

13 November 2018

The General Manager
Northern Beaches Council
Civic Centre
DEE WHY NSW 2099

Dear Sir,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT
SECTION 4.55 (1) ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

Development Application No:	DA 2018/0559 (Deferred Commencement)
Date of Determination:	29 June 2018
Premises:	Lot 2127 DP 752038 No 8 Nargong Road, Allambie Heights
Proposed Development:	Demolition work and construction of a dwelling house with a Secondary dwelling

On behalf of Ms Sonia Maree Pascuzzo & David Pender, this submission has been prepared to assist Council in the consideration of an application pursuant to Section 4.55 (1) of the Environmental Planning & Assessment Act 1979 to alter the terms of the Deferred Commencement Consent as approved by development consent DA2018/0559.

The application will seek to modify the form of the approved deferred commencement consent through the deletion of Condition 1 of the Deferred Commencement Consent condition, which noted:

1. Registration of Allotment

This consent is not to be activated until a time that a Subdivision Certificate for development consent DA2016/0834 for the land has been issued and registered with the NSW Land Registry Services.

Note: This consent is to be read in conjunction with DA2016/0834.

Reason: To ensure the development allotment legally exists.

Evidence required to satisfy the deferred commencement condition/s must be submitted to Council within five (5) years of the date of this consent, or the consent will lapse in accordance with Section 95 of the Environmental Planning and Assessment Regulation 2000.

Upon satisfaction of the deferred commencement condition/s, the following conditions apply:

...1/4

The application sought consent for a new dwelling and attached secondary dwelling to replace the existing dwelling.

The approved new dwelling and attached secondary dwelling stand clear of the approved subdivision boundary line and as such, the demolition and replacement of the existing dwelling construction would not preclude the operation of the approved subdivision, previously issued under DA 2016/0834.

The works to affects the subdivision have not commenced as yet.

PROPOSED MODIFICATION

This application under s4.55 (1) of the Act seeks to delete Condition 1 of the deferred commencement consent in order to allow for the immediate construction of the approved new dwelling, which replaces the existing g dwelling.

We assume that the deferred commencement condition was imposed to ensure that the subdivision was in place prior to work commencing to avoid any issue with an unauthorised dual occupancy arrangement being created with two dwellings being retained on the site.

As the proposed new dwelling and attached secondary dwelling sought under DA 2018/0559 requires the demolition of the current dwelling in order to construct the new dwelling, it is considered to be unnecessary to require the subdivision to be in place prior to the construction of the new dwelling. In our view, the imposition of the condition can be considered as an “*minor error*” as noted in S4.55(1).

We seek to delete Condition 1 to allow for the immediate construction of the new dwelling and attached secondary dwelling in accordance with DA 2018/0559.

In support of our request, we suggest that the construction of the new dwelling and a secondary dwelling will not hamper the achievement of the subdivision as detailed under DA 2016/0834.

JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under S4.55 (1) which notes:

(1) Modifications involving minor error, misdescription or miscalculation

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 a development consent granted by it to correct a minor error, misdescription or miscalculation. Subsections (1A), (2), (3), (5) and (6) and Part 8 do not apply to such a modification. Note.

Section 380AA of the Mining Act 1992 provides that an application for modification of development consent to mine for coal can only be made by or with the consent of the holder of an authority under that Act in respect of coal and the land concerned.

Accordingly, for the Council to approve the s96 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.

We seek to delete Condition 1 to allow for the immediate construction of the new dwelling and attached secondary dwelling in accordance with DA 2018/0559.

In support of our request, we suggest that the construction of the new dwelling and a secondary dwelling will not hamper the achievement of the subdivision as detailed under DA 2016/0834.

Similarly, the application is substantially the same development when subjected to a “quantitative comparison”, as the works provide for the commencement of the physical works to construct the approved dwelling detailed under DA 2018/0559 and in doing so, will not hinder the achievement of the approved subdivision under DA 2016/0834.

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(1) 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 proposed works, the dwelling to be constructed under DA 2018/0559 will not restrict or hinder the achievement of the subdivision of the land previously considered under DA 2016/0834.

The proposal also satisfies the qualitative assessment required by the Moto test. The modifications will not alter the approved built form, which if allowed to be constructed prior to the commencement of the subdivision works, will remain as approved and for the same purpose and with no substantive modifications to the physical appearance of the approved building.

These Court decisions also make clear that the Council has the power to approve the Modification Application.

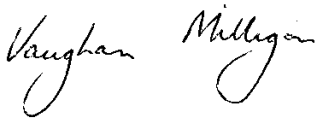
The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as initially lodged and as detailed under the original Notice of Determination dated 29 June 2018.
- The imposition of the deferred commencement condition can be reasonably viewed as an “error” as it is assumed it was intended to ensure that two dwellings were not retained on the land, when in fact the construction of the approved dwelling necessitated the removal of the existing dwelling. The approved subdivision can be carried out at a later date.
- 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