

28 May 2020

The General Manager  
Northern Beaches 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:** DA 2019/0083  
**Date of Determination:** 17 July 2019 (as modified Mod2019/0361 – 31 July 2019)  
**Premises:** Lot 1 DP 76807  
No. 29-33 Pittwater Road, Manly  
**Proposed Development:** Alterations and additions to an existing mixed use development

On behalf of JSALT Pty Ltd, 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 2019/0083 (as modified).

The application proposes alterations to the form of the existing consent, comprising:

1. Approach to the completion of the building works, which will be discussed further within this submission, and
2. Modifications to the design of the alterations and additions to the existing mixed use development. The proposed changes are also addressed further within this submission.

**BACKGROUND**

An application for consent for *“Alterations and additions to an existing mixed use development”* was approved by Council by Notice of Determination dated 17 July 2019, following a Development Determination Panel meeting held on the 10 July 2019.

The Notice of Determination included Conditions which were issued in error and a subsequent application to modify the consent under S4.55(1) of the Environmental Planning & Assessment Act 1979 was lodged and approved under MOD2019/0377, dated 31 July 2019.

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A subsequent Development Application which sought to introduce architectural changes to the approved development and also requested the removal of the requirement under Condition 7 of the Notice of Determination for the payment of Section 94 Contributions for the shortfall in the parking requirement was lodged under DA2020/0142.

This application was subsequently withdrawn on 18 May 2020.

The works that are the subject of the consent have not commenced.

## **PROPOSED MODIFICATION**

This application seeks to include the following modifications to the Notice of Determination and the form of the approved alterations and additions to the existing mixed use development..

Specifically, we propose the amendments:

1. Staging of the approved works in accordance with the following construction schedule:
  - **Stage 1** - Carry out refurbishment works and approved alterations to the existing Ground Floor, First Floor and Second Floor Levels of the existing building in accordance with the approved development consent and approved architectural plans, except as otherwise modified by the revised architectural plans prepared by Alastair Robb - Chartered Architect, Drawings No's, PR-SA1 - Issue D dated May 2020, PR-01 Issue D dated May 2020, PR-02 Issue C dated May 2020, PR-03 Issue D dated May 2020, PR-04 Issue C dated May 2020, PR-05 Issue C dated May 2020, PR-06 Issue A dated May 2020, PR-S1 Issue B dated May 2020.
  - **Stage 2** - Construct the additional Third Floor Level over the existing building levels of the existing building in accordance with the approved development consent and approved architectural plans, except as otherwise modified by the revised architectural plans prepared by Alastair Robb - Chartered Architect, Drawings No's, PR-SA1 - Issue D dated May 2020, PR-01 Issue D dated May 2020, PR-02 Issue C dated May 2020, PR-03 Issue D dated May 2020, PR-04 Issue C dated May 2020, PR-05 Issue C dated May 2020, PR-06 Issue A dated May 2020, PR-S1 Issue B dated May 2020.

As the demand for additional parking will result from the new approved floor area applicable with the construction of the Third Floor Level, it is proposed to defer the payment of the Development Contributions Car Parking until the issue of a Construction Certificate for the Stage 2.

## **Proposed Architectural Changes**

The proposed works will comprise the following changes from the previously approved works:

### **Ground Floor**

- Disabled unisex toilet to be relocated to sit next to the new, single, passenger lift (which has been located closer to the position of the old lift, which will now be removed).
- Passenger lift has door facing east at this level.
- Fire stair to the north of the new passenger lift to be revised.
- Passenger lift in the south east corner of the development has been deleted.
- The awning on Denison Street has been extended west to encompass the new door to the lift lobby.
- The large shop has been extended and a dedicated toilet & sink added under the new stair up to the first floor Gym.
- There is now a platform lift and steps up to the parking exit, which now discharges to Denison Street.
- The electrical room has been relocated to sit behind (west of) the disabled toilet (accessible off the delivery bay).
- The shop area at the front of the property has increased from 128m<sup>2</sup> to 133m<sup>2</sup> and the commercial space has also increased from 105m<sup>2</sup> to 109m<sup>2</sup>.

### **First Floor**

- Passenger lift in the south east corner of the development has been deleted.
- The new passenger lift opens on the south side, directly into the general Gym area.
- Fire stair to the north of the new passenger lift to be revised.
- A small plant room has been provided at first floor level (south west corner).
- The Gross Floor Area (GFA) at this level has reduced slightly from 601m<sup>2</sup> to 594m<sup>2</sup>. This is due to the 'new' stair in the south east corner which provides access directly into the Gym.

### **Second Floor**

- Passenger lift in the south east corner of the development has been deleted – Bedrooms B9 & B10 are now unaffected.
- Bedrooms B3 & B4 are now to have skylights added as these rooms will effectively lose all natural light as a result of the approved development to the south.
- Small cooking appliances added to each bedroom – communal kitchen deleted.
- Bedroom 19 added, with communal laundry maintained and re-planned.
- The new passenger lift opens on the south side, directly into the central hallway.
- Fire stair to the north & west of the new passenger lift to be revised.
- The GFA at this level has increased from 536m<sup>2</sup> to 548m<sup>2</sup>. This is due to the removal of one lift and the more efficient arrangement of the stairs & new lift.

### Third Floor

- Passenger lift in the south east corner of the development has been deleted.
- The new passenger lift is now between Suite 3 & Suite 4.
- There is still no disabled toilet at this level, as there is an accessible uni-sex toilet adjacent to the lift at the ground floor level.
- All of the toilets in the commercial suites now have a shower included (which has made these amenities larger) and the planning of the commercial suites has been revised to accommodate the overall changes.
- The skylights to the bedrooms below are shown (nominal size).

### South Elevation

- This has been revised to show the new 'exit' door towards the front of the building (at roof terrace level).
- The windows which will be impacted by the approved development on No. 27 Pittwater Road have been shown removed / blocked up.
- A note has been added to the elevation in relation to the demolition and re-building to rectify the boundary alignment.

The overall height of the approved development and the general external configuration remains consistent with the approved development originally considered by Council in its determination of DA2019/0083.

### 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:*

- 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 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 which involves proposed architectural changes to the form of the approved development, together with the introduction of a staged approach to the construction schedule, is substantially the same development as that which was approved within Consent DA2020/0083 as modified.

The works seek to provide for the construction of additions and alterations to an existing mixed use development dwelling, which maintain a scale and form which is 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.

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 an existing Mixed Use Development*” 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 not significant and do not inherently alter the nature and form of the approved alterations and additions to the mixed use 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 by virtue of the floor levels and overall ridge level being unchanged, with be generally consistent with 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.

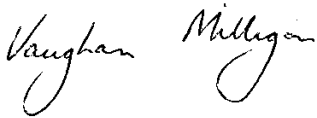
The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as initially lodged and as detailed under the original Notice of Determination dated 17 July 2019, as modified.
- The proposal is “substantially” the same development, as defined by the Environmental Planning & Assessment Act.

Council’s support of the modification to the Staging of the proposed works and 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**