Further objections in respect to the Development Application for 23 Hay Street Collaroy (DA2021/1824)

Submitted on behalf of Simon and Emilie Burns of 25 Hay Street, Collaroy.

Overview

The Council's Assessment Report is legally flawed and deficient for 6 different reasons, each of which should be considered further.

From a threshold perspective, it is clear that conditions were imposed originally by the Development Determination Panel in 2022 for a reason (i.e. Coorey), and the Modification Assessment Report recommends removal of those conditions without at all engaging with the reasons for the stipulation of those conditions in the first place. This is a public policy mistake, and contrary to law, and is not permitted by s4.55(2) or (3).

Key issues

1. **Unilateral variation of a consent other than on request by applicant not permitted.** The Modification Application does not seek to remove any of Conditions Number 15, 26 or 33 – each of which were expressly imposed by the Development Determination Panel itself. In fact, the Modification Application expressly states (as extracted below) that ***no conditions need to be removed or altered***.

   > The proposed modifications do not necessitate deletions oo amendments to Conditions Number 15, 26 and 33 of the existing conditions of Consent.

   S4.55(2) does not permit the consent authority to unilaterally modify the development consent, but only "*on application being made by the applicant*", which then links to the requirements for public exhibition and notification.

   Consequently, the consent authority has no legal basis to remove conditions where the removal of those conditions is not the subject of the Modification Application. In addition to being outside council's power and in breach of s4.55, to do so undermines the integrity of the whole process. This material change was not notified as part of the modification application, it was not subject to public exhibition or participation or objections and so cannot proceed.

2. **Reasons for conditions not considered as per 4.55(3).** If the consent authority did have a legal basis to remove the Conditions Number 15, 26 or 33, then in accordance with clause 4.55(3) the "*consent authority must also take into consideration the reasons given*" for the consent that is sought to be modified.

   Each of Conditions 15, 26, and 33 were expressly included by the original consent authority to ensure that the basis on which the consent was granted remained valid, and the development remained an addition / alteration consistent with the principles in Coorey.

   The recommendations by Council in respect of the Modification Application do not at all address these express reasons and so is deficient and in breach of 4.55(3). Consequently, any purported approval under s4.55(2) is also deficient unless the consent authority first actually engages with the express reasons for the Conditions 15, 26 and 33 before proposing removing them. To do otherwise undermines the whole basis of the original consent, which was expressly granted "***subject to conditions***".

3. **Contrary to Council's view – Conditions Number 15, 26 and 33 are enforceable.** There is no basis or rationale for the Council's statement in the Modification Assessment Report that the conditions are "not necessary or enforceable". Indeed, this statement is in fact incorrect. The conditions are in fact enforceable. If they were enforced, then a new Development Application would be required – as per the express words of the conditions stipulated by the Development Determination Panel on 22 June 2022. We urge the Council to enforce the conditions, not just because it is the law, as per the case law stated below, but because from a public policy perspective, without enforcing conditions, you may as well never impose them in the first place. Indeed, council has no power to retrospectively remove conditions where they have already been breached – see *Buyozo at [2021] NSWCA 177at 39* re inability to approve *"demolition of a building that has already been demolished".*

4. **Failure to consider our second objection.** We lodged two (2) objections. The second of these objections dated 16.09.2024 (just after the applicant modified their Modification Application) is not referred to in the Council's Assessment Report. For example, there is zero consideration of any of the case law nor issues raised in that objection. This is required under s4.55(2)(d) as a pre-condition to making any assessment.

5. **Failure to properly consider case law regarding "substantially the same development".** It is odd, and concerning, that the Council appear to be heavily biased and one sided in their reference in the Modification Assessment Report to case law solely on the applicant's view of case law – in no way engaging with the long line of leading cases which are analogous to the current case with respect to excessive unauthorised demolition. This one sided analysis raises questions.

   For example, there is no mention of ***Taylor v Mosman Municipal Council [2007] NSWLEC 86*** (23 February 2007) (Taylor). In rejecting the modification for approval of additional demolition the court in Taylor stated:

   "*I am still not satisfied that the development is substantially the same development in that the modification application transforms the approved development for 'alterations and additions' to one that could only be described as the erection of a new dwelling house. As such the ... modification application does not pass the threshold test of being 'substantially the same development" at [22].* ***This is directly relevant – but not mentioned by council.***

   In ***Thomas v Pittwater Council [2003] NSWLEC 19*** (13 February 2003) rejecting modification application for additional demolition the court found: *"What is now proposed cannot be said to be alterations and additions to an existing dwelling house. Apart from the two sections of external walls which presently remain, the whole of the existing dwelling house has been demolished. There is almost nothing left to be altered or added to. The development as proposed to be modified amounts to a new dwelling which would incorporate token elements of the existing external walls. As I previously noted, the original development consent was for alterations and additions to an existing dwelling house. The development as proposed to be modified could not be so described [and so is not substantially the same development]." [Emphasis added].* ***Again – directly relevant, but not considered in the Council report.***

   As per Thomas: "The Court therefore is without power to approve the changes under the ...modification application."

   These cases – and not Ganley (where the extent of demolition was immaterial to the original consent) are analogous and act as valid and binding precedent for the current case. As stated in our second objection paper, the legal test, properly formulated, taking into account these leading cases and the more recent cases is as follows:

   1. **There must be a qualitative assessment of the extent of demolition.** The extent of demolition in 23 Hay Street is analogous to that in Thomas, Taylor and City Plan, and not Stavides, Xu nor Ganley. The former, not the latter are the precedent. This examination has not been undertaken in the Assessment report.

   2. **The development will not be "substantially the same" where demolition is extensive and the extent of demolition was a fundamental consideration in the original application** (as per Thomas, Taylor, City Plan, Stravides, Xu and Ganley). It is self-evident that the extent of demolition and the need to retain existing features was a fundamental consideration in the original application and original development consent for 23 Hay Street. It was an express condition (i.e. Numbers 15, 26 and 33), and the subject of multiple discussions, including with the panel.

6. **Flawed logic in the Modification Assessment Report.** The Council's Modification Assessment Report, in response to our first objection is logically and legally flawed as it quotes on multiple occasions from the original report and the minutes from the 22 June 2022 Development Determination Panel, the reasons for the grant of consent as basis to approve the modification. In those quotes, on both occasions, the reasons and statements are expressly "**subject to conditions**". So logically, where those conditions are removed (as is proposed by Council) those statements or recommendations are no longer valid basis on which to move forward – especially given our statements in item 1 and 2 above with respect to the failure to consider the reasons for those conditions in the first place, and the fact that the assessment was based on a classification as an addition / alteration – which is not the case anymore – it is something different.