



Planning Direction Pty. Ltd.
Town Planning & Development Services

The General Manager
Northern Beaches Council

3rd November 2019

**Re: Statement of Environmental Effects - Modification Application
of DA2018/1452 - No 17 Kimo Street North Balgowlah**

Dear Sir/Madam,

Planning Direction Pty Ltd has been engaged to prepare a planning submission in support of an application pursuant to Section 4.55 of the Environmental Planning and Assessment Act 1979. The applicant is seeking to modify the above development consent.

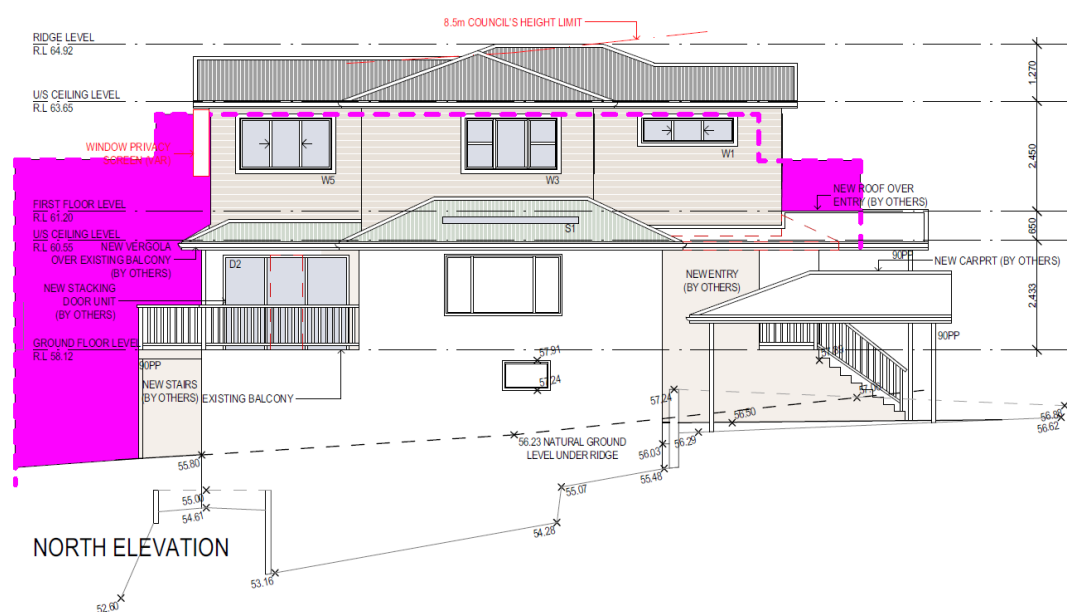
Northern Beaches Council issued development consent No DA2018/1452 on the 8th February 2018 for *alterations and additions to a dwelling including a swimming pool*.

The development has not commenced. Upon review of the approved design with a builder there appears to be opportunity to simplify the design and at the same time reduce potential impacts to both adjoining neighbours. The approved design presents an elongated built form which gave concern to the northern adjoining owner in terms of privacy loss and potential view loss to the adjoining southern property owner.

The proposed design amendment is a more conventional design presenting a cascading and cohesive series of roof elements when viewed from the street. Providing the additional most needed floor space above the existing dwelling has the effect of limiting impacts despite an increase in building height. To assist Council, the proposed development plans include an outline of the previously approved scheme relative to the proposed design. From a site analysis and topographical point of view, the proposed design is more appropriate in respect of privacy, view sharing and streetscape considerations.



Proposed Streetscape elevation



The pink denotes extent of the approved built form

Effectively the amended design reduces the approved dwelling footprint and building bulk at the rear of the dwelling as viewed particularly from neighbouring properties.

An increase in building height is proposed with the provision of a level above the ground floor level. Although standard floor to ceiling heights are proposed, a maximum building height at the ridge point of 8.95m eventuates. The proposed building height is considered to be inconsequential given that it applies only in the vicinity of the ridge and the proposed upper level is shifted away from the northern side boundary.

Prior to finalising the design, the architect met with Council's duty town planner Penny Wood who was of the opinion that the application can be lodged as a Modification - Minimal environmental impact 4.55(1A) of the EPA Act 1979, particularly as the design was reducing impacts.

A summary of the proposed works relative to the approved design is as follows:

North Elevation

- Ridge height of previously approved DA=63.393m. New proposed ridge height=64.92m
- underside of rear balcony previously enclosed has been deleted from the amended plans.
- New amended proposal has been set in from the Northern wall below and northern side boundary. Previously approved DA was built straight up from this northern side wall.
- Existing hipped roof to be retained. Previous approved plan was for a skillion roof.
- Weatherboard cladding to addition consistent with approved plans.

South Elevation

- Rear extension to ground floor deleted from plans. New amended addition sits within the existing footprint of the dwelling.
- new amended plans in the main are compliant under the 8.5m height limit as per approved DA. A small portion at the ridge point exceeds the height limit only.
- The resultant is a reduced impact on neighbours to the South.
- Neighbours to the South retain more of their side view across the subject property and less overshadowing given that the building height is shifted closer to the road.

East Elevation

- Existing rear balcony retained. New steps to rear yard in same location as approved DA.
- underside of rear balcony previously enclosed has been deleted from the amended plans.
- Existing R.L levels to ground floor have not changed.
- Landscaping to rear yard as per approved DA plans
- Stormwater as per approved DA plans

West Elevation

- New Entry portico and steps in same location as Approved plans.
- Carport and Driveway as per Approved plans.
- existing hipped roof retained. Approved DA was for a new skillion roof.
- Weatherboard cladding consistent with approved plans.
- Addition set in from side to reduce bulk/ overshadowing and privacy.

Accordingly the application is submitted pursuant the Section 4.55(1A) of the Environmental Planning and Assessment Act 1979.

Name and Address of Applicant

Current Applicant: Add Style Home Additions

Description of the Land

The subject site comprises a regular shaped allotment known as No17 Kimo Street North Balgowlah and is legally identified as being Lot 339 in DP 12316.





View of the existing dwelling from the street

The subject site is a relatively large lot with a regular configuration. The subject site has a front boundary dimension of 13.58m, a rear western boundary dimension of 13.715m, and a depth of 48.77m. The total area of the site is **668.9sqm**.

Section 4.55 of the EPA Act 1979

(cf previous s 96)

*(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.

(1A) Modifications involving minimal environmental impact

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, 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 any period prescribed by the regulations or provided by the development control plan, as the case may be.*

Subsections (1), (2) and (5) do not apply to such a modification.

(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.

(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.

(4) The modification of a development consent in accordance with this section is taken not to be the granting of development consent under this Part, but a reference in this or any other Act to a development consent includes a reference to a development consent as so modified.

(5) (Repealed)

(6) Deemed refusals

The regulations may make provision for or with respect to the following:

(a) the period after which a consent authority, that has not determined an application under this section, is taken to have determined the application by refusing consent,

b) the effect of any such deemed determination on the power of a consent authority to determine any such application,

(c) the effect of a subsequent determination on the power of a consent authority on any appeal sought under this Act.

(6A), (7) (Repealed)

(8) Modifications by the Court

The provisions of this section extend, subject to the regulations, to enable the Court to modify a consent granted by it but, in the extension of those provisions, the functions imposed on a consent authority under subsection (1A) (c) or subsection (2) (b) and (c) are to be exercised by the relevant consent authority and not the Court.

Comment:

The modification of the development consent relates to a change in the design and presentation of the alterations and additions to a dwelling.

A key outcome from the proposed changes are a reduction in potential impacts arising to adjoining owners. Accordingly the application can be made pursuant to Section 4.55(1A) of the EPA Act 1979.

Section 4.15 of The EPA Act 1979 Checklist

The following provides an assessment of the proposal against the provisions of Section 4.15 of the Environmental Planning and Assessment Act 1979.

(1) Matters for consideration—general In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

(a) the provisions of:

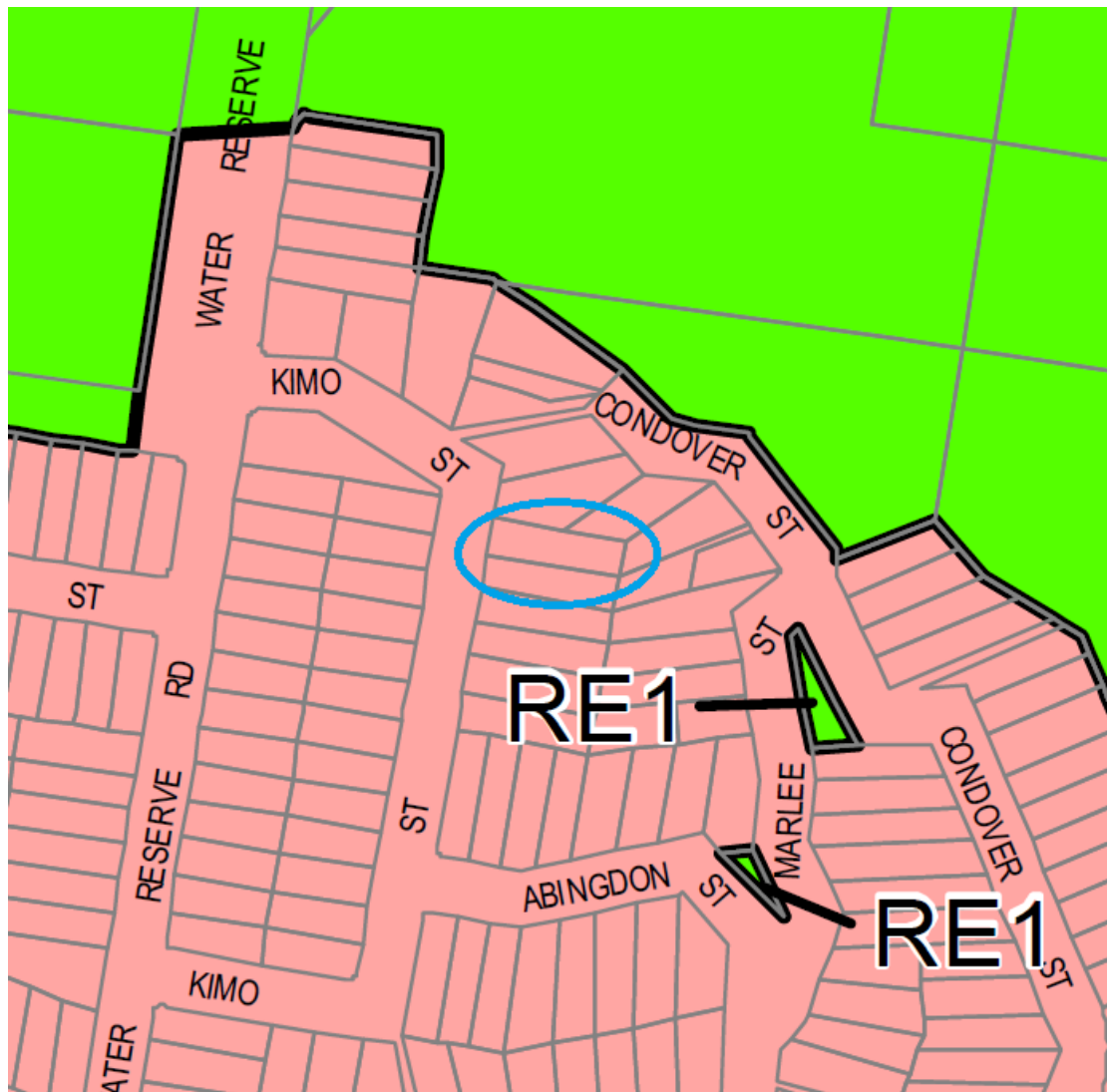
- (i) any environmental planning instrument, and*
- (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*
- (iii) any development control plan, and*
- (iiia) 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*
- (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and*
- (v) any coastal zone management plan (within the meaning of the Coastal Protection Act 1979), that apply to the land to which the development application relates,*

Comment:

The proposal remains permissible and the modified development remains consistent with the zone objectives as follows:

- It does not alter the approved residential use or density of development.
- The proposed reconfiguration of the internal layout of rooms is more conventional and anticipated within a locality.
- It enables the construction of a compliant and appropriate built form in the zone.
- The modification reduces impacts in terms of overshadowing, view loss and privacy considerations.

- No change is proposed to the approved extent of landscaping and private open space.



The subject site is zoned R2 Low Density Residential under the Warringah LEP 2011.

Proposed Building Height Increase

As previously stated the proposal seeks to better allocate floor space on-site resulting in a technical increase in height by 0.45m in the vicinity of the roof ridge only. Such results in a slight departure from the maximum building height as prescribed for the site pursuant to clause 4.3 of the WLEP 2011.

It should be noted that a modification application can be approved without a clause 4.6 variation even though the modified development would contravene a development standard. This is because the power to modify a development consent (under section 4.55 or 4.46 – former section 96) is a 'free-standing provision' (*North Sydney Council v Michael Standley & Associates Pty Ltd*).

Pursuant to *Gann & Anor v Sutherland Shire Council* [2008] NSWLEC 157 (24 April 2008) the WLEP 2011 building height control does not apply as a development standard in the assessment of the Section 4.55 modification (formerly Section 96). Under this case the Court concluded that Section 96 (now section 4.56) '*is a freestanding provision*' and '*a modification application may be approved notwithstanding the development would be in breach of an applicable development standard were it the subject of an original development application*'.

Clause 4.6 does not arise, because the development standards are not binding.

This does not mean that the Building height development standard counts for nothing. Any development standards contained in a current LEP require general consideration under the Section 4.15 of the EPA Act. As interpreted by the Land and Environment Court in *Gann* (at [15]) and *1643 Pittwater Road v Pittwater Council* [2004] NSWLEC 685 (at [51]). A consent authority must take into consideration section 79(c) (now section 4.15) of the EPA Act embracing among other things:

(a) *the relevant provisions of any 'environmental planning instrument';*
(b) *the likely environmental impacts (which includes beneficial impacts) of the modification on the built environment;*
(c) *the social and economic impacts in the locality (which includes beneficial impacts) of the modification; and*
(d) *the suitability of the site for the modified development.*
(Note: Notwithstanding the above a formal clause 4.6 request accompanies this application on a precautionary basis). The following considers the variation to the height standard in the context of the above criteria.

(a) The relevant provisions of any 'environmental planning instrument'

The approved use is permissible in the zone. The proposed works are minor and contained in the main, within the typical building zone in the street.

The proposal is consistent with the zone objectives and does not invoke consideration pursuant to any other clause in the LEP.

The objectives of the building height control are:

The objectives of this clause are as follows:

- (a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
- (d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

The proposed building height variation is acceptable from a town planning perspective having specific regard to the objectives because:

- The increase in building height is minor in the context of the approved development and topographical circumstances of the site. As the site experiences a cross fall from south to north, it seems logical to contain the additional floor space to within the existing footprint of the dwelling and typical building zone in the street. The proposed dwelling will sit comfortably at the proposed height within the streetscape. The dwelling is also well setback from the street and contains established trees in the front yard partially screening the building from view.
- The approved levels in the building are retained and the streetscape presentation of the development is enhanced relative to the approved design.
- There are no heritage considerations with this site and proposal.
- The building remains of a low scale and appropriate in its setting.
- No adverse impacts arise in respect of privacy or overshadowing. An improvement to the level of privacy afforded the northern property owner is a positive outcome with the transfer of floor space away from the common boundary.
- The shifting of floor space above the dwelling also retains an existing view corridor across the site benefitting the southern adjoining neighbour.

The proposed building height increase is marginal and appropriate. The proposed modified design will retain the desired character of the area as approved despite the slight increase in building height.

(b) The likely environmental impacts (which includes beneficial impacts) of the modification on the built environment

The proposed modification is acceptable having regard to streetscape and neighbourhood character considerations. No change is proposed in this regard and the approved external finishes remain consistent with that which was previously approved.

(c) The social and economic impacts in the locality (which includes beneficial impacts) of the modification

No negative social or economic impacts arise from the works proposed. The positive aspect is that the development will be constructed to a high standard with less impacts arising to neighbours.

The same high level of amenity will be offered to future residents without impinging on neighbour amenity. Approval of the modified plan will ensure the development can proceed via a recommended structural path consistent with the intent of the consent plans.

(d) The suitability of the site for the modified development.

The site remains suitable for the development and the siting of works is appropriate relative to the side slope. The siting of the upper level away from the northern side boundary and down slope assists greatly in terms of built form integration.

The design modification is essentially minor and is reasonable from a town planning perspective.

(d) any submissions made in accordance with this Act or the regulations,

Comment: Nil

(e) the public interest.

Note.

See section 75P (2) (a) for circumstances in which determination of development application to be generally consistent with approved concept plan for a project under Part 3A.

Comment:

The proposed design changes raise no consideration with the public interest.

(2) Compliance with non-discretionary development standards—development other than complying development If an environmental planning instrument or a regulation contains non-discretionary development standards and development, not being complying development, the subject of a development application complies with those standards, the consent authority:

(a) is not entitled to take those standards into further consideration in determining the development application, and

(b) must not refuse the application on the ground that the development does not comply with those standards, and

(c) must not impose a condition of consent that has the same, or substantially the same, effect as those standards but is more onerous than those standards,

and the discretion of the consent authority under this section and section 4.16 is limited accordingly.

(3) If an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a development application does not comply with those standards:

(a) subsection (2) does not apply and the discretion of the consent authority under this section and section 4.16 is not limited as referred to in that subsection, and

(b) a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.

Note.

The application of non-discretionary development standards to complying development is dealt with in section 4.28 (3) and (4).

Comment: Not applicable.

(3A) Development control plans If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority:

(a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and

(b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and

(c) may consider those provisions only in connection with the assessment of that development application.

In this subsection, standards include performance criteria.

Comment:

The proposal does not invoke further considerations pursuant to the development control plan.

(4) Consent where an accreditation is in force. A consent authority must not refuse to grant consent to development on the ground that any building product or system relating to the development does not comply with a requirement of the Building Code of Australia if the building product or system is accredited in respect of that requirement in accordance with the regulations.

(5) A consent authority and an employee of a consent authority do not incur any liability as a consequence of acting in accordance with subsection (4).

(6) Definitions In this section:

(a) reference to development extends to include a reference to the building, work, use or land proposed to be erected, carried out, undertaken or subdivided, respectively, pursuant to the grant of consent to a development application, and

(b) non-discretionary development standards means development standards that are identified in an environmental planning instrument or a regulation as non-discretionary development standards.

Comment: Not applicable.

Development Substantially the Same

The development as modified remains substantially the same as that approved by the consent authority. A conventional design is generated for the dwelling, with strong streetscape presentation.

The modification will enable the development to proceed in a manner consistent with the intent of the original consent in an orderly and economic manner.

The Consent Authority

The application is being made to the Northern Beaches Council being the consent authority under the provisions of section 4.55(1A) of the Environmental Planning and Assessment (EPA) Act 1979.

Conclusion

The modified plans are reasonable and have no adverse ramifications in respect of the prior planning consideration by Council.

The matter is permissible pursuant to the provisions of the EPA Act 1979.

No adverse impacts arise as a result of the modified works as the development as modified remains substantially the same and includes design improvements to the benefit of neighbours.

To effect the proposed modification of the consent, the applicant seeks the following:

Amend condition No 1 to reflect the modified set of plans.

Overall the proposal is consistent with the provisions of section 4.15 and 4.55 of the EPA Act 1979. Council's assistance in modifying the development consent as proposed in this submission is requested.

Yours Faithfully

A handwritten signature in dark ink, appearing to read 'Nigel White', with a stylized flourish at the end.

Nigel White - Bachelor of Applied Science (Environmental Planning)