

**STATEMENT OF MODIFICATION - APPLICATION TO MODIFY CONSENT UNDER
S4.55 (2) OF THE ENVIRONMENTAL PLANNING & ASSESMENT ACT 1979**

**FOR THE DEMOLITION OF THE EXISTING STRUCTURES AND THE CONSTRUCTION OF A
NEW TWO AND THREE STOREY DWELLING WITH ATTACHED GARAGE, DRIVEWAY,
SWIMMING POOL AND ASSOCIATED LANDSCAPING**

AT

1 TUTUS STREET, BALGOWLAH HEIGHTS

FOR

PAUL & ANGELA WINTER



**Prepared July 2022
(As revised 18 July 2022 & 10 October 2022)**

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1.0 Introduction

This Statement of Modification accompanies details prepared on behalf of Paul and Angela Winter by Achilles Apostolellis Architecture, Sheets No's. DA03, DA05 – DA14, Revision M2, Issue dated 9 October 2022, which seek to modify the development consent issued under Notice of Determination (DA2021/1130) dated 28 September 2021 (as subsequently modified on 23 May 2022) to detail minor amendments to the design of the approved *“Demolition works and construction of a dwelling house including a swimming pool”* at **1 Tutus Street, Balgowlah Heights**.

The amendments which are the subject of this application respond to Council's correspondence dated 27 September 2022.

In response to recent case law in regard to modifications that seek retrospective consent, the amended architectural design has removed any works which have been constructed from the Modification Application.

A revised list of proposed modifications is provided within **Section 3.0**.

The proposed modifications to the dwelling have been highlighted within the revised architectural plans and do not result in any increase in the overall height of the dwelling or the general building footprint and envelope of the dwelling on the site.

This Statement reviews the proposed development by assessing the relevant matters for consideration under Section 4.15 of the Environmental Planning and Assessment Act 1979, (as amended) including:

- *State Environmental Planning Policy (Resilience and Hazards) 2021*
- *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004*
- *Manly Local Environmental Plan 2013*
- *Manly Development Control Plan 2013*

2.0 Background

An application for consent (DA2021/1130) for *“Demolition works and construction of a dwelling house and swimming pool”* was approved by Council by Notice of Determination dated 28 September 2021.

The approved demolition works and construction of a new dwelling house and swimming pool have commenced in accordance with Construction Certificate CC2021/1465, dated 24 November 2021.

The original determination was subsequently modified by the Notice of Determination of Mod2022/0149 dated 23 May 2022.

The works have commenced in accordance with Construction Certificate CC2022/0650, dated 31 May 2022.

3.0 Proposed Modifications

The application involves a change to the form of the approved dwelling house and swimming pool, which was recently considered under the Notice of Determination of DA2021/1130 (as subsequently modified on 23 May 2022).

Specifically, the proposed works involve the following changes:

Basement Level

- Include garden access stair along the north façade from the driveway to ground floor level

Lower Ground Floor Level

- Add glass cover above pergola at front door

Ground Floor Level

- Align external wall at pantry
- Omit pantry wall
- Connect west facing windows (pantry and kitchen), adjust wall
- Extend window in family room, adjust wall, and omit shutter
- Confirm use of gas powered appliance to the fireplace to the living room
- Move garden access stair from driveway to the north façade wall
- Confirm gas heating to pool heat pump
- Confirm gas instantaneous hot water system for the dwelling

First Floor Level

- Align external wall at bath 1
- Extend window, adjust wall, omit shutter, and add overhead sunshade in bedroom 1
- Extend window, adjust wall, omit shutter, extend balcony, and add overhead sunshade in bedroom 2 and 3.

Roof

- Add aluminum framed sunshade louvres above balconies in bedroom 1, 2 and 3

Council's correspondence notes the inclusion of a path adjoining the northern elevation as being works which have been constructed prior to the issue of any revised consent. We note that this is not as a pathway and rather provides a cover over the services shaft at the lower level.

The revised plans otherwise note works which are proposed to be modified and have not been constructed.

The following documentation has been prepared to support the proposed modifications:

- Revised Architectural Plans prepared by Achilles Apostolellis Architecture, Issue M2, dated 9 October 2022
- Revised BASIX Certificate, Ref No. 1195996S_03, dated 13 July 2022

4.0 Zoning and Development Controls

4.1 State Environmental Planning Policy (Resilience and Hazards) 2021

Chapter 4 – Remediation of Land

Chapter 4 – Remediation of Land and in particular Clause 4.6 suggests that a consent authority must not grant consent to the carrying out of any development on land unless it has considered whether the land is contaminated.

Given the history of residential use of the land, the site is not considered to be subject to contamination and further investigation is not required at this stage.

4.2 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

The proposed modifications have been designed to respect the water, thermal and energy standards required by BASIX. The modified works remain consistent with the original BASIX certificate submitted with the development application.

4.4 Manly Local Environmental Plan 20123

The Manly LEP 2013 became effective on 5 April 2013

The subject site is zoned R2 Low Density Residential under the provisions of the LEP. This zone permits dwelling houses with consent.

The development of and use of the land for residential purposes is consistent with the R2 Low Density Residential objectives, which are noted as:

- *To provide for the housing needs of the community within a R2 Low Density Residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

It is considered that the proposed modification will continue to achieve the zone objectives and are consistent with the established character of the surrounding locality for the following reasons:

- The modification application maintains the approved and consistent built form and will be consistent with and complement the existing detached style housing within the locality.

- The proposed modifications are minor within the context of a larger scale development and will continue to respect the scale and form of other dwellings in the vicinity and therefore complements the locality.
- The setbacks remain compatible with the existing surrounding development.
- The modifications will not have any significant impact on long distance views for the neighbouring properties.
- The site is utilised as housing and will continue to maintain the residential use.
- The works will provide for modification an approved dwelling which will maintain the residential scale and character of the locality.
- The modification will maintain an appropriate level of amenity to the adjoining properties.
- The modifications do not alter the approved building height nor the general envelope of the approved dwelling, therefore the application does not unreasonably obstruct any significant views from private property or the public domain.
- As above, the approved height and envelope remains unchanged, therefore the proposal maintains appropriate solar access to the surrounding properties.



Fig 1: Extract of Manly Local Environmental Plan 2013 Zoning Map

Clause 4.3 – Height of buildings

The dictionary supplement to the LEP notes building height to be:

building height (or height of building) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The building height was approved at 8.26m and the proposed modification application does not seek to amend the approved height, therefore continuing to achieve the control.

Clause 4.4 – Floor space ratio

A maximum floor space ratio control of 0.4:1 for development in this locality is required. The dwelling was approved with a FSR of 0.37:1 or GFA of 478sqm. The consent was subsequently modified induced a minor increase in the gross floor area to 494.3m² or 0.384:1, which continued to comply with the control.

The proposed works under this application involve minor locations to the building which do not do not alter the gross floor area.

Clause 6.8 – Landslide risk

The site is identified on Council's DCP Mapping as being subject to Landslip Hazard (Area G4). The proposed modifications do not potentially alter the existing ground conditions and therefore the previous geotechnical reports are considered to be sufficient to support the proposed development. n valid.

The development will be carried out in accordance with the recommendations and requirements within the submissions prepared by JK Geotechnics and the proposal is therefore considered to satisfy the provisions of this clause.

Clause 6.9 – Foreshore scenic protection area

The subject site is identified as being within the Foreshore Scenic Protection Area. The objective of this clause is as follows:

- *The objective of this clause is to protect visual aesthetic amenity and views to and from Sydney Harbour, the Pacific Ocean and the foreshore in Manly.*

The proposed modification works will retain the approved height and envelope, as well as wall height, therefore will not adversely impact on the visual aesthetic amenity and views. The proposal remains consistent with the approved dwelling with respect to clause 6.9.

4.4 Manly Development Control Plan

Council's DCP Development Control Plan 2013 – Amendment 14 provides the primary control for development within the area.

The modification application submission will address the Council's submission requirements outlined in Part 2 – Process.

The primary areas which are applicable to the proposed works are detailed within Part 3 – General Principles of Development & Part 4 – Development Controls and Development Types.

Control	Required	Approved	Compliance
Clause 4.1.1 Residential Density & Subdivision	Density Area D7 – 1 dwelling per 750m ²	Site area is 1286m ²	Yes - existing site and dimensions are unchanged
Clause 4.1.2 Height of Buildings	Maximum height – 8.5m Wall height – 8m Max two storeys Roof height – 2.5m above wall height	Maximum height – 8.26m Max proposed wall height approx. 7.59m Three storeys Flat roof	Yes, application does not alter the approved height. Yes, application does not alter the approved wall height. Yes, the application does not alter the number of storeys. Yes, the application does not alter the approved roof form.
Clause 4.1.13 Floor Space Ratio (FSR)	0.4:1	0.384:1 or 494.3m ³ (as approved and remains unaltered)	Yes, the application continue to comply with Council control will not see any change to the approved gross floor area.
Clause 4.1.4 Setbacks (front, side and rear)	<u>Front</u> a) Relate to neighbouring sites and the prevailing building lines or 6m c) Projections into the front setback may be accepted for unenclosed	10m	Yes, no change proposed to the approved front setback.

	balconies, roof eaves, sun-hoods, chimneys, meter boxes and the like, where no adverse impact on the streetscape or adjoining properties is demonstrated to Council's satisfaction.		
Side Boundary setback – 1/3 of wall height	<u>Side</u> 1/3 x 7.5m = 2.5m	North: 2.3m – 7.1m	Yes, no change to the approved side setback to the north.
Rear setback	<u>Rear</u> Min 8m	20.9m	Yes -= no change to the approved rear setback to the dwelling.
Setback for development adjacent to LEP Zones RE1, RE2, C1 and C2.	South: 6m (common boundary)	1.5m – 6m	Yes, no change proposed to the southern side setback.
Clause 4.1.5 Open space and Landscaping	Area OS 4 Open space: Min 60% site area – 771.6m ² Landscaping: 40% of open space – 308.64m ²	Approved open space 813.59m ² or 63.27%. Marginal reduction in open space by extending covered terrace (7.8m ²), adding Pool Cabana (15.6m ²) and Pool Filter Roof (9.5m ²) = 32.9m ² . 813.59 – 32.9 = 780.69m ² or 60.7% Approved landscaped area 67.87% or 547.06m ² of total open space. Approved landscaped area generally unchanged	Yes, proposed open space complies with the DCP control. Yes, no change proposed to the approved landscaped area.

Clause 4.1.6 Parking	Min 2 spaces	Two vehicle spaces provided within proposed garage	Yes, no change.
Clause 4.1.6.4 Vehicular Access	<p>a) All vehicles should enter and leave the site in a forward direction.</p> <p>b) Vehicular access and parking for buildings with more than 1 dwelling is to be consolidated within one location, unless an alternative layout/design would better reflect the streetscape or the building form.</p> <p>c) Vision of vehicles entering and leaving the site must not be impaired by structures or landscaping.</p> <p>d) Particular attention should be given to separating pedestrian entries and vehicular crossings for safety.</p>	The approval granted consent for a new double garage under the dwelling.	Yes, no change.
Clause 4.1.8 Development on sloping sites	<p>a) Site Stability Report may be required in Geotechnical Areas G2, G3 and G4</p> <p>i) The applicant should complete Council's Checklist</p>	The site is identified in Landslip Hazard – Area G4. Previous addendum letter to the original Geotechnical Stability Assessment has been prepared by JK	Yes

	<p>for Preliminary Assessment of Site Conditions (Landslip) at Schedule 11 of this plan to determine whether a Site Stability Report is required. All development involving load bearing building works must complete the checklist for Preliminary Assessment of Site Conditions (Landslip) to ensure developments follows good engineering practice.</p> <p>b) Area G2 - Potential Hazards i) Potential Geotechnical hazards in this area include:</p> <ul style="list-style-type: none"> • Rock falls and slumping of soil and fill materials from unsupported cuts and natural cliffs onto public and private pathways and roadways. • Possible creep of talus materials on steeper soil covered slopes. • Possible movement of detached blocks of sandstone. Limited to moderate damage of some or 	<p>Geotechnics has been provided. Subject to compliance with the recommendations contained within the original report, the proposal will satisfy the provisions of this clause.</p> <p>The proposed works under this medication do not substantially alter the existing site conditions.</p>	
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	part of structures (for example dwelling or roadway), with part of site requiring some stabilisation works. Large scale stabilisation works unlikely to be required.		
Clause 4.1.9 Swimming pools, spas and Water features	<p>Height above ground not more than 1m</p> <p>a) Swimming pools and spas must not be located within the front setback i.e., between the front boundary of the lot and the building line. Consideration of any exception to the required location must demonstrate that any swimming pools and/or spa and their curtilage and/or concourse:</p> <p>i) does not detract from the amenity or character of the neighbourhood; and</p> <p>ii) is a minimum distance from the front boundary equivalent to at least twice the height of the swimming</p>	<p>Proposed pool is largely sited at or below existing ground level</p> <p>Proposed pool is located in the rear yard</p>	<p>Yes, no change to the height above ground.</p> <p>N/A</p>

	<p>pools and/or spa and their curtilage and/or concourse at any point above existing ground level.</p> <p>b) Setback of outer edge of pool concourse from side and rear boundaries must be at least 1m with water line being at least 1.5m from the boundary</p>	<p>Approved pool coping is sited 1.3m and 13.3m from northern and southern side boundaries respectively and 4.4m from the rear boundary.</p>	<p>The approved swimming pool location is unaltered.</p>
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Part 5 – Special Character Area and Sites

The subject site is identified as being within the Foreshore Scenic Protection Area. The proposed modification works seek to provide for minor amendments within the context of the approved dwelling and swimming pool. The modification works are consistent with the approved dwelling and its relationship within the Foreshore Scenic Protection Area. The modification works maintain a consistent design and largely follow the sloping topography of the site, and will continue to comply with Council's statutory height limit. The proposal is consistent with the approved setbacks, and the development will maintain suitable views and amenity for neighbouring properties and the adjoining public domain.

The proposed minor modifications do not require removal of any additional trees .

Subject to compliance with the recommendations contained in the Arborist's original report, the proposal considered to be in keeping with the provisions of this clause.

5.0 Matters for Consideration under Section 4.15 of The Environmental Planning and Assessment Act, 1979

5.1 The provisions of any environmental planning instrument

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 8.2019.186.1

The works continue to provide for demolition works and the construction of a dwelling house including new swimming pool, with no substantive change to the external configuration, height and impact of the development to the public domain or to the neighbouring property

The revised design with minor modifications to the built form will 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 including a swimming pool*” 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.

5.2 Any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

There are no relevant draft instruments applying to the land.

5.3 Any development control plan

The development as modified has been designed to comply with the requirements of Council’s Manly Development Control Plan 2013.

It is considered that the proposed design respects the desired character objectives of the DCP in that it reinforces the existing residential character of the area and is compatible with the existing uses in the vicinity.

5.4 Any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and

No matters of relevance are raised in regard to the proposed development.

5.5 The regulations (to the extent that they prescribe matters for the purposes of this paragraph),

No matters of relevance are raised in regard to the proposed development.

5.6 The likely impacts of that development, including environmental impacts on both the natural and built environments, and the social and economic impacts in the locality.

It is considered that the proposal, which seeks consent for modifications to the approved new dwelling and swimming pool, will not unreasonably impact upon the amenity of adjoining properties or upon the character of the surrounding area. It is considered that the resultant development is compatible with and will complement the residential character of the area.

The proposal is considered to be well designed having regard to the relevant provisions of the Manly Local Environmental Plan 2013 and Council's Codes and Policies, in particular the Manly DCP 2013.

5.7 The suitability of the site for the development

The subject land is currently zoned R2 Low Density Residential under the Manly Local Environmental Plan 2013 and is considered suitable for the proposed development.

5.8 Any submissions made in accordance with this Act or the regulations

This is a matter for Council in the consideration of this proposal.

5.9 The public interest

The proposal will not impact upon the environment, the character of the locality or upon the amenity of adjoining properties and is therefore considered to be within the public interest.

6.0 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 new dwelling and swimming pool 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 development.

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 28 September 2021 (as subsequently modified on 23 May 2022) and commenced in accordance with the confirmation of the satisfaction of the deferred commencement conditions.
- 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.

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