

26 June 2023

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 2022/0562
Date of Determination: 14 July 2022
Premises: Lot 129 within DP 6143, No. 18 Austin Avenue,
North Curl Curl
Proposed Development: Alterations and additions to a dwelling house

On behalf of Andrew Kaines & Zoe Byers and Your Beautiful Home, 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 DA2022/0562.

The application involves modifications to the form of the approved development, with the proposed design amendments detailed in the revised architectural plans prepared by Your Beautiful Home, Drawings No's MOD 01 – MOD 702, Revision B 30 May 2023.

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

BACKGROUND

An application for consent for "*Alterations and additions to a dwelling house*" was approved by Council by Notice of Determination dated 14 July 2022.

Construction Certificate CC2023/0255 has recently been issued with a Notice of Commencement submitted to Council.

PROPOSED MODIFICATIONS

The application involves changes to the form of the approved development the proposed design revisions are detailed within the amended plans prepared by Your Beautiful Home and comprise

...1/4

the following changes:

Lower Ground and Ground Floor

- New stair layout to new entrance terrace;
- New bin storage in front of altered planter box

First floor

- 2 new highlight windows to western elevation of living room
- 2 new privacy screens to eastern and western elevations of the covered southern balcony (see discussion below);
- New support column to the south-eastern corner of the southern
- Infill existing window on west elevation

General Modifications

- Modifications to external finishes and materials – see Sheet MOD 04

The proposed design modifications maintain the approved roof form and ridge heights, together with the building footprint and general landscaped area being largely unchanged.

The modifications to the southern terrace at the first floor level to include privacy screens for a portion of the width of the balcony allow for privacy to be provided for the building occupants, together with oblique views for properties to the west of the site being maintained through and past the balcony towards the south-east.

The existing first floor southern balcony has been provided with privacy screens, with the intention to replicate these screens in the proposed design to achieve a similar level of privacy protection for the new balcony. Part screening of the southern facing balconies for the properties on the northern side of Austin Avenue is not uncommon and the proposed design represents an appropriate mix of providing for suitable privacy and amenity to the balcony which is directly off the principal living areas of the dwelling, and respecting view opportunities for surrounding properties.

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. It 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. DA2022/0562.

The works seek to provide for “*Additions and alterations to a dwelling house*”.

The proposal will continue to achieve reasonable levels of privacy and amenity for the neighbouring properties as was contemplated by Council in its determination and 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 *“Additions and alterations to a dwelling house”* 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 new 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 14 July 2022.
- 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