

5 May 2017

The General Manager  
Northern Beaches Council  
Civic Centre  
725 Pittwater Road  
DEE WHY NSW 2099

Dear Sir/Madam,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT,  
SECTION 96 (1a) ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

**Development Application No:** DA2013/1316  
**Date of Determination:** 16 December 2013  
**Premises:** Lot 1, DP 575244, 176 Allambie Road, Allambie Heights  
**Proposed Development:** Alterations and additions to a dwelling house and construction of a swimming pool.

On behalf of Mr & Mrs Mclean & THW Architects, this submission has been prepared to assist Council in the consideration of an application pursuant to Section 96(1a) of the Environmental Planning & Assessment Act 1979 to alter the development as approved by development consent No DA2013/1316 dated 16 December 2013.

**BACKGROUND**

A Development Application for alterations and additions to a dwelling house and construction of a swimming pool was approved by Council by Notice of Determination dated 16 December 2013.

The approved development detailed under DA2013/1316 included an entertaining room with sink facilities within the Basement Level.

The subject application will seek to modify the form of the entertaining area to allow for the inclusion of a second kitchen, which is to be used in conjunction with the swimming pool area and primarily in the summer months. The basement level is to be used solely in conjunction with the principal single residential use of the dwelling.

The works that are the subject of the consent are nearing completion.

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## PROPOSED MODIFICATION

The proposal seeks to modify the existing consent to provide for a second kitchen area within the Basement Level.

The works will not result in any external change to the dwelling, with the height of the building and its location on the site unchanged.

The proposed revisions are noted on the amended architectural plans prepared by THW Architects, Job No 049, Drawings No 00-A – A08-A dated 29 March 2017.

The proposal will not result in any increase in site coverage or loss of car parking. The existing approved garage will continue to be available for parking of vehicles.

## JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under S96 (1a) which notes:

### ***(1A) Modifications involving minimal environmental impact***

*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 proposed modification is of minimal environmental impact, and*
- (b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), 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 any period prescribed by the regulations or provided by the development control plan, as the case may be.*

*Subsections (1), (2) and (5) do not apply to such a modification.*

Accordingly, for the Council to approve the s96 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.

The works seek to provide for a second kitchen facility within the existing Basement Level, which is to be used solely by the residents of the subject dwelling. The second kitchen facility supports the primary single residential use of the site and which will not result in any physical change to the external configuration of the dwelling, which is consistent with the form, height and location of the dwelling as initially considered within the Consent.

When viewed from the public domain or from the neighbouring properties, the building 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 provide for “*alterations and additions to a dwelling house and construction of a swimming pool*” in a location and to 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 S96 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 proposed alterations to the Basement Level, the Modification Application provides for a relatively minor change to the design which was approved.

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.

The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as approved and will not comprise the amenity of the subject or neighbouring properties.
- The proposal is “substantially” the same development, as defined by the Environmental Planning & Assessment Act 1979.

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**

**Town Planner**

**Grad. Dip. Urban & Regional Planning (UNE)**