

29 March 2023

Northern Beaches Council
PO Box 82
MANLY, NSW

**REQUEST FOR SECTION 4.55 (2) MODIFICATION OF THE CONSENT (DA2022/2098) –
ALTERATIONS AND ADDITIONS TO DWELLING**

10 WILLIAM STREET, FAIRLIGHT

STATEMENT OF MODIFICATION - STATEMENT OF ENVIRONMENTAL EFFECTS

1. INTRODUCTION

On the 24th of January 2023 the Northern Beaches Council's approved alterations and additions to the dwelling at 10 William Street, Fairlight under their delegated authority. Specifically, the development application approved the construction of a rear extension to the dwelling, alterations to create an attic storage space within the existing roof cavity, a carport over an existing hardstand space and a shed. The proposed modification seeks to make amendments to the attic storage level and minor amendments at ground level.

2. APPROVED CONSENT AND DETAILS OF MODIFICATIONS PROPOSED

The extent of the proposed modifications are as follows:

- Modified internal wall layout to the bathroom and relocate the window (W02).
- New staircase to attic level to replace the pull down ladder
- New dormer window located off the rear roof pitch which will increase the floor space at that level.

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 Baulkam 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 predominately relate to modifications to the approved attic storage area with the proposed dormer window not considered a significant amendment that would fall outside of it being substantially the same as approved. The modifications proposed 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 MANLY LOCAL ENVIRONMENTAL PLAN

Land Use and Zoning

The site is zoned R1 general residential zone. This application relates to modifications to an approved dwelling. Dwelling houses are permissible with consent in the zone.

Height of Buildings

The height of the dwelling is to remain as approved. The dormer window will sit below the ridge level and not be seen from the street.

Floor Space Ratio

The approved dwelling had an FSR of 0.38:1 which is approximately 155m². That calculation did not include the attic as storage within an attic can be excluded. With the attic floor space included the development will still be comfortably below the FSR development standard.

4.2 MANLY DEVELOPMENT CONTROL PLAN

Clause 3.1.1.3 – Roofs & Dormer Windows

This clause states that:

C) Dormer windows and windows in the roof must be designed and placed to compliment the roof structure and reflect the character of the building. In particular, such windows are not permitted on the street frontage of the building where there is no precedent in the streetscape, especially on adjoining dwellings.

The dormer will be off the rear pitch of the roof and will not be seen from the street. The dormer has been designed to reflect the character of the dwelling and the complement the existing roof form.

Clause 3.4 – Amenity

The proposed dormer will not give rise to any unreasonable amenity impacted with regard to privacy and overshadowing. The window will face the rear and does not give rise to any privacy concerns. The dormer will have a negligible impact on the approved shadowing outcome.

Clause 4.1 – Residential Development Controls

The proposed dormer window to the attic is consistent with the height of buildings provisions, floor space ratio, setbacks and will not impact on the open space/landscaping calculation as approved. No change to the approved parking arrangement is proposed.

Clause 4.1.7 – First Floor & Roof Additions

Clause 4.1.7.1, First Floor Additions, states that:

- a) *First floor additions must complement the architectural style of the ground floor and where possible retain existing roof forms. Notwithstanding setback provisions, the addition may follow the existing ground floor wall setbacks providing adjoining properties are not adversely impacted by overshadowing, view loss or privacy issues.*
- b) *The dwelling and the form of alterations and additions must retain the existing scale and character of the street and should not degrade the amenity of surrounding residences or the aesthetic quality of the former Manly Council area. In this regard, it may be preferable that the addition be confined to the rear of the premises or be contained within the roof structure.*

The scale of the dwelling as it presents to the street will not be altered with the proposed dormer window. The dormer is located to the rear pitch of the roof and will not be seen from the street.

Clause 4.1.7.2, Habitable Rooms in the Roof Structure, states that:

Habitable rooms will be permitted in a roof structure subject to compliance with all other controls in this plan and the LEP including height and FSR in the LEP. However alterations and additions to a building which existed prior to 2007 may involve habitable rooms within an existing roof structure that is above the maximum wall and roof height; (see paragraph 4.1.2 of this plan) subject to the rooms not detracting from the character or integrity of the roof structure and not adversely impacting on the amenity of adjacent and nearby properties and the streetscape. Similarly, alterations and additions which exceed the maximum height must not increase the overall height of the building. Consideration may be given in this paragraph to the application of LEP clause 4.6 in considering exceptions to the LEP Building Height standard.

The attic space will be capable of being used as an additional habitable space for the occupants. The dormer window facilitates additional floorspace to achieve reasonable amenity to the space and provide head height clearance. The works are consistent with the LEP development standards, will not result in any unreasonable amenity impacts and the streetscape outcome will be preserved.

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