

4 March 2024

The General Manager
Northern Beaches Council
PO Box 82
MANLY NSW 1655

Dear Sir/Madam,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT,
SECTION 4.56 OF THE ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

Development Application No:	DA 2018/0628
Date of Determination:	3 December 2019 (Land & Environment Court Judgment)
Premises:	Lot 34 DP 8075 No. 8 Bower Street, Manly
Proposed Development:	Alterations and additions to an existing dwelling house and a swimming pool

On behalf of Mr David Duckworth & SketchArc Architects, this submission has been prepared to assist Council in the consideration of an application pursuant to Section 4.56 of the Environmental Planning & Assessment Act 1979 to alter the development as approved by Development Consent DA2018/0628.

BACKGROUND

The subject development was approved on 3 December 2019 in accordance with the Land and Environment Court Judgement dated 3 December 2019.

The approved development provided for the construction of alterations and additions to an existing dwelling house including a swimming pool.

The Development Consent remains valid until 3 December 2024 however it would also benefit from the COVID incentives under section 4.53 of the Environmental Planning and Assessment Act 1979 and having been issued prior to the amendment of the prescribed period within S4.53, the consent would benefit from additional two-year extension to the date on the original expiry, expiring 3 December 2026.

The works which of the subject of the original consent have not commenced.

PROPOSED MODIFICATION

This submission under S4.56 of the EP&A Act seeks to modify the design of the dwelling and the swimming pool, and schedule of the proposed obligations is provided over:

....1/5

The revised architectural plans prepared by SketchArc, Project No 1617, Sheets No's. S4.56-1 – S4.56 – 26, dated 20 February 2024 and the revised Landscape plans prepared by Landart, Sheets DA-001 – DA – 301, Revision A dated 31 January 2024 note the following changes to the approved development :

- Relocation and reorientation of the swimming pool to be parallel to the south-western boundary of the site
- Relocation of the proposed pool cabana area to present as an open style structure positioned at the North Eastern end of the proposed swimming pool.
- Inclusion of a small storage area adjacent to the proposed pool cabana
- The use of the pre-existing cabana area in the approved Pool House Floor Level will be amended to provide for a new rumpus room with wet bar facilities.
- The landscape treatment of the yard will be amended to accommodate the relocated pool position and a revised Landscape Plan has been prepared by Landart Landscapes Pty Ltd

The general floor plan layout of the dwelling is otherwise unaltered and the overall height position of the dwelling will be unchanged. The streetscape presentation of the dwelling and the presentation to the neighbouring properties will be largely unchanged.

The modified proposal is accompanied by an Arboricultural Review prepared by Peake Arboriculture, dated 19 February 2024 which notes that two trees will be required to be removed however they are considered to be exempt species under Council's Northern Beaches Council Exempt Tree species list.

The proposed planting schedule also includes an additional eight mature tree species to be provided.

As noted below, the proposal will not see any change to the approved floor space ratio of the development. As a result of changes to the layout and paved areas, the total open space and landscaped area will see minor increases and represent improvements above the approved indices.

The modified proposal will present the following development indices:

Site Area	973.77m²
Permissible FSR	0.45:1 or 437.85m ²
Approved FSR	0.448:1 or 436.85m ²
Modified FSR	0.448:1 or 436.85m ² (unchanged)
Required Total Open Space	535.57m ² or 55%
Approved Total Open Space Area	632.80m ² or 64.98%
Proposed Total Open Space	694.39m ² or 71.31%
Required Landscaped Area	187.45m ² or 35% of TOS
Approved Landscaped Area	417.81m ² or 78.01%
Proposed Landscaped Area	424.24m ² or 79.21%

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

- Revised Architectural Plans prepared by SketchArc Architects, Project No 1617, S4.56-1 –

S4.56 – 26, dated 20 February 2024

- Revised Landscape Plans prepared by Landart Landscapes, Project No 23013, Sheets No. DA-001 & DA-301 dated 31 January 2024
- Revised Stormwater Management Plans prepared by NB Consulting Engineers, Job Number 171256, dated 16 February 2024
- Arboricultural Review prepared by Peake Arboriculture, dated 19 February 2024 Revised BASIX Certificate, Reference No. A312560_05, dated 1 February 2024.
- Terrestrial Biodiversity Report prepared by GIS Environmental Consultants, dated March 2024
- Revised Geotechnical Comments prepared by White Geotechnical Group, Report Reference J1676B dated 2 February 2024
- Updated Bushfire Assessment Report prepared by Building Code and Bushfire Hazard Solutions, Report Reference 240593 dated 19 February 2024

JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under S4.56 and notes:

(1) A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court and subject to and in accordance with 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 the consent was originally granted and before that consent as originally granted was modified (if at all), and*
- (b) 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*
- (c) it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the object or other person, and*
- (c) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.*

Accordingly, for the Council to approve the s4.56 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.

The works seek to provide for minor alterations to the form of the approved building to provide for minor architectural changes and reuse of the lower floor level of the dwelling, together with a reorientation of the swimming pool and the inclusion of an open cabana and a revised landscape treatment to the rear yard.

The approved height of the additions and alterations to the dwelling, and general bulk and form of the dwelling as viewed from the street and from the adjoining will be otherwise unchanged and will be consistent with the height and location of the approved design initially considered within DA2018/0628.

When viewed from the public domain or from the neighbouring properties, the building will 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 the construction of alterations and additions to an existing dwelling house and a swimming pool in a form which is generally consistent with the original consent.

In my view, this application is fundamentally 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 S4.56 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 approved residential 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 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 3 December 2019.
- 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, appearing to read 'Vaughan Milligan'. The signature is written in a cursive, flowing style.

VAUGHAN MILLIGAN