

28 June 2019

The General Manager
Northern Beaches Council
1 Belgrave Street
Manly 2095

Dear Sir,

**DEVELOPMENT APPLICATION REFERENCE DA123/2015
SECTION 4.55 (1A) MODIFICATION – PROPOSED MINOR DESIGN MODIFICATIONS TO DA
APPROVAL DA123/2015
STATEMENT OF ENVIRONMENTAL EFFECTS
2 MOORE ROAD, CLONTARF**

1.0 INTRODUCTION

On the 15 October 2015, Northern Beaches Development Application Panel granted approval to Development Application (Ref DA123/2015) for the demolition of the existing dwelling and the construction of a new three (3) storey dwelling with swimming pool and landscaping. A modification application was also approved on 16 March 2017 for a deletion of condition to the consent.

This modification application relates to minor design modifications to the approved drawings. The proposed modifications are highlighted on the accompanying architectural plans prepared by Lifestyle Home Designs and minor modifications to the landscape plan as shown on the landscape plan Woodside Plants & Design.

2.0 DETAIL OF THE MODIFICATIONS

Specifically, the modification proposed are as follows:

- Removal of two (2) windows from the ground floor family room.
- Reduce the size of window 11 in Bedroom 2 on the first floor
- Install a window in the first floor sitting room
- Increase the floor space of the storage/plant room and install a new window
- Remove a window from the garage and centre the remaining window
- Pool filter box location at the rear side boundary which will include thick foam to reduce noise level.
- Modification to the landscape plan

It is considered that the proposed modifications are minor in nature and the approved development will remain substantially the same.

3.0 SECTION 4.55 (1A) ENVIRONMENTAL PLANNING & ASSESSMENT ACT 1979

The application is made pursuant to Section 4.55 (1A) (Previously Section 96(1A) of the EP&A Act 1979 (as amended). Section 4.55 of the Act provides:

(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 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 same development as the development for which the consent was originally granted and before that consent as modified (if at all), and*
- c) It has notified the application in accordance with 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 any period prescribed by the regulations or provided by the development control plan, as the case may be.*

In this instance it is not considered the proposed design modifications as approved substantially alters or changes the development as consented to an extent that it would not be considered to be the same, or substantially the same development. The land use outcome remains as per the approved land use. The building form, bulk and scale remain as per the approval. The height of the dwelling remains as per the approval.

A consideration of whether the development is substantially the same development has been the subject of numerous decisions by the Land & Environment Court and by the NSW Court of Appeal in matters involving applications made pursuant to S.96 of the Act. *Sydney City Council v Ilencace Pty Ltd (1984) 3 NSWLR 414* drew a distinction between matters of substance compared to matters of detail. In *Moto Projects (No.2) Pty Ltd v North Sydney Council (1999) 106 LGERA 298* Bignold J referred to a requirement for the modified development to be substantially the same as

the originally approved development and that the requisite finding of fact to require a comparison of the developments. However, Bignold noted the result of the comparison must be a finding that the modified development is ‘essentially or materially’ the same as the (currently) approved development. Bignold noted;

“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 sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the development being compared in their proper contexts (including the circumstances in which the development consent was granted).”

In *Basemount Pty Ltd & Or v Baulkam Hills Shire Council* NSWLEC 95 Cowdroy J referred to the finding of Talbot J in *Andari – Diakanastasi v Rockdale City Council* and to a requirement that in totality the two sets of plans should include common elements and not be in contrast to each other. In *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468; 97 LGRERA 443 Mason P noted:

“Parliament has therefore made it plain that consent is not set in concrete. It has chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity. The consent authority can withhold its approval for unsuitable applications even if the threshold of subs (1) is passed.

I agree with Bignold J in Houlton v Woollahra Municipal Council (1997) 95 LGRERA 201 who (at 203) described the power conferred by s.102 as beneficial and facultative. The risk of abuse is circumscribed by a number of factors. Paragraphs (a), (b) and (c) of subs (1) provide narrow gateways through which those who invoke the power must first proceed. Subsection (1A) and subs (2) ensure that proper notice is given to persons having a proper interest in the modified development. And there is nothing to stop public consultation by a Council if it thinks that this would aid it in its decision making referable to modification. Finally, subs (3A), coupled with the consent authorities discretion to withhold consent, tend to ensure that modifications will not be enterprised, nor taken in hand, unadvisedly, lightly or wantonly. Naturally some modifications will be controversial, but decision making under this Act is no stranger to controversy.”

Senior Commission Moore in *Jaques Ave Bondi Pty Ltd v Waverly Council (No.2)* (2004) NSWLEC 101 relied upon *Moto Projects* in the determination, involving an application to increase the number of units in this development by 5 to a total of 79. Moore concluded the degree of change did not result in the a development which was not substantially the same, despite the fact that in that case the changes included an overall increase in height of the building. Moore relied upon a quantitative and qualitative assessment of the changes as determined by the Moto test.

In my opinion a quantitative and qualitative assessment of the application is that it remains substantially the same. The approved land use and dwelling house as approved is not substantially altered as a result of the proposed works and the development as consented as consented remains as per the approval.

There is considered to be no statutory impediment to the making and determination of this application.

4.0 MATTERS FOR CONSIDERATION PURSUANT TO S4.15 (PREVIOUSLY S79C) OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 AS AMENDED

The following matters are to be taken into consideration when assessing an application pursuant to S4.15 of the Environmental Planning and Assessment Act 1979 (as amended):

The provisions of any environmental planning instrument, proposed instrument that has been the subject of public consultation under this Act and any development control plan.

4.1 Manly Local Environmental Plan 2014

Floor Space Ratio

A floor space ratio (FSR) of 0.52:1 was approved with the original DA which exceeded the maximum FSR of 0.4:1 as stipulated in the LEP with the submitted clause 4.6 request being well-founded. A minor increase to the FSR was proposed and approved via a subsequent modification application which resulted in an FSR of 0.53:1 which was also approved.

This modification works proposed will result in no increase to the approved FSR of 0.53:1 .

4.2 Manly Development Control Plan 2014

The overall bulk, scale and built form of the dwelling as assessed under the original DA approval is not substantially altered as a result of the proposed modifications.

The first floor comprises bedrooms with a new window proposed for the sitting area at this level. This is considered to be not the primary habitable area of the home and will not result in any significant adverse overlooking concerns for the neighbouring dwelling. The proposed window modifications are considered to be reasonable in this instance and not result in any adverse impacts on the amenity of neighbouring dwellings.

The proposed modifications to the landscaping, as detailed in the landscape plan, are considered to be minor and compliant with the conditions of the original consent.

5.0 CONCLUSION

Pursuant to Section 4.55 (1A) of the Environmental Planning and Assessment Act 1979 (As Amended), the consent authority can be satisfied that the modified consent as sought by this submission is substantially the same development as referred to in the original application.

The proposed modifications do not substantially alter or change the development as consented to an extent that it would not be considered, to be the same, or substantially the same development. The land use outcome remains as per the approved land use. The building form, bulk and scale of the dwelling remains as per the original approval.

Please do not hesitate to contact me to discuss any aspect of this submission.

Yours Faithfully



Kate Fleming
BBF Town Planners
Director