

10 August 2021

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**

<b>Development Application No:</b>	<b>DA2020/0148 (as modified)</b>
<b>Date of Determination:</b>	<b>27 April 2020 &amp; 2 February 2021</b>
<b>Premises:</b>	<b>Lot 12 DP 1105469</b>
	<b>No. 12 Montpelier Place, Manly</b>
<b>Proposed Development:</b>	<b>Alterations and additions to a dwelling house including a swimming pool</b>

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 (subsequently modified under Mod2020/0667, determined 2 February 2021).

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, Drawings No's DA02 – DA05, Revision B dated 10 August 2021.

The proposal provides for minor modifications to the approved form of the dwelling, with the approved external configuration, height and the dwellings' location on the site remaining 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.

The approval was subsequently modified under MOD2020/0667 dated 2 February 2021. the solicitor

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## **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 Job No. 1908, Drawings No's DA02 – DA05, Revision B dated 10 August 2021

Specifically, the proposed modifications involve the following changes:

### **BASEMENT**

- Internal portholes added
- Rainwater tanks moved from beneath the redundant pool into the dwelling footprint

### **GROUND FLOOR**

- Internal reconfiguration of the kitchen walls and amendment to the shape of the skylight over the kitchen entry
- Pool area retaining walls amended
- Games room door change to sliding configuration
- Coat code cupboard added to the entry

### **FIRST FLOOR**

- Spa pool added to the western terrace with glass balustrading provided
- Sill height to the east facing window to Bedroom 1 raised by 200mm, with the external louvres removed. A new horizontal awning is provided over the window.
- AC duct removed to the hallway removed
- Door location to Bedroom 2 repositioned
- Sill height to the south facing window to the ensuite lowered by 300 mm.
- Redundant louvres removed with new perpendicular or privacy screen added to the south eastern corner of the dwelling.

### **EXTERNAL CHANGES**

- New and existing sun shade canopies to be detailed as aluminium patterns
- Weathertex cladding changed to painted Scyon grooved panels
- Boundary fences or retaining walls identified in the plan and construction changed to aluminium and palisade fencing where shown

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 proposal is also supported by a revised BASIX Certificate – No. A368962\_04, dated 9 August 2021.

## 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 (subsequently modified under Mod2020/0667 determined 2 February 2021)..

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.

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## 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.

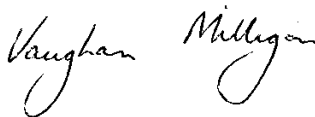
The proposed modification is justified on the basis that:

- 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 (subsequently modified under Mod2020/0667 determined 2 February 2021).
- 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**