

12 February 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**

Development Application No:	DA2023/1780
Date of Determination:	2 July 2024 (subsequently modified Mod2024/0436 determined 18 August 2024)
Premises:	Lot 122 within DP 8394 No. 89 Marine Parade, Avalon Beach
Proposed Development:	Demolition works and construction of a dwelling house including swimming pool

On behalf of Ms Jennifer Hempton & Annabelle Chapman Architect, 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 DA2023/1780, which was determined on 2 July 2024 (subsequently modified under Mod2024/0436 determined 18 August 2024).

The application involves modifications to the form of the approved development, with the amendments detailed in the revised architectural plans prepared by Annabelle Chapman Architect, Project No 2201, comprising Drawings No. 101 – 105, 200 – 204, 101.1-105.1 201.1-204.1, 801-808 , dated 21 January 2025.

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

BACKGROUND

An application for consent for *“Demolition works and construction of a dwelling house including swimming pool”* was approved by Council by Notice of Determination of DA2023/1780 dated 2 July 2024.

A subsequent Modification Application under Mod2024/0436 was lodged to correct an error in the conditions detailed within the Notice of Determination and the modified consent was determined 18 August 2024) .

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The construction of the proposed new dwelling has commenced in accordance with Construction Certificate CC2024/1011 issued on 11 September 2024 however the works which of the subject of this application have not been commenced.

PROPOSED MODIFICATIONS

The application involves changes to the form of the approved development, which are detailed in the modified architectural plans prepared by Annabelle Chapman Architect, Project No 2201, comprising Drawings No. 101 – 105, 200 – 204, 101.1-105.1 201.1-204.1, 801-808 dated 21 January 2025.

The proposed modifications are detailed in the Schedule of Changes prepared by Annabelle Chapman Architect and include the following revisions:

External changes –

Entry staircase realigned – moved south by approximately 300mm.

Minor amendment to roof over Garden Terrace, pushed East to align with western eaves line

Revised skylight sizes & locations

Minor amendment to Upper Ground Floor ‘Vergola’ To align with western line of dwelling

Minor re-pitching of the roof over the dining room area, resulting in a slight increase in the short east-west portion of the roof over the dining area which will raise from RL 43.26 to RL43.49 (+230mm).

Basement –

Revised shower room & Bin Store arrangements

Revised Lift & Staircase arrangements

New Vehicle Turntable within Basement

Lower Ground Floor

Minor changes to Lower Ground Floor room arrangements

LGF internal works: Outdoor Equipment Store western wall moved East 1090mm

LGF internal works: Revised Lift & Staircase arrangements

Window and external door changes –

WLG/01: REDUCED GLAZING SIZE

WLG/02: REDUCED GLAZING SIZE

WLG/14: NEW WINDOW TO MATCH WLG/01

DLG/02: REVISED DIMENSIONS & TYPE

DLG/03: REVISED DIMENSIONS & TYPE

DLG/04: OMITTED

Upper Floor Plan

North facing Courtyard extended 1 metre North to allow for privacy planting & screen

Garden Terrace roof moved west to align with western eaves line

Minor amendment to Upper Ground Floor ‘Vergola’ To align with western line of dwelling

Minor changes to Upper Ground Floor internal room arrangements

New rear balcony to Laundry, with proposed Privacy Screen+1800 AFFL

Window and external door changes –

WUG/01: REDUCED GLAZING SIZE

WUG/02: REDUCED GLAZING SIZE

WUG/04: REDUCED GLAZING SIZE

WUG/07: REVISED DIMENSIONS & TYPE

WUG/09: REVISED DIMENSIONS & TYPE

WUG/11, 12 & 13: OMITTED

WUG/21: REDUCED GLAZING SIZE
WUG/23: REVISED DIMENSIONS
WUG/24: REVISED DIMENSIONS
WUG/25: NEW WINDOW
DUG/01: REDUCED GLAZING SIZE

The proposed modifications to the dwelling are wholly within the existing approved building footprint.

A minor increase in the excavation within the building footprint for the Lower Ground Floor Level is proposed and modifications to the extent of the Vergola roof over the east facing ocean deck, the proposal will not see any significant increase in the overall height of the building, any substantial reduction in the side setbacks or reduction in landscaped area.

To simplify the roof structure , a minor re-pitching of the roof over the dining room area will see a slight increase in the short east-west portion of the roof over the dining area which will raise from RL 43.26 to RL43.49 (+230mm). The new ridge height remains between 1.5m and 2m under the 8.5 metre Building Height Limit.

The remaining roof levels of the building are unchanged. The architectural changes to the building do not result in any substantial change to the shadow diagrams cast by the development.

The extent of works within the foreshore area will not change in terms of the built footprint as compared to the approved building extent.

A small deck has been introduced to the southern elevation of the laundry on the ground floor level however this small deck will have a privacy screen with a minimum height of 1.8m and therefore there will be no privacy or acoustic impacts introduced for the southern neighbours.

Proposed windows to the south facing elevation of the Sitting Room and Bedroom 1 have been deleted, which in turn benefit the privacy and outlook for the southern neighbouring property.

Other window amendments to the southern elevation will maintain a reasonable level of privacy for the surrounding properties.

The proposed alterations to the building are clearly detailed in the architectural submission prepared by Annabelle Chapman Architect and are modest in nature and do not result in any substantial change to the privacy and amenity envisaged in the initial approval, for the surrounding properties.

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 A1782378 dated 6 February 2025
- Additional Geotechnical Advice prepared by Crozier Geotechnical Consultants, Project No.: 2021-159, dated 4 February 2025 which notes that the Geotechnical Engineer is satisfied that the proposed changes to the original design do not alter the geotechnical aspects of the proposed development or the site from those on which the original report was based. Including the critical aspects of geotechnical assessment of excavation support systems.

- Coastal Engineering Advice has been prepared by Horton Coastal Engineering, dated 5 February 2025 confirming the drawing changes do not alter the findings in the Horton DA Report 28 September 2023.

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. DA2023/1780 and as subsequently modified.

The works seek to provide for *“Demolition Works and Construction of a dwelling house including swimming pool”*.

As the proposed modifications to the approved design will largely maintain the approved overall height and floor levels, the visual bulk and scale of the development remains consistent with the original approval, 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 *“Demolition Works and Construction of a dwelling house including 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 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.

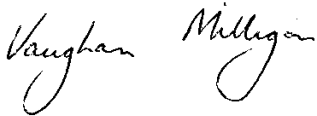
The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as initially lodged and as detailed under the original Notice of Determination dated 2 July 2024 (subsequently modified 18 August 2024 (Mod2024/0436). 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