

23 June 2021

The General Manager
Northern Beaches Council
PO Box 882
MONA VALE NSW 1660

Dear Sir,

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

Development Application No: DA2020/0255
Date of Determination: 13 May 2020
Premises: Lot 2 DP 518855
No. 24 Penrith Avenue, Wheeler Heights
Proposed Development: Demolition works and construction of a dwelling house

On behalf of Mr & Mrs John & Veronica Turner, 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 DA2020/0255.

The application will seek to modify the form of the approved alterations and additions.

The modifications are detailed in the revised architectural plans prepared by Sammy Fedele Architectural Drafting Services, Sheets DA1 – DA15 dated 12 June 2021 which are discussed further in this submission.

The proposal provides for various minor modifications to the approved form of the development, with the generally approved external configuration, height and the dwellings' location on the site remaining largely unchanged.

BACKGROUND

An application for consent for "*Demolition works and construction of a dwelling house*" was approved by Council by Notice of Determination dated 13 May 2020.

The demolition and construction works that were the subject of the consent has not commenced.

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PROPOSED MODIFICATIONS

The modifications are detailed in the revised architectural plans prepared by Sammy Fedele Architectural Drafting Services, Sheets DA1 – DA15 dated 12 June 2021 which are discussed further in this submission.

The proposed modifications largely retain the approved form and overall height of the development, with minor modifications to simplify the construction methodology and reduce the floor area in certain aspects.

The proposed minor modifications changes include the following general modifications:

The amendments to the previous set of plans include:

Lower Ground Floor Plan

1. Similar footprint
2. Remove the lift
3. Remove external curved staircase and replace with straight staircase
4. Internal rooms modified
5. Windows slightly modified
6. Floor level of garage slightly modified previous RL 18.74 proposed RL 19.56.

Ground Floor

1. Similar footprint
2. Remove the lift
3. Remove external curved staircase and replace with straight staircase
4. Internal Rooms modified
5. Windows slightly modified

First Floor Plan

1. Similar footprint
2. Remove the lift
3. Internal rooms have been modified
4. Windows modified

Roof Plan

1. Similar footprint however a new roof profile

The site is also affected by drainage infrastructure and accordingly a submission has been prepared by Northern Beaches Consulting Engineers, dated 9 April 2021 which provides a comprehensive review of the modified development plans against the approved development plans and the requirements of the Overland Flow Assessment Report dated 28 February 2020.

The conclusion of the NB Consulting Engineers' review is that it is not anticipated that the proposed modifications will have any material impact on the modelled Overland flow regime as detailed in the Overland Flow Assessment Report dated 28 February 2020.

The proposed modifications are also supported by revised BASIX Certificate dated 26 May 2021.

Also accompanying the modified design is a revised Geotechnical Risk Assessment prepared by White Geotechnical Group under Report No J2514A dated 21 June 2021.

The revised assessment suggests that *“provided the excavation support advice in the original report is followed, the proposed changes do not alter the recommendations or the risk assessment in the report carried out by this firm numbered J2514 and dated 11 December 2019”*.

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 DA2020/0255.

The works propose minor modifications to the design of the approved new dwelling, which maintain a scale and form which is generally consistent with the original approval.

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 “*Demolition works and construction of 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 substantive modifications to the physical appearance of the approved building.

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.

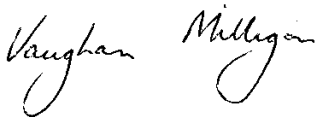
The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as initially lodged and as detailed under the original Notice of Determination dated 13 May 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, looped 'V' and 'M'.

VAUGHAN MILLIGAN