



Our Ref: CHS:KA:240022

11 September 2024

Mr Scott Phillips
Chief Executive Officer
Northern Beaches Council
Village Park
1 Park Street
Mona Vale NSW 2103

Attention: Stephanie Gelder, Planner

Dear Mr Phillips,

Re: REV2024/0020 - Review of Determination of Application DA2023/1469 for alterations and additions to a dwelling house including a swimming pool at 955 Barrenjoey Road Palm Beach

1. We act for Mr David Hornery in relation to the above Review of Determination of Application DA2023/1469 (the **Review**) for alterations and additions to a dwelling house including a swimming pool at 955 Barrenjoey Road Palm Beach (the **Property**).
2. We refer to the letter from Council dated 14 August 2024 regarding the Review and Council's list of issues identified in its assessment.
3. We kindly request that the matters raised in this letter be considered by Council's Planner, Ms Stephanie Gelder, and that Ms Gelder contact Mr Chris Shaw of our firm to discuss Council's position. In the event that additional information is requested, we respectfully request that we are notified, and our client is provided the opportunity make further submissions.

Summary of Advice

4. In summary:
 - a. the proposed development, pursuant to the Review, seeks development consent "*to carry out 'alterations and additions...'*" to the existing dwelling;
 - b. to determine whether a development application is properly characterised as additions and/or alterations, *both a qualitative and a quantitative analysis* of what is proposed compared to what is currently in existence should be undertaken;
 - c. in this instance, and having regard to the relevant planning principle, the proposed development is for alterations and additions rather than an application for a new structure.

Case law

5. The Court has handed down a number of judgments and established a planning principle relevant to the determination of what is deemed to be a new building rather than alterations and additions.

6. In *Coorey v Municipality of Hunters Hill* [2013] NSWLEC 1187 (**Coorey**), the Court (Senior Commissioner Moore and Acting Commissioner Sullivan) considered a development proposal seeking to remove, what was then, a recent extension to a cottage listed as a heritage item and replace it with new structures that would differ in both style and scale from that extension. The 1970's additions comprised a single-level structure mainly behind and to the side of the heritage item and were constructed in sandstone and timber. The development application before the Court described the proposal as '*alterations and additions to existing dwelling, including first-floor addition, single-storey cabana, barbecue shelter, pergola and front fence*'. The Court considered whether the application was for '*alterations and additions*' or for a '*new*' development and held that both a '*qualitative and quantitative*' approach is required, by setting out what is referred to as the '*planning principle*'. We note the following relevant observations of the Court:

[55] ... it is no longer appropriate to set a prescriptive basis for determining whether approval is being sought for additions and/or alterations or if it is an application for an entirely new development. As with solar amenity, strict mathematical formulae are not an appropriate basis for such an assessment.

[56] The first question to be considered is "what is the purpose for determining whether this application should be characterised as being for additions and/or alterations to an existing structure rather than an application for a new structure?" The answer to this fundamental question will frame the approach to be undertaken to the analytic framework set out below.

*[57] In determining whether an application is appropriate to be regarded as for additions and/or alterations or not, it is appropriate to follow, by broad analogy, the process discussed by Bignold J in *Moto Projects (No 2) Pty Limited v North Sydney Council* [1999] NSWLEC 280; (1999) 106 LGERA 298 - namely undertaking both a qualitative and a quantitative analysis of what is proposed compared to what is currently in existence.*

[58] In this consideration, regard should be had to such of the matters in the following lists of matters as are relevant to the enquiry:

[59] Qualitative issues

- *How is the appearance of the existing building to be changed when viewed from public places?*
- *To what extent, if any, will existing landscaping be removed and how will that affect the setting of the building when viewed from public places?*
- *To what extent, if any, will the proposal impact on a heritage item, the curtilage of a heritage item or a heritage conservation area?*
- *What additional structures, if any, in the curtilage of the existing building will be demolished or altered if the proposal is approved?*
- *What is the extent, if any, of any proposed change to the use of the building?*
- *To what extent, if any, will the proposed development result in any change to the streetscape in which the building is located?*
- *To what extent, if any, are the existing access arrangements for the building proposed to be altered?*

- *To what extent, if any, will the outlook from within the existing building be altered as a consequence the proposed development?*
- *Is the proposed demolition so extensive to cause that which remains to lose the characteristics of the form of the existing structure?*

[60] Quantitative issues

- *To what extent is the site coverage proposed to be changed?*
- *To what extent are any existing non-compliances with numerical controls either increased or diminished by the proposal?*
- *To what extent is the building envelope proposed to be changed?*
- *To what extent are boundary setbacks proposed to be changed?*
- *To what extent will the present numerical degree of landscaping on the site be changed?*
- *To what extent will the existing floor space ratio be altered?*
- *To what extent will there be changes in the roof form?*
- *To what extent will there be alterations to car parking/garaging on the site and/or within the building?*
- *To what extent is the existing landform proposed to be changed by cut and/or fill to give effect to the proposed development?*
- *What relationship does the proportion of the retained building bear to the proposed new development?*

[61] Obviously, the greater the overall extent of departure from the existing position, the greater the likelihood the proposal should be characterised as being for a new building.

[62] It is not intended that the above lists should be regarded as exhaustive. Other matters may well arise for consideration in the facts and circumstances of a particular application or the reason why the analysis is being undertaken. However, having considered all of the listed matters (together with any other additional matters that may be relevant in the particular circumstances of the application), an evaluation can then be made as to whether or not a proposal would correctly be characterised as additions and/or alterations to an existing structure or whether the proposal should be characterised as an application for an entirely new structure.

Purpose of determining the characterisation of the Proposal

7. In *Coorey* the Court set out the first step as considering the following question:

"what is the purpose for determining whether this application should be characterised as being for additions and/or alterations to an existing structure rather than an application for a new structure?"

8. The purpose for determining whether the proposal should be characterised as being for alterations and additions to an existing structure rather than a new structure is for Council to be able to consider the applicable planning controls under the Pittwater 21 Development Control Plan (the **DCP**).

Characterisation of the Proposal

9. The next step in determining whether an application is for '*alterations and additions*' or is for a '*new development*', requires both a qualitative and quantitative approach, as set out in *Coorey*, where the Court provided a non exhaustive list of things to be considered. These matters are considered below.

Qualitative analysis of the Proposed Development

10. We refer to the qualitative issues set out by the Court in *Coorey* and note the following with respect to the proposed development:
- a. the proposed demolition relates only to the elements shown on the demolition plans, with extensive elements remaining;
 - b. the alterations and additions retain the characteristics of the form of the existing structure, because:
 - i. the alterations and additions retain the existing garage walls and slabs;
 - ii. the alterations and additions retain the existing internal and external slabs of the Level 2 main bedroom;
 - iii. the alterations and additions retain parts of the existing external walls of bed 2 on Level 2;
 - iv. the alterations and additions retain parts of the existing Level 2 living room;
 - v. the alterations and additions retain parts of the existing Level 1 external walls;
 - vi. the alterations and additions retain parts of the existing Level 1 subfloor;
 - vii. the alterations and additions retain parts of the internal laundry walls; and
 - viii. the alterations and additions retain the swimming pool;
 - c. there is no change to the use of the building;
 - d. garaging will remain the same;
 - e. existing ancillary structures, including the swimming pool and works within the foreshore, are to be retained/unaltered;
 - f. access arrangements remain unchanged with respect to the location of pedestrian and vehicular access; and
 - g. the outlook from within the two existing levels of the building remains unchanged.

11. The applicant accepts that on a square metre basis, the quantum of new building fabric exceeds that of retained building fabric. However, the proposed development will continue to respond to the characteristics of Barrenjoey Road and is entirely commensurate with that which has been approved and undertaken on sloping sites throughout the immediately locality and the wider local government area.

Quantitative issues

12. We refer to the quantitative issues set out by the Court in *Coorey* and note the following with respect quantitative aspects of the Amended Proposal:

- a. the setting of the building will not be affected when viewed from a public place;
- b. there is no impact on a heritage item or heritage conservation area;
- c. any change to the streetscape in which the building is located will be positive and an improvement, and a passer-by will not appreciate a new building;
- d. the structure remains in part and the fabric covering the structure will alter by improvement;
- e. the extent of non-compliances with the numerical controls is not substantial and is otherwise well supported;
- f. site coverage remains generally unchanged;
- g. boundary setbacks remain generally unchanged (excluding the southern side boundary); and
- h. landscaping remains generally unchanged.

13. Having considered the qualitative and quantitative matters listed above, it is reasonable to characterise the proposal as alterations and additions.

Next steps

14. Applying the planning principal in *Coorey*, the development proposed is appropriately characterised as alterations and additions.

15. Given the advice above, it is open for Council to assess the development as alterations and additions.

16. Please contact the writer if you have any questions about this letter, or require further information.

Yours faithfully,

Karen Arthur

per

Chris Shaw
Principal
for **SHAW REYNOLDS LAWYERS**

Karen Arthur
Special Counsel

Mobile: 0414 353 818
Email: chris.shaw@shawreynolds.com.au

Mobile: 0401 584 509
Email: karen.arthur@shawreynolds.com.au