

29 March 2022

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 2021/0657
Date of Determination:	16 August 2021
Premises:	Lot 30 within DP 13686, No. 888 Barrenjoey Road, Palm Beach
Proposed Development:	Alterations and additions to a dwelling house including swimming pool and garage

On behalf of Ms Lisa Keighery, 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 DA2021/0657.

The application involves modifications to the form of the approved development, with the amendments detailed in the revised architectural plans prepared by Wyer & Co, Job No 20.052 Drawings No's S4.55_1.0 Revision 3, S4.55_5.0 Revision 2, S4.55_5.2 Revision 2, S4.55_7.1 Revision 2, S4.55_7.2 Revision 2, all dated 17 March 2022 & Landscape Plans Job No 20_052, Drawings LP_1.0 & LP_2.0 Revision 2 dated 17 March 2022.

The proposed modifications are discussed in further detail in this submission.

BACKGROUND

An application for consent for *"Alterations and additions to a dwelling house including swimming pool and garage"* was approved by Council by Notice of Determination dated 16 August 2021.

The construction of the alterations and additions to the dwelling under DA 2021/0657 have not commenced.

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PROPOSED MODIFICATIONS

The application involves changes to the form of the approved development, which are detailed in the revised architectural plans prepared by Wyer and Co.

In summary, the proposed modifications include:

- The approved in-ground swimming pool is no longer included in the works.
- A small semi in-ground spa is now proposed to replace the approved swimming pool
- All existing retaining walls and landscaping behind the existing terrace are to be retained and unaltered
- The approved new stairs and retaining wall along the southern boundary are no longer included in the works.
- The existing set of stairs along the southern boundary are to be retained and unaltered.
- A new pergola structure will replace the existing pergola over the BBQ areas at the northern end of the rear terrace.
- A new set of stairs will provide access from the dwelling to the proposed terrace level
- A new masonry wall is to be position in-front of the existing retaining walls at the eastern side of the proposed terrace
- in order to reduce the extent of the excavation and site disturbance, proposed level of the terrace has been increased from RL 29.77 to RL 30.25. The minor increase in height will not result in any unreasonable or excessive overlooking the neighbouring properties and will limit the extent of site works.

The proposed revisions will not otherwise alter the overall height or the general configuration of the proposed works as viewed from the street or from the surrounding neighbouring properties.

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

- Revised architectural plans prepared by Wyer & Co, Job No 20.052 Drawings No's S4.55_1.0 Revision 3, S4.55_5.0, Revision 2 S4.55_5.2 Revision 2, S4.55_7.1 Revision 2, S4.44_7.2 Revision 2, all dated 17 March 2022 & Landscape Plans Job No 20_052, Drawings LP_1.0 & LP_2.0 Revision 2 dated 17 March 2022.
- Geotechnical Investigation prepared by Alliance Geotechnical Group Pty Ltd, Report Reference 12949-GR-1-2 dated 25 March 2022
- Revised Arboricultural Impact Assessment prepared by Hugh The Arborist, dated 1 April 2022
- Revised Stormwater Management Plans prepared by Heinz Consulting Engineers, Drawings Number 22S229 H01- H03 dated 18 March 2022
- Revised Bushfire Risk Assessment prepared by Bush Fire Planning Services dated 29 March 2022

JUSTIFICATION

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

- (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.

Accordingly, for the Council to approve the S4.55 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 within Consent No. DA2021/0657.

The works seek to provide for *“Alterations and additions to a dwelling house including swimming pool and garage”*.

As the proposed modifications to the approved design will maintain the approved overall height, setbacks to side and front and rear boundaries and will present a compatible bulk and scale when viewed from the street or the neighbours, the modified proposal is reasonably considered to be substantially the same development as originally approved.

The revised design does not introduce any significant issues for the neighbouring properties in terms of view loss or privacy.

When viewed from the public domain or from the neighbouring properties, the development will largely 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 a *“Alterations and additions to a dwelling including swimming pool and garage”* in a location and in a form which is consistent with the consent.

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 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 significant or adverse implications for the physical appearance of the approved building and the site’s contribution to the local streetscape.

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.

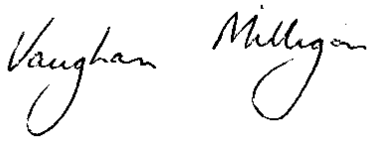
This Court decision also makes clear that the Council has the power to approve the Modification Application.

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 16 August 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