From:	Emilie Burns
Sent:	16/08/2024 4:41:53 PM
To:	Council Northernbeaches Mailbox
Subject:	ATT: Development Assessment. Application No. Mod2024/0398 - DA2021/1824
Attachments:	23 Hay St Objection to Modification - Burns Family.pdf;

ATT: Development Assessment. Application No. Mod2024/0398 - DA2021/1824.
23 Hay Street, Collaroy. NSW 2097

Hello,
Please find attached our Objections in respect to the Application S4.55 Modification of Development Consent for Property 23 Hay Street Collaroy (Mod2024/0398).
Would you kindly acknowledge receipt of this email?
Many thanks,
Emilie

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Objections in respect to Application S4.55 Modification of Development Consent Property 23 Hay Street Collaroy (Mod2024/0398)

Submitted on behalf of Simon and Emilie Burns of 25 Hay Street, Collaroy

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“Alteration and Addition” or “New Build?

This cannot be an Alteration / Addition. It must be New Build.

1 Summary

- A new Development Application (DA) is required, not a modification to the existing Development Consent.

- This is because the Consent Authority (Northern Beaches Council) has already stipulated the outcome and a requirement in the existing Development Consent, by virtue of the condition is, that should the existing dwelling not be retained, then a **"***new Development Application to Northern Beaches Council is required***"** (refer to point 10 in section 2 below).

- The choice of words by Council in that condition, re: requiring a "*new Development Application*", as opposed to a modification application, were deliberate, and the reasons given were – if demolition exceeded what has been approved, the whole development would need to be reconsidered as a "new build" consistent with the Planning Principle in *Coorey v Municipality of Hunters Hill* [2013] NSW LEC 1187 (**Coorey**), and the current assessment and consent would be totally invalidated. This has occurred.

- The modification application does not in fact seek removal of that condition, so it is inherently deficient in any event, as the development is unable to comply given the condition is already breached and the applicant has not sought its removal.

- We also query whether s4.55 can apply without altering the design of the new dwelling. We note that the modification application expressly states in 6.1 that it is "*exactly the same development*". If this assertion is true, then consistent with the principal in *Buyozo Pty Limited v Ku-ring-gai Council* [2021] NSWLEC 2 there is no power under s4.55 to modify anything, as power to modify relates to developments that are substantially the same, not exactly the same as asserted by the applicant, and so the modification application must be rejected.

- The present circumstances are vastly different to the position in *Ganley v Mosman Municipal Council [2021] NSWLEC 1124* (**Ga**nley) presented by the applicants, as the issue as to whether or not the development was an alteration or addition, or a new build, was not in fact a live issue in Ganley, as the development was always assessed by Council as a new build, and non-compliances were not justified on the basis of constraints of the existing dwelling, as they were in the present case (refer to points 4 and 5 in section 2 below below). Further, Ganley did not have a condition in the same form as the present case, which gives express reasons for the condition being the planning principle in Coorey and the issue as to whether the development properly an alteration / or addition (which reasons must be considered under s4.55(3)), and which condition expressly requires a "new development application" if breached. In Ganley, it merely required that additional consent for the additional demolition be obtained, not a new application for the whole development due to recharacterisation of the nature of the development per Coorey. It is completely different and does not establish present in the current context.

- The applicants own application for modification makes clear that the legal position is that both "essence" and "substance" of the development need to be assessed "*including in the circumstances in which the development consent was granted*" (per Moto Projects (No.2)), **not the form (per** Gordon & Valich**)**, but the modification application really only address the "form" of the development (and appears to assume that because the form is the same, the

substance and essence is). This is a misinterpretation of the law, as clearly the courts drew a distinction between substance and form.

- Whilst the form of the development may be the same, the essence and substance is not, as it is now a knock down rebuild, and not an alteration or addition any more. The original assessment of it being an alteration was dependent on limited demolition, and this must be reconsidered pursuant to s4.55(3) – as it was a relevant matter under 4.15(1) and Council gave express reasons for the condition limiting demolition, by reference to Coorey, which must be considered under s4.55(3) also. Further, as outlined by the applicant themselves, the consent authority must have regard to the context in which the original application was granted and assessed, which further mandates reconsideration of whether the development should now be properly characterised as a new build, and thus requiring a new Development Application as per the Council's own requirements as stipulated in the development consent.

- Contrary to the applicant's assertion in the legal letter (see second last page), the mere fact that the Council included an express condition limiting demolition, by reference to ensuring the development remains an alteration and addition, and not a new build, within the principles in Coorey and requiring a "new development application" if breached, means that the extent of demolition and characterisation as an alteration was expressly an "***essential or material element***" of the original approval. If it was not an essential or material element, there would have been no such condition.

- Finally, as a matter of public interest and principle, to assess a development on the basis that it's an alteration, then via a modification and to allow almost total demolition of the existing dwelling – purely on the basis (as the applicants assert) that the design is not changing, makes a mockery of the initial assessment process and panel deliberations and would set a dangerous precedent, contrary to public policy.

- It also must be queried whether the applicants intentionally mislead Council or had any intention of complying with the development consent given they breached the conditions of consent on "day 1" of demolition.

2 Facts

The following sets out the facts concerning the history and what has happened. They are not opinions of ours, but irrefutable facts.

1. **The initial Development Application was returned by Council because of the extent of the proposed demolition at that stage and it did not address whether it was a "new build" or "alterations and additions".** See extract below.

> **2. BACKGROUND**
>
> Development Application (DA2021/1575) was returned by Council for the following reason:
>
> *DA Application Type and Statement of Environmental Effects*
>
> *The extent of demolition of the existing dwelling is substantial. The Statement of Environmental Effects does not address the question of whether the proposal constitutes "alterations and additions" or a "new building" as per Coorey v Municipality of Hunters Hill [2013] NSW LEC 1187. Either a revised Statement of Environmental Effects is required or a supplementary statement addressing this issue.*

2. **Whether or not it is a new build, or an alteration / addition was expressly stated by Council in its Assessment Report as relevant as to how any non-compliances are to be assessed.**

   *"[whether it is an addition or alteration, or new build is necessary] to determine how any new and existing non-compliance to the dwelling such as the building height, side boundary envelope encroachments can be assessed against the relevant planning legislation***"**

3. **The revised Development Application then expressly claimed that it was an alteration / addition, and so should not be assessed as a new build – referencing the principles in Coorey v Municipality of Hunters Hill [2013] NSW LEC 1187 (Coorey).**

   "*This proposal seeks approval for the construction of alterations and additions to an existing dwelling*".

   "*Additions are also proposed to the rear northeast corner of the dwelling*." However, there is currently no dwelling or northeast corner of any structure *on which t**o add*** anything.

   "*The proposal also provides for an addition to the first floor level*." However, again, there is currently no dwelling nor first floor on which to ***add or alter anything.***

   Relevantly the applicants and their planners asserted that:

   "*The proposed external walls of the western elevation are retained, and all floor levels are retained… The **proposal maintains a reasonable portion of the existing building** fabric,*

such that it is deemed reasonable to consider the development as alterations and addition" (see page 7 of the Statement of Environmental Effects".)

4. **The 11% breach of height controls and the clause 4.6 exemption request was expressly predicated by the applicants on the basis that the breach of height controls was necessitated as a result of retaining the existing fabric – which has now been demolished.**

   "*The non-compliance with the height controls* is ***a result of … the existing dwelling on site***." (see section 3 of the Clause 4.6 exemption application)

   "*The non-compliance is a* ***direct result of… the need to provide a roof to complement the existing dwelling***" (see section 4 of the Clause 4.6 exemption application)

   "*The proposal is* ***constrained by the existing dwelling*** *on site which is non-compliant with the height of building development standard*" (see section 4 of the Clause 4.6 exemption application).

   "The ***site is constrained by the existing dwelling and the adopted floor***" (see section 4 of the Clause 4.6 exemption application).

5. **Non-compliances with controls were assessed by Council as justified given it was an alteration / addition and the development was constrained by the existing dwelling being renovated.**

   In Council's own assessment and reasoning, the section 4.6 application was viewed favourably based on the "*sitting and form of the existing dwelling*" which was being altered.

   Council also expressly accepted the applicant's reasons outlined in section 4 above which were based on "*constraints by the existing dwelling*".

   Further non-compliances with front setback and side boundary envelope were assessed by Council as reasonable due to the **"***site and location of the existing dwelling***".**

   Breach of wall heights were assessed by Council as justified as they were a result of "*the design of the existing three level dwelling*".

6. **Objections were raised by us that despite these assertions, the applicant's own geotechnical engineers required more extensive demolition than indicated in the plans, in particular that the southern wall could not be retained, and so it should be considered as a new build.**

7. **Council found that this level of demolition would warrant refusal of the application, implicitly because it would not be an alteration or addition as asserted by the applicants in their submission.**

   "*The matters raised in the submission are detailed in this report, and in summary it was found that several of the concerns would warrant the refusal of the application. The applicant was requested to provide amended plans addressing… the Planning Principle -*

Demolition, in particular addressing the geotechnical report which stated that the southern elevation could not be retained. Amended plans were submitted [with] an engineer's report stating that the south elevation of the existing dwelling could be retained."

8. **As indicated above, the applicants subsequently got revised geotechnical reports which enabled the retention of the southern wall, so that they could continue to claim the development was an alteration / addition, and not a new build.**

9. **The Council, as consent authority, considered in detail whether or not the development should be considered a new build or an alteration / addition. Their conclusion on this topic was based on the fact that the revised plans and proposal retained a large part of the existing dwelling. This is no longer the case.**

   "*In summary, when assessed against the Qualitative and Quantitative criteria, the proposal retains a large proportion of the existing dwelling, including part of the front wall, the southern elevation and the rear wall. The proposal also retains the floor plates and floor to ceiling heights of the lower ground, ground and first floor*".

   "The general form of the existing dwelling will be retained"

   "The proposal retains significant portions of the existing structure. The proposal retains the southern elevation wall, part of the front wall and the rear wall of the dwelling. The proposal also retains the floor plates and the floor to ceiling height of the Lower Ground, Ground and First Floor. While the general look of the dwelling will change somewhat, the proposal retains a large portion of the existing structure."

   "An assessment against the Planning Principles demonstrates that a large portion of the existing dwelling will remain and that the essential elements of the dwelling, being the floor plates, floor to ceiling heights and external walls of the southern, rear and part of the front elevations are to be retained. It is concluded that proposal when assessed against the planning principles can be considered as Alterations and Additions"

10. **Given the significance of this analysis and the assessment that "a significant portion of the existing dwelling" needed to be retained to support the favourable development consent, Council included an express condition in the development consent that such a significant portion of the dwelling was in fact retained (the Existing Building Condition). Further, if the significant portions of the existing dwelling were not retained, Council expressly stated that "a new Development Application" is required.**

    The express reasons for this condition and the express requirement to submit "a new Development Application", as opposed to a mere modification application, were expressly stated by Council as the planning principle in Coorey – which is assessment as an alteration / addition. This requires consideration by council under s4.55(3).

> 26. **Maintain the existing building fabric**
> The parts of the existing building fabric which are shown to be retained on the approved plans are to be retained during construction works to ensure consistency with approval as alterations and additions to a dwelling house. If this cannot be achieved, a new development application will need to be lodged with Northern Beaches Council.
>
> Reason: Coorey v Municipality of Hunters Hill [2013] NSWLEC 1187

11. **Contrary to the above, the entire existing dwelling was demolished (essentially straight away), save for a portion (approx. 1/4 of the southern wall).**

    To be clear, as indicated above, the entire Development Application was assessed with respect to non-compliances with controls on the basis that it was an alteration and that a "*substantial portion of the existing dwelling is retained*", including:

    - the entire southern wall – of which ¾ has been demolished.
    - the floor plates for the ground, first and second floor – all of which have been demolished.
    - parts of the rear wall – all of which have been demolished.
    - parts of the front wall – all of which have been demolished.

12. **Given the above, the condition is breached, and as per Council's own requirements "a new Development Application" is required, not a modification.**

13. **Part way through the demolition, we queried whether the applicants were comfortable with the extent of the demolition given the scope of the development consent, and they confirmed to us that they were. The demolition continued.**

14. **We also raised our concern with the Principal Certifier, again part way through the demolition, but no action was taken for a number of weeks without response. The demolition continued.**

2 Modification application

As per the summary above, the modification is deficient for multiple reasons:

- It really only addresses the form of the dwelling and ignores the context and substance of what was originally approved, which was expressly an alteration.

- The express condition which was included in the development consent to ensure that the substance of the development remained as an alteration/addition within the meaning in Coorey, is evidence that this was an essential and material consideration of the consent authority and material to the nature and circumstances of the original approval. It cannot be disregarded merely because the form of the dwelling is unchanged.

- The modification application does not establish that the development, as modified remains consistent with an alteration/addition as per Coorey, which is required by s4.55(3), and the (re)consideration of the issues under 4.15(1).

- The modification application does not (re)justify the non-compliances with controls given its previous justification that the development is constrained by the existing dwelling are not invalidated by the applicant's breach of the development consent.

- As stated above, the modification application expressly states a number of times that the development is exactly the same. If this is the case, there is no grounds for a modification application under s4.55, and the modification application must fail. See *Buyozo.*

- Conversely, if the development is not the same, then necessarily the substance of it has changed, which again requires reconsideration of Coorey and the justification of non-compliances with the control. Again, the modification application does not adequately address these matters so must fail.

3 Additional concerns

3.1 The applicants have a history of ignoring or not complying with conditions of consent.

- The condition on retention of the existing building fabric and features was essentially breached on day one of the demolition – with no regard placed on it at all.
- Further, had we not intervened, the applicants had advised the builder and tree loppers to cut down and remove a mature eucalyptus tree (T3) which was not consented for removal in the DA (cl 17). This tree (T3) was expressly required to be retained in the Arborist Report and the Landscapers Report. They completely disregarded this however, including initially when challenged by us on this topic.
- The applicants also failed to comply with an earlier condition on a prior consent (DA2018/0087) for removal of two large gum trees on the property, and never replanted trees as required.
- Given the above, we query whether the applicant had any intent to comply with the conditions and / or intentionally mislead the Council in relation to their Development Application.
- We note that no evidence or rationale has been furnished in the application as to why the condition restricting demolition was breached or why the modification and extra demolition is required, which further gives rise the question of misrepresentation above.
- For context, we also note that the development breached a number of other conditions and requirements of the development consent:
    - No tree protection was put in place for T3 for many weeks (until we complained to the PC);
    - No fencing was placed on the northern boundary (until we complained to the PC);
    - Excavation was conducted on our property without our consent, including below the footings of our house, and within 40cm of those footings. No prior notice was given for this level of excavation as required by the condition of the development consent.
    - No dilapidation report was provided to us as required by the condition of the development consent prior to the commencement of demolition.

- Demolition and excavation works commenced at 7am every day, not 8am as required by the development consent.

- Builders accessed our property on multiple occasions without consent (including after expressly being asked to seek consent in the future).

- Materials, being 4 x large form ply boards were lent up against our property without notice or consent.

3.2 There is a clear conflict of interest in the presentation of a legal opinion by WMW Lawyers, with legal opinion written by the applicant, to support their application for modification.

The legal opinion was written by the applicant themselves, and so should carry no weight as it is not an independent nor objective consideration of the law or application of the EPA Act.

Further, and putting the inherent conflict of interest to one side, the legal opinion is deficient in many respects as outlined above but most importantly because it does not in any way address the condition requiring retention of the existing building to remain an alteration and addition, and the express reasons given by Council for the purposes of s4.55(3)(b), that this condition was included to be consistent with Coorey.