

29 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**

Development Application No:	DA2023/0827
Date of Determination:	26 October 2023
Premises:	Lot 13 within DP 758566 No. 142 Melwood Avenue, Killarney Heights
Proposed Development:	Construction of a carport, swim spa and deck

On behalf of David and Haruna Barda, 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 DA2023/0827, which was originally determined on 26 October 2023.

The application involves modifications to the form of the approved development, with the amendments detailed in the revised architectural plans prepared by Site Design Studio, Drawing No 1411, Sheets L-00 - L-16, Issue 1 dated 11 April 2025.

The proposed modifications involves minor architectural changes to the floor and roof level of the garage in order to ease the vehicle access levels. The changes will be discussed in further detail in this submission.

BACKGROUND

An application for consent for *“Construction of a carport, swim spa and deck”* was approved by Council by Notice of Determination of DA2023/0827 dated 26 October 2023.

A Construction Certificate – CC2025/0279 was issued on 25 March 2025 and the works which are the subject of this Modification Application have not been carried out.

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PROPOSED MODIFICATIONS

The modification application involves changes to the form of the approved development, which are detailed in the modified architectural plans prepared by Site Design Studio, Drawing No 1411, Sheets L-00 - L-16, Issue 1 dated 11 April 2025..

In order to provide for improved driveway access levels to the approved carport, the proposed location involves a minor raising of the approved carport slab level by 150mm from RL 107.85 to RL 108.00.

The roof level of the carport will increase slightly by 300mm from RL 110.77 to RL 110.80, however this is largely to accommodate a slight increase in the depth of the roof members and supporting steel beam from 250mm to 350 m.

The internal vertical clearance within the carport has been slightly reduced from 2670mm in order to minimise the required increase in overall height as a result of the increased floor level and increased roof depth to accommodate structural tolerances.

The minimum front setback to the north eastern corner of the carport has been marginally reduced by 154mm from 3504mm to 3350mm, however this minor change is not readily perceived from the street and does not introduce any further impacts to the street domain or the neighbouring property.

The carport has been marginally moved towards the south eastern boundary in order to provide for an increased driveway length to assist in easing the levels to the carport. Similarly the approved walkway at the first floor level of the dwelling has been moved slightly to the south.

As the proposed carport is still substantially below road level remains well set down from the road level with the planting within the site and combined with the width of the road reserve contributing to offset any significant visual impact, the minor changes do not introduce any adverse visual impact to the street or neighbouring properties.

The approved boardwalk path providing access to the dwelling from the street level remains unchanged. A new small pergola has been added over the balcony for weather protection to the walkway entry. In conjunction with a pergola, a 1.6m high batten privacy screen has been added adjacent to the front entrance to provide for privacy to the front entry.

The approved built footprint remains generally unchanged and therefore there is no further impact on trees within the site or reduction in the approved landscaped area.

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

Zoning and Development Controls

State Environmental Planning Policy (Biodiversity and Conservation) 2021

Chapter 2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity & Conservation SEPP) contains planning controls for the removal of vegetation on the land within non-rural areas of the State. The policy aims to protect the biodiversity values of trees and other vegetation in non-rural areas of the State and to preserve the amenity of nonrural areas of the State through the preservation of trees and other vegetation.

The proposal does not see the loss of any additional trees and therefore no further consideration of the SEPP is required.

State Environmental Planning Policy (Resilience and Hazards) 2021

Chapter 4 of SEPP (Resilience and Hazards) applies to all land and aims to provide for a state-wide planning approach to the remediation of contaminated land.

Clause 4.6(1)(a) of this policy requires the consent authority to consider whether land is contaminated. Given the history of residential use of the land, the site is not considered to be subject to contamination and further investigation is not required at this stage.

Overall, the proposed modified development remains consistent with the relevant provisions of SEPP (Resilience and Hazards).

State Environmental Planning Policy (Sustainable Buildings) 2022

The proposed amendments to the carport do not constitute work which requires assessment under the SEPP.

Warringah Local Environment Plan 2011

Zone Objectives and Land Use Table

The land is zoned R2 Low Density Residential under the provisions of the WLEP 2011.

Development for the purposes of a dwelling house (and associated ancillary development) is permissible in this zone.

The development of and use of the land for residential purposes is consistent with the zone objectives, which are noted as:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

It is considered that the modified development will remain consistent with the desired future character of the surrounding locality for the following reasons:

- The proposal will be consistent with and complement the existing detached style housing within the locality.
- The proposed development respects the scale and form of other development in the vicinity and therefore compliments the locality.
- The setbacks are compatible with the existing surrounding development.
- The proposal does not have any significant impact on the amenity of adjoining properties.

Clause 4.3 provides controls relating to the height of buildings.

The dictionary supplement to the LEP notes building height to be:

***building height (or height of building)** means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

The building height limit for development for the site is 8.5m. The modified proposal presents a height of a approximately 3m and therefore comfortably comply with Council's height control.

Nice acetate Clause 6.2 relates to earthworks. The modified proposal does not necessitate any further site disturbance or change to the site conditions.

All site works will continue to be carried out in accordance with the recommendations of the Consulting Structural and Geotechnical Engineers, and therefore satisfy the provisions of this clause.

Clause 6.4 relates to development on sloping land. The site is identified within Area B on Council's Geotechnical Risk Mapping. The modified proposal does not require any further site disturbance or further review by the geotechnical engineer.

There are no other clauses of the WLEP 2011 that are considered to be relevant to the proposed development. It is considered that the proposal achieves the requirements of the WLEP.

Warringah Development Control Plan 2011

An assessment against the Warringah Development Control Plan is as follows:

Part B - Built Form Controls			
Standard	Required	Proposed	Compliance
B1 – Wall heights	Max 7.2m	Height of the modified carport design is approximately 3 m.	Yes
B2 – Number of storeys	No requirement identified on map		N/A
B3 – Side Boundary Envelope	Building envelope 45 degrees from 4m.	The proposed development is maintained below the prescribed envelope.	Yes
B5 – Side Boundary setbacks	R2 zoned land 0.9m • To provide opportunities for deep soil landscape areas. • To ensure that development does not become visually dominant. • To ensure that the scale and bulk of buildings is minimised. • To provide adequate separation between buildings to ensure a reasonable level of privacy, amenity and solar access is maintained. • To provide reasonable sharing of views to and from public and private properties.	The proposal largely maintains the approved location on-site.	Yes – on merit

B7 – Front Boundary Setbacks	Minimum 6.5m • <i>To create a sense of openness.</i> • <i>To maintain the visual continuity and pattern of buildings and landscape elements.</i> • <i>To protect and enhance the visual quality of streetscapes and public spaces.</i> • <i>To achieve reasonable view sharing.</i>	3.5m The application seeks to slightly modify the floor level and roof level of the approved carport with the location of the carport on the site generally a change, other than a minor reduction in the front setback of 154 mm which is largely not perceptible from the street domain. The approved carport to be modified remains sunken into the site, to maintain a sense of openness along the frontage of the site and to minimize bulk and scale. The carport as modified will not result in any adverse impacts upon views. The proposed modifications are considered to be supportable on merit, as the objectives of the control are otherwise achieved.	Yes – on merit.
B9 – Rear Boundary Setbacks	Min 6m rear setback. Pool shall not exceed 50% of rear setback area	Unchanged from approved conditions	N/A
Part C – Siting Factors			
C2 – Traffic, Access and Safety	Vehicular crossing to be provided in accordance with Council's Vehicle Crossing Policy	Existing crossing to remain.	Yes
C3 – Parking Facilities	Garages not to visually dominate façade Parking to be in accordance with AS/NZS 2890.1	The proposal seeks minor modifications to the roof carport in order to improve access levels and resolve construction tolerances in relation to the increased depth of the roof members. The structure to be modified remains open on four sides and is situated below street level to	Yes

		ensure that the minor changes to the approved structure will not result in the carport being visually dominant when seen from the street.	
C4 – Stormwater	Hydraulic Design to be provided in accordance with Council's Stormwater Drainage Design Guidelines for Minor Developments and Minor Works Specification	The roof area and the collected stormwater from the roof areas will be largely unchanged as the structures are predominantly over existing concrete areas or current rock areas. Stormwater from the approved carport roof will be directed to the existing system which disperses stormwater within the rear yard..	Yes
C5 – Erosion and Sedimentation	Soil and Water Management required	Suitable sediment and erosion control measures to be provided during construction.	Yes
C6 – Building over or adjacent to Constructed Council Drainage Easements	N/A		N/A
C7 – Excavation and Landfill	Site stability to be maintained	The proposed publications do not see any sick and change to the site conditions and therefore further review by the geotechnical engineer is not considered necessary in this instance.	Yes
C8 – Demolition and Construction	Waste management plan required	Waste management measures to be employed	Yes
C9 – Waste Management	Waste storage area to be provided	Bins storage proposed within the site.	Yes

Part D – Design			
D1 – Landscaped Open Space and Bushland	Min 40% Landscaped Area, with dimensions >2m. The objectives of this control are: • <i>To enable planting to maintain and enhance the streetscape.</i> • <i>To conserve and enhance indigenous vegetation, topographical features and habitat for wildlife.</i> • <i>To provide for landscaped open space with dimensions that are sufficient to enable the establishment of low lying shrubs, medium high shrubs and canopy trees of a size and density to mitigate the height, bulk and scale of the building.</i> • <i>To enhance privacy between buildings.</i> • <i>To accommodate appropriate outdoor recreational opportunities that meet the needs of the occupants.</i> • <i>To provide space for service functions, including clothes drying.</i> • <i>To facilitate water management, including on-site detention and infiltration of stormwater.</i>	The proposed modifications do not significantly alter the approved building four point and therefore the proposal will remain compliant with Council's controls.	Complies
D2 – Private Open Space	Min 60m ² with min dimension 5m	The proposal will not alter the approved private open space areas.	Yes

D3 – Noise	Mechanical noise is to be attenuated to maintain adjoining unit amenity. Compliance with NSW Industrial Noise Policy Requirements	The proposed modifications do not introduce any additional mechanical equipment or mechanical noise.	Yes
D5 – Orientation and Energy Efficiency	Dwellings to be orientated to receive northern sun. Appropriate construction to enhance thermal properties and ventilation/natural cooling. Compliance with SEPP (BASIX) requirements	The proposed modifications do not alter the energy efficiency of the dwelling.	Yes
D6 – Access to sunlight	At least 50% of the required area of private open space of each dwelling and at least 50% of the required area of private open space of adjoining dwellings are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21.	The proposal substantially retains the existing carport in its current location and generally similar to the approved form and therefore there is no impact on solar access to the neighbouring properties or the subject dwelling.	Yes
D7 – Views	View sharing to be maintained	The modified proposal does not result in the loss of views any neighbouring properties.	Yes
D8 – Privacy	This clause specifies that development is not to cause unreasonable overlooking of habitable rooms and principle private open space of adjoining properties	The modify proposal will not result in any privacy impacts to neighbouring properties.	Yes
D9 – Building Bulk	This clause requires buildings to have a visual bulk and architectural scale that is consistent with structures on nearby	The bulk and scale of the modified proposal remains compatible with the approved form.	Yes

	and adjoining properties and not to visually dominate the street or surrounding spaces		
D10 – Building Colours and materials		The approved colours and finishes of the developer will remain unchanged.	Yes
D11 – Roofs	The LEP requires that roofs should not dominate the local skyline.	The modified roof level of the carport remains below Council's height limit and the height of adjoining and nearby properties.	Yes
D12 – Glare and Reflection	Glare impacts from artificial illumination minimised. Reflective building materials to be minimised	The roof of the carport is to be covered in pebbles to minimise glare and reflection.	Yes
D13 – Front Fences and Front Walls	Front fences to be generally to a maximum of 1200mm, of an open style to complement the streetscape and not to encroach onto street.	No front fencing proposed.	N/A
D14 – Site Facilities	Garbage storage areas and mailboxes to have minimal visual impact to the street Landscaping to be provided to reduce the view of the site facilities.	No change to existing site facilities	Yes
D15 – Side and Rear Fences	Side and rear fences to be maximum 1.8m and have regard for Dividing Fences Act 1991.	Side fences unchanged.	Yes
D16 – Swimming Pools and Spa Pools	Pool not to be located in front yard or where site has two frontages, pool not to be located in primary frontage. Siting to have regard for neighbouring trees.	The approved pool within the rear yard remains unchanged	Yes

D20 – Safety and Security	Buildings to enhance the security of the community. Buildings are to provide for casual surveillance of the street.	The proposed modifications to the approved works will not reduce the security of the street area or the subject property. Casual surveillance of the street will remain available from the dwelling to the street over and through the proposed carport.	Yes
D21 – Provision and Location of Utility Services	Utility services to be provided	Normal utility services are available to the site	Yes
D22 – Conservation of Energy and Water	Compliance with SEPP BASIX	A BASIX Certificate is not required in this instance.	Yes
Part E – The Natural Environment			
E1 – Private Property Tree Management	Arboricultural report to be provided to support development where impacts to trees are presented.	The modified proposal will not introduce any further adverse impacts to the trees in the vicinity of the approved carport.	Yes
E2 – Prescribed Vegetation	Not identified on map		N/A
E3 – Threatened species, populations, ecological communities	Not identified on map		N/A
E4 – Wildlife Corridors	Not identified on map		N/A
E5 – Native Vegetation	Not identified on map		N/A
E6 – Retaining unique environmental features	Not identified on map	No unreasonable impacts to significant features within site.	Yes
E7 – Development on land adjoining public open space	Not identified on map		N/A
E8 – Waterways and Riparian Lands	Not identified on map		N/A
E9 – Coastline Hazard	Not identified on map		N/A
E10 – Landslip Risk	Identified on map as Area B.	The site is identified within Area B on Council's Geotechnical Risk Mapping. The modified proposal will necessitate any further excavation or site	Yes

		disturbance and therefore further review by the geotechnical engineer is not considered necessary.	
E11 – Flood Prone Land			N/A

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. DA2023/0827 and as subsequently modified.

The works seek to provide for “*Construction of a carport, swim spa and deck*”.

As the proposed modifications to the approved design will maintain a compliant modest height, 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 “*Construction of a carport, swim spa and deck*” 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.

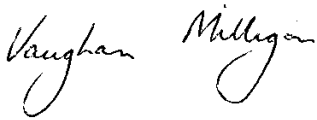
The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as initially lodged and as detailed under the original Notice of Determination dated 26 October 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, reading 'Vaughan Milligan'. The signature is written in a cursive, flowing style.

VAUGHAN MILLIGAN