

2 April 2025

The General Manager  
Northern Beaches Council  
PO Box 82  
MANLY NSW 1655

Dear Sir,

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

<b>Development Application No:</b>	<b>DA2023/0763</b>
<b>Date of Determination:</b>	<b>22 November 2023</b>
<b>Premises:</b>	<b>Lot 5 within DP 13686 No. 940 Barrenjoey Road, Palm Beach</b>
<b>Proposed Development:</b>	<b>Alterations and additions to a dwelling house</b>

On behalf of Mr & Mrs Kemp-Leeder, 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 DA2023/0763, which was originally determined on 22 November 2023.

The application involves modifications to the form of the approved development, with the amendments detailed in the revised architectural plans prepared by Atelier Haefeli, Project No. 2102, Drawings No. A.01E, A.02D, A.03D, A.04D, A.05D, A.06D dated 13 March 2024 & A.07C, dated 13 February 2024.

The proposed modifications involve minor architectural changes to the plans which will be discussed in further detail in this submission.

**BACKGROUND**

An application for consent for "*Alterations and additions to a dwelling house*" was approved by Council by Notice of Determination of DA2023/0763 dated 22 November 2023.

The works that are subject of the development application have not commenced.

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## **PROPOSED MODIFICATIONS**

The application involves changes to the form of the approved development, which are detailed in the modified architectural plans prepared by Atelier Haefeli, Project No. 2102, Drawings No. A.01E, A.02D, A.03D, A.04D, A.05D, A.06D & A.07C, dated October 2021.

The proposed modifications include the following:

### **Lower Ground Floor**

- Relocation of sliding doors to Bedrooms 3 & 4
- New windows to Bedroom 3
- External corner revised (bathroom/laundry)

### **Ground Floor**

- Northern wall of Bedroom 2 to be relocated

### **First Floor**

- Reconfiguration of deck
- Alter material of northern wall to lift

The proposal will not see any change to the approved building footprint.

Given the modest amendments to the form of the approved development, the modifications will not introduce privacy impacts for the adjoining neighbours.

The architectural changes to the building do not result in any additional overall height to the development or any substantial change to the shadow diagrams cast by the development.

The extent of the existing site coverage and landscaping will remain unchanged.

To assist Council in its assessment, the following documentation is provided to support the proposal:

- Revised BASIX Certificate No A496521\_02 dated 1 April 2025
- Revised Stormwater Management Plan & Details prepared by Peninsula Consulting Engineers, Job No. 23-0509, dated 27 February 2025
- Advice re. Hydraulic Design Certificate prepared by Peninsula Consulting Engineers, Job No. 23-0509, dated 27 February 2025 which confirms that the Civil Engineer is satisfied that the revised design complies with SAA Codes & Standards and Council's Stormwater Specification.
- Additional Geotechnical Advice prepared by JK Geotechnics dated 14 March 2025 which notes that the Geotechnical Engineer is satisfied that the proposed minor alterations and additions are not expected to significantly increase the structural loading on building

foundations and that the previous recommendations presented in their Geotechnical Report remain applicable for the modification location.

- Additional Bushfire Advice prepared by Building Code & Bushfire Hazard Solutions dated 20 March 2025 which notes that the Bushfire Consultant is satisfied that the recommendations within the previous Bushfire Assessment Report and the Development Consent remain valid.

## 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. DA2023/0763 and as subsequently modified.

The works seek to provide for *“Alterations and additions to a dwelling house”*.

The proposed modifications to the approved design will maintain the existing overall height and the levels and ridge level of the development will remain unchanged, retaining the development’s compatible 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 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 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 *“Alterations and additions to 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 are minor and do not inherently alter the nature and form of the approved outbuilding and carport 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 significant or adverse implications for the physical appearance of the approved building and the site's contribution to the local streetscape.

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 November 2023.
- 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, appearing to read 'Vaughan Milligan', written in a cursive style.

**VAUGHAN MILLIGAN**