

18 May 2023

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

Dear Sir,

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

Development Application No: DA 2020/0274
Date of Determination: 2 October 2020
Premises: Lot 1 within DP 1205310, No 67 Marine Parade,
Avalon Beach
Proposed Development: Alterations and additions to a dwelling house

On behalf of Matthew & Susan Root, 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 DA2020/0274, determined 2 October 2020).

The application involves modifications to the form of the approved development, with the amendments detailed in the revised architectural plans prepared by SketchArc, Project No 1816, Sheets C4.55-1 – C4.55-24 dated 18 May 2023.

The proposed modifications will also seek to delete the requirements of Condition 7(b) which read:

7. Amendments to the approved plans

The following amendments are to be made to the approved plans:

(a)..... (to be unchanged)

(b) the floor level of the first floor lounge/dining/kitchen area is to be lowered 0.9m, to ensure a height of RL41.98m in a corresponding 0.9m decrease in the total floor height above.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of the construction certificate .

Reason: to ensure that development minimises unreasonable impacts upon the surrounding are (sic) of high scenic value.

....1/5

The proposed modifications are discussed in further detail in this submission.

BACKGROUND

An application for consent for *“Alterations and additions to a dwelling house”* was approved by Council by Notice of Determination dated 2 October 2020, with the construction work commencing under Construction Certificate 2021/0488 dated 29 April 2021 & Notification of Commencement NOC2021/0544 dated 3 May 2021.

The construction of the First Floor Level kitchen/dining/lounge area with associated deck which is the subject of this modification has not commenced.

PROPOSED MODIFICATIONS

The application involves changes to the form of the approved development and involve the proposed construction of the first floor level comprising the kitchen/dining/lounge area with the associated deck at RL42.880m, which was the original floor level as assessed within the initial determination.

The proposed construction of the floor level of the kitchen/dining/lounge level to RL 42.880m will allow for the retention of the existing roof and ceilings within the front portion of the dwelling which currently comprises the ground floor level bedrooms, rumpus and bathroom.

Council’s determination required within Condition 7(b) that the floor level of the first floor level be lowered by 0.9m to RL 41.98m.

The reason for the imposition of the condition provided within the determination for the requirement to lower the floor level was to minimise unreasonable impacts upon the surrounding area of high scenic value.

Now that the construction works which include the new rear wing which extends uphill of the original dwelling have been completed, is it visually apparent that the works, if constructed to the proposed floor level of RL 42.880m would not result in a development which is unreasonably impacting on the scenic quality of the area or on privacy and amenity of the neighbouring properties.

Council’s original determination required a lowering of the first floor level of the kitchen//dining/lounge area by 0.9m to RL41.98m, with a corresponding lowering of the maximum ridge level of this element by 0.9m from RL46.390m to RL45.49m.

In order to respect Council’s intention to minimise unreasonable impacts on the surrounding area, the design of the proposed modified first floor level has been amended through a reduction in the floor ceiling height and modification to the roof form, to achieve a maximum height to the western parapet element of RL45.490m which is consistent with Council’s original approval.

With the overall height of the first floor level being generally consistent with the approval building form anticipated within Council’s original determination, and the works being compliant with Council side boundary setback and maximum building height controls, the views and outlook for neighbouring properties will be reasonably retained and the building will achieve the desired outcome of Council’s original determination.

The modified submission prepared by SketchArc notes that the overshadowing from the proposed first floor element will be generally similar to the original approved form.

The proposed modifications do not otherwise alter the existing height of the remainder of the approved works.

As the works do not propose any other physical change to the land, revised bushfire and geotechnical reports is not considered to be necessary in this instance.

In support of the application, the following documentation is provided to assist Council in its deliberations:

- Revised architectural plans prepared by architectural plans prepared by SketchArc, Project No 1816, Sheets C4.55-1 – C4.55-24 dated 18 May 2023
- Revised BASIX Certificate – No. A35739_06 dated 17 May 2023.

JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under Section 4.55(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 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.

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 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 No. DA2020/0274.

The works will continue to provide for “*Alterations and additions to a dwelling house*”.

As the proposed modifications to the approved design will maintain the approved overall height of the first floor kitchen/dining/lounge element and the remainder of the works completed within the site are unchanged, the proposal will continue to present a compatible bulk and scale when viewed from the street or the neighbours. The modified proposal is reasonably considered to be substantially the same development as originally approved.

The revised design does not introduce any significant issues for the neighbouring properties in terms of view loss or privacy.

When viewed from the public domain or from the neighbouring properties, the development will largely present the same visual impact and appearance to that originally approved.

Similarly, the application is substantially the same development when subjected to a “quantitative comparison”, as the works will continue to provide for a “*Alterations and additions to a dwelling house*” in a location and in 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 changes to the originally approved development, the works which are the subject of the application are minor and do not inherently alter the nature and form of the additions to the dwelling 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 significant or adverse implications for the physical appearance of the approved building and the site's contribution to the local streetscape.

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 initially lodged and as detailed under the original Notice of Determination dated 2 October 2020.

- 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 9999 4922 or 0412 448 088 should you wish to discuss these proposed amendments.

Yours faithfully,

A handwritten signature in black ink, reading "Vaughan Milligan". The signature is written in a cursive style with a large initial 'V' and 'M'.

VAUGHAN MILLIGAN