the established character of the surrounding locality for the following reasons:

- The modification application maintains the approved and consistent built form and will be consistent with and complement the existing detached style housing within the locality.
- The proposed modifications are minor within the context of the approved development and will continue to respect the scale and form of other dwellings in the vicinity and therefore complements the locality.
- The setbacks remain compatible with the existing surrounding development.
- The modifications will not have any significant impact on long distance views for the neighbouring properties.

- The site is utilised as housing and will continue to maintain the approved residential use.
- The works will provide for modifications to an approved dwelling which will maintain the residential scale and character of the locality.
- The modification will maintain an appropriate level of amenity to the adjoining properties.
- The modifications result in only minor changes to the approved building height, and therefore the application does not unreasonably obstruct any significant views from private property or the public domain.
- As above, the approved height and envelope remains largely unchanged, and therefore the proposal maintains appropriate solar access to the surrounding properties.



Fig 1: Extract of Manly Local Environmental Plan 2013 Zoning Map

Clause 4.3 – Height of buildings

The dictionary supplement to the LEP notes building height to be:

building height (or **height of building**) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The building height was approved at 8.35m. The proposed modification application seeks to amend the approved height, providing a height of up to 8.5m, which continues to achieve compliance with the control.

Clause 6.2 relates to earthworks. The proposed modification will reduce the extent of excavation required to accommodate the proposed new works at the lower floor level. All site works will be carried out in accordance with the recommendations of the Consulting Structural and Geotechnical Engineers, and therefore satisfy the provisions of this clause.

Clause 6.4 relates to development on sloping land. The site is noted as Area A on Council's Geotechnical Risk Mapping. Given the minor nature of the proposed modifications to the approved design, the works

remain consistent with the conclusions outlined within the Geotechnical Risk Assessment prepared by White Geotechnical Group, Report Reference J3560 dated 14 July 2021 which accompanied the original application.

There are no other clauses of the WLEP 2011 that are considered to be relevant to the proposed development. It is considered that the proposal achieves the requirements of the WLEP.

4.4 Warringah Development Control Plan

Council's DCP Development Control Plan provides the primary control for development within the area.

The modification application submission will address the Council's submission requirements outlined in Part 2 – Process.

The relevant numerical and performance-based controls under WDCP are discussed below:

Control	Required	Approved	Compliance
B1 – Wall height	Max 7.2m	Max wall height of new works approx. 5m to the north-eastern extremity of the north-western and south-eastern elevations and therefore readily complies this control.	Yes
B2 – Number of storeys	No requirement identified on map		
B3 – Side Boundary Envelope and Side Setback	Building envelope 45 degrees from 5m. Setback 0.9m	The proposed modifications will not alter the compliance of the building envelope control. The roof height of the principal roof is slightly raised, however the north-south hipped portion of the roof which encroaches on the building envelope control remains unchanged.	Yes
B4 – Site Coverage	No requirement identified on map		N/A
B5 – Side Boundary setbacks	R2 zoned land 0.9m	The proposed modifications will not see any change to the side setbacks of the approved development.	Yes

B6 – Merit assessment of Side Boundary Setbacks	No requirement identified on map		N/A
B7 – Front Boundary Setbacks	Minimum 6.5m	The proposed modifications will not see any change to the front setback of the approved development.	Yes
B8 – Merit assessment of front boundary setbacks	No requirement identified on map		N/A
B9 – Rear Boundary Setbacks	Min 6m rear setback	No change to approved rear setback.	N/A
B10 – Merit Assessment of rear boundary setbacks	No requirement identified on map		N/A
B11 – Foreshore Building Setback	No requirement identified on map		N/A
B12 – National Parks Setback	No requirement identified on map		N/A
B13 – Coastal Cliffs Setback	No requirement identified on map		N/A
B14 – Main Roads Setback	No requirement identified on map		N/A
B15 – Minimum Floor to Ceiling Height	No requirement identified on map		N/A

Part C – Siting Factors			
C2 – Traffic, Access and Safety	Vehicular crossing to be provided in accordance with Council's Vehicle Crossing Policy	Approved existing driveway crossing and layback location to be maintained.	Yes
C3 – Parking Facilities	Garages not to visually dominate façade Parking to be in accordance with AS/NZS 2890.1	Approved carport maintained, however the proposal seeks to provide for storage in place of the existing garage. The parking structure will not dominate the façade of the development.	Yes
C4 – Stormwater	Hydraulic Design to be provided in accordance with Council's Stormwater Drainage Design Guidelines for Minor Developments and Minor Works Specification	No change to approved stormwater arrangements.	Yes
C5 – Erosion and Sedimentation	Soil and Water Management required	Existing sediment and erosion control measures remain unchanged.	Yes
C6 – Building over or adjacent to Constructed Council Drainage Easements	N/A		N/A
C7 – Excavation and Landfill	Site stability to be maintained		
C8 – Demolition and Construction	Waste management plan required	Waste management measures to be employed	Yes, no change to approved waste management measures
C9 – Waste Management	Waste storage area to be provided	Bins storage available within proposed garage.	Yes

Part D – Design			
D1 – Landscaped Open Space and Bushland	Min 40% Landscaped Area to be maintained	Approved landscape area of 175.77m ² or 46.9% of the site area to be increased to 183.7m ² or 48.9% of the site area as soft landscaping which complies with Council's requirement.	Yes
D2 – Private Open Space	Dwelling houses with three or more bedrooms Min 60m ² with min dimension 5m	The proposal will maintain the approved area of private open space, which is directly accessible from the dwelling and will maintain good access to the northern sun.	Yes
D3 – Noise	Mechanical noise is to be attenuated to maintain adjoining unit amenity. Compliance with NSW Industrial Noise Policy Requirements		N/A
D4 – Electromagnetic Radiation	N/A to proposed development		N/A
D5 – Orientation and Energy Efficiency	Dwellings to be orientated to receive northern sun Appropriate construction to enhance thermal properties and ventilation/natural cooling Compliance with SEPP (BASIX) requirements	The site enjoys good access to northern sun to the yard areas.	Yes
D6 – Access to sunlight	At least 50% of the required area of private open space of each dwelling and at least 50% of the required area of private open	The proposal is accompanied by Shadow Diagrams (Drawing No. YH-15-DA) which demonstrate that the subject and neighbouring	Yes

	space of adjoining dwellings are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21.	properties will retain suitable solar access to their internal and external living areas.	
D7 – Views	View sharing to be maintained	<p>The controls require that development should enable the reasonable sharing of views. The works see the modification of the approved alterations and additions, which will comply with Council’s statutory height control.</p> <p>The site and the neighbouring properties enjoy local views only.</p> <p>The works will not unreasonably obstruct the outlook for the neighbouring properties.</p> <p>The proposed new works will not unreasonably reduce the view corridors available for the adjacent neighbours.</p>	Yes
D8 – Privacy	This clause specifies that development is not to cause unreasonable overlooking of habitable rooms and principle private open space of adjoining properties	The proposed modifications result in minor alterations to the existing window openings will not unreasonably reduce the privacy enjoyed by the neighbours.	Yes
D9 – Building Bulk	This clause requires buildings to have a	The bulk and scale of the approved	Yes

	visual bulk and architectural scale that is consistent with structures on nearby and adjoining properties and not to visually dominate the street or surrounding spaces	development will remain largely unchanged. The form of the proposed new works will maintain a modest two storey height and scale that complements the prevailing scale of the surrounding development.	
D10 – Building Colours and materials		The approved recessive colours and finishes will be maintained.	Yes
D11 – Roofs	The LEP requires that roofs should not dominate the local skyline.	The approved roof form will remain largely unchanged, with the exception of the slightly raised primary roof form. The modified roof minimises bulk and scale and maximises view retention to adjoining properties.	Yes
D12 – Glare and Reflection	Glare impacts from artificial illumination minimised. Reflective building materials to be minimised	The proposed external finishes and colours will be selected to minimise glare and will complement the existing dwelling. No significant glare impacts will result from proposed new works.	Yes
D13 – Front Fences and Front Walls	Front fences to be generally to a maximum of 1200mm, of an open style to complement the streetscape and not to encroach onto street.	Approved fencing unchanged.	Yes

D14 – Site Facilities	Garbage storage areas and mailboxes to have minimal visual impact to the street Landscaping to be provided to reduce the view of the site facilities	Garbage storage areas and mail box maintained	N/A
D15 – Side and Rear Fences	Side and rear fences to be maximum 1.8m and have regard for Dividing Fences Act 1991	Side fences unchanged.	Yes
D16 – Swimming Pools and Spa Pools	Pool not to be located in front yard or where site has two frontages, pool not to be located in primary frontage. Siting to have regard for neighbouring trees.	N/A	N/A
D17 – Tennis Courts	N/A		N/A
D18 – Accessibility	Safe and secure access for persons with a disability to be provided where required	Not applicable to residential development	N/A
D20 – Safety and Security	Buildings to enhance the security of the community. Buildings are to provide for casual surveillance of the street.	The proposed modifications will not reduce the security of the street area or the subject property. Casual surveillance of the street is available from the dwelling to the street over and through the front landscaped area.	Yes
D21 – Provision and Location of Utility Services	Utility services to be provided	Normal utility services are available to the site	Yes
D22 – Conservation of Energy and Water	Compliance with SEPP BASIX	A BASIX Certificate has been provided to support the proposed development.	Yes
D23 – Signs	Building identification signage to be	No signage proposed	N/A

	appropriate for proposed use and not to impact on amenity of surrounding locality. Signs not to obscure views vehicles, pedestrians or potentially hazardous road features or traffic control devices.		
Part E – The Natural Environment			
E1 – Private Property Tree Management	Arboricultural report to be provided to support development where impacts to trees are presented	No significant protected trees are affected by the works.	Yes
E2 – Prescribed Vegetation	Not identified on map		N/A
E3 – Threatened species, populations, ecological communities	Not identified on map		N/A
E4 – Wildlife Corridors	Not identified on map		N/A
E5 – Native Vegetation	Not identified on map		N/A
E6 – Retaining unique environmental features	Not identified on map	No significant features within site	Yes
E7 – Development on land adjoining public open space	Not identified on map		N/A
E8 – Waterways and Riparian Lands	Not identified on map		N/A
E9 – Coastline Hazard	Not identified on map		N/A
E10 – Landslip Risk	Identified on map as Area A.	The minor nature of the proposed modifications to the approved design will ensure that the works remain consistent with the Geotechnical Investigation has been prepared by White Geotechnical Group, Report Reference J3560 dated 14 July 2021.	Yes

		In addition, the works will be carried out in accordance with the recommendations of the consulting Structural Engineer. The proposal will therefore satisfy the provisions of this clause.	
E11 – Flood Prone Land	Not identified on map		N/A

5.0 Matters for Consideration under Section 4.15 of The Environmental Planning and Assessment Act, 1979

5.1 The provisions of any environmental planning instrument

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 8.2019.186.1

The works continue to provide for demolition works and the construction of a dwelling house including new swimming pool, with no substantial changes to the external configuration, height and impact of the development to the public domain or to the neighbouring property.

The revised design with minor modifications to the built form 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 a “*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.

5.2 Any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

There are no relevant draft instruments applying to the land.

5.3 Any development control plan

The development as modified has been designed to comply with the requirements of Council’s Warringah Development Control Plan.

It is considered that the proposed design respects the desired character objectives of the DCP in that it reinforces the existing residential character of the area and is compatible with the existing uses in the vicinity.

5.4 Any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and

No matters of relevance are raised in regard to the proposed development.

5.5 The regulations (to the extent that they prescribe matters for the purposes of this paragraph),

No matters of relevance are raised in regard to the proposed development.

5.6 The likely impacts of that development, including environmental impacts on both the natural and built environments, and the social and economic impacts in the locality.

It is considered that the proposal, which seeks consent for modifications to the approved new dwelling and swimming pool, will not unreasonably impact upon the amenity of adjoining properties or upon the character of the surrounding area. It is considered that the resultant development is compatible with and will complement the residential character of the area.

The proposal is considered to be well designed having regard to the relevant provisions of the Warringah Local Environmental Plan 2011 and Council's Codes and Policies, in particular the Warringah DCP 2013.

5.7 The suitability of the site for the development

The subject land is currently zoned R2 Low Density Residential under the Warringah Local Environmental Plan 2011 and is considered suitable for the proposed development.

5.8 Any submissions made in accordance with this Act or the regulations

This is a matter for Council in the consideration of this proposal.

5.9 The public interest

The proposal will not impact upon the environment, the character of the locality or upon the amenity of adjoining properties and is therefore considered to be within the public interest.

6.0 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 alterations and additions including a carport and swimming pool 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 5 November 2021 and commenced in accordance with the confirmation of the satisfaction of the deferred commencement conditions.
- 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.

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