

1 June 2021

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

Dear Sir/Madam,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT,
SECTION 4.56 OF THE ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

Development Application No:	DA 2019/0154 (as modified by MOD2021/0101)
Date of Determination:	28 July 2020 & 12 May 2021
Premises:	Lot 1 DP 373531 No. 1955 Pittwater Road, Bayview
Proposed Development:	Demolition works and construction of a seniors housing development

On behalf of Mr Ian and Mrs Jan Westaway, this submission has been prepared to assist Council in the consideration of an application pursuant to Section 4.56 of the Environmental Planning & Assessment Act 1979 to alter the development as approved by Development Consent DA2019/0154.

As the development involves a determination that was made by the Land and Environment Court, this application is made under Section 4.56 of the Environment Planning and Assessment Act 1979.

BACKGROUND

The subject development was approved by way of a s34 agreement under Land and Environment Court Proceedings 2019/00199786, dated 28 July 2020.

The approved development provided for the construction of 4 residential units and associated car parking.

A Stage 1 Construction Certificate (CC2021/0122) has been issued for the site excavation and car park level construction associated retaining walls and the works have commenced.

The original determination was subsequently modified by Application No MOD2021/0101, dated 12 May 2021 which allowed for design revisions to the location of the proposed piling and retaining walls and which did not involve any changes to the building's position on site, overall height and scale or the form of the building as it was intended to appear above the existing ground level.

As a consequence of the approved revisions to the piling locations and retaining walls, void spaces within the basement levels of the relevant have been created, which could be utilised as non-habitable storage spaces for the benefit of the units.

...1/4

PROPOSED MODIFICATION

This submission under S4.56 of the EP&A Act seeks to modify the use of the void spaces within the basement level, which have been created as a consequence of the required relocation of the external piling and supporting retaining walls for the upper levels of the development.

The revised architectural plans prepared by Leech Harmon Architects as revised 18 May 2021 provide for the inclusion of individual internal stair access from each unit to the storage areas located within the void space at the Lower Ground Floor level (RL9.70).

The utilisation of the void areas for non-habitable, storage purposes will not result in any change to the external appearance of this building as the proposed storage areas are below the external ground level.

As basement storage area, the inclusion of the additional non-habitable storage space within the basement level which is less than 1m above ground level will not contribute to the gross floor area of the building, with the approved floor space ratio for the development being unchanged.

In support of the application, the following documentation is provided to assist Council in its deliberations:

- Revised architectural plans prepared by Leech Harmon Architects, Sheets SA-01 Revision C, , DA-03 Revision G, DA-04 Revision F & DA10 - Revision E all dated 18 May 2021
- Revised Geotechnical Review Letter prepared by Ascent Geotechnical Review Letter, Report AG 19015D, dated 31 May 2021

JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under S4.56 and notes:

(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 Court and subject to and in accordance with 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 the consent was originally granted and before that consent as originally granted was modified (if at all), and*
- (b) 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*
- (c) it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last dress known to the consent authority of the object or other person, and*

- (c) 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.*

Accordingly, for the Council to approve the s4.56 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.

The works seek to provide for minor alterations to the form of the approved building to provide for internal stair access from each unit to the void area at the Lower Ground Floor level (RL9.70) to allow for the use of the space as non-habitable storage.

The approved height and setbacks, together with the approved bulk and form of the seniors housing development will be otherwise unchanged and will be consistent with the height and location of the approved design initially considered within DA2019/0154 and as modified under MOD2021/0101.

When viewed from the public domain or from the neighbouring properties, the building will present 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 will continue to provide for the construction of a seniors housing development in a form which is generally consistent with the original consent.

In my view, this application is fundamentally 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 S4.56 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 approved seniors housing development 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 28 July 2020 and as subsequently modified 12 May 2021.
- 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