

21 December 2020

The General Manager
Pittwater Council
PO Box 882
MONA VALE NSW 1660

Dear Sir,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT
SECTION 4.55 (2) ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

Development Application No:	DA2018/1653
Date of Determination:	22 May 2019
Premises:	Lot 44 DP 16212 No. 75 Rickard Road, North Narrabeen
Proposed Development:	Demolition works, construction of a dwelling house and a secondary dwelling including a swimming pool

On behalf of Bradstreet Building Services Pty Ltd, this submission has been prepared to assist Council in the consideration of an application pursuant to Section 4.55(2) of the Environmental Planning & Assessment Act 1979 to alter the development as approved by Development Consent DA2018/1653.

The application involves modifications to the form of the approved development, with the amendments detailed in the revised architectural plans prepared by Bradstreet Building Services Design & Construction, Drawing No's. DA-01 – DA-17, Revision C dated October 2020.

The proposed modifications are discussed in further detail in this submission.

BACKGROUND

An application for consent for *"Demolition works, construction of a dwelling house and a secondary dwelling including a swimming pool"* was approved by Council by Notice of Determination dated 22 May 2019.

The construction of the alterations and additions to the dwelling has commenced.

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PROPOSED MODIFICATIONS

The application involves minor changes to the form of the approved element, including window changes and minor amendments to the roof form, which however do not substantially alter the approved bulk and scale and the approved overall height of the dwelling remains unchanged at RL 29.500.

The proposed modifications are detailed in the revised architectural plans prepared by Bradstreet Building Services Design & Construction, Drawing No's. DA-01 – DA-17, Revision C dated October 2020.

The proposed modifications include the following changes, which have been highlighted on the revised architectural plans:

- Windows Deleted: W08 – W011, W13, W19, W24, W27, W30 – W32, W34, W36, W43, W45, W49, W50.
- Windows reduced in size: WD15, W17 & W33.
- Cladding from Custom Orb to Weathertex Weatherboards.
- Lift moved 600mm north-west.
- First floor void adjacent to lift changed to cupboard and extended to align with new lift location.
- Upper roof profile changed from to 2-degree pitched.
- Mid roof profile changed from flat to 5-degree pitch.
- Roof profile over entry void changed from flat to 9-degree pitch.
- First floor deck balustrade changed from glass to weatherboard.

The individual floor levels of the proposed dwelling have not altered, together with the maximum roof ridge level being unaltered from that detailed in the original approval. Similarly, the approved for the boundary setbacks are unaltered.

The proposed changes do not materially alter the approved bulk and scale of the development or its relationship with the adjacent properties and the surrounding public places.

In support of the application, the following documentation is provided to assist Council in its deliberations:

- Revised architectural plans prepared by Bradstreet Building Services Design & Construction, Drawing No's. DA-01 – DA-17, Revision C dated October 2020
- Revised BASIX Certificate – No 926070M_03, dated 18 November 2020.
- Revised NaTHERS Certificate dated 13 November 2020.
- Revised Geotechnical Report prepared by White Geotechnical Group, Report Reference J1704C dated 23 November 2020.

JUSTIFICATION

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 No. DA2018/1653.

The works seek to provide for *“Demolition works, construction of a dwelling house and a secondary dwelling including a swimming pool”*.

As the proposed modifications to the approved design will maintain the approved overall height, setbacks to side and front and rear boundaries and largely the same bulk and scale when viewed from the Street or the neighbours, the modified proposal is reasonably considered to be substantially the same development as originally approved.

The revised design does 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, construction of dwelling house and a secondary dwelling 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.

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 additions to the dwelling 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 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.

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 2019.
- 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