

4 May 2020

The General Manager
Northern Beaches Council

Dear Sir,

**DEVELOPMENT APPLICATION REFERENCE DA2019/1246
SECTION 4.55 (1A) MODIFICATION – PROPOSED MINOR MODIFICATIONS TO DA
APPROVAL DA2019/1246
STATEMENT OF ENVIRONMENTAL EFFECTS
31 CALVERT PARADE NEWPORT**

1.0 INTRODUCTION

On the 9th December 2019 a consent was granted for alterations and additions to the dwelling consisting of landscaping works and a new swimming pool.

This modification application relates to minor amendment to the landscaping plan to include additional paving, changes to retaining walls and minor alterations to the stairs adjacent to the existing garage.

2.0 DETAIL OF THE MODIFICATIONS

This application seeks to make minor amendments to the approved landscaping associated with the consent. Specifically, the modifications include:

- New paving adjacent to the northern side boundary next to the dwelling
- New retaining walls to create a tiered front garden
- Existing staircase adjacent to the garage to be minorly amended.

3.0 BACKGROUND

A consent was granted for alterations and additions relating to landscaping works, new hardstand parking area and new swimming on the 9th of December 2019.

4.0 SECTION 4.55 (1A) ENVIRONMENTAL PLANNING & ASSESSMENT ACT 1979

The application is made pursuant to Section 4.55 (1A). Section 4.55 of the Act provides:

(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 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 modified (if at all), and*
- c) It has notified the application in accordance with 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.*

In this instance it is not considered the proposed modification as approved substantially alters or changes the development as consented to an extent that it would not be considered to be the same, or substantially the same development. The land use outcome remains as per the approved land use.

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 Ilene 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 LGRERA 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 Commission Moore in *Jaques Ave Bondi Pty Ltd v Waverly Council* (No.2) (2004) NSWLEC 101 relied upon *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 the 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.

There is considered to be no statutory impediment to the making and determination of this application.

5.0 MATTERS FOR CONSIDERATION PURSUANT TO S4.15 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 S4.15 of the Environmental Planning and Assessment Act 1979 (as amended):

The provisions of any environmental planning instrument, proposed instrument that has been the subject of public consultation under this Act and any development control plan.

5.1 PITTWATER LOCAL ENVIRONMENTAL PLAN 2014

5.1.1 Zoning and Permissibility

As previously noted the site is zoned E4 Environmental Living pursuant to the provisions of the Pittwater Local Environmental Plan 2014.

Dwelling Houses are permissible with consent in the E4 zone. The specific objectives of the zone are identified as follows:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values*
- *To ensure that residential development does not adversely affect those values.*
- *To provide for residential development of a low density and scale integrated with the landform and landscape.*
- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*

The application relates to minor modifications to the approved landscaping. The tiered front garden and new retaining walls are consistent with development in the local area and will not result in a significant adverse impact on the environmental value of the area.

5.1.2 Geotechnical Hazards

A geotechnical report was provided with the development application and determined that there were no instability observed on or surrounding the site. It is considered that the proposed retaining walls would be an 'acceptable' risk provided geotechnical directives are implemented.

5.2 PITTWATER DEVELOPMENT CONTROL PLAN

5.2.1 Newport Locality

The modifications proposed result in substantially the same development as approved with the original DA. As such, it is considered that the modifications are consistent with the desired future character of the Newport Locality.

5.2.2 Landscaping

Pursuant to Clause C1.1 the proposal includes an enhancement to the landscaping on the site. The outcomes of the control area as follows:

- A built form softened and complemented by landscaping.*
- Landscaping reflects the scale and form of development.*
- Retention of canopy trees by encouraging the use of pier and beam footings.*

Development results in retention of existing native vegetation.
Landscaping results in the long-term retention of Pittwater's locally native tree canopy.
Landscaping retains and enhances Pittwater's biodiversity by using locally native plant species
Landscaping enhances habitat and amenity value.
Landscaping results in reduced risk of landslide.
Landscaping results in low watering requirement.

The landscaping modifications proposed is consistent with the outcomes of this control. The new retaining walls will assist in mitigating any potential landslide risk. Furthermore, the geotechnical report provided with the development application did not find any indications of instability on or surrounding the site.

The new retaining walls create a terrace styled front garden which is consistent with landscaping in the local area. The works to the landscaping are considered substantially the same development as was approved with the original consent.

5.2.3 Landscaped Area – Environmentally Sensitive Land

The site is mapped as Area 1 on the landscape area map. Clause D1.14 requires that 60% of the total site area be landscaped area. The proposed modification result in a landscape area of 64%. This 64% calculation includes 6% of the total site being provided as impervious landscape treatments providing these areas are for outdoor recreational purposes.

6.0 CONCLUSION

Pursuant to Section 4.55 (1A) of the Environmental Planning and Assessment Act 1979 (As Amended), the consent authority can be satisfied that the modified consent as sought by this submission is substantially the same development as referred to in the original application.

The proposed modification to the landscaping does not substantially alter or change the development as consented to an extent that it would not be considered, to be the same, or substantially the same development. The land use outcome remains as per the approved land use.

Please do not hesitate to contact me to discuss any aspect of this submission.

Yours Faithfully
Kate Fleming
 BBF Town Planners
Planner