

8 June 2021

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

Dear Sir/Madam,

**APPLICATION TO MODIFY DEVELOPMENT CONSENT,
SECTION 4.55 (1A) ENVIRONMENTAL PLANNING & ASSESSMENT ACT**

Development Application No: DA NO 072/14
Date of Determination: 5 February 2015 (as subsequently modified 30 June 2015, 29 June 2017, 30 November 2017 and 15 November 2018)

Premises: Lot 53 within DP 774017
No 4C Minkara Road, Bayview

Proposed Development: Alterations and additions to an existing dual occupancy, demolition and construction of an existing dual occupancy and the construction of a veterinary clinic

On behalf of Ms Patty Walcott & Mr Sean Walcott, 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 DA NO 072/14, (which was subsequently modified on 30 June 2015, 29 June 2017, 30 November 2017 and 15 November 2018).

The application will seek a minor modifications to the approved form of the proposed northern dual occupancy of the development, which are detailed within the revised architectural plans and supporting information.

BACKGROUND

An application for consent for alterations and additions to an existing dual occupancy, demolition and construction of an existing dual occupancy and the construction of a veterinary clinic was approved by Council by Notice of Determination dated 5 February 2015.

The approval was subsequently modified to amend the form of the northern dwelling, under Application Number N0072/14/S96/1, which was determined 30 June 2015. Application Number N0072/14/S96/2 was determined 29 June 2017. Application Number N0072/14/S96/3 was determined 30 November 2017 and Application Number Mod2018/0372 was determined 15 November 2018.

The works that are the subject of this application were previously considered under a Section 4.55 Modification detailed within Mod2019/0582 lodged 20 November 2019. Due to family circumstances, the application was withdrawn prior to the full consideration of the proposal.

The subject application details proposed changes to the northern dual occupancy as outlined below, however it is submitted that the subsequent modifications to the original design detailed under DA N072/14 have not fundamentally changed the nature of the development and it remains consistent with Council's original Development Consent.

PROPOSED MODIFICATION

This submission under S4.55(1A) of the EP& A Act seeks minor modifications to the form of the approved northern dual occupancy.

The amendments to the approved northern dual occupancy plan are detailed in the revised architectural plans prepared by Canvas Architecture and Design, Ref No. S4.55, Sheets 01-03 dated 17 September 2019.

The proposed changes to the approved northern dual occupancy involves the inclusion of a wet bar area within the "Media Room/Home Office". The wet bar will not alter the use of the media room/home office, which will remain as an ancillary area which is used in conjunction with the dual occupancy use.

The proposed changes are wholly internal, with no change to the height or external configuration of the dual occupancy.

JUSTIFICATION

The Environmental Planning & Assessment Act 1979 provides for the modification of a consent under Section 4.55 (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*
- (c) 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*
- (d) 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*

(e) 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 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 072/14.

The works seek to provide for minor internal modifications to the form of the approved northern two storey dual occupancy dwelling, which are located within the approved building footprint and will not alter the external configuration or the scale and form of the development which will remain consistent with the original approval.

The revised design does not introduce any issues for the neighbouring properties in terms of view loss or privacy.

The proposed modification to the approved development is also supported by a revised Bushfire Risk Assessment Certificate prepared by Planning for Bushfire Protection dated 25 September 2019. As the site circumstances and the plans have not changed since the report was originally considered in September 2019, no further bushfire assessment is considered necessary.

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 “*Alterations and additions to an existing dual occupancy, demolition and construction of an existing dual occupancy and the construction of a veterinary clinic*” 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 internal works which are the subject of the application are minor and do not inherently alter the nature and form of the approved northern dual occupancy 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 northern dual occupancy dwelling.

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.

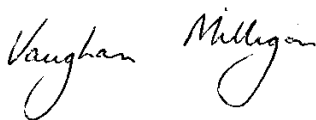
The proposed modification is justified on the basis that:

- The proposed works are generally consistent with the application as initially lodged and as detailed under the original Notice of Determination dated 5 February 2015 and as subsequently modified by Council.
- 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