

24 January 2022

The General Manager
Pittwater Council
PO Box 882
MONA VALE NSW 1660

Dear Sir,

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

Development Application No:	DA2020/0148 (as modified)
Date of Determination:	27 April 2020, 2 February 2021 & 5 November 2021
Premises:	Lot 12 DP 1105469 No. 12 Montpelier Place, Manly
Proposed Development:	Alterations and additions to a dwelling house including a swimming pool

On behalf of Mr John & Mrs Christine Kelleher, 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 DA2020/0148 (subsequently modified under Mod2020/0667, determined 2 February 2021 and further amended 5 November 2021).

The application involves a minor change to the boundary wall treatment at the south-western corner of the site in accordance with an agreement with the adjoining western neighbour. In addition, the change the boundary wall will allow for an amendment to the form of the proposed pool fencing and as such, the modification application seeks to delete Condition 19A of the most recent Notice of Determination dated 5 November 2021.

The proposed modifications to the boundary fence works have been detailed in the revised architectural plans prepared by Ilario G. Cortese Architects Pty Ltd, Job No. 1908, Drawings No's DA02 & DA04, Revision C dated 21 January 2021.

The proposal provides for minor modifications to the approved form of the boundary fencing with no other substantial changes to the dwelling under construction.

BACKGROUND

An application for consent for *"Alterations and additions to a dwelling house including a swimming pool"* was approved by Council by Notice of Determination dated 27 April 2020.

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The construction of the alterations and additions to the dwelling has commenced under Construction Certificate CC2020/1312 dated 26 November 2020.

The approval was subsequently modified under MOD2020/0667 dated 2 February 2021 & MOD2021/0638 dated 5 November 2021.

MOD 2021/0638 included a condition of consent to address the required pool fencing works, being:

B. Add Condition 19A. Pool Fencing to read as follows:

19A. Pool Fencing

The proposed pool fencing is to be located inside the western boundary of the site and is to be separate from the western boundary fence.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of a Construction Certificate.

Reason: To minimise the visual impact of the development.

The form of the boundary fencing has been discussed between the affected property owners and an agreement has been reached on the fence design which provides for a height above ground level within 12 Montpelier Place of between 1.2m and 1.8m in height.

As the revised boundary fence design as agreed with the adjacent neighbour will provide for a minimum height of 1.8 m measured internally from the pool area, 19A is no longer considered necessary and its deletion is sought under this application.

PROPOSED MODIFICATIONS

The application seeks to provide for the following amendments:

1. Amend the form of the proposed boundary fence treatment at the south-western corner of the site in accordance with the revised architectural plans prepared by Ilario G. Cortese Architects Pty Ltd, Job No. 1908, Drawings No's DA02 & DA04, Revision C dated 21 January 2021.
2. Delete Condition 19A from the most recent Notice of Determination dated 5 November 2022.

As the proposal will be in accordance with an agreed outcome resolved with the adjoining neighbour and will not have any impact on the other public space or neighbouring properties, re-notification of this application is not considered necessary and is requested the application proceed without the requirement for further re-notification.

The works will not involve any other change to the dwelling and yard areas. Provision for bandicoots to move through the site will be maintained in the new fence design.

The proposal does not require any change to the existing approved BASIX Certificate..

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 DA2020/0148 (subsequently modified under Mod2020/0667 determined 2 February 2021 & MOD 2021/0638 dated 5 November 2021).

The works seek to modify the form of the proposed boundary fencing are generally consistent with the original approval.

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 and with a compatible bulk when viewed from the public domain.

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 house including a swimming pool”* 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 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.

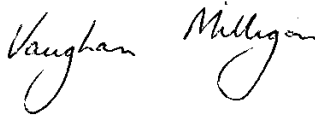
The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as initially lodged and as detailed under the original Notice of Determination dated 27 April 2020 (subsequently modified under Mod2020/0667 determined 2 February 2021 & MOD2021/038 dated 5 November 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