

8 March 2021

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**

<b>Development Application No:</b>	<b>DA 2019/0154</b>
<b>Date of Determination:</b>	<b>28 July 2020</b>
<b>Premises:</b>	<b>Lot 1 DP 373531</b>
	<b>No. 1955 Pittwater Road, Bayview</b>
<b>Proposed Development:</b>	<b>Demolition works and construction of a seniors housing development</b>

On behalf of Mr Ian and Mrs Jan Westaway, 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 DA2019/0154.

As the development involves a determination that was made by the Land and Environment Court, this application is made under Section 4.56 of the Environment Planning and Assessment Act 1979.

**BACKGROUND**

The subject development was approved by way of a s34 agreement under Land and Environment Court Proceedings 2019/00199786, dated 28 July 2020.

The approved development provided for the construction of 4 residential units and associated car parking.

A Stage 1 Construction Certificate (CC2021/0122) has been issued for the site excavation and car park level construction associated retaining walls and the works have commenced.

The proposed amendments to the design of the development involve revisions to the location of the proposed piling and retaining walls and will be discussed further within this submission.

The works that are the subject of this Modification Application will not involve any changes to the building's position on site or overall height and scale or the form of the building as it was intended to appear above the existing ground level.

## **PROPOSED MODIFICATION**

This submission under S4.56 of the EP&A Act seeks to amend the location and method of piling and shoring and the reinforced concrete block work retaining walls associated with the excavated car park levels.

The original design of the development was resolved with the Consultant Structural Engineer – Taylor Consulting, with the proposed piling and retaining wall locations identified within the approved architectural plans, on the expectation that the excavation would encounter substantial sandstone bedrock.

As discussed in the structural report dated 8 March 2021, Taylor Consulting have been provided with further detailed bore-logs by the Geotechnical Engineer and have revised their position in relation to the anticipated foundation material.

Taylor Consulting have advised that the ground bearing capacity is less than the original assumption and have recommended that all footings, including under the eastern façade be carried down directly to the excavated base level.

Further, Taylor consulting note in their submission:

### ***Basement Wall Restraint***

*Due to the necessity of extending down the founding level of the perimeter basement wall, it is recommended that the associated mezzanine level slab also be extended across to the basement perimeter as slab is required to restrain the basement wall at approximately mid span.*

*Please note that both rock anchors and temporary steel framing configurations were considered as alternative bracing methods however due to the close proximity to the side boundary and the potential for creating an unnecessarily unsafe work area, both of these options were subsequently discounted.*

As a result of the updated advice from Taylor Consulting the architectural layout has been revised as detailed in the amended details prepared by Leech Harmon Architects, Sheets SA-01, DA-02 – DA10, Rev B, dated 18 February 2021 and comprise:

### **Carpark Floor Plan**

- Carpark east wall relocated to align with brick walls over.

### **Lower Ground Floor Plan**

- Carpark bracing slab over added.
- Garage fire exit door relocated

The proposed modifications are minor in nature in that other than the relocation of the garage fire exit door, the external form of the building as it appears above the existing and finished ground levels is unchanged from the approved development, with the setbacks, approved residential floor and roof levels and the overall height and visual bulk unchanged.

The proposed changes are contained wholly within the car park and mezzanine level of the building and other than the positioning of the fire door adjacent to the main driveway entry, the changes will not be visible from any external examination of the building.

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

- Revised architectural plans prepared by Leech Harmon Architects, Sheets SA-01, DA-02 – DA10, Rev B, dated 18 February 2021
- Revised Structural Report prepared by Taylor Consulting dated 8 March 2021
- Revised Piling/Shoring plan prepared by Soilsrock Geotechnical, Project No SRE/714/BV/20 Drawing No S004 dated 27 January 2021
- Revised Geotechnical Review prepared by Ascent Geotechnical Review Letter, Report AG 19015D, dated 1 March 2021.

## 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 dress 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 excavated car park and mezzanine levels as a result of the structural requirements to suitably support the foundation area retaining walls, with all works contained wholly within the building footprint. The approved height and setbacks, together with the approved bulk and form of the seniors housing development will be otherwise unchanged and will be consistent with the height and location of the approved design initially considered within DA2019/0154.

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 a seniors housing development 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 seniors housing 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 28 July 2020.
- 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**