

12 August 2021

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:	DA2020/0237
Date of Determination:	22 May 2020
Premises:	Lot 130 DP 11162 15 Alto Avenue, Seaforth
Proposed Development:	Construction of a dwelling house

On behalf of Mr Matthew & Mrs Shannon Deeran, 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 DA2020/0237.

The application involves a request to modify the conditions of the development consent, and in particular, Conditions No's 33 & 35 which read:

33. Subdivision Stage 3 (DA2020/0036)

the subject land Lot 130 of DP 378463 shall be subdivided as per Stage 3 approval DA2020/0036.

Evidence of the approved Subdivision Certificate Application as per Stage 3 (DA2020/00236) shall be provided to the Principal Certifying authority prior to the issue of a Final Occupation Certificate.

Reason: To ensure all three (3) stages of the proposal are complete

35. Demolition Works - Stage 2 (DA2020/0238)

All existing buildings as part of the demolition is work for Stage 2 (DA2020/0238) shall be demolished.

Evidence of the demolition of the buildings, as approved in Stage 2(DA2020/0238 shall be provided to the Principal Certifying Authority prior to the issue of a Final Occupation Certificate .

Reason: To ensure all works are complete prior to the subdivision of the land.

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As discussed within this submission, it is considered that the requirement for the demolition of the existing dwelling within the site and the subdivision of the land prior to the issue of a Final Occupation Certificate for the dwelling approved within this consent is onerous and unnecessary to achieve Council's stated aim that the works which were the subject of the separate applications and noted Stages 1, 2 and 3 be completed prior to the subdivision of the land.

BACKGROUND

An application seeking development consent for the purposes of *"For the proposed construction of a new dwelling to provide for a detached dual occupancy"* was lodged with Northern Beaches Council on 11 March 2020.

The proposed construction of the detached dual occupancy was noted as being Stage 1 of a three stage development which was essentially intended to provide for :

Stage 1 - Construction of a new dwelling to provide for a detached dual occupancy

Stage 2 - Proposed demolition of the existing single storey dwelling and associated structures

Stage 3 - Proposed Torrens Title subdivision of one lot into two

Council's considered the three stage approach to the works and the individual stages were approved with the following determinations:

Stage 1 - Construction of a dwelling house – DA2020/0237 dated 22 May 2020

Stage 2 - Demolition of a Dwelling House and associated structures – DA2020/0238 dated 22 May 2020

Stage 3 - Subdivision of one lot into two – DA2020/0236 dated 22 May 2020

Each individual development consent contained within at Condition 1 - a common condition which noted in part:

1. *Approved Plans and Supporting Documentation*

Development consents DA2020/0036, DA2020/0037 and DA2020/0038 for Stage 1, 2 and 3 are to operate concurrently and are linked to ensure the completed development is consistent with all requirements of Stages 1, 2 & 3, with resulting development being a dwelling house on Lot 1 and the subdivided land in accordance with DA2020/0036.

NB: It is noted that the common Development Consent Condition 1 referred to DA2020/0036, DA2020/0037 & DA2020/0038 and it is assumed that Council intended to refer to DA2020/0236, DA2020/0237 & DA2020/0238 which were the formal consent numbers for each Stage of the works

Each Notice of Determination included a particularised addition to Condition 1 which was relevant to the works which were the subject of the consent.

For example, DA2020/0237, which is the subject of this current application, noted the additional wording to Condition 1 being :

Stage 1 development consent is granted only for the following:

- *construction of a new dwelling, garage/guest room/driveway and associated landscaping*

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The works which were the subject of Stage 1, being the construction of a dwelling house, were commenced in accordance with Construction Certificate CC2020/0608, submitted 26 June 2020 and are nearing completion.

It is clear from the structure of the applications as made to Council and Council's approach in issuing the relevant consents for Stages 1, 2 and 3 that it was the applicant's and Council's intention that the ultimate development of the site would provide for the construction of a new detached dwelling and upon demolition of the existing single storey dwelling, the land be subdivided and be available for a future separate dwelling within the vacant allotment.

It is the applicant's intention to provide for the 3 Stage development in accordance with the format outlined within the Development Applications and Council's Notices of Determination.

For reasons of difficulty in completing the demolition of the existing dwelling prior to the completion of the new dwelling as detailed under DA2020/0237, Conditions 33 and 35 as they are effectively addressed under the Notices of Determination of the relevant Stages 2 for the demolition of the existing dwelling and Stage 3 for the subdivision of one lot into two.

It is our submission to Council that the fundamental reason for the imposition of the conditions on the three stages as outlined by Council is to ensure that the site the new dwelling and demolition of the existing dwelling are completed prior to the subdivision of the land and this aim will be still achieved and would not be thwarted through the removal of the requirement that the existing dwelling not be occupied prior to the issue of the Subdivision Certificate.

PROPOSED MODIFICATIONS

As outlined above, this application seeks to delete condition 33 and 35 from the Notice of Determination of DA2020/0237, in order to allow for the new dwelling which is nearing completion, be occupied, without the need to demolish the existing dwelling and arrange for the subdivision application works.

Council's aim of ensuring that the subdivision of the land is not completed without the demolition of the existing dwelling will be achieved through the conditions included within the Notices of Determination of DA2020/0236 & DA2020/0238.

The construction of a detached dwelling as a dual occupancy, which was the use sought within the Development Application for DA2020/0237 is a permissible form of development for the site and as designed and constructed, the proposal complies with Council's development controls.

The proposed modification to the Notice of Determination to delete Conditions 33 and 35 will not result in any physical change to the land nor alter the relationship of the built form is constructed to the neighbouring properties.

The demolition of the existing dwelling will occur under the requirements of DA2020/0238 and the subdivision of the land will be carried out under the requirements of DA2020/0236.

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JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under Section 4.55(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*
- (c) 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*
- (d) 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**
- (e) 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.

In my opinion, the development for the construction of a dwelling house, as Stage I within a three stage development, with the demolition of the existing dwelling and the subdivision of the land to be carried out in accordance with respective Notices of Determination, will be substantially the same development as a development for which the 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

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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 DA2020/0237.

The works sought to provide for the construction of a new dwelling, which was proposed as a detached dual occupancy and forms part of a three stage approach to permit the demolition of the existing structures and subdivision of the land as a final outcome for the three stages.

This application simply seeks to allow for the occupation of the existing dwelling whilst the demolition works are being carried out and the subdivision of the land is arranged. The subdivision of the land cannot proceed until such time that the demolition of the existing dwelling has been carried out and this is effectively addressed within the conditions of DA2020/0236 (Condition 8).

Similarly, the application is substantially the same development when subjected to a “quantitative comparison”, as the works will continue to provide for a “*the construction of a dwelling house*” 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.

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 will be completed in accordance with the consent and will continue to perform as Stage I in a three Stage construction process, with the demolition of the existing dwelling and subdivision of one lot into two being completed in accordance with Stages 2 & 3.

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.

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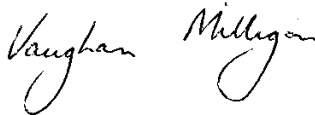
The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as initially lodged and as detailed under the original Notice of Determination dated 22 May 2020, in that the proposed deletion of conditions 33 and 35 will not limit or thwart Council's intention to allow for the construction of a new dwelling, demolition of the existing dwelling and subdivision of one lot into 2, with provision for a future dwelling under a separate application.
- 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, flowing style.

VAUGHAN MILLIGAN