

23 November 2020

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:	DA2020/0148
Date of Determination:	27 April 2020
Premises:	Lot 12 DP 1105469 No. 12 Montpelier Place, Manly
Proposed Development:	Alterations and additions to a dwelling house including a swimming pool

On behalf of Mr John & Mrs Christine Kelleher, 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 DA2020/0148.

The application involves a change to the form of the approved works, as detailed in the revised architectural plans prepared by Ilario G. Cortese Architects Pty Ltd, Job No. 1908 Plan No. – DA EX01, DA EX02, DA02 - DA05, dated 22 September 2020.

Other than the various minor modifications to the approved form of the development, the general approved external configuration, height and the dwellings' location on the site remains largely unchanged.

BACKGROUND

An application for consent for *"Alterations and additions to a dwelling house including a swimming pool"* was approved by Council by Notice of Determination dated 27 April 2020.

The construction of the alterations and additions to the dwelling has commenced under Construction Certificate CC2020/1312 dated 26 November 2020, with the works which are the subject of these modifications still to be commenced.

.....1/5

PROPOSED MODIFICATIONS

The application involves a change to the form of the approved additions, with various alterations to each level of the dwelling.

The overall bulk and scale and the floor levels and ridge levels of the approved dwelling remains unchanged, with the works being largely internal and/or cosmetic changes to the building which do not substantially alter its relationship with its neighbouring properties, side and rear boundaries or the street network.

The proposed modifications are detailed in the revised architectural plans prepared by Ilario G. Cortese Architects Pty Ltd, Job No. 1908 Plan No. – DA EX01, DA EX02, DA02 - DA05 & Pool Plan, all dated 12 November 2020.

Specifically, the proposed modifications involve the following changes:

BASEMENT

- Removal of rainwater tanks to allow for the addition of a wine cellar
- Addition of walls to make a rainwater storage for a portion of the redundant swimming pool

GROUND FLOOR

- Addition of planters to the northern balcony with glazed balustrading provided to the inside face of the planter

FIRST FLOOR

- Inclusion of a new slender northern balcony in front of bedroom with glass balustrading (no planters)
- Infill to the existing void immediately adjacent to the eastern wall of the bedroom and void area adjoining dressing room to provide for a minor increase in the floor space. New fixed east and north facing windows are provided
- Inclusion of a highlight window with sunshade to the western side of the access corridor to the main bedroom suite
- Reduction in size of the window to the master ensuite

EXTERNAL CHANGES

- Removal of the BBQ /masonry element in the S/W corner, with the addition of new columns to support the first floor
- Relocation of the BBQ next to the breakfast area
- Addition of a pool safety fence around the perimeter of the pool terrace
- Enlargement of the west facing windows of the Study
- Alterations to the existing roof to provide for new roof sheeting where voids are infilled at the first floor level

Other than the various minor modifications to the approved form of the development, the general approved external configuration, height and the dwellings' location on the site remaining largely unchanged.

The approved development presented a floor area of 338.76m² or an FSR of 0.41:1, which complies with Council's maximum FSR control for this site of 0.45:1.

The minor changes to fill the existing voids at the first floor level introduce a new floor area of approximately 7m², which is largely within the enclosing walls of the existing building form and therefore will not see any resulting increase in the buildings bulk or scale.

The proposed building will present a gross floor area of approximately 313m², or a FSR of 0.415:1 which remains compliant with Council's maximum control.

The proposal is also supported by a revised BASIX Certificate – No. A368962_03, dated 10 November 2020.

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 DA2020/0148.

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 a compatible 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 house including a 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.

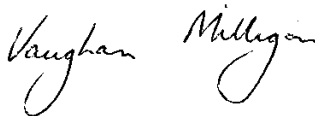
The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as initially lodged and as detailed under the original Notice of Determination dated 27 April 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