

20 November 2019

Chief Executive Officer
Northern Beaches Council
725 Pittwater Road
DEE WHY NSW 2099

BY EXPRESS POST

Dear Chief Executive Officer

**PROPERTY: 19 JOSEPH STREET AVALON BEACH
DEVELOPMENT CONSENT DA2019/0699
MODIFICATION APPLICATION UNDER SECTION 4.55(1A) OF THE
EPAA
REQUEST FOR SUBSTITUTION OF CONSENT CONDITION 5 AND
DELETION OF CONSENT CONDITION 11**

We act for Mr David Djuric and Ms Marina de Marchi (jointly and severally, 'our client') in relation to this matter, being an application for modification of a development consent.

The property in question is 19 Joseph Street, Avalon Beach (the 'property').

Status and purpose of this letter

This letter, which is to be read in conjunction with the duly completed application form, comprises a modification request (the 'request' or 'application') pursuant to section 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (NSW) (the 'EPAA').

The development consent sought to be modified and the subject of the request is Development Consent DA2019/0699 (the 'Consent').

The proposed modification seeks, firstly, the substitution of Conditions 5, and, secondly, the deletion of Condition 11, of the Consent (jointly and severally, the 'proposed modification').

The purpose of the proposed modification is twofold, as follows:

- firstly, to remove the requirement in the Consent (cf Condition 5) for the unfinished carport structure to effectively be demolished and rebuilt; and
- secondly, remove the requirement in the Consent (cf Condition 11) for a boundary survey to be conducted of the south-western boundary of the property, being the boundary between 19 and 17 Joseph Street, Avalon, prior to the issue of a construction certificate.

Background and supporting information

The Consent was granted on 12 September 2019 which is also the effective date of the Consent.

The development the subject of the Consent is described as being 'alterations and additions to a dwelling house'. However, as Council is aware, Development Application DA2019/0699 related to, firstly, certain works that had already been carried out on the property without the prior consent of Council and, secondly, certain works yet to be carried out and completed.

The building work carried out on the property without the prior consent of Council comprised certain alterations and additions to the existing dwelling house on the property. Those alterations and additions (jointly and severally, the 'building work') included the addition of a room adjacent to the existing bedroom and a veranda as well as an effective extension to the existing carport.

The work associated with the rebuilding of the existing virtually completed carport remains uncompleted.

Essentially, for present purposes, the Development Application sought consent to both *use* and *complete* the unfinished carport. (Note. As Council is aware, an application for a building information certificate was also made to Council in respect of the works carried out without the prior consent of Council.)

The effect of the Consent is, firstly, to authorise and legitimise the *use* of the works carried out without the prior consent of Council and, secondly, authorise the completion of the building work associated with the carport.

The Consent is subject to various conditions. The two conditions that are relevant to the request are as follows:

5. Amendments to the approved plans

The following amendments are to be made to the approved plans:

- The carport structure (excluding guttering and downpipes) is to be setback a minimum distance of 1m from the south-western boundary to achieve compliance with the 1m side setback.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of the Construction Certificate.

Reason: In order to maintain privacy and amenity to the adjoining / nearby property.

11. Boundary Survey

A Boundary Survey is to be conducted of the south-western boundary, (being the boundary between 19 and 17 Joseph Street, Avalon) of the subject site prior to the issue of a Construction Certificate. The Boundary Survey is to be prepared and signed by a registered surveyor.

Reason: to ensure the works are contained wholly within the subject site.

Regrettably, in light of the above two conditions, the Consent as issued does not fulfil the purpose sought as regards Development Application DA2019/0699.

Firstly, the effect of Condition 5 of the Consent, for all intents and purposes, would be to require the actual demolition of the carport and the erection of an entirely new carport structure.

Secondly, insofar as condition 11 of the Consent is concerned, in the event that consent is granted to the proposed modification, and Condition 5 is substituted as proposed, there will be no need for a boundary survey to be conducted of the south-western boundary of the property, being the boundary between 19 and 17 Joseph Street, Avalon. In that regard, the only possible justification for the imposition of Condition 11 was to ensure that the works carried out to, relevantly, the carport pursuant to Condition 5 are contained wholly within the property and with a setback of 1m. However, if Condition 5 is modified as proposed, and the carport remains in its present position, there will be no need for a survey.

Details of the proposed modification

The proposed modification is in two parts, as there are two conditions of the Consent that are sought to be modified.

Firstly, Condition 5 is sought to be replaced (that is, entirely substituted) by a condition worded as follows:

5. Amendments to the approved plans

The following amendment is to be made to the approved plans:

- An appropriately painted lattice or similar screen is to be provided to cover the side elevation of the carport (attached to the posts) from fence height to just under the eaves of the carport on the south-west side.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of the Construction Certificate.

Reason: In order to maintain privacy and amenity to the adjoining / nearby property.

Secondly, Condition 11 is sought to be deleted.

We respectfully submit on behalf of our client that the two abovementioned conditions serve no reasonable planning purpose as regards the amenity of the neighbouring properties and their use and enjoyment of their land. Furthermore, the two abovementioned conditions have the potential to cause a safety issue for our client apart from the overall impracticality that they generate.

The issue of 'minimal environmental impact'

This modification application is lodged pursuant to section 4.55(1A) of the EPAA for the reason that the proposed modification, objectively and reasonably assessed, is of 'minimal environmental impact'.

By virtue of section 4.55(1A)(a) of the EPAA, the consent authority must be satisfied—that means, in law, 'reasonably satisfied' (see *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; 69 CLR 407; 18 ALJR 205)—that the proposed modification is of 'minimal environmental impact'.

The concept of 'minimal environmental impact' requires a contextual assessment: see *Port Stephens Council v SS & LM Johnston Pty Ltd; Port Stephens Council v Port Stephens Veterans and Citizens Aged Care Limited* [2007] NSWLEC 30 per Jagot J at [87]. A contextual assessment involves, among things, a consideration of the particular zone in which the subject property is situated, the uses permissible in the zone, and the objectives of

the zone. In addition, regard is to be had to the likely environmental and amenity impacts of the proposed modification.

The property is zoned R2 Low Density Residential under the provisions of *Pittwater Local Environmental Plan 2014* ('PLEP'). The objectives of the R2 zone are as follows:

- To provide for the housing needs of the community within a low-density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.

In our opinion, the work the subject of the request is entirely consistent with the abovementioned zone objectives. In particular, the building work, as carried out, will maintain the low-density residential development of the property. The privacy of the neighbours (relevantly, the occupants of 17 Joseph Street, Avalon Beach) will not be compromised by the building work as the carport and the additions to the dwelling house are setback from the boundary and are properly screened by vegetation. In that regard, the occupants of 17 Joseph Street will not have a direct view of either the carport or the additions carried out to the dwelling house. The building work the subject of the request and the Consent does not create any amenity impacts to the occupants of either 17 Joseph Street or 21 Joseph Street, being the immediately adjoining properties.

The building work carried out and proposed to be carried out on the property is development that is permissible with consent and a construction certificate, being work that is ancillary to the carrying out of development for the purpose of a 'dwelling house', as relevantly defined in the Dictionary at the end of PLEP.

The issue of 'substantially the same development'

By virtue of section 4.55(1A)(b) of the EPAA, the consent authority must be satisfied—that means, in law, 'reasonably satisfied' (see *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; 69 CLR 407; 18 ALJR 205)—that the development to which the consent as modified relates is 'substantially the same development' as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all).

In our opinion, the proposed modification of the Consent is extremely minor in nature, both individually and severally. Objectively and reasonably assessed, the modifications would not render the development different in terms of its essential and material character. In that regard, Bignold J in

Moto Projects (No 2) Pty Limited v North Sydney Council (1999) 106 LGERA 298 stated at 56:

[T]he 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 kind of sterile vacuum. Rather the comparison involves an appreciation, qualitative as well as quantitative, of the developments being compared in their proper contexts ...

Having regard to the various cases summarised in *Bandora Holdings Pty Ltd v Byron Shire Council* [2009] NSWLEC 1317 it can be confidently stated that the development (a dwelling house including associated and ancillary structures) will not be altered by the proposed changes. In addition, it can also be confidently stated that there will be no change to the essential character of the development. The nature and purpose of the development is and will remain a dwelling house.

In short, the essence of the development is substantially the same as that in respect of which consent was originally sought. There is no radical transformation of the development: see *Vacik Pty Limited v Penrith City Council* (unreported, NSW LEC, Stein J, 18 February 1992); *Moto Projects (No 2)*. In a comparison of the proposed development in respect of which consent was originally sought and the amended development, the only reasonable conclusion that is capable of being drawn by a consent authority, properly directed in law, and applying the correct legal test, is that the development will be ‘substantially the same development’.

Justification for the request and relevant planning issues

The main planning issue insofar as Conditions 5 and 11 of the Consent are concerned is that the conditions serve no reasonable planning purpose (as regards, in particular, the occupants of 17 Joseph Street) and indeed have the potential to cause a safety issue for our client apart from the overall impracticality that the conditions generate.

In essence, the planning justification for the proposed modification is as follows:

- In order to comply with Condition 5 of the Consent, as presently worded, an already 95% completed carport will need to be demolished and rebuilt. This would involve relocation of supporting members and rebuilding of the roof of the carport, then re-erection. In our opinion, that is an unreasonable impost, especially in light of the fact that the amenity and privacy of the adjoining properties—that is, 17 and 21 Joseph Street—can be safeguarded and secured in another way which would be just as effective and which would not require the total demolition and rebuilding of the almost completed carport (see below).

- The privacy and amenity of, relevantly, the occupants of 17 Joseph Street are already protected and to set back the carport back 1m would make no difference to such privacy protection. In this regard there is a solid fence and planting already separating the two properties. The carport has and will have no impact on the internal amenity of the adjoining property. In that regard, the existing planting currently exceeds the height of the carport. In addition, there is a 1.8m fence that separates the properties. Combined with the screening, any possible amenity concerns are adequately addressed already. However, to the extent to which there may be any residual doubt as to that matter, what is proposed by way of the modification sought will ensure that there are or will be no amenity concerns.
- In terms of bulk and scale, the carport is adequate in all aspects. The overall size and setbacks of the carport is consistent with adjoining neighbours' carports and sits only 2.2m high. The overall bulk of the carport has further been reduced by use of a 'flat top' roofing structure. The carport sits well under the hedge and bamboo plantings on the adjoining land.
- The alteration to the width of the carport presently required by Condition 5 of the Consent significantly impedes upon the use of the structure for its purpose as a carport. In addition, the changes required by Condition 5 create safety issues for drivers attempting to enter the further constrained distance between carport posts and further restricts the opening.
- The applicant has lodged an application for a building information certificate as regards the existing virtually completed carport structure. That application is yet to be determined but, on the basis of the information available to us, it seems more probable than not that a building information certificate will issue in due course. Accordingly, to require something that is tantamount to the total demolition and rebuilding of the carport structure when a building information certificate is likely to issue is, not to put too fine a point on it, unreasonable and would not serve any useful planning purpose whatsoever. (**Note.** We have discussed this matter with Mr Hoffman of Council's Building Section. Should you have any queries or questions, we respectfully suggest that this matter should, in the first instance, be discussed with him.)
- *Pittwater 21 Development Control Plan ('PDCP')*, at Section D1.8, provides as follows:

On steeply sloping or constrained sites, **reduced or nil setbacks for carparking structures and spaces may be considered**, however

all other structures on the site must satisfy or exceed the minimum building line applicable. *[Emphasis added]*

In the case of the subject development, the carport is set back over 8.0m from the front building line. As such, the front setback of the carport exceeds the relevantly applicable minimum building setback.

- In addition, the property has constrained access and Section D1.8 of PDCP is clearly applicable and has been framed to deal with situations such as the present.
- It is also relevant to note, as a matter of fact, that the carport currently enjoys a boundary setback, albeit minimal, of 0.135m to the side boundaries of the hatchet handle. We respectfully submit that Condition 5 of the Consent appears to have arisen as a result of a mistaken understanding of the facts.
- Carports on either side of the property, relevantly at 17 and 21 Joseph Street, enjoy effective zero lot lines—that is, nil setback from their respective boundaries with our client's property.
- As our request to delete and replace the Condition 5, the existing setback between 19 and 17 Joseph Street, Avalon Beach will be retained. No further boundary survey will be involved.

Attached is a copy of a letter dated 2 August 2019 which our firm forwarded to Council. The letter was sent well prior to determination of Development Application DA2019/0699 and deals comprehensively with the issues raised by the sole objector to the development. In addition, the letter discusses the merits of the proposal as submitted, particularly the privacy/amenity issue.

Suggested Substituted Condition 5

As mentioned above, we respectfully suggest that Condition 5 be replaced (that is, entirely substituted) with a condition as follows:

5. Amendments to the approved plans

The following amendment is to be made to the approved plans:

- An appropriately painted lattice or similar screen is to be provided to cover the side elevation of the carport (attached to the posts) from fence height to just under the eaves of the carport on the south-west side.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of the Construction Certificate.

Reason: In order to maintain privacy and amenity to the adjoining / nearby property.

Condition 11 is sought to be deleted in its entirety as it would then become totally unnecessary.

Conclusion

The privacy and amenity of, relevantly, the occupants of 17 Joseph Street are already protected and to set back the carport back 1m would make no difference to such privacy protection. In this regard there is a solid fence and planting already separating the two properties. The carport has and will have no impact on the internal amenity of the adjoining property. In that regard, the existing planting currently exceeds the height of the carport. In addition, there is a 1.8m fence that separates the properties. Combined with the screening, any possible amenity concerns are adequately addressed already. However, to the extent to which there may be any residual doubt as to that matter, as a matter of abundant precaution what is proposed by way of the modification sought (as respects the proposed substituted Condition 5) will ensure that there are or will be no amenity concerns.

In short, Condition 5 serves no useful planning purpose that cannot otherwise be more simply and less draconianly achieved.

Condition 11 of the Consent becomes redundant and unnecessary in the event that Condition 5 is substituted as proposed. It should therefore be deleted in its entirety.

We have previously expressed our view to Council that Conditions 5 and 11 of the Consent, in their present form, appear to have been formulated and imposed on the basis of a mistaken understanding of the true factual position. Without wishing to put too fine a point on the matter, we still hold that view. The carport setback complies with requirements in Section D1.8 of PDCP and is also satisfactory when considered on merit.

Should you wish to discuss this matter please call Nic Najar on 9979 4922.

Yours faithfully

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Attachment. Copy of Turnbull Planning International letter to Council dated 2 August 2019.