

9<sup>th</sup> February 2021

The General Manager  
Northern Beaches Council  
PO Box 82  
Manly NSW 1655

Dear Sir,

**Statement of Environmental Effects**  
**Modification of Development Consent DA2019/0509**  
**Demolition works, subdivision of 1 Lot into 2 and construction of semi-detached dwellings**  
**52 Lauderdale Avenue, Fairlight**

**1.0 Introduction**

On 9<sup>th</sup> October 2019, development consent DA2019/0509 was granted for the demolition of the existing site structures, the Torrens Title subdivision of the land and the construction of semi-detached dwellings on the created allotments.

This consent has subsequently been modified to rectify a minor mis-description in relation to the approved driveway width (Mod 2019/0584) and the introduction of high thermal performance windows to habitable areas (Mod 2019/0585).

We have been engaged to prepare an application seeking to further modify the consent pursuant to Section 4.55(1A) of the Environmental Planning and Assessment Act 1979 (the Act). Specifically, this application seeks to further enhance the environmental sustainability and performance of the approved dwellings through the installation of a Controlled Mechanical Ventilation (CMV) system with Heat Recovery Unit (HRV). The heat recovery unit exchanges the heat of outgoing air with the incoming air thereby reducing the need for mechanical heating and cooling.

Our client's goal is to deliver near zero energy cost dwellings through the adoption of a "passive house" approach. The concept is to create an internal environment that is sealed from the external environment and for that internal environment to be managed to create a constant temperature and relative humidity that requires minimal adjustment and energy to maintain it.

To achieve this the dwellings must operate as completely sealed environments with the following elements modelled and incorporated to achieve the forecasted zero energy outcomes.

#### Superior Insulation and Sealing

- Walls to provide insulation to R4
- Roof to provide insulation to R8
- Windows U value 0.98 to 1.5 (U Value is 1/R value) double pane glazing (argon gas sealed) with low e coating and window frames thermally broken
- All windows and door openings are sealed

#### HRV (Heat Ventilatory Control) Air Management System

- Delivers a constant temperature and relative humidity throughout the house
- Passive airflow with 2 air changes per hour
- Captures heat (or cool) from conditioned air prior to expulsion and fresh air is temperature conditioned to maintain constant internal temperature and reduce energy required to maintain this
- Filters air from allergens and virus
- See attached file for explanation of HRV function

#### Reduced Thermostatic Control Requirement

- With superior insulation, a sealed internal environment and the benefit of a HRV system the heat and cooling load for the house is approximately halved to require a 7-8 kw reverse cycle system that would be required in short periods and the additional heat (or cooling) will be picked up through the HRV system and re-distributed throughout the home

#### Solar PV Panels and Storage Battery

- Modelling indicates using 20 PV panels per house generation will theoretically exceed energy demand
- A 5-7 kw storage battery will allow energy to be stored and utilised when the home is not being powered direct from the solar PV panels

Further information can be found within the accompanying Low Energy PHPP report utilising Passive House Planning Package software.

To work efficiently, the HRV system is required to be installed within the sealed dwelling house perimeter. The logical location is within a room located in the approved undercroft area with such location ensuring that the enclosure will not give rise to any adverse streetscape or residential amenity outcomes noting that this area of the development was always trafficable as nominated on the approved plans.

The modifications are generally contained within the approved building envelope such that the 3-dimensional form, streetscape appearance, car parking, drainage and landscape outcomes as approved are not compromised. Importantly, the spatial relationship of the proposal to adjoining development is maintained together with a complimentary and compatible streetscape presentation and appropriate residential amenity outcomes.

To that extent Council can be satisfied that the modifications involve minimal environmental impact and the development as modified represents substantially the same development as originally approved. Accordingly, the application is appropriately dealt with by way of Section 4.55(1A) of the Act.

## **2.0 Detail of Modifications Sought**

The proposed modifications are shown coloured on plans A1.01 MOD2, A1.02 MOD2, A2.01 MOD2 – A2.04 MOD2, A3.01 MOD2 – A3.04 MOD2, A5.03 MOD2 and a modified schedule of materials and finishes (dated 23<sup>rd</sup> November 2020) prepared by Platform Architects. Specifically, the modifications involve the following key built form changes:

- Enclosure of the entry level undercroft area to create a sealed room to facilitate the proper and efficient operation of the CMV system and HRV unit and the provision of an associated passive air inlet and outlet to the east and west elevations,
- Upgraded wall, door, window and lift structures to create a fully sealed air system throughout the dwelling,
- Provision of a bathroom at entry level,
- Modification to the detailing of the front dividing wall between dwellings, and
- Modification to external wall finishes where nominated.

The application also seeks the modification of Condition 1 to reflect the modified Architectural plans.

### **3.0 Section 4.55(1A) of the Environmental Planning and Assessment Act 1979**

Section 4.55(1A) of the Act provides that:

- (1) *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, and*
    - (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.*
- (3) *In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.*

In answering the above threshold question, we have formed the considered opinion that the modifications sought are of minimal environmental impact given that the previously approved building height, setbacks and envelope are otherwise unaltered. The proposed undercroft enclosures will not be readily discernible as viewed from outside the site with the design quality of the overall development not compromised as consequence of the modifications sought.

The approved residential amenity outcomes in terms of solar access, privacy and view sharing are not compromised with the modifications both quantitatively and qualitatively of minimal environmental impact. In fact, the proposed modifications will have a significant environmental benefit through the enhanced environmental sustainability and energy efficiency outcomes achieved.

In answering the threshold question as to whether the proposal represents “substantially the same” development the proposal must be compared to the development for which consent was originally granted, and the applicable planning controls. In order for Council to be satisfied that the proposal is “substantially the same” there must be a finding that the modified development is “essentially” or “materially” the same as the (currently) approved development - *Moto Projects (no. 2) Pty Ltd v North Sydney Council* [1999] 106 LGERA 298 per Bignold J.

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 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 LGERA 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 Commissioner Moore in *Jaques Ave Bondi Pty Ltd v Waverly Council* (No.2) (2004) NSWLEC 101 relied upon the 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 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. Quantitatively, the nature of the approved land use is not altered as a consequence of the changes as proposed. The approved building height, bulk and scale of the building remains generally within the ambit of the consent and the plans as approved. The form of the approved dwellings is not materially altered, and the impacts are limited to a consideration of the undercroft enclosure and associated layout. These revisions are minor and have little to no material impact to the surrounding properties given the changes are generally confined within the volume of the structure as originally approved. Qualitatively, the physical appearance of the structure remains consistent with the consent as issued. The form of the building is maintained although its environmental performance is significantly enhanced. In that circumstance the changes may be considered minor.

On the basis of the above analysis, we regard the proposed application as being of minimal environmental impact and “essentially or materially” the same as the approved development such that the application is appropriately categorised as being “substantially the same” and appropriately dealt with by way of Section 4.55(1A) of the Act.

#### **4.0 Manly Local Environmental Plan 2013**

##### **Zoning and permissibility**

The subject site is zoned R1 General Residential pursuant to the provisions of Manly Local Environmental Plan 2013 (“MLEP”). Semi-detached dwellings are permissible in the zone with the consent of Council. The stated objectives of the zone are as follows:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The development as modified remains permissible with consent with the modifications proposed not compromising the developments performance when assessed against the objectives of the zone.

Accordingly, there are no statutory zoning or zone objective impediment to the granting of approval to the proposed development.

##### **Height of Buildings**

Pursuant to Clause 4.3 of MLEP 2013, the height of a building on the subject land is not to exceed 8.5 metres in height.

We confirm that the approved height of the dwellings is not altered with all proposed modifications sitting comfortably below the prescribed height standard. Accordingly, there is no impediment to the granting of consent on the basis that building height.

##### **Floor Space Ratio**

Pursuant to Clause 4.4 MLEP 2013, the maximum FSR for development on the site is 0.6:1 representing a gross floor area of 319.8 square metres. The stated objectives of this clause are:

- (a) *to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*
- (b) *to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*
- (c) *to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*
- (d) *to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*
- (e) *to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.*

We note that the GFA/FSR approved by Council is as follows:

Standard	Requirement	Proposed	% Variation	Complies
Floor Space Ratio	FSR: 0.6:1 (Lot 1-168.78m <sup>2</sup> )	FSR: 0.59:1 (166m <sup>2</sup> )	-	Yes
	FSR: 0.6:1 (Lot 2-151.08m <sup>2</sup> )	FSR: 0.66:1 (166m <sup>2</sup> )	9.87%	No

We confirm that the enclosure of the approved undercroft areas as nominated results in additional GFA as detailed below:

Standard	Requirement	Proposed	Variation	Complies
Floor Space ratio	Lot 1 site area 281.3sqm  FSR: 0.6:1 - 168.78sqm	187sqm GFA  FSR - 0.66:1	18.22sqm or 10.7%	No
	Lot 2 site area 251.7sqm  FSR: 0.6:1 - 151.08sqm)	188sqm GFA  FSR – 0.74:1	36.92sqm or 24.4%	No

Whilst clause 4.6 of MLEP 2013 does not apply to an application to modify a consent pursuant to Section 4.55 of the Act, it remains appropriate is to assess the acceptability of any variation having regard to the objectives of the standard.

Having regard to the stated objectives it is considered that strict compliance is both unreasonable and unnecessary for the following reasons:

- (a) *to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*

Response: The height, bulk and scale of the approved dwelling houses, as reflected by floor space, are entirely consistent with the built form characteristics established by adjoining development and development generally within the site's visual catchment. The enclosure of the approved undercroft areas does not, in any significant or readily discernible manner, contribute to the bulk and scale of the development as approved.

We have formed the considered opinion that the bulk and scale of the approved dwellings remain consistent with the bulk and scale of surrounding development and development generally within the site's visual catchment.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the modified development by virtue of its form, massing or scale (as reflected by FSR), offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the site's visual catchment.

The proposal is consistent with this objective.

- (b) *to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*

Response: Having inspected the site and its surrounds we have formed the considered opinion that the enclosure of the approved undercroft areas will not obscure any important landscape or townscape features with a compliant landscape area curtilage maintained.

The proposal is consistent with this objective.

- (c) *to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*

Response: The minor variation proposed will not compromise the developments ability to satisfy this objective noting that the previously approved landscape regime is unaltered as a consequence of the modifications sought. In fact, the approved landscaping at the front of the site will screen the undercroft enclosures as viewed from the public domain.

The proposal is consistent with this objective.

- (d) *to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*

Response: being located within the previously approved undercroft area the additional floor space will not give rise to any additional shadowing impact to surrounding development or the adjacent public domain. For the same reason, the additional floor space will not give rise to public or private view affectation with the previously approved privacy outcomes maintained noting that the undercroft area as approved was always a trafficable area of the development. The maintenance of the existing blade walls adjacent to the outer side boundaries will ensure that the previously approved privacy outcomes will be maintained notwithstanding the enclosure of the approved undercroft areas.

The proposal is consistent with this objective.

Consistent with the first test in *Whebe* as the development, as modified, satisfies the objectives of the standard strict compliance has been found to be unreasonable or unnecessary.

We have also formed the opinion that sufficient environmental planning grounds exist to justify the additional floor space proposed including the enhanced environmental performance of the dwelling houses and the associated enhanced internal amenity being outcomes consistent with objectives 1.3(b) and (g) of the Act.

### **Foreshore Scenic Protection Area**

Pursuant to clause 6.9(2) the land is identified on the Foreshore Scenic Protection Area Map. Pursuant to clause 6.9(3) development consent must not be granted to development on land to which this clause applies unless the consent authority has considered the following matters:

- (a) *impacts that are of detriment to the visual amenity of harbour or coastal foreshore, including overshadowing of the foreshore and any loss of views from a public place to the foreshore,*
- (b) *measures to protect and improve scenic qualities of the coastline,*
- (c) *suitability of development given its type, location and design and its relationship with and impact on the foreshore,*

*(d) measures to reduce the potential for conflict between land-based and water-based coastal activities.*

Having regard to these provisions, we have formed the considered opinion that the proposed modifications will not result in any actual or perceivable impact on the Foreshore Scenic Protection Area in that:

- Due to the location of the site and juxtaposition of adjoining development the proposed development, as modified, will not be readily discernible when viewed from Manly Beach, Manly Cove, Sydney Harbour and its immediate environs.
- The approved height, scale and architectural presentation of the development are not materially altered and remain compatible with the built form characteristics established by adjoining development.
- Having regards to the Land and Environment Court of NSW planning principle established in the matter of Project Venture Developments v Pittwater Council [2005] NSWLEC 191 most observers would not find the proposed building offensive, jarring or unsympathetic to its context or surrounds.

For these reasons Council can be satisfied that the development will not give rise to any actual or perceived impact on the Foreshore Scenic Protection Area having regard to the Clause 6.9 considerations.

## **5.0 Manly Development Control Plan 2013**

Having assessed the modified development against the applicable provision of MDCP we note the following:

- The siting, scale, form and massing of the development is not altered with the modified proposal maintaining the previously approved building height, setbacks and spatial relationship with adjoining development,
- The modified proposal will not give rise to any adverse public or private view affectation,
- The previously approved car parking, drainage and landscape regimes are unaltered,
- The modified schedule of materials and finishes and internalised boundary wall treatments will not compromise the design quality of the development as approved,

- The modified proposal does not compromise the residential amenity outcomes afforded to adjoining development through approval of the original application in relation to views, solar access and privacy, and
- The energy performance of the development is significantly enhanced as outlined in this submission.

## **6.0 Matters for Consideration Pursuant to Section 4.15(1) 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 section 4.15(1) of the Environmental Planning and Assessment Act 1979(as amended):

The provision of any planning instrument, draft environmental planning instrument, development control plan or regulations.

The developments performance when assessed against the relevant statutory planning regime is not compromised as detailed within this report.

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

### *Context and Setting*

i) *What is the relationship to the region and local context on terms of:*

- *the scenic qualities and features of the landscape?*
- *the character and amenity of the locality and streetscape?*
- *the scale, bulk, height, mass, form, character, density and design of development in the locality?*
- *the previous and existing land uses and activities in the locality?*

The modifications sought are contained within the approved building envelope, and not readily discernible as viewed from outside the site, with the 3 dimensional form, streetscape appearance and landscape outcomes as approved not compromised as consequence of the modifications sought.

ii) *What are the potential impacts on adjacent properties in terms of:*

- *relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)?*
- *visual and acoustic privacy?*
- *views and vistas?*
- *edge conditions such as boundary treatments and fencing?*

The approved development will remain, in its modified state, a development which will continue to relate to its surrounds and adjoining development in the same fashion as originally approved in terms of view sharing, height, boundary setbacks, privacy and landscape outcomes.

#### *Access, transport and traffic*

*Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:*

- *travel demand?*
- *dependency on motor vehicles?*
- *traffic generation and the capacity of the local and arterial road network?*
- *public transport availability and use (including freight rail where relevant)?*
- *conflicts within and between transport modes?*
- *traffic management schemes?*
- *vehicular parking spaces?*

Approved car parking numbers are maintained.

#### *Public domain*

There are no public domain changes.

#### *Economic impact in the locality*

The proposed development will provide short term employment opportunities during construction.

#### *Site design and internal design*

i) *Is the development design sensitive to environmental conditions and site attributes including:*

- *size, shape and design of allotments?*
- *the proportion of site covered by buildings?*
- *the position of buildings?*
- *the size (bulk, height, mass), form, appearance and design of buildings?*
- *the amount, location, design, use and management of private and communal open space?*
- *landscaping?*

The modifications sought are contained within the approved building envelope, and not readily discernible as viewed from outside the site, with the 3 dimensional form, streetscape appearance and landscape outcomes as approved not compromised as consequence of the modifications sought.

- ii) *How would the development affect the health and safety of the occupants in terms of:*
- *lighting, ventilation and insulation?*
  - *building fire risk – prevention and suppression/*
  - *building materials and finishes?*
  - *a common wall structure and design?*
  - *access and facilities for the disabled?*
  - *likely compliance with the Building Code of Australia?*

The proposed development will comply with the provisions of the Building Code of Australia without difficulty. There will be no detrimental effects on the occupants through the building design which will achieve the relevant standards pertaining to health, safety and accessibility.

#### *Construction*

- i) *What would be the impacts of construction activities in terms of:*
- *the environmental planning issues listed above?*
  - *site safety?*

Normal site safety measures and procedures will ensure that no site safety or environmental impacts will arise during construction.

#### The suitability of the site for the development.

##### *Does the proposal fit in the locality?*

- *are the constraints posed by adjacent developments prohibitive?*
- *would development lead to unmanageable transport demands and are there adequate transport facilities in the area?*
- *are utilities and services available to the site adequate for the development?*

The adjacent development does not impose any insurmountable development constraints. No additional excavation is required to accommodate the proposed modifications. The site is well located with regards to utility services and public transport. There will be no additional transport demand created.

##### *Are the site attributes conducive to development?*

The site has no special physical or engineering constraints is suitable for the proposed development.

#### Any submissions received in accordance with this Act or the regulations.

It is envisaged that any submissions made in relation to the proposed development will be appropriately assessed by Council.

### The public interest.

The development is consistent with the adopted planning regime with the modifications sought providing for substantially enhanced sustainability outcomes for the approved dwelling houses. In this regard, approval would be in the public interest.

## **7.0 Conclusion**

This application seeks to further enhance the environmental sustainability and performance of the approved dwellings through the installation of a Controlled Mechanical Ventilation (CMV) system with Heat Recovery Unit (HRV). The heat recovery unit exchanges the heat of outgoing air with the incoming air thereby reducing the need for mechanical heating and cooling.

Our client's goal is to deliver near zero energy cost dwellings through the adoption of a "passive house" approach. The concept is to create an internal environment that is sealed from the external environment and for that internal environment to be managed to create a constant temperature and relative humidity that requires minimal adjustment and energy to maintain it.

To work efficiently, the HRV system is required to be installed within the sealed dwelling house perimeter. The logical location is within a room located in the approved undercroft area with such location ensuring that the enclosure will not give rise to any adverse streetscape or residential amenity outcomes noting that this area of the development was always trafficable as nominated on the approved plans. Whilst this results in additional GFA/FSR on the site strict compliance with the numerical standard has been found to be unreasonable and unnecessary given the consistency of the development, as modified, with the objectives of the FSR standard.

The modifications are contained within the approved building envelope such that the 3-dimensional form, streetscape appearance, car parking, drainage and landscape outcomes as approved are not compromised. Importantly, the spatial relationship of the proposal to adjoining development is maintained together with a complimentary and compatible streetscape presentation and appropriate residential amenity outcomes.

To that extent Council can be satisfied that the modifications involve minimal environmental impact and the development as modified represents substantially the same development as originally approved. Accordingly, the application is appropriately dealt with by way of Section 4.55(1A) of the Act.

Having given due consideration to the relevant considerations pursuant to s4.15(1) of the Act it is considered that the application, the subject of this document, succeeds on merit and is appropriate for the granting of consent.

Yours sincerely

**BOSTON BLYTH FLEMING PTY LTD**

A handwritten signature in black ink, appearing to read 'Greg Boston', written over a horizontal line.

**Greg Boston**

B Urb & Reg Plan (UNE) MPIA

**Director**