

24 March 2022

Northern Beaches Council
PO Box 82
MANLY, NSW

**REQUEST FOR SECTION 4.55 (1a) MODIFICATION OF THE CONSENT (DA2019/0152) –
DEMOLITION AND CONSTRUCTION OF A DWELLING HOUSE INCLUDING SWIMMING
POOL AND REFURBISHMENT OF AN EXISTING BOATSHED**

78 HUDSON PARADE, CLAREVILLE

STATEMENT OF MODIFICATION - STATEMENT OF ENVIRONMENTAL EFFECTS

1. INTRODUCTION

On the 23 August 2019 Council approved the construction of a new dwelling with swimming pool with associated landscaping and boat shed refurbishment. The application was approved under Council's delegated authority.

There have been three section 4.55 (1a) modification applications (MOD2020/0337; MOD2020/0343; MOD2021/0421) that have been approved since the original consent which relating to minor amendment with little to no environmental impacts. The proposed modification application is considered to be minor also with the majority of the works proposed being internal.

2. APPROVED CONSENT AND DETAILS OF MODIFICATIONS PROPOSED

The original consent to be modified approved a new dwelling with swimming pool and landscaping. The existing boat shed was retained and refurbished. The extent of the proposed modifications are as follows:

- First floor shower and WC deleted and replaced with storage room
- Addition of an internal lift connection between each level
- Relocation of laundry door and addition of partition walls to laundry
- Addition of sliding door between kitchen and stairs
- Addition of nib wall in lower ground floor excise room
- Length of wall extended in first floor sung room extended and additional door in corridor
- Delete step into Master robe and ensuite
- Modifications to the landscape plan
- Delete skylight from master ensuite

3. APPLICATION FOR MODIFICATION

SECTION 4.55(1a) ENVIRONMENTAL PLANNING & ASSESSMENT ACT 1979

The application is made pursuant to Section 4.55 (1a). Section 4.55(1a) of the Act provides:

(1A) Modifications involving minimal environmental impact 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 proposed modification is of minimal environmental impact, and*
- (b) 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*
- (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 any period prescribed by the regulations or provided by the development control plan, as the case may be.*

In this instance it is not considered the proposed modifications do not substantially alter or change the development as consented. The land use outcome remains within the ambit of the approved land use as referred to within the notice of determination.

A consideration of whether the development is substantially the same development has been the subject of numerous decisions by the Land & Environment Court and by the NSW Court of Appeal in matters involving applications made pursuant to the former S.96 of the Act. *Sydney City Council v Ilenace Pty Ltd (1984) 3 NSWLR 414* drew a distinction between matters of substance compared to matters of detail. In *Moto Projects (No.2) Pty Ltd v North Sydney Council (1999) 106 LGERA 298* Bignold J referred to a requirement for the modified development to be substantially the same as the originally approved development and that the requisite finding of fact to require a comparison of the developments. However, Bignold noted the result of the comparison must be a finding that the modified development is ‘essentially or materially’ the same as the (currently) approved development. Bignold noted;

“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 sterile vacuum. Rather, the

comparison involves an appreciation, qualitative, as well as quantitative, of the development being compared in their proper contexts (including the circumstances in which the development consent was granted)."

In *Basemount Pty Ltd & Or v Baulkam Hills Shire Council NSWLEC 95* Cowdroy J referred to the finding of Talbot J in *Andari – Diakanastasi v Rockdale City Council* and to a requirement that in totality the two sets of plans should include common elements and not be in contrast to each other. In *North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468; 97 LGRERA 443* Mason P noted:

"Parliament has therefore made it plain that consent is not set in concrete. It has chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity. The consent authority can withhold its approval for unsuitable applications even if the threshold of subs (1) is passed.

I agree with Bignold J in Houlton v Woollahra Municipal Council (1997) 95 LGRERA 201 who (at 203) described the power conferred by s.102 as beneficial and facultative. The risk of abuse is circumscribed by a number of factors. Paragraphs (a), (b) and (c) of subs (1) provide narrow gateways through which those who invoke the power must first proceed. Subsection (1A) and subs (2) ensure that proper notice is given to persons having a proper interest in the modified development. And there is nothing to stop public consultation by a Council if it thinks that this would aid it in its decision making referable to modification. Finally, subs (3A), coupled with the consent authorities discretion to withhold consent, tend to ensure that modifications will not be enterprised, nor taken in hand, unadvisedly, lightly or wantonly. Naturally some modifications will be controversial, but decision making under this Act is no stranger to controversy."

Senior Commission Moore in *Jaques Ave Bondi Pty Ltd v Waverly Council (No.2) (2004) NSWLEC 101* relied upon *Moto Projects* in the determination, involving an application to increase the number of units in this development by 5 to a total of 79. Moore concluded the degree of change did not result in the a development which was not substantially the same, despite the fact that in that case the changes included an overall increase in height of the building. Moore relied upon a quantitative and qualitative assessment of the changes as determined by the Moto test.

In my opinion a quantitative and qualitative assessment of the application is that it remains substantially the same. The approved land use is not altered as a consequence of the changes as proposed. The works relate to minor alterations and additions internally to the dwelling. The changes proposed to the landscape plan are minor and do not substantially alter the landscape plan as approved.

It is submitted the Council can be satisfied that the proposal to changes remain substantially the same and within the ambit of the consent as issued. The modifications proposed to the dwelling results in a negligible environmental impact.

4.0 MATTERS FOR CONSIDERATION PURSUANT TO S4.15 OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 AS AMENDED

The following matters are to be taken into consideration when assessing an application pursuant to S4.15 of the Environmental Planning and Assessment Act 1979 (as amended):

The provisions of any environmental planning instrument, proposed instrument that has been the subject of public consultation under this Act and any development control plan.

4.1 PITTWATER LOCAL ENVIRONMENTAL PLAN 2014

Land Use and Zoning

The site is zoned C4 Environmental Living. This application relates to a minor amendments to the approved new dwelling. Dwelling houses are permissible with consent in the zone.

Height of Buildings

The works to the dwelling are internal and will not alter the existing building envelope as approved.

Terristrial Biodiversity

The proposed amendments to the landscape plan will not impact on the biodiversity value of the local area. The landscape plan is substantially the same as approved with minor changes to external access stairs. It is considered that development is still sensitive to the biodiversity of the local area.

Geotechnical Hazards

The site is mapped within a geotechnical hazard area. The works to the dwelling are within the existing footprint and envelope of the dwelling and does not raise any geotechnical hazard concerns. The landscape changes also do not relate to any structural retaining walls and predominately relate to establish pathways and external access through the site.

Limited Development on Foreshore Area

No works are proposed within the foreshore building line.

4.2 PITTWATER DEVELOPMENT CONTROL PLAN 2014

Built Form Controls

The dwelling setbacks and envelope will be retained as approved. Proposed modification to the dwelling sit entirely within the approved footprint and envelope of the dwelling. No amenity impacts are associated with the modifications.

Landscaped Area – Environmentally Sensitive

The landscape area will remain as approved with a total area of 60.4%. This represents 54.5% (743m²) of soft landscaping and 6% impervious areas used for outdoor recreation (83m²). The development will remain compliant with the landscaped area control as approved.

5.0 CONCLUSION

Pursuant to section S.4.55(2) of the Environmental Planning and Assessment Act 1979 the consent authority can be satisfied that the modified consent as sought by this submission is substantially the same development as referred to in the original application. For the reasons outlined above we consider the amendments to the details of the consent are reasonable.

Yours sincerely
William Fleming
Planner
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