

18 July 2018

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

Dear Sir,

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

Development Application No:	DA N0275/15 (as modified by S96 N0275/15/S96/1)
Date of Determination:	14 October 2015 (as modified 27 June 2016)
Premises:	Lots 1 & 2 DP878612 & Lic. 386878, No 125 & 127 Riverview Road, Avalon Beach
Proposed Development:	Boundary adjustment between 125 & 127 Riverview Road and alterations and additions to residential house and new pool at 127 Riverview Road

On behalf of Mr & Mrs Matt & Katherine Watt & THW Architects, this submission has been prepared to assist Council in the consideration of an application pursuant to Section 4.55 (2) of the Environmental Planning & Assessment Act 1979 to alter the development as approved by development consent DA N0407/16.

The application will seek to modify the form of the approved alterations and additions to the existing dwelling to allow for improved access to and around the dwelling, increased parking and storage area and various minor modifications to the new works under construction at the above premises.

The new works have been highlighted within the architectural plans prepared by THW Architects, Job No 067 dated 10 May 2018, which accompany the application.

All other works detailed under the original development consent and including the overall height and the dwellings' general location on the site remain unchanged.

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

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BACKGROUND

An application for consent for *“Boundary adjustment between 125 & 127 Riverview Road and alterations and additions to residential house and new pool at 127 Riverview Road”* was approved by Council by Notice of Determination dated 14 October 2015.

The consent was subsequently modified under S96 N0275/15/S96/1, dated 27 June 2016.

The schedule of changes is detailed below, however it is submitted that the subsequent modifications to the original design detailed under DA N0275/15 have not fundamentally changed the nature of the development and it remains consistent with Council’s original Development Consent.

PROPOSED MODIFICATION

The proposed revisions to the plans have been detailed in the amended details prepared by THW Architects, Job No 067, Sheets A01-K – A15K, all Issue K dated 10 May 2018.

This submission under 4.55 (2) seeks to modify the approved development, with the particular changes noted as highlighted elements within the modified plans and variously provide for the following amendments:

Garage Level

- Extend the existing garage adjoining the south-eastern boundary, with a 1740mm increase in the length of the garage.
- Extend the existing garage adjoining the northern boundary, with a 2500mm increase in the length of the garage.
- Provide a new inclinator adjacent to the northern boundary to provide access from the garage level to various points within the site the dwelling and the yard area, including the waterfront area (See further discussion)

Lower Ground Floor Level 1

- Extend the approved deck to the Lower Ground Floor Level 1 to the west by up to 1264mm.

Lower Ground Floor Level 2

- Extend the existing deck adjoining the Living/Dining room to wrap around the southern elevation, with external stair access to the yard areas.
- Extend the existing deck adjoining the Gym to provide for an inclinator access point.
- Replace approved deck with colourbond roof over master suite below.
- Operable louvres to northern face off deck off Living/Dining room.

Lower Ground Floor Level 3

- Reposition approved sauna and add WC with external access
- The coping level of the swimming pool and the surrounding timber deck has been raised from RL 19550 to RL 20410 to match the floor level of LGL 3.
- Realigned northern deck with extension to provide for inclinator access
- New external stair configuration to southern side of dwelling

The modified works do not introduce any significant impact for the existing trees within the subject or adjoining properties. A revised report has been prepared by Naturally Trees, Issue B, dated 25 July 2018, which accompanies the submission.

Given the modest scale of the work and the fact they are largely at or near ground level, there will not be any reduction in the privacy and amenity of the neighbouring properties.

The proposed inclinator is located adjacent to the northern boundary of the site. The intended inclinator product is a *Railglider "Monorail Turning"* or "*Railglider*" for short.

The nature of the proposed installation is that all mechanical noise is isolated to the winch area, which is stationary and located adjacent to or under the driveway (See Sheet A01-K).

The winch noise is very low, because it is a smooth cable winding into a grooved drum. There are no chains or pulleys, with the gearmotor being direct coupled to the winch drum, which is suspended under the driveway slab.

The Bogie /Chassis is supported on polyurethane rollers (200mm diameter) running on a smooth surface. The inclinator car body sits on the chassis and in operation, the lift car would not be readily discernible above the background noise for the majority of its travel path.

Given the limited area available between the existing structures and the side boundary, the proposed inclinator rail will be setback 1105mm to the centre of the rail from the side boundary, with a setback of 794mm to the inclinator car. Council's Pittwater DCP controls suggests a 2.0m setback to the inclinator carriage.

The inclinator rail has been designed to where possible closely follow the contours of the site.

The Landscape Plan prepared by Lone Pine Landscapes includes screening planting along the northern setback, to provide for a *Waterhousia Floribunda* (45L pot size) screen to assist in reducing the visual impact of the proposal inclinator rail and car. Further physical screening could be added to the car if required by Council.

The operation of the inclinator car will comply with Council's acoustic and operational requirements.

Notwithstanding the non-compliance of the inclinator rail and car with Council's DCP side setback control, the proposed landscaping will effectively mitigate any unreasonable impacts on the

privacy and amenity of the northern neighbouring property.

The proposed modification seeks to rely on the following supporting information:

- Revised architectural plans prepared by THW Architects, Job No 067, Drawings Numbers A01-K – A15-K, Issue K dated 10 May 2018
- Revised stormwater and sediment and erosion control details prepared by NTMA Consulting Pty Ltd, Project No 1914H, Issue B dated 16 July 2018
- Revised Landscape Plan prepared by Lone Pine Landscapes, Drawing No LPL 155 dated 28 June 2018
- Revised Geotechnical Engineers supporting letter prepared by Jack Hodgson Consultants Pty Ltd, Reference No MQ 30073B dated 3 July 2018
- Revised Arboricultural Impact Report prepared by Naturally Trees, Issue B, dated 25 July 2018.
- Revised BASIX Certificate No A217801-03.

JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under 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:

- 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*
- it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) 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*
- it has notified the application in accordance with:*
 - the regulations, if the regulations so require, or*
 - 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*
- 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 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.

When viewed from the public domain or from the neighbouring properties, the building will present substantially 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 provide for modest changes to the form of the outdoor structures in a manner which is consistent with the consent. The overall height and general bulk and scale of the development will continue to be consistent with the approved design as endorsed by Council.

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 S96 of the Act.

Conclusion

The test established in **Moto** requires both a quantitative and a qualitative assessment.

In terms of the quantitative extent of the changes to the originally approved development, the works which are the subject of the application are minor and do not inherently alter the nature and form of the additions to the dwelling as originally approved by Council.

The proposal also satisfies the qualitative assessment required by the **Moto** test. The modifications will result in a development which remains generally as approved, for the same purpose and with no substantive modifications to the physical appearance of the approved building.

Consistent with the Court decision in **Moto**, the Council would be satisfied that the development as modified would remain essentially or materially the same as the approved development.


This Court decision also makes clear that the Council has the power to approve the Modification Application.

The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as initially lodged and as detailed under the original Notice of Determination dated 14 October 2015 and as subsequently modified 27 June 2016.
- 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.

A handwritten signature in black ink, reading "Vaughan Milligan". The signature is written in a cursive, flowing style.

VAUGHAN MILLIGAN