

1 September 2020

The General Manager
Pittwater Council
PO Box 882
MONA VALE NSW 1660

Dear Sir,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT
SECTION 4.55 (1) ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

Development Application No:	DA2019/0749
Date of Determination:	2 October 2019
Premises:	Lot 28 DP 233779 No. 4 Yachtsman's Paradise, Newport
Proposed Development:	Alterations and additions to a dwelling house including a swimming pool

On behalf of Mr Timothy & Mrs Kerrie Fussell, this submission has been prepared to assist Council in the consideration of an application pursuant to Section 4.55(1) of the Environmental Planning & Assessment Act 1979 to alter the development as approved by Development Consent DA2019/0749.

The application involves a change to the Notice of Determination of DA 2019/0749 to correct an error within the staging of the consent requirements.

In particular, condition **No 11 Post – Construction Dilapidation Survey** which is contained within Council's general heading of **Conditions to be Satisfied Prior to the Issue of the Construction Certificate** and which requires a survey of the completed works, is incorrectly positioned within the consent as it is clearly intended to apply to the works after completion.

This application seeks to reposition condition 11 to be included within the group under the general heading of **Conditions which must be Complied with Prior to the Issue of the Occupation Certificate** and which would then subsequently require the provision of a survey upon the completion of the works.

The application does not propose any change to the approved external configuration and location on the site for the approved works.

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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 2 October 2019.

The construction of the works has not commenced.

PROPOSED MODIFICATIONS

The application seeks to modify the format of the conditions included within the Notice of Determination of DA2019/0749.

In particular, condition **No 11 Post – Construction Dilapidation Survey** which is contained within Council’s general heading of **Conditions to be Satisfied Prior to the Issue of the Construction Certificate** and which is incorrectly positioned within the structure of the consent and is to be repositioned to be included within the group under the general heading of **Conditions which must be Complied with Prior to the Issue of the Occupation Certificate**.

The application does not propose any change to the approved external configuration and location on the site for the approved works.

JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under Section 4.55(1) which notes:

*(1) **Modifications involving minor error, misdescription or miscalculation** 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 a development consent granted by it to correct a minor error, misdescription or miscalculation. Subsections (1A), (2), (3), (5) and (6) and Part 8 do not apply to such a modification.*

Note—

Section 380AA of the [Mining Act 1992](#) provides that an application for modification of development consent to mine for coal can only be made by or with the consent of the holder of an authority under that Act in respect of coal and the land concerned.

Condition **No 11 Post – Construction Dilapidation Survey** has been included within Council’s general heading of **Conditions to be Satisfied Prior to the Issue of the Construction Certificate** and which requires a survey of the completed works, is incorrectly positioned within the consent as it is clearly intended to apply to the works after completion.

As issued, the location of Condition number 11 within the format of the consent is considered to be an error.

This application seeks to reposition condition 11 to be included within the group under the general heading of Conditions which must **be Complied with Prior to the Issue of the Occupation Certificate** and which would then subsequently require a survey of the works after their completion.

The application does not propose any change to the approved external configuration and location on the site for the approved works.

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 DA2019/0749.

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 consistent with the original approval.

This application simply seeks to amend the format of the conditions of the consent to correct an error in the placement of Condition 11 within the group requiring matters to be satisfied prior to the issue of the Construction Certificate.

Given the requirements of the Condition 1 it is clear that it is more correctly located within the group headed ***Conditions which must be Complied with Prior to the Issue of the Occupation Certificate.***

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 will remain consistent with the original approval.

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 correction of the error resulting in the condition being incorrectly placed within the consent will not 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 2 October 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, reading 'Vaughan Milligan'. The signature is written in a cursive, flowing style.

VAUGHAN MILLIGAN