

29 August 2022

The General Manager  
Northern Beaches Council  
PO Box 82  
MANLY NSW 1655

Dear Sir/Madam,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT,  
SECTION 4.55(2) ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

**Development Application No:** DA 2020/0364  
**Date of Determination:** 20 May 2020  
**Premises:** Lot 23 DP 17189, No. 36 Albert Road, Avalon Beach  
**Proposed Development:** Alterations and additions to a dwelling house

On behalf of Ms Gabrielle Wright and Mr Steven Edwards, 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 DA2020/0364.

The application will seek to modify the form of the approved additions and alterations to the dwelling house and the ancillary pool & garage, which are discussed in further detail within this submission.

**BACKGROUND**

An application for consent for alterations and additions to an existing dwelling was approved by Council by Notice of Determination on 20 May 2020.

The works that were the subject of Council's consent have commenced under Construction Certificate CC2020/0760.

....1/5

## PROPOSED MODIFICATION

The proposed revisions to the plans have been detailed in the amended details prepared by Sammy Fedele, Job No. 20/19, Sheets DA01 – DA09, dated 31 May 2022.

This submission under S4.55(2) seeks to modify the approved development to reflect the following changes, which are highlighted in red and individually noted on the revised architectural plans prepared by Sammy Fedele, dated 31 May 2022:

- Relocate driveway and carport
- New en-suite and walk-in robe in bedroom 1
- New bathroom off sitting room
- New laundry
- New windows (1,2,3,4) and new doors (1,2,3)
- Modifications to front and side facades

The proposed changes see the relocation of the approved car parking to the southern side of the site with the carport to be provided as a side-by-side arrangement, in lieu of the previously approved tandem car spaces with open car space within the front setback.

The revisions to the form of the carparking will require less vehicle movements across the public road reserve, improving safety for the public through reduce the potential for conflict between pedestrians and vehicles entering and exiting the site.

The approved overall roof height of the carport will increase slightly by 425mm through the increase in the width of the carport to provide for covered accommodation for two cars.

The approved development was previously supported by a Flood Risk Management Report prepared by Pittwater Data Services Pty Ltd.

The proposed modifications do not alter the floor levels of the dwelling and the carport remains an open structure which allows for any floodwaters to move freely within the site.

The site was considered to be of Medium and Low flood risk and as the works do not alter the flood characteristics of the building in its location on the site, further assessment by the flood consultant is not considered necessary in this instance. With proprietor limited. Flood assessment prepared by

In support of the proposed modifications, the following additional information is provided:

- Revised architectural plans prepared by Sammy Fedele, Job No. 20/19, Sheets DA01 – DA09, dated 31 May 2022.
- Revised BASIX Certificate, Reference No A465435, dated 4 July 2022.

## JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under S4.55(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 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 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 Honour states:

*[54] The relevant satisfaction required by s4.55(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 minor alterations to the approved form of the development and which do not alter the building’s bulk and scale.

The changes do not introduce any issues for the neighbouring properties in terms of view loss or privacy.

When viewed from the public domain or from the neighbouring properties, the additions and alterations to the existing dwelling will present the same visual impact and appearance to that originally approved.

The proposal will see the relocation of the approved carparking from the northern side of the site to adjacent to the southern side however the minor increase in the width of the carport to provide for double side-by-side accommodation is considered to be benefit to the community through reduce vehicle movements across the public road reserve.

Similarly, the application is substantially the same development when subjected to a “*quantitative comparison*”, as the works provide for “*Alterations and additions to a dwelling house*” in a location and to 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.

## **Conclusion**

The test established in **Moto** requires both a quantitative and a qualitative assessment.

In terms of the quantitative extent of the proposed alterations to the 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 modification is justified on the basis that:

- The proposed works are consistent with the application as originally approved and as subsequently modified and will not compromise the amenity of the subject or neighbouring properties.

- The proposal is “substantially” the same development, as defined by the Environmental Planning & Assessment Act 1979.

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 cursive script, reading "Vaughan Milligan". The signature is written in black ink and is positioned above the printed name.

**VAUGHAN MILLIGAN**