

27 July 2020

The General Manager
Northern Beaches Council
PO Box 882
Mona Vale NSW 1660

Dear Sir or Madam,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT,
SECTION 4.56 ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

Development Application No:	N0530/15 (Court approved)
Date of Determination:	15 November 2017 (as modified)
Premises:	Lot 1 within DP 202857 No. 7 Trentwood Park, Avalon Beach
Approved Development:	Subdivision of one lot into three, demolition of existing detached garage and extension of existing access road to provide access to new lots

1.0 INTRODUCTION

This submission has been prepared on behalf of Mr Jim & Mrs Margot Dargaville to assist Council in the consideration of an application pursuant to Section 4.56 of the Environmental Planning & Assessment Act 1979 to alter the development consent as approved by the Court under Development Consent No. N0530/15 (which was subsequently modified on 26 July 2019).

The proposal provides for modifications to the conditions of consent in order to allow the development to be staged to facilitate the subdivision of approved Lot 1 prior to the construction of the driveway. Lot 1 receives direct vehicular access from Trentwood Park, and can be connected to the existing services in Trentwood Park. No physical works are required as part of the subject modification.

A separate boundary adjustment application is to be made for minor changes to the allotment configuration.

Revised stormwater plans have been prepared by Barrenjoey Consulting Engineers Pty Ltd, Job No. 181208-S4.55, Sheets SW1, dated 21 July 2020 and which are discussed further in this submission.

2.0 BACKGROUND

Development Application No. N0530/15 for “*Subdivision of one lot into three, demolition of existing detached garage and extension of existing access road to provide access to new lots*” was approved by the Land and Environment Court on 15 November 2017.

The consent was subsequently modified on 26 July 2019 to create service handles from approved Lots 2 and 3 to Trentwood Park to enable the efficient and separate servicing of each allotment without the need for easements.

The schedule of the proposed modifications is detailed below, however it is submitted that the subsequent modifications to the original design detailed under N0530/15 have not fundamentally changed the nature of the development and it remains consistent with Council’s original Development Consent.

3.0 PROPOSED MODIFICATION

This submission under S4.56 of the EP&A Act seeks minor modifications to the approved conditions of consent (as modified) in order to allow the staging of the allotment registration. The proposed amendments are detailed below.

Condition B8 is to be amended to allow the stormwater for Lot 1 to be provided separately, as per the updated Stormwater Management Plan prepared by Barrenjoey Consulting Engineers, dated 21 July 2020. The amended condition is to read as follows:

An inter-allotment stormwater drainage system is required to be installed within the land to carry stormwater discharged from the newly created properties to the public drainage system. The maximum permissible discharge to the kerb is to be limited to 30l/s for the entire development site including the proposed driveway, existing dwelling future dwellings (proposed lot 3) which is to be connected into the inter-allotment drainage pipe line.

Stormwater for proposed lot 3 is to be provided in accordance with the Stormwater Management Plan prepared by Barrenjoey Consulting Engineers, dated 21 July 2020.

The Section C heading is to be modified to facilitate the staging of the allotment registration as follows:

C. Matters to be satisfied prior to issue of the relevant Construction Certificate

Condition C1 is to be modified to allow the Section 94 payment for Lot 1 to be paid prior to the issue of the Subdivision Certificate for Lot 1. The contribution amount is to be modified to facilitate the separate subdivision of Lot 1, and the second paragraph is to be modified as follows:

The contribution is to be paid prior to the issue of the relevant Construction Certificate or relevant Subdivision Certificate (whichever occurs first) or prior to the issue.

Condition C5 is to be modified as follows:

Structural Engineering details relating to the development are to be submitted to the Accredited Certifier or Council prior to release of the relevant Construction Certificate. Each plan/sheet is to be signed by a qualified practising Structural Engineer with corporate membership of the Institute of Engineers Australia (M.I.E), or who is eligible to become a corporate member and has appropriate experience and competence in the related field.

Condition C6 is to be modified as follows:

Engineering plans including specifications and details of the internal driveway, are to be submitted to the Accredited Certifier or Council with the relevant Construction Certificate application. Such details are to be accompanied by a certification by a qualified experienced practicing Civil Engineer with corporate membership of the Institute of Engineers Australia (M.I.E), or who is eligible to become a corporate member and has appropriate experience and competence in the related field, confirming that the plans/details comply with B6.2 of Pittwater 21 DCP and generally with the plan prepared by Gartnertrovato Architects drawing number 1711 A01 issue F dated October 17 and traffic report prepared by Michael Logan dated 19/10/2017.

Condition C7 is to be modified as follows:

Prior to issue of any Construction Certificate, Form 2 of the Geotechnical Risk Management Policy for Pittwater (Appendix 5 of P21 DCP) is to be completed and submitted to the Accredited Certifier.

Condition C8 is to be modified as follows:

Details in the relevant Construction Certificate are to reflect the recommendations/requirements of the Bushfire Risk Assessment Report prepared by Australian Bushfire Protection Planners Pty Ltd, dated 24 August 2017, and the requirements of NSW Rural Fire Service letter, dated 07 September 2017.

Condition C10 is to be modified as follows:

Drainage plans including specifications and details showing the site stormwater management are to be submitted to the Accredited Certifier with the relevant Construction Certificate application. Such details are to be accompanied by a certificate from (as appropriate) either a Licensed plumber or qualified practicing Civil Engineer with corporate membership of the Institute of Engineers Australia (M.I.E), or who is eligible to become a Corporate member and has appropriate experience and competence in the related field, that the stormwater management system complies with the requirements of section 3.1.2 Drainage of the Building Code of Australia Housing Provision and AS/NZS 3500.3.2 - Stormwater Drainage. The details shall include disposal of site stormwater (if the site is in a known slip area the stormwater disposal system must comply with the recommendations of a Geotechnical Engineers Report). Appeal No: 2017/00202349 Page 8 of 16 Note: Where Council is the Principal Certifying Authority 3 sets of plans/specifications are to be submitted.

Condition C11 is to be modified as follows:

Civil engineering details of the proposed excavation/landfill are to be submitted to the Accredited Certifier or Council with the relevant Construction Certificate application. Each plan/sheet is to be signed by a qualified practising Civil Engineer who has corporate membership of the Institution of Engineers Australia (M.I.E) or who is eligible to become a corporate member and has appropriate experience and competence in the related field.

Condition C12 is to be modified as follows:

Prior to the issue of any Construction Certificate for Lot 2 or Lot 3, the proposed fencing located along the southern boundary, adjoining 22 Ruskin Rowe, is to be amended as follows: a) the fence is to be a hard wood timber paling fence, a maximum of 1.8m above the existing ground level. The material of the fence should be a wood that will weather to a grey tone in order to blend in with the natural environment and minimise the visual impact of the fence. The wood used is to have a density of 750kg/m³ at a 12% moisture content. Planting should be incorporated into and/or over the fence to further minimise the visual appearance of the fence, where possible. b) the fence is to be located wholly within 7 Trentwood Park, Avalon.

Condition C13 is to be modified as follows:

The Tree Protection Plan attached to the Arboricultural Impact Assessment, August 2017 is to be updated prior to issue of any construction certificate to indicate the alignment of tree protection fencing within the lot to which the construction certificate relates.

The Section F heading is to be modified to facilitate the staging of the allotment registration as follows:

F. Matters to be satisfied prior to issue of the Subdivision Certificates

Condition F1 is to be modified to facilitate the staged implementation of the development consent, and provide for the initial creation and registration of proposed Lot 1 as follows:

Prior to issue of each/any Subdivision Certificate, Form 3 of the Geotechnical Risk Management Policy (Appendix 5 of P21 DCP) is to be completed and submitted to the Principal Certifying Authority.

Condition F2 is to be modified as follows:

An accredited Bushfire consultant is to provide a certification to the Principal Certifying Authority with the relevant Subdivision Certificate application confirming that;

- a) The listed requirements of the NSW Rural Fire Service, dated 07 September 2017 must be satisfied, as follows:*
 - i. At the issue of any subdivision certificate and in perpetuity the entire property shall be managed as an inner protection area (IPA) as outlined within section 4.1.3 and Appendix 5 of 'Planning for Bush Fire Protection 2006' and the NSW Rural Fire Service's document 'Standards for asset protection zones'.*
 - ii. Water, electricity and gas are to comply with section 4.1.3 of 'Planning for Bush Fire Protection 2006'.*

- iii. *At the issue of the relevant subdivision certificate, a fire fighting hydrant supply system shall be provided to Lots 2 and 3 as detailed in the 'Supplementary Bushfire Report' prepared by Australian Bushfire Protection Planners Pty Ltd with reference 'B172918-1' dated 24 August 2017.*
- b) *The recommendations of the Bushfire Assessment Report, prepared by Australian Bushfire Protection Planners Pty Ltd, dated 24 August 2017, have been complied with.*

The last sentence of **Condition F3** is to be modified as follows:

The Subdivision Certificate for approved Lots 2 and 3 will not be released until this certification has been submitted and the Principal Certifying Authority has confirmed that this condition has been satisfied.

Condition F4 is to be modified in the following manner:

Restoration of all damaged public infrastructure caused as a result of the development to Council's satisfaction. Council's written approval that all restorations have been completed satisfactorily must be obtained and provided to the Private Certifying Authority with the relevant Subdivision Certificate application.

Condition F5 is to be modified as follows:

Prior to occupation and issuing of Subdivision Certificate for approved Lots 2 and 3, the applicant shall register a Positive Covenant and a Restriction as to User, under Section 88E and or section 88B of the Conveyancing Act as appropriate in favour of Council ensuring the ongoing maintenance of the on-site detention system facility.

Condition F6 is to be modified as follows:

A Certificate is to be submitted to the Principal Certifying Authority with the Subdivision Certificate application for approved Lots 2 and 3 by a qualified practising Civil Engineer with corporate membership of the Institute of Engineers Australia (M.I.E), or who is eligible to become a Corporate member and has appropriate experience and competence in the related field confirming to the satisfaction of the Private Certifying Authority that the driveway has been constructed in accordance with the approved plans and relevant conditions of Development Consent.

Condition F7 is to be modified as follows:

Appropriate Rights of Way and/or Rights of Carriageway are to be created over the common driveway burdening and benefiting the proposed lots, to provide for suitable legal pedestrian access to the dwellings and vehicular access and manoeuvring to the parking areas on the lots. These can be created by the registration of the Subdivision Plan for proposed Lot 2 and 3 and an accompanying 88B Instrument.

Condition F8 & F9 are to be modified to refer to the relevant Subdivision Certificate application.

Condition F10 is to be modified to read as follows:

A Restriction on Use of Land is to be created, burdening Lot 1 and Lot 3, the terms of which restrict future buildings within Lot 1 and Lot 3 to the building area/s shown on the approved plans. Full details in this regard are to be submitted to Council on the final plan of Subdivision/ and an accompanying Section 88B instrument pertaining to the relevant lot. The creation of the Restriction on Use of Land is achieved through registration of the Plan of Subdivision.

Condition F11 is to be modified to read as follows

The stormwater drainage system must be constructed and completed in accordance with the approved design and relevant Australian Standards.

A plan showing pipe locations and diameters of the stormwater drainage system, together with certification by a Licensed Plumber or qualified practicing Civil Engineer that the drainage system has been constructed in accordance with the approved design and relevant Australian Standards must be provided prior to issue of the Subdivision Certificate for the relevant lots.

Conditions F12, F13 and F14 are to be modified to commence with the following:

Prior to issue of a Subdivision Certificate for the relevant Lot...

Condition F15 is to be modified to read as follows:

Prior to the commencement of construction works on the relevant Lot...

Condition F16 is to be modified as follows:

At the issue of the relevant Subdivision Certificate, and in perpetuity, the relevant Lot shall be managed as an inner protection area (IPA) as outlined within section 4.1.3 and Appendix 5 of 'Planning for Bush Fire Protection 2006' and the NSW Rural Fire Service's document 'Standards for asset protection zones'.

Condition F17 is to be modified as follows:

Prior to issue of a Subdivision Certificate for proposed Lots 2 and 3, a fire hydrant supply system shall be provided to Lots 2 and 3 as detailed in the 'Supplementary Bushfire Report' prepared by Australian Bushfire Protection Planners Pty Ltd with reference 'B172918-1' dated 24 August 2017.

Condition F18 is to be modified as follows:

A Section 73 Compliance Certificate issued under the provisions of the Sydney Water Act 1994 is to be provided to the Principal Certifying Authority with the relevant Subdivision Certificate application.

Condition F19 is to be modified to read as follows:

Prior to issue of the relevant Subdivision Certificate, certification is to be provided that trees have been planted on the relevant Lot in accordance with condition B23.

The preamble of **Condition F20** is to be modified as follows:

The following documents and payments are to be submitted to Council in a single package to ensure the efficient release of the relevant Subdivision Certificate: -

4.0 MATTERS FOR CONSIDERATION PURSUANT TO SECTION 4.15 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 section 4.15 of the Act:

4.1 Pittwater Local Environmental Plan 2014

The proposal will not alter the compliance of the developments with the provisions of PLEP 2014. The subject modification does not seek to provide for any physical changes to the approved development.

4.2 Pittwater 21 Development Control Plan

The proposal will not alter the compliance of the developments with the provisions of Pittwater 21 DCP. The subject modification does not seek to provide for any physical changes to the approved development.

5.0 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 within Consent N0530/15.

The works seek to provide for minor amendments to the approved conditions to facilitate the subdivision of approved Lot 1 prior to the construction of the driveway. The current proposal does not seek to provide any change to the subdivision layout or physical works.

Similarly, the application is substantially the same development when subjected to a “quantitative comparison”, as the works will continue to provide for Torrens title subdivision in a location and in a form which is consistent with the consent, as modified.

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 S4.56 of the Act.

6.0 CONCLUSION

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

In terms of the quantitative extent of the changes to the originally approved development, the internal works which are the subject of the application are minor and do not inherently alter the nature and form of the approved development as originally approved by Council.

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 modifications to the physical appearance of the approved development.

Consistent with the Court decision in **Moto**, the Council would be satisfied that the development as modified would remain essentially or materially the same as the approved development.

This Court decision also makes clear that the Council has the power to approve the Modification Application.

The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as detailed under the original Notice of Determination dated 15 November 2017 and as subsequently modified by Council.
- The proposal is “substantially” the same development, as defined by the Environmental Planning & Assessment Act.

Council’s support of the modification to the form of the proposed development is sought in this instance.

Please contact me on 0404 626 165 or Jim Dargaville on 0418 259 003 should you wish to discuss the proposed amendments.

Yours Sincerely,



FRAN DARGAVILLE
Town Planner
BPlan (Hons) *UNSW*