

Strategic Planning Referral Response

Application Number:	Mod2023/0703
Proposed Development:	Modification of Development Consent DA2022/1342 granted for alterations and additions to a dwelling house
Date:	08/01/2024
To:	Dean Pattalis
Land to be developed (Address):	Lot 93 DP 12749 , 43 Florence Terrace SCOTLAND ISLAND NSW 2105 Lot LIC 640698 , 43 Florence Terrace SCOTLAND ISLAND NSW 2105

Officer comments

Mod2023/0703 seeks to modify DA2022/1342 for alteration and additions to a dwelling house.

SUBJECT SITE

The subject site is 43 Florence Terrace, Scotland Island. The land is zoned C3 Environmental Management under the Pittwater LEP 2014 and contains an existing dwelling.

DA2022/1342 was approved on 7 October 2022 for alteration and additions to a dwelling house. The approved works comprised:

- the relocation of the kitchen and creation of an open plan kitchen/dining/living room;
- reconfiguration of three bedrooms;
- the creation of a new TV/media room;
- new laundry and two renovated bathrooms;
- back deck with pergola; and
- reconfigured front deck and access stairs.

At the time of determination, the Northern Beaches Section 7.12 Contributions Plan 2022 applied to the land and development.

Condition 4 required payment of a monetary contribution to Council totalling \$6,140.75. The monetary contribution was based on a cost of works of \$614,075 as identified in the submitted cost summary report prepared by Harmony Varley (building designer) dated 3 August 2022.

Mod2023/0703 has been submitted pursuant to s4.55(1a) of the EP&A Act. The submitted statement of modification, prepared by Waratah Planning and dated 18 December 2023, identifies that the application seeks to reduce the scale of the approved development and will result in a reduction of the overall building footprint from 144m² to 110m².

The application is supported by a cost summary report, prepared by Harmony Varley (building designer) dated 18 December 2023. The updated cost of works is \$454,575.

The statement of modification identifies that the application seeks to amend Condition 4 to reflect the new cost of works. The statement advises "A monetary contribution of \$6,140.75 was paid to Council for DA2022/1342. As the cost of the development is reduced, the Applicant requests a pro-rata refund". It is noted that the modification application is not the correct mechanism to request a refund of contributions.

The adjusted monetary contribution required by Condition 4 was paid in full on 5 December 2022 and totalled \$6,282.45. A Construction Certificate was issued by Australian Certifying Group on 7 October 2022.

On 13 August 2021, the NSW Court of Appeal issued a judgement on Ku-ring-gai Council v Buyozo Pty Ltd [2021] NSWCA177. This judgement confirmed that conditions of consent cannot be modified retrospectively. In relation to conditions requiring the payment of a development contribution, the judgement found that a condition is satisfied upon payment and cannot be modified after this time:

45 ... Thus a condition authorised to be imposed under s 7.11 can only require the dedication of land or the payment of a monetary contribution at some time in the future, not in the past. Equally, a condition of development consent can never be modified so as to require the doing of something retrospectively, but rather only to do something prospectively. Thus, a condition of consent imposed under s 7.11 can be modified if the condition as modified will require the dedication of land or the payment of a monetary contribution in the future, but not if the land or monetary contribution required by the original condition to be dedicated or paid has already been dedicated or paid, as the condition cannot be modified to operate retrospectively.

The monetary contribution required by Condition 4 was satisfied upon payment on 5 December 2022 and Council has no power to modify this condition. Additionally, the Contributions Plan states that a refund of contributions will only be considered where a modification seeks to reduce the cost of works and a Construction Certificate has not been issued.

RECOMMENDATION

A. The requested amendment to Condition 4 is not supported. There are no other issues raised with Mod2023/0703.

The proposal is therefore unsupported.

Note: Should you have any concerns with the referral comments above, please discuss these with the Responsible Officer.

Strategic Planning Conditions:

Nil.