

15 August 2024

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

Dear Sir/Madam,

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

Development Application No: DA2019/0741
Date of Determination: 9 October 2019
Premises: Lot A DP 397484,
No. 3 Beaconsfield Street, Newport
Proposed Development: Alterations and additions to the existing dwelling

On behalf of Therese Rushby 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 DA2019/0741.

The application will seek to modify the form of the alterations and additions to a dwelling house. The changes are discussed in further detail below.

BACKGROUND

An application for consent for alterations and additions to the existing dwelling was approved by Council by Notice of Determination on 9 October 2019.

The works that were the subject of Council's consent have commenced under Construction Certificate CC2020/0335, dated 15 April 2020.

The works which are the subject of this modification application have not been carried out.

PROPOSED MODIFICATION

This submission under S4.55(2) seeks to modify the approved development to reflect the following changes, which are noted on the revised architectural plans prepared by THW Architects, Drawings No's. 00-05, 10-13, 20-21, 100-102, Revision F, dated 2 July 2024.

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The proposed revisions comprise the following architectural changes to the approved design and their position on the proposed plans is identified by the amendment revisions:

1. New Fence and Gate
2. Changes to balustrades and planter boxes.
3. Removal of arches on East and North Elevations
4. Removal of external stairs on South Elevation
5. Changes to windows and sliding doors.
6. Minor internal changes.
7. Move 3 Banksia trees so they are not located over the basement garage

The approved overall roof height to RL 55300 is unchanged and it is not anticipated that there will be any significant change in the views enjoyed by the surrounding properties. Similarly, the minor window alterations will not result in any substantial change to the impact of the development on the neighbouring properties in terms of overlooking, overshadowing or loss of privacy.

The modified proposal will not result in any change in the approved total floor area or any increase in site coverage, or corresponding reduction in landscaped area. The approved building footprint, overall height and setbacks to the side boundaries remain unchanged.

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

- Revised architectural plans prepared by THW Architects, Drawings No's. 00-05, 10-13, 20-21, 100-102, Revision F, dated 2 July 2024
- A revised Basix Certificate is not required in this instance as the number of windows has been reduced.

JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under S4.55(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 5) 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 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 approved form of the development and which do not substantially alter the building’s bulk and scale.

The changes do 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 building 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 provide for “Alterations and additions to a dwelling house” in a location and to 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 proposed alterations to the dwelling, the minor nature of the changes ensures that the design remains consistent with the approved form.

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.

The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as approved and will not comprise the amenity of the subject or neighbouring properties.
- The proposal is “substantially” the same development, as defined by the Environmental Planning & Assessment Act 1979.

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, flowing style.

VAUGHAN MILLIGAN