

21 June 2022

The General Manager
Northern Beaches Council
PO Box 82
Manly NSW 2095

Dear Sir,

Statement of Environmental Effects
Section 4.55(1A) Modification of Consent DA2019/0541
Construction of a dwelling house
2 Ellery Parade, Seaforth

1.0 Introduction

On 7th August 2019 development application DA2019/0541 was approved by Council proposing the demolition of the existing dwelling and the construction of a new 2 storey dwelling house with garage and landscape works on the subject site involving a general refinement in the detailing of the proposed dwelling. This consent has been modified a number of times since to refine the detailing of the works as approved.

We have again been engaged to prepare an application seeking to modify the development consent pursuant to Section 4.55(1A) of the Environmental Planning and Assessment Act 1979 (the Act). Specifically, the application seeks a modification to the approved front fence design and detailing to create a formal pedestrian entrance and the provision of security gates across the driveway. The solid fencing has been replaced with a more open style battened fencing design to enable the landscaping within the front setback to be viewed through the fencing. The balance of the development is unchanged.

The height and form of the proposed fencing is entirely consistent with other front fencing established within immediate proximity of the site and to that extent will not be perceived as inappropriate or jarring in a streetscape context.

As such, Council can be satisfied that the modifications involve minimal environmental impact and the development as modified represents substantially the same development as originally approved. Accordingly, the application is appropriately dealt with by way of s4.55(1A) of the Act.

2.0 Proposed modifications

The proposed modifications are depicted on Architectural plan WD.308(B) prepared by Brick Architects.

Specifically, the application seeks a modification to the approved front fence design and detailing to create a formal pedestrian entrance and the provision of security gates across the driveway. The solid fencing has been replaced with a more open style battened fencing design to enable the landscaping within the front setback to be viewed through the fencing. The balance of the approved development remains unchanged.

The application will necessitate the modification of condition 1 of the consent to reference the amended plans.

3.0 Section 4.55 of the Environmental Planning and Assessment Act 1979

Section 4.55(1A) of the Act provides that:

- (1) *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 proposed modification is of minimal environmental impact, and*
 - (b) *it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and*
 - (c) *it has notified the application in accordance with:*
 - (i) *the regulations, if the regulations so require, and*
 - (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 any period prescribed by the regulations or provided by the development control plan, as the case may be.*

- (3) *In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.*

In answering the above threshold question, we have formed the considered opinion that the modifications sought are of minimal environmental impact given that the previously approved building height, setbacks and envelope are otherwise unaltered. The approved residential amenity outcomes in terms of solar access, privacy and view sharing are not compromised. The modifications are both quantitatively and qualitatively of minimal environmental impact.

In answering the threshold question as to whether the proposal represents “substantially the same” development the proposal must be compared to the development for which consent was originally granted, and the applicable planning controls. In order for Council to be satisfied that the proposal is “substantially the same” there must be a finding that the modified development is “essentially” or “materially” the same as the (currently) approved development - *Moto Projects (no. 2) Pty Ltd v North Sydney Council* [1999] 106 LGERA 298 per Bignold J.

The above reference by Bignold J to “essentially” and “materially” the same is taken from Stein J in *Vacik Pty Ltd v Penrith City Council* (unreported), Land and Environment Court NSW, 24 February 1992, where his honour said in reference to Section 102 of the Environmental Planning and Assessment Act (the predecessor to Section 96):

“Substantially when used in the Section means essentially or materially or having the same essence.”

What the abovementioned authorities confirms is that in undertaking the comparative analysis the enquiry must focus on qualitative elements (numerical aspects such as heights, setbacks etc) and the general context in which the development was approved (including relationships to neighbouring properties and aspects of development that were of importance to the consent authority when granting the original approval).

When one undertakes the above analysis in respect of the subject application it is clear that the previously approved building height and envelope are unaltered with the residential amenity outcomes in terms of solar access, privacy and view sharing not compromised. The height and form of the proposed fencing is entirely consistent with other front fencing established within immediate proximity of the site and to that extent will not be perceived as inappropriate or jarring in a streetscape context.

In this regard, the approved development remains, in its modified state, a development which will continue to relate to its surrounds and adjoining development in the same fashion to that originally approved.

The Court in the authority of *Stavrides v Canada Bay City Council* [2007] NSWLEC 248 established general principles which should be considered in determining whether a modified proposal was “substantially the same” as that originally. A number of those general principles are relevant to the subject application, namely:

- The application remains a proposal involving the construction of a dwelling house;
- The previously approved building heights, setbacks and footprint are maintained;
- The modifications maintain the previously approved environmental outcomes in terms of residential amenity and streetscape presentation.

On the basis of the above analysis we regard the proposed application as being of minimal environmental impact and “essentially or materially” the same as the approved development such that the application is appropriately categorised as being “substantially the same” and appropriately dealt with by way of Section 4.55(1A) of the Act.

4.0 Manly Local Environmental Plan 2013

Zoning and permissibility

The subject site is zoned R2 Low Density Residential pursuant to the provisions of Manly Local Environmental Plan 2013 (MLEP) with the modifications to the approved dwelling house remaining permissible with consent.

Height of buildings

We confirm that the previously approved building height, wall heights and number of storeys are unaltered as a consequence of the modifications sought. Strict compliance with the 8.5 metre height standard is maintained.

Such outcome preserves the view sharing scenario achieved through approval of the original scheme.

Floor Space Ratio

Pursuant to Clause 4.4 MLEP 2013 the maximum FSR for development on the site is 0.45:1 representing a gross floor area of 333m².

We conform that the previously approved GFA/ FSR of 330.1 square metres (0.44:1) is unaltered.

5.0 Manly Development Control Plan 2013

Having assessed the modified development against the applicable provision of Manly Development Control Plan we note the following:

- The siting and scale of the development is unaltered,
- The proposal maintains the previously approved building heights and side and rear setbacks and an appropriate spatial relationship with adjoining development,
- The modified proposal does not compromise the residential amenity outcomes afforded to adjoining development in relation to visual and aural privacy, solar access and view sharing, and
- The height and form of the proposed fencing is entirely consistent with other front fencing established within immediate proximity of the site and to that extent will not be perceived as inappropriate or jarring in a streetscape context.

6.0 Conclusion

This Statement of Environmental Effects has been prepared in support of an application seeking to modify the development consent pursuant to Section 4.55(1A) of the Environmental Planning and Assessment Act 1979 (the Act). Specifically, the application seeks a modification to the approved front fence design and detailing to create a formal pedestrian entrance and the provision of security gates across the driveway. The solid fencing has been replaced with a more open style battened fencing design to enable the landscaping within the front setback to be viewed through the fencing. The balance of the approved development remains unchanged.

The height and form of the proposed fencing is entirely consistent with other front fencing established within immediate proximity of the site and to that extent will not be perceived as inappropriate or jarring in a streetscape context. The modified proposal does not compromise the residential amenity outcomes afforded to adjoining development in relation to visual and aural privacy, solar access and view sharing.

As such, Council can be satisfied that the modifications involve minimal environmental impact and the development as modified represents substantially the same development as originally approved.

Accordingly, the application is appropriately dealt with by way of s4.55(1A) of the Act.

Yours faithfully

Boston Blyth Fleming Pty Limited

A handwritten signature in black ink, appearing to read 'Greg Boston', is written over a horizontal line.

Greg Boston

B Urb & Reg Plan (UNE) MPIA

B Env Hlth (UWS)

Director