

OUR REF: 18230 – s4.55

27 July 2023

The Chief Executive Officer
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**Attention: Maxwell Duncan, Principal Planner &
Rod Piggott, Manager, Development Assessment**

Dear Maxwell and Rod

**RE: SECTION 4.55 MODIFICATION FOR DEVELOPMENT APPLICATION (DA NO. 2019/0916)
Additional Information
No. 32 Bower Street, Manly**

Firstly, thank you for our phone meeting on 13 July, it was extremely helpful to discuss the various matters with you both. This letter is in response to those discussions and should be read in conjunction with the submitted Statement of Environmental Effects.

1.0 Internal Referrals

Thank you for allaying our concerns regarding the nature of the referral responses. We anticipate that with the submission of the Arborist Report prepared by George Palmer, that re-referrals to those internal officers will yield a positive result. However, if there are further questions, please don't hesitate to contact us.

We would appreciate if the internal referral officers were advised there is already a construction certificate in operation and therefore, works have commenced on site. We were concerned they believed there were unapproved works being carried out.

As Mark Davies, Managing Director, of I've Got Time Group explained, we want to work with Council to ensure the best outcome for this wonderful proposal on a very complex and highly sensitive site. We understand that (other than the single objection) adjacent neighbours are supportive of the modified proposal which has improved environmental outcomes for them; and the general neighbourhood prefers the single dwelling proposal to the previously approved three dwelling subdivision.

2.0 Condition Limiting the Development to a Single Dwelling

Thank you for advising a separate condition is not necessary. Our clients accept your recommendation that a separate condition is not required.

3.0 Updated Arboricultural Assessment and Tree Management Plan

As emailed to you prior to our meeting, attached please find the updated document prepared by George Palmer, Botanics Tree Wise People, which outlines the proposed removal of Trees 17, 27 and 28.

4.0 Assessment Under s4.55(2) of the EPAA Act 1979

Thank you for clarifying that the application will be assessed under s4.55(2), rather than the s4.55(1A) which was applied for in error. We note the considerations are slightly different:

(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.*

Our clients have agreed to this change and will expect an invoice for the additional fees.

5.0 The Modification is ‘Substantially the Same’

In response to s4.55(2)(a), the threshold test of ‘substantially the same’ applies to the development as a whole. Notwithstanding the changes to the architectural style, and the driveway location, the development as proposed is considered to be substantially the same as that originally approved.

We have undertaken a comparative exercise required ‘*by identifying and comparing the material and essential elements, both quantitative and qualitative, of the modified development and the originally approved development*’, as Preston CJ outlined in *Arrage v Inner West Council [2019] NSWLEC 85* at [33]. Please refer to **Section 5.1.1**

As we stated in our Statement of Environmental Effects, the proposal is considered to be a modification to consent, and is substantially the same as the original approval:

The proposed modifications are a response of the site’s new owners who had a slightly different family requirements and therefore prepared a new brief for the architects. As the original architects, Campbell Architecture, were not available, the modification proposal has been developed by Eaton Molina Architects, with the brief expanded to include a more formal architectural form, while still incorporating natural stone and other elements of the original approval.

The proposal retains the separate pavilion for a gym and guest, deletes the elevated pool connecting the gym to the main dwelling, and has combined two of the three remaining pavilions to provide the entry and living areas on the one level. This has allowed a lift to be installed from basement garage to Master Bedroom suite. The main pool’s central location better suits the family of the new owners. Same as the approval, a second plunge pool/spa is located at the northern end of the site, adjacent to a barbeque area. To increase landscaping between the gym and living areas, the driveway has been relocated to the eastern side, as per an earlier approval for the site. The driveway retains a planted area along the eastern boundary with the adjacent reserve.

The fundamental design approach for the modification was to maintain the building massing along the site, specifically maintaining the approved height and northern orientation and locations of the main pavilions. Consequently, the design retains the bulk, shadow impact, view lines, and general privacy conditions of the approval. While the approval had oriented the pavilions in different directions, the modification proposes a straight alignment, which still retains views across the site to the reserve, for neighbours at No. 34 Bower Street, who support the proposal.

The proposed development is the subject of a Section 4.55 modification and not a new development application. This is because the proposal is substantially the same as the approved development and generally retains a similar overall built form of the approved dwelling, with adjustments which reflect the engagement of a new architect.

The modifications have a similar envelope to the previously approved built form, propose a lower FSR, revert to an earlier approval for the driveway location and provide similar building heights to the approval, noting the proposal is compliant on the western elevation of this site. The modification includes the following, inter alia:

- Minor *reduction* in FSR.
- Consolidation of two pavilions on the main dwelling, forming a larger courtyard between the northern and southern pavilions, with combined roof utilising the *lower* roof height approved.
- Reorientation of gym/guest and main pavilions to align with eastern boundary.
- Increased setbacks to the eastern boundary.
- Relocation of the elevated swimming pool, to an inground pool in a central courtyard
- Reconfiguration of the northern swimming pool.
- Internal adjustments to provide consistent floor levels on the Living Level and include a lift.
- Varied skillion and flat roof forms to a more disciplined parapet roof form with new roof garden proposed on the northern pavilion.
- Minor adjustment to excavation volume, by altering levels of the garage and the nearby bedroom level, to service the basement garage and driveway.
- Relocate driveway to eastern boundary (consistent with an earlier approval) and move double garage closer to driveway.
- Revised landscape plan to suit driveway location, pools, and altered setbacks.
- Many features are retained including the projecting elements on the eastern elevation, the pedestrian and driveway entries from Bower Street, the internal uses and their approximate locations, and rear garden features such as the pool, lawn, and significant rocks.

The proposal remains a dwelling of separate elements, and two swimming pools, spread out along a long, and steep site which falls not only from south to north, but has a steep cross fall from west to east. In our opinion, the proposed modifications satisfy the qualitative and quantitative tests of being ‘substantially the same’ as the approved development, as discussed in the next section.

5.1.1 Qualitative and Quantitative Assessment

In **quantitative terms**, the proposed development before and after modifications is still a single dwelling residential use with four levels proposed; and has separate pavilions; and a double garage. The overall height is unchanged; the FSR is slightly reduced; open space and soft landscaping are marginally reduced but still soft landscaping is more than double the minimum requirement; setbacks are increased; and excavation volume is similar; with adjustments to the basement garage.

In **qualitative terms** the proposed development before and after modifications retains a similar bulk and scale; maintains privacy; minimises any view impacts; has similar overshadowing to the approval. The building type; external materials; landscaping; and projections are all similar. The modifications include adjustments to the external appearance, the result of the modified design, orientation to north rather than in several directions; parapet roof forms rather than many skillion roofs; single floor levels rather than split levels on each floor; and increased side setbacks.”

In both **quantitative and qualitative terms**, the proposed development as modified will remain substantially the same as the development for which consent was originally granted. The modifications have been designed to maintain views and amenity of neighbours and has the support of the neighbour immediately to the west at No. 34 Bower Street.

Thus, the development as modified can be considered ‘substantially the same’ and assessed as a s4.55 modification to consent.

5.1.2 Land and Environment Court Cases Related to ‘Substantially the Same’

There are numerous examples of Section 4.55 Modifications approved by many Councils, including Northern Beaches Council, which have involved a far greater degree of modification. Such modifications that have passed the test of Section 4.55 and have involved changes including the following, inter alia:

- Changes to the facades and external appearance;
- Changes to the envelope and profile of the development;
- Increases in floor space;
- Increases in height (in metres);
- Increases in number of storeys;
- Additional basement levels; and
- Increases in number of dwellings.

While such examples may be helpful in understanding the threshold that has been applied by Councils, consideration should also be given to applications for modification determined by the Court. There have been numerous appeals where “substantially the same” has been shaped and informed by Court decisions. Four of these cases will now be discussed.

Moto Projects (No. 2) Pty Ltd v North Sydney Council [1999] NSWLEC 280

In *Moto Projects (No. 2) Pty Ltd v North Sydney Council*, the Court was not satisfied the proposed modifications were “substantially the same development” as the approved development of the North Sydney Club, with the deletion of an access ramp from Warringah Expressway.

Bignold J considered the separate ingress to be: ‘a material and essential physical element of the approved development’ [59]. In his assessment Bignold J, referred to the Council Planning Report which he said ‘places undue reliance upon the modification representing “only a fraction of the overall development, inter alia:

*52. That opinion [Council’s Planning Report] appears to involve some form of numeric or quantitative evaluation of the modification as a part of the whole, without attempting any **qualitative** assessment. With respect, I think this approach is legally flawed and I am entirely unable to accept it...*

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).

The Modification: Importantly the FSR is not increased, but is reduced slightly, and the roof heights are either reduced or remain the same. The design refinements reflect the new owners’ requirements, but essentially the house is the same as the approved development.

In our opinion, in qualitative terms, the modifications remain a house with separate pavilion; the same number of storeys; two swimming pools; a basement garage; lower-level rumpus with sauna etc; similar generous open space and landscaping, with an extended driveway, relocated; and other adjustments.

Hrsto v Ku-Ring-Gai Council [2011] NSWLEC 1169

This case considered significant alterations whereas, the proposed modifications could be considered minor.

In *Hrsto v Ku-Ring-Gai Council*, the modifications proposed various changes including an increase in the number of units from 51 to 66, a reduction in the number of car parking spaces from 96 to 92, an increase in floor area from 5304m² to 5520m², an increase in floor space ratio (FSR) from 1.25:1 to 1.3:1, a decrease in the building footprint from 2114m² to 1907m², an increase in deep soil area and; a reduction in the basement volume by 500m³ to 11,700m³. The proposed modifications listed were accepted as substantially the same development, inter alia:

- *The proposed development is consistent with State Environmental Planning Policy No. 65 – Design of Residential Flat Buildings and the Residential Flat Design Code;*
- *The overall mass and volume of the development is generally the same, notwithstanding the variation in the FSR, which forms the basis of an improved internal design and amenity and overall improved internal planning;*
- *The impact on neighbours is generally the same or improved and there is no significant change to the relationship to adjoining properties;*
- *The materials proposed are generally the same;*
- *The height above natural ground level is essentially the same;*
- *The height in storeys is the same, there is no apparent or visual change to the streetscape, the proposed residential nature is unchanged, or in the alternative there is no significant change to the nature or intensity of the residential use;*
- *There is no significant change in the architectural appearance and character of the proposed development, the modulation detailing proportion and finishes remain generally the same;*
- *The building length and setbacks, envelope and footprint remain generally unchanged and are in accordance with the existing approval, the location of the car park entrance remains the same; and*
- *The location, scale, size, shape and appearance of the proposed development generally and essentially remain the same, creating minimal environmental impacts.*

In accepting the proposed amendments as listed above, the Court determined the modification was ‘essentially or materially’ the same as the previous approval. The Court considered the proposal to be qualitatively, of little change to the appearance of the proposed building.

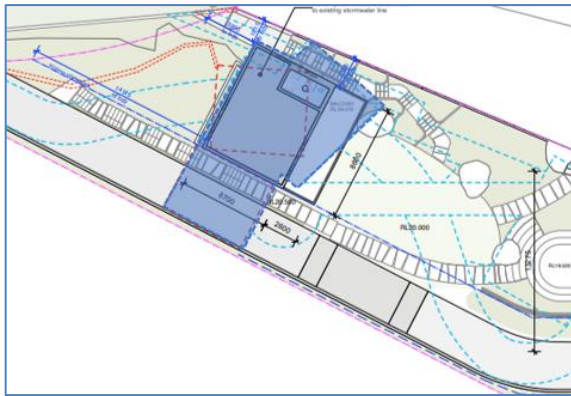
Modification:

In the current instance, the FSR is slightly reduced, some roof heights are reduced, and others remain the same as the approval, two swimming pools are still proposed, the basement double garage is still proposed, open space and soft landscaping provisions are still far greater than the minimum, and shadow diagrams are very similar to the approved.

Increases in setbacks, reductions in some roof heights and consultation with neighbours ensures there is unlikely to be any increase in the effects of the development on neighbours.

Importantly, views are improved for the adjacent neighbour, and solar access is maintained. This has been demonstrated in the SEE.

The changes to the gym/guest pavilion are likely to be the only visible element from Bower Street, and it has been reoriented to allow the driveway to run adjacent to the eastern boundary. It remains a modest and separate structure with a discreet appearance (see **Figure 1**, on the following page). We have outlined the approved dwelling in the excerpts below which demonstrate there are reductions to the width. It is more difficult to represent this in an elevation, because the original gym/guest accommodation pavilion was set at an angle, and it is now parallel to the side boundary. We trust this confirms the two elevations will now appear narrower.



Plan: As approved



Plan: As proposed



View from Bower Street: As approved



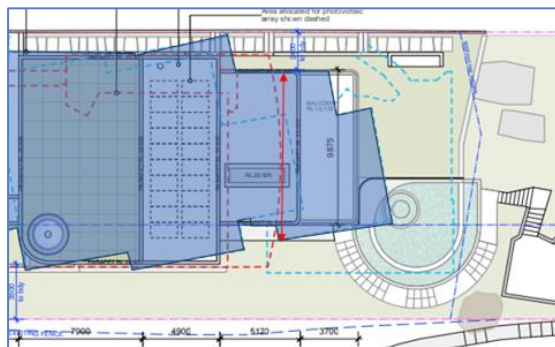
View from Bower Street: As proposed

Source: Eaton Molina Architects

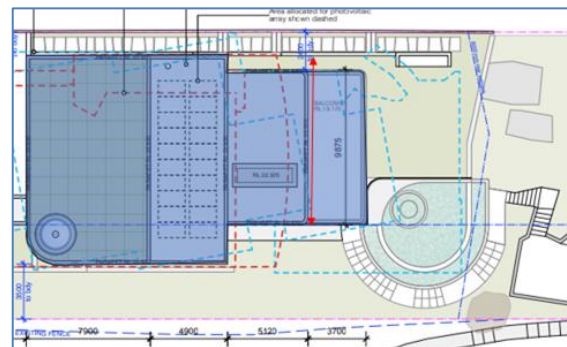
Figure 1: Comparison of Approved & Proposed Gym Building

The eastern elevation includes articulation, varied materials, and project elements, similar to the approval, although on the same orientation as the eastern boundary.

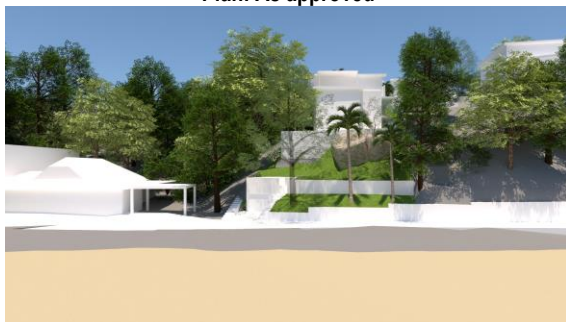
When viewed from Shelly Beach, the general appearance of the proposed modification, with large terraces at ground level and at basement level adjoining the second pool, are essentially and materially similar (as demonstrated in **Figure 2**).



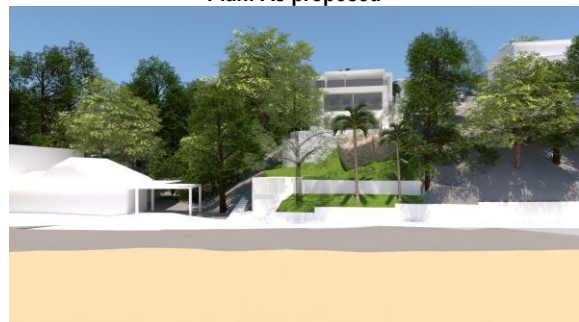
Plan: As approved



Plan: As proposed



View from Shelly Beach: As approved



View from Shelly Beach: As proposed

Source: Eaton Molina Architects

Figure 2: Comparison of Approved & Proposed Northern Elevation

Three pavilions of the main dwelling have been consolidated into two, and the orientations have been adjusted, but the general room uses, and their locations are the same. Internally, the number of bedrooms and en suites, and living areas are the same; although staff accommodation is not required by the new owners. The separate gym/guest pavilion use is retained.

The materials are similar to the approval and include sandstone/stone cladding, painted render and timber battening/cladding. As noted, the original architect for the previous owners was not available at the time of engagement so the new owners briefed a new architect. With a slightly different set of requirements, some adjustments were required, however, the location, scale, size, and general forms are generally and essentially the same, with the intent to create minimal environmental impacts. Accordingly, we believe the proposal is consistent with the Court's determination on *Hrsto*.

***Chidiac v Canterbury City Council* [2012] NSWLEC 1335**

In *Chidiac v Canterbury City Council*, the proposed modifications included the deletion of basement level 2 due to site constraints and other reasons. The Court found that the proposed modifications were appropriate as they resulted in a better planning outcome:

The proposal is an appropriate response to the constraints and opportunities of the site and represents a better planning outcome for the development and therefore the Modification Application can be granted approval.

Modification: The modifications have reduced the extent of many departures from the controls, and regularised the built form which by increasing setbacks, and lowering some roof heights and floor levels, protects the amenity of neighbours. The adjustments are considered to result in a better planning outcome.

***Vatich Pty Limited v Penrith City Council* (unreported, Land and Environment Court, 24 February 1992)**

In *Vatich Pty Limited v Penrith City Council*, Stein J considered the proposal which altered approval conditions regarding site rehabilitation by introducing non-putrescible waste handling use. Stein J considered the proposal to no longer be "...for precisely the same use and accordingly is substantially the same development ... particularly extractive industry, must be assumed to include the way in which the development is to be carried out." The appeal was dismissed as the final landform proposed would be significantly different, and waste disposal was a different use to the use consented.

Modification: The proposed modifications to the previously approved single dwelling, in our opinion, retain the approved use and room uses, other than deletion of staff quarters which are not required by the new owners.

The proposal retains the separate gym/guest pavilion, basement garaging, two swimming pools, and general placement of room uses. The soft landscaping and open space requirements are still greater than the minimums required in the DCP. The extent of intrusion into the reserve setbacks has been reduced.

Accordingly, we consider the proposed modifications to be consistent with Stein J's conclusions in *Vatich* with respect to 'substantially the same development' and can be supported as a s4.55 modification.

Garbourg v Ku-ring-gai Council [2022] NSWLEC 1429

In this case, the discernible built form of the development when viewed from the street or adjacent properties would be largely unchanged, however additional areas were proposed within the approved building envelope, which resulted in extra accommodation, and an FSR above the development standard. Bradbury AC rejected arguments with respect to the *'infilling of space within an envelope to increase the floor area and exceed the FSR development standard by some 22%'*, instead finding at [51]:

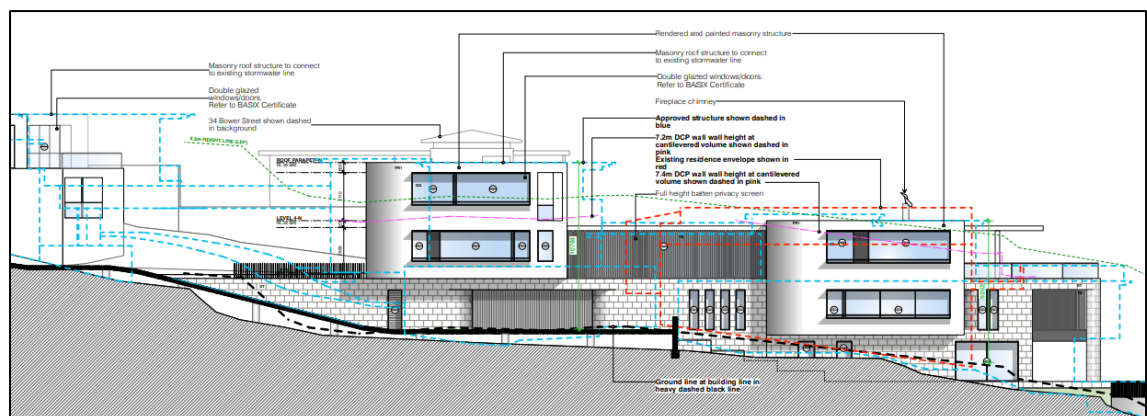
'That increase in floor area, even though it is contained within the approved building envelope, is in my view a very substantial increase and one that I find results in the modified development not being substantially the same as the development the subject of the Consent.'

Modification: In contrast to Garbourg, the proposed modification slightly reduces the approved FSR which complies with the development standard, does not increase the maximum height of the approved dwelling, despite the varied levels within the highly modified site; and maintains the approved RLs for the dwelling.

The architects have been extremely careful to ensure that the modifications do not increase height, do not affect neighbours, and in fact, improve neighbour outcomes for views.

The lower RL of two pavilions (proposed to be combined) has been used, and reduced pavilion size has increased views across the site and maintained those views over.

In our Clause 4.6 Application, it can be seen the height departures on the southern elevation were up to 10.89m (+2.39m). The current in the same location is 10.874m (2.38m). There is no increase in height. The architects have prepared an elevation which shows the lower of the approved RLs is maintained and the approved heights (in metres) are not increased when measured from existing ground line: a heavy black dashed line at the ground line adjacent to the building.



Source: Eaton Molina Architects

Figure 3: Eastern Elevation Showing Approved Heights Maintained

This was carefully done to maintain heights in accordance with the approval, despite this being a highly modified site with falls in several directions. Importantly, there is no detrimental amenity effect on neighbours adjacent, or across the road in terms of views or privacy; and with solar access close to the neighbour, increased, which are considered to be better environmental outcomes.

The proposal has carefully maintained the quantitative elements of the original approval, to ensure the proposal can be considered as a modification to consent.

Accordingly, we believe this additional information will allay any concerns regarding the items raised at our meeting. We consider the caselaw supports our position the proposal is 'substantially the same as the development for which consent was originally granted' and can therefore be considered under Section 4.55(2) as a modification to consent.

If you require further information, do not hesitate to contact our office on 9362 3364.

Yours faithfully,



George Karavanas
MANAGING DIRECTOR