

5 July 2023

Northern Beaches Council  
PO Box 82  
WARRINGAH, NSW

**REQUEST FOR SECTION 4.55 (2) MODIFICATION OF THE CONSENT (DA2018/1412) –  
CONSTRUCTION OF A NEW DWELLING**

**104a WAKEHURST PARKWAY, ELANORA HEIGHTS**

**STATEMENT OF MODIFICATION - STATEMENT OF ENVIRONMENTAL EFFECTS**

**1. INTRODUCTION**

On the 1<sup>st</sup> of April 2019 the Northern Beaches Council's approved a new dwelling on the subject site. The proposed works seek to make minor amendments to the external built form of the dwelling and internal reconfigurations. The modifications seek to improve the functionality of the dwelling and provide more private open space opportunities by way of front facing terrace at the upper level.

The site is the rear lot of a battle-axe subdivision arrangement with access provided from Wakehurst Parkway. An aerial location is provided below:



**Image 1: Aerial Location**

## 2. APPROVED CONSENT AND DETAILS OF MODIFICATIONS PROPOSED

The original consent to be modified approved a new dwelling. The proposed modification application seeks to modify condition 1a – approved plans – and comprise:

### Garage level Plan:

- Revised entryway
- Plant room and wine cellar to the rear of the garage
- Ensuite to guest room enlarged.
- Powder room
- Relocation of stairs to level 1
- New lift connection

### Level 1 Plan:

- Revised front façade presentation
- Reconfigurations to make this the bedroom level. 3 bedrooms including the master. Master to include WIR and ensuite
- Rumpus room
- Bathroom
- Lift connection

### Level 2 Plan:

- reconfigurations to create the main living level with kitchen, lounge and dining space.
- Rear facing deck to the enlarged.
- The approved front facing planted roof to be replaced with new terraces
- Proposed study/spare bedroom
- Bathroom
- Lift connection

## 3. APPLICATION FOR MODIFICATION

### SECTION 4.55(2) ENVIRONMENTAL PLANNING & ASSESSMENT ACT 1979

The application is made pursuant to Section 4.55 (2). Section 4.55(2) of the Act provides:

*(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.*

In this instance it is considered the proposed modifications do not substantially alter or change the development as consented. The land use outcome remains within the ambit of the approved land use as referred to within the notice of determination.

A consideration of whether the development is substantially the same development has been the subject of numerous decisions by the Land & Environment Court and by the NSW Court of Appeal in matters involving applications made pursuant to the former S.96 of the Act. *Sydney City Council v Ilenace Pty Ltd (1984) 3 NSWLR 414* drew a distinction between matters of substance compared to matters of detail. In *Moto Projects (No.2) Pty Ltd v North Sydney Council (1999) 106 LGERA 298* Bignold J referred to a requirement for the modified development to be substantially the same as the originally approved development and that the requisite finding of fact to require a comparison of the developments. However, Bignold noted the result of the comparison must be a finding that the modified development is 'essentially or materially' the same as the (currently) approved development. Bignold noted;

*“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 sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the development being compared in their proper contexts (including the circumstances in which the development consent was granted).”*

In *Basemount Pty Ltd & Or v Baulkham Hills Shire Council NSWLEC 95* Cowdroy J referred to the finding of Talbot J in *Andari – Diakanastasi v Rockdale City Council* and to a requirement that in totality the two sets of plans should include common elements and not be in contrast to each other. In *North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468; 97 LGRERA 443* Mason P noted:

*“Parliament has therefore made it plain that consent is not set in concrete. It has chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity. The consent authority can withhold its approval for unsuitable applications even if the threshold of subs (1) is passed.*

*I agree with Bignold J in Houlton v Woollahra Municipal Council (1997) 95 LGRERA 201 who (at 203) described the power conferred by s.102 as beneficial and facultative. The risk of abuse is circumscribed by a number of factors. Paragraphs (a), (b) and (c) of subs (1) provide narrow gateways through which those who invoke the power must first proceed. Subsection (1A) and subs (2) ensure that proper notice is given to persons having a proper interest in the modified development. And there is nothing to stop public consultation by a Council if it thinks that this would aid it in its decision making referable to modification. Finally, subs (3A), coupled with the consent authorities discretion to withhold consent, tend to ensure that modifications will not be enterprised, nor taken in hand, unadvisedly, lightly or wantonly. Naturally some modifications will be controversial, but decision making under this Act is no stranger to controversy.”*

Senior Commission Moore in *Jaques Ave Bondi Pty Ltd v Waverly Council (No.2) (2004) NSWLEC 101* relied upon *Moto Projects* in the determination, involving an application to increase the number of units in this development by 5 to a total of 79. Moore concluded the degree of change did not result in the a development which was not substantially the same, despite the fact that in that case the changes included an overall increase in height of the building. Moore relied upon a quantitative and qualitative assessment of the changes as determined by the Moto test.

In my opinion a quantitative and qualitative assessment of the application is that it remains substantially the same. The approved land use is not altered as a consequence of the changes as proposed. The works relate to refinements of the design to improve functionality, amenity while largely preserving the bulk and scale as approved. The works do not give rise to any additional amenity impacts from the approved scheme and is in general conformity with the planning controls as they reasonably apply.

It is submitted the Council can be satisfied that the proposal to changes remain substantially the same and within the ambit of the consent as issued. The modifications proposed to the dwelling results in a negligible environmental impact.

**4.0 MATTERS FOR CONSIDERATION PURSUANT TO S4.15 OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 AS AMENDED**

The following matters are to be taken into consideration when assessing an application pursuant to S4.15 of the Environmental Planning and Assessment Act 1979 (as amended):

**The provisions of any environmental planning instrument, proposed instrument that has been the subject of public consultation under this Act and any development control plan.**

#### **4.1 PITTWATER LOCAL ENVIRONMENTAL PLAN**

##### **Land Use and Zoning**

The site is zoned C4 Environmental Management. This application relates to modifications to an approved dwelling. Dwelling houses are permissible with consent in the zone.

The southern end of the site is zoned SP2 Infrastructure with no works proposed within that zone.

##### **Height of Buildings**

The height of the dwelling is to remain as approved.

##### **Landslip Risk**

A letter has been provided with this application from the Geotechnical Engineering consultants who have reviewed the modifications plans and do not require any changes to the recommendations of the original report provided with the DA.

##### **Bushfire Prone Land**

A letter has been provided from the bushfire consultants who have reviewed the modifications. The original recommendations of the bushfire risk assessment can be applied to the proposed modifications as well.

##### **Terrestrial Biodiversity**

The proposed modifications will have no impact on the biodiversity value of the local area.

#### **4.2 PITTWATER DEVELOPMENT CONTROL PLAN 2011**

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Control	Requirement	Proposed	Compliance
<b>General Controls</b>			
<b>B4 Flora and Fauna</b>	The long-term viability of locally native flora and fauna and their habitats in the Pittwater Local Government Area.	The site is identified as a terrestrial biodiversity area within the LEP. The works will not impact on any flora or fauna present on site and will protect the biodiversity value of the area.	Yes
<b>B5.15 Stormwater</b>	<p>Stormwater runoff must not cause downstream flooding and must have minimal environmental impact on any receiving stormwater infrastructure, watercourse, stream, lagoon, lake and waterway or the like.</p> <p>The stormwater drainage systems for all developments are to be designed, installed and maintained in accordance with Council's Water Management for Development Policy.</p>	Stormwater management plans have been provided.	Yes
<b>B6.3 Off-Street Vehicle Parking Requirement</b>	2 spaces	2 car garage is maintained.	Yes
<b>Section C: Development Type Controls – Residential</b>			

Control	Requirement	Proposed	Compliance
<p><b>C1.1 Landscaping</b></p>	<p>A built form softened and complemented by landscaping.</p> <p>Landscaping reflects the scale and form of development</p> <p>Retention of canopy trees by encouraging the use of pier and beam footings.</p>	<p>No change to the approved landscaping.</p>	<p>Yes</p>
<p><b>C1.3 View Sharing</b></p>	<p>The proposal must demonstrate that view sharing is achieved through the application of the Land and Environment Court's planning principles for view sharing.</p>	<p>The works will not result in any additional view impacts accessed from surrounding properties.</p>	<p>Yes</p>
<p><b>C1.4 Solar Access</b></p>	<p>The main private open space of each dwelling and the main private open space of any adjoining dwellings are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21st.</p> <p>Windows to the principal living area of the proposal, and windows to the principal living area of adjoining dwellings, are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21st (that is, to at least 50%</p>	<p>The shadow diagrams demonstrate that compliant levels of solar access will be maintained to the adjoining properties.</p> <p>The additional overshadowing does not significantly change from the existing with regard to its impact.</p>	<p>Yes</p>



Control	Requirement	Proposed	Compliance
	of the glazed area of those windows).		
<b>C1.5 Visual Privacy</b>	Habitable rooms and outdoor living areas of dwellings optimise visual privacy through good design.  A sense of territory and safety is provided for residents	The works do not give rise to any unreasonable privacy impacts to adjoining dwellings. The replacement of the upper level planter boxes with terraces do not give rise to any unreasonable privacy impacts.  Window treatments at the upper level have been considered to ensure no unreasonable overlooking impacts occur to neighbouring dwellings.	Yes
<b>C1.6 Acoustic Privacy</b>	Noise is substantially contained within each dwelling and noise from any communal or private open space areas are limited	No unreasonable acoustic impacts are anticipated with the development.	Yes
<b>C1.7 Private Open Space</b>	Minimum 80m <sup>2</sup> of private open space per dwelling at ground level	>80m <sup>2</sup>	Yes
<b>Section D: Locality Specific Controls – North Narrabeen</b>			
<b>D11.1 Character as viewed from a public place</b>	To achieve the desired future character of the Locality. To ensure new development responds to, reinforces and sensitively relates to the spatial characteristics of the existing built and natural environment.	The refinements to the front façade provide for a highly articulated built form and provides increases visual interest.  The site is the rear lot in a battle-axe subdivision pattern and does not have a direct street presentation nor is it readily discernible from public spaces	Yes



Control	Requirement	Proposed	Compliance
	To enhance the existing streetscapes and promote a scale and density that is in scale with the height of the natural environment.	along the Narrabeen Lagoon foreshore.	
<b>D11.3 Building colours and materials</b>	External colours and materials shall be dark and earthy tones	Proposed materials and finishes are shown on the architectural set and will use dark earthy tones	Yes
<b>D11.6 Front building line</b>	Land zoned R2 Low Density Residential or E4 Environmental Living adjoining Pittwater Road or the Wakehurst Parkway.  <b>10m or established building line, whichever is the greater</b>	The dwelling is the rear lot in a battle-axe subdivision pattern.  The modifications maintain its existing setback to the rear boundary of the front lot.	Yes
<b>D11.7 Side and rear building line</b>	2.5 to at least one side; 1.0 for other side  6.5 rear (other than where the foreshore building line applies)	Approved side setbacks are maintained.	Yes
<b>D11.9 Building envelope</b>	Planes are to be projected at 45 degrees from a height of 3.5 metres above ground level (existing) at the side boundaries to the maximum building height	The approved building envelope is maintained.	Yes

Control	Requirement	Proposed	Compliance
<b>D11.10 Landscaped Area - General</b>	60%	81% of the site is landscaping.	Yes

## 5.0 CONCLUSION

Pursuant to section S.4.55(2) of the Environmental Planning and Assessment Act 1979 the consent authority can be satisfied that the modified consent as sought by this submission is substantially the same development as referred to in the original application. For the reasons outlined above we consider the amendments to the details of the consent are reasonable.

Yours sincerely  
 William Fleming  
 Director  
 Boston Blyth Fleming Pty Ltd