

29 May 2018

The General Manager
Pittwater Council
PO Box 882
MONA VALE NSW 1660

Dear Sir,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT
SECTION 4.55 (1A) ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

Development Application No: DA N0541/17
Date of Determination: 29 January 2018
Premises: Lot 204 DP 1212459 No. 8 Orchard Street, Warriewood
Proposed Development: Constructions of a new two storey dwelling and driveway

On behalf of Mr Fainbaum and Ms Moriki, this submission has been prepared to assist Council in the consideration of an application pursuant to Section 4.55(1a) of the Environmental Planning & Assessment Act 1979 to alter the development as approved by Development Consent DA N0541/17.

The application will seek to modify the form of the approved landscaping works which accompany the approved two storey dwelling and driveway. In particular, the proposed modifications relate to a re-positioning of the low level retaining walls which were included to support the minor site works required in the benching of the site to construct the dwelling.

The modifications are detailed in the revised architectural plans prepared by Clarendon Homes, Job No. 29911591, Revision L dated 19 September 2016 which are discussed further in this submission.

The retaining walls are primarily below the pre-existing ground level and are located within the front setback and rear yard.

All other works detailed under the original development consent and including the general external configuration, height and the dwellings' location on the site remain largely unchanged.

BACKGROUND

An application for consent for "*Construction of a new two storey dwelling and driveway*" was approved by Council by Notice of Determination dated 29 January 2018.

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The construction of the two storey dwelling and driveway has commenced.

PROPOSED MODIFICATION

The proposed revisions to the plans have been detailed in the amended details prepared by Clarendon Homes, Job No. 29911591, Revision L, dated 19 September 2016.

The proposed changes note a re-positioning of the proposed retaining walls, which are largely at or near existing ground level and have a maximum height to the north-western corner of the site of 780mm.

JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under S4.55 (1a) which notes:

(1A) Modifications involving minimal environmental impact

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, 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 any period prescribed by the regulations or provided by the development control plan, as the case may be.*

Subsections (1), (2) and (5) 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 S4.55(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.

The works seek to provide for minor alterations to the form of the landscaping works to support the approved construction of a two storey dwelling and driveway, which will maintain a consistent form, height and location to the approved design initially considered within the Consent No. 541/17.

When viewed from the public domain or from the neighbouring properties, the building will present substantially 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 provide for construction of a new dwelling and driveway in a form which is generally consistent with the original consent.

In my view, this application is fundamentally 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 construction of a new two storey dwelling and driveway 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 29 January 2018.
- 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, looping 'V' and 'M'.

VAUGHAN MILLIGAN