

11 May 2018

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:	DA N0451/17
Date of Determination:	28 February 2018
Premises:	Lot 12 DP 13291 No. 24 Delecta Avenue, Clareville
Proposed Development:	Alterations and additions to a dwelling including new swimming pool

On behalf of Ms Claire Cavanaugh, 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 N0 451/17.

The application will seek to modify the form of the approved alterations and additions and swimming pool.

The modifications are detailed in the revised architectural plans prepared by SketchArc, Project No 1531, Sheets S96-3 – S96 -10 dated 27 April 2018 and which are discussed further in this submission.

A modified Landscape Design has been prepared by Serenescapes, Project no 18404 dated 11 April 2018 to accompany the

The proposal provides for various minor modifications to the approved form of the development, with the general approved external configuration, height and the dwellings' location on the site remaining largely unchanged.

BACKGROUND

An application for consent for "*Alterations and additions to dwelling including new swimming pool*" was approved by Council by Notice of Determination dated 28 February 2018.

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The construction of the alterations and additions to the dwelling has not commenced.

PROPOSED MODIFICATIONS

The proposed revisions to the plans have been detailed in the amended details prepared by SketchArc, Project No 1531, Sheets S96-3 – S96 -10 dated 27 April 2018.

The proposed changes include the following general modifications:

Architectural Modifications

- 1 The pitched roof over the ground floor Bedroom 2 and carport is to be replaced with a flat roof element in lieu of the pitched roof form.
- 2 The internal layout of the first floor level has been reconfigured.
- 3 A Vergola has been added to the western elevation of the first floor level to assist in reducing the impacts of the western sun and to assist in cooling the building.
- 4 The privacy screens to the side elevations of the ground floor western deck have been removed (as directed by Condition B5 of DAN0451/17).
- 5 Solar panels have been included to the roof level.
- 6 The form of the proposed north-eastern facing windows to the first floor level has been modified.
- 7 The posts to the carport have been modified and clad to match the finishes to the dwelling.
- 8 A skylight has been added over the kitchen.
- 9 The south facing window to the kitchen has been deleted, with a south facing highlight window added to the laundry area.

Landscape Modifications

- 10 A revised landscape plan prepared by Serenescapes notes the retention of the *Eucalyptus botryoides*, which was previously noted for removal. With the retention of the significant tree and the limited area for substantial replanting, the modified proposal seeks to delete Condition C2 (G) which required an additional ten trees with a height of 8.5m to be planted within the site.
- 11 The modified proposal seeks to delete Condition B6 which required the paved area between the existing studio and the front boundary to be replaced with soft landscaped area. Due the owner's particular circumstances with a family member with severe and permanent intellectual and physical disability, there is a need to provide for functional and accessible parking for parents and carers to safely assist with parking, entering and existing the vehicle. The modified landscape design seeks to provide a deco-granite finish to the area to provide for all weather and safe vehicle turning and parking for the carers.

- 12 A 1.0m high open vertical batten style fence has been added to the western boundary facing the Pittwater reserve.
13. The modified proposal seeks to amend Condition B20, which it is assumed was intended to address the requirement for the boundary fencing adjacent to the swimming pool. The condition refers to the boundary fence at the “rear” of the property must be a minimum of 1800mm in height.

In our view, the condition is more correctly framed by referring to the northern boundary and where the fence relates to the pool area and we request that Council amend the condition in order to avoid any confusion with a future Construction Certificate application.

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 N0451/17.

The works seek to provide for the construction of additions and alterations to an existing dwelling, which are located within the approved building footprint of 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 and with the simplified roof form will present less 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 including new 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.

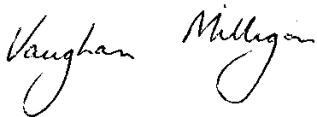
The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as initially lodged and as detailed under the original Notice of Determination dated 28 February 2018.
- 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