

8 December 2017

The General Manager
Northern Beaches Council
PO Box 882
MONA VALE NSW 1660

Dear Sir/Madam,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT,
SECTION 96 (2) ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

Development Application No: DA NO 115/16
Date of Determination: 20 June 2016

Premises: Lot 10 within DP 12435, No 25 Kevin Ave, Avalon Beach
Proposed Development: Construction of a secondary dwelling

On behalf of Mr and Mrs Hancock, this submission has been prepared to assist Council in the consideration of an application pursuant to Section 96(2) of the Environmental Planning & Assessment Act 1979 to alter the development as approved by development consent DA NO 115/16, determined 20 June 2016.

The application will seek various minor modifications to the approved form of the proposed secondary dwelling, which are detailed within the revised architectural plans and supporting information.

BACKGROUND

An application for consent for construction of a secondary dwelling was approved by Council by Notice of Determination dated 20 June 2016.

The approval was subsequently modified to amend the form of the northern dwelling, under Application Number N0115/16, which was determined 20 June 2016.

It is noted from the file history that prior to the final determination of the initial application, Council sought an increased front setback to a minimum of 9500mm, together with the deletion of a large covered front deck.

The revised proposal maintains the 9500mm setback with a lower overall roof height through the inclusion of skillion roof profile and seeks to include a smaller, uncovered north facing deck.

The works that are the subject of the consent have not commenced.

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PROPOSED MODIFICATION

This submission under S96(2) of the EP& A Act seeks minor modifications to the form of the approved secondary dwelling: -

- Revised roof form to provide for a low pitch skillion roof form with a maximum overall ridge level of RL 26.59. The approved maximum ridge level was RL 26.67.
- Inclusion of W9 to north elevation. The new window will be provided as a high sill window to allow for additional light to the main living areas and will assist in protecting the amenity of the neighbouring property.
- Inclusion of uncovered front deck, with access stairs leading to deck from the yard area
- Revised form to the windows to the eastern and southern elevation.
- Deletion of window and door to the western elevation.

The amendments to the approved car parking layout and site plan are detailed in the revised architectural plans prepared by Multidwell Group Pty Ltd, Project OXX, as listed below:

Sheet 001	04.04.17	Rev A
Sheet 01A	04.04.17	Rev A
Sheet 002	04.04.17	Rev A
Sheet 003	06.06.17	Rev B
Sheet 004	06.06.17	Rev H
Sheet 005	22.05.17	Rev D
Sheet 006	04.04.16	Rev A
Sheet 007	22.05.16	Rev B

The proposed amendment to the approved form of the secondary dwelling will not introduce any significant impacts to the amenity and privacy of the surrounding neighbours or the adjacent public spaces. The proposed amendments will result in any increase in building bulk or the scale of the approved development.

An Arboricultural Impact Appraisal and Method Statement has been prepared by Naturally Trees, dated 6 December 2017 to address potential impacts on the existing trees.

The report concludes that the works have the potential to impact on four trees which have been classified as "Important" and two trees which have been classified as "Unimportant".

The report suggests that subject to suitable protection measures being provided, all trees can be successfully retained. The protection measures have been outlined by the Arborist and the works will be carried out in accordance with the recommendations of the Consulting Arborist.

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

- Revised architectural plans prepared by Multidwell Group Pty Ltd, Project No. OXX, Drawings No 001 – 007, as detailed above.
- BASIX Certificate, 710120S_04, dated 13 November 2017
- Arboricultural Impact Appraisal and Method Statement has been prepared by Naturally Trees, dated 6 December 2017

JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under S96 (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 5) 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 S96 Modification Application, the Council must be satisfied that the development to which the consent as modified relates is substantially the same development as the original approval.

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 amendments to the form of the approved secondary dwelling which will preserve the inherent nature of the approval as a detached secondary dwelling, within a similar location and general form to that of the approved development.

The proposed amendments to the form of the secondary dwelling do not substantially alter the building’s bulk and scale or approved overall height. The changes do 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 building will largely present a similar 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 “*Construction of a secondary dwelling*” 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 S96 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 proposed changes to the approved secondary dwelling, the minor nature of the changes ensures that the design remains consistent with the approved form.

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.

The proposed modifications are justified on the basis that:

- The proposed works are consistent with the application as initially lodged, with this request seeking minor modifications to the form of the development as detailed under the Notice of Determination dated 20 June 2016 and as subsequently modified.
- The proposed modest changes to the approved secondary dwelling will not result in a significant change to the approved bulk and scale and will not adversely affect the surrounding neighbours or the public domain
- The proposed amendments do not encroach the existing approved side or rear boundary setbacks.
- The proposal is “substantially” the same development, as defined by the Environmental Planning & Assessment Act.

Council's support of the modifications 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,


VAUGHAN MILLIGAN