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**Section 96AA Application to Modify
NSW Land and Environment Court Approval
Minnici v Warringah Council [2009] NSWLEC 1098
File No. 11108 of 2008**



Modification to Conditions of Development Consent to Allow
Staging of Construction and Occupation of the Development,
Remove Underground Pedestrian Access, Remove Right of
Carriageway and Conditions relating to the approved Plan of
Subdivision

5 & 5A Lawrence Street and 18 Marmora Street, Freshwater

Prepared for: Frank Minnici
Project No: 6019C
Date: July 2013



Section 96AA Application

5 & 5A Lawrence Street and 18 Marmora Street, Freshwater

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Table of Contents

1	Introduction	1
2	The Site and Locality	2
3	Information Required by Clause 115 of the Regulation	3
4	Description of the Proposed Modifications to the Development	4
4.1	Construct Development in Two (2) Stages	5
4.2	Remove Underground Pedestrian Access	5
4.3	Delete Condition 95 – Consolidation of Lots	5
4.4	Delete Condition 115 – Right of Carriageway	6
5	Statutory Assessment	6
5.1	Section 96AA of the Act	6
5.1.1	Substantially the Same Development	6
5.1.2	Notification	6
5.1.3	Notify Previous Objectors	6
5.1.4	Consideration of Submissions	6
5.2	Section 79C(1) of the Act	7
5.2.1	Any Environmental Planning Instrument, Proposed Instrument, Development Control Plan, Planning Agreement, the Regulations or any Coastal Zone Management Plan (Section 79C(1)(a))	7
5.2.2	The Likely Impacts of that Development (Section 79C(1)(b))	8
5.2.3	The Suitability of the Site for the Development (Section 79C(1)(c))	8
5.2.4	Any Submissions (Section 79C(1)(d))	8
5.2.5	The Public Interest (Section 79C(1)(e))	9
6	Conclusion and Recommendation	9

Section 96AA Application

5 & 5A Lawrence Street and 18 Marmora Street, Freshwater

Figures

1. The Site Location
2. Site Survey Plan

Tables

1. Information Required by Section 115 of The Regulation

Appendices

- A. Schedule of Proposed Modifications
- B. Minnici v Warringah Council (2009) NSWLEC 1098
- C. Approved Plans
- D. Proposed Plan of Subdivision
- E. Certification Advice
- F. Stormwater Engineering Advice
- G. Sydney Water Sewer Main Advice
- H. Letter from Peter M. Davey to Frank Minnici re: Right of Way
- I. Cost Analysis

1 Introduction

This Section 96AA submission has been prepared by DFP on behalf of Frank Minnici, in respect of the Court approved mixed use development at 5 & 5A Lawrence Street and 18 Marmora Street, Freshwater.

This application is made pursuant to s96AA of the *Environmental Planning and Assessment Act 1979* (EP&A Act) to modify the conditions of the consent granted by the Judgement made by Commissioner Bly in the NSW Land and Environment Court (the Court) under *Minnici v Warringah Council [2009] NSWLEC 1098* (11108 of 2008), issued on 3 April 2009 (the Consent). The purpose of this s96AA application is to modify the conditions at Annexure A of the consent issued by the Court for the following purposes:

- Allow for the staging of the construction and occupation of the proposed mixed use development approved by the Court;
- Remove reference to the underground pedestrian access;
- Remove reference to the consolidation of allotments as the consent issued by the Court included approval of a proposed subdivision of the site into two (2) lots; and
- Remove provision for a right of carriageway over the subject property to provide pedestrian access to the adjoining Church property in Marmora Street.

A schedule which details the proposed modifications to the consent is provided at **Appendix A** of this report. A copy of the Court Judgement in *Minnici v Warringah Council [2009] NSWLEC 1098* (including the conditions of the Consent) is provided at **Appendix B**.

Pursuant to Section 96AA of the EP&A Act, Warringah Council (Council), as the relevant consent authority, may approve the modification of a development consent granted by the Court, provided:

- It is satisfied 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);
- The modification application has been notified appropriately (in accordance with the requirements of the Environmental Planning & Assessment Regulation 2000 (the Regulation) and/or any applicable Development Control Plans);
- It has notified, or made reasonable attempt to notify, each person who made a submission in respect of the relevant development application of the proposed modification; and
- Any submissions made during the notification period have been considered.

This report demonstrates that the proposed modifications to the conditions of the consent for the mixed use development will not significantly alter the development proposal from the approved scheme and is substantially the same development as approved by the Court. Indeed, the only proposed design amendment to the Court approved mixed use development is the deletion of the underground pedestrian access from the proposed commercial building to the basement car parking level at the Residential Buildings A & B on the Court approved architectural plans for the proposal.

2 The Site and Locality

The site is located on the northern side of Lawrence Street and is centrally positioned within the Freshwater Village local shopping centre. The site also extends through to Marmora Street which is a local residential street in the wider Freshwater locality. A locality plan indicating the site is provided at **Figure 1**.

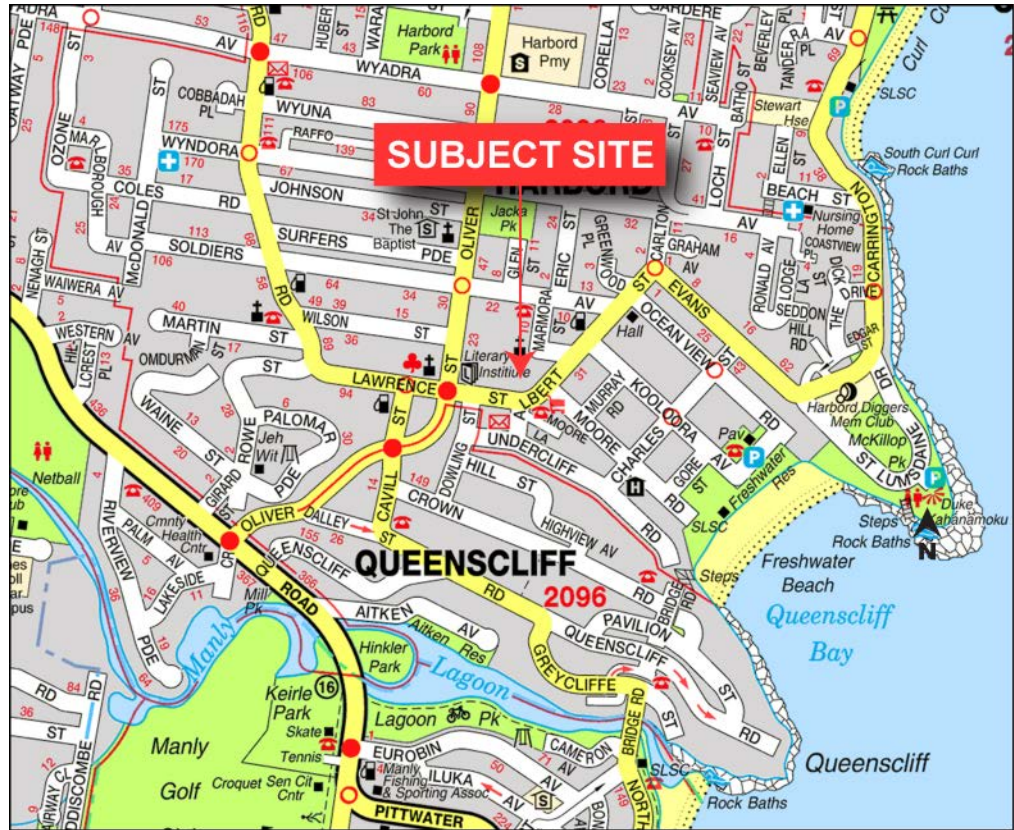


Figure 1: The site location.

The real property description of the site is Lot A & Lot B in DP 37558, No's 5 & 5A Lawrence Street, Freshwater and Lot 9 in DP 10321, No. 18 Marmora Street, Freshwater. **Figure 2** is a reduced copy of the site survey plan.

Section 96AA Application

5 & 5A Lawrence Street and 18 Marmora Street, Freshwater

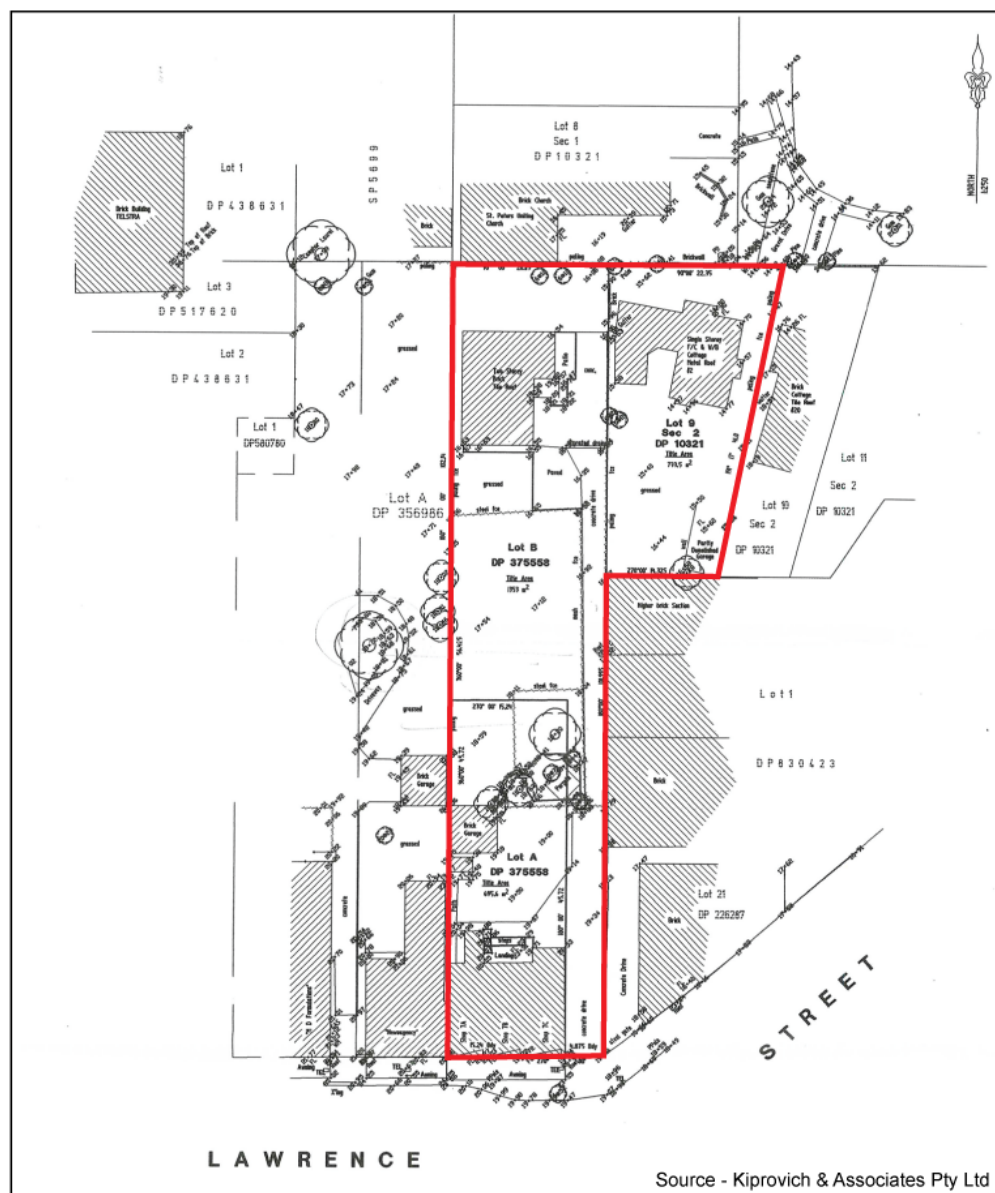


Figure 2: Site Survey Plan

3 Information Required by Clause 115 of the Regulation

Clause 115 Requirement	Details
Clause 115(1)	
Name & Address of Applicant	Don Fox Planning Pty Ltd 11 Dartford Road, Thornleigh PO Box 230 Pennant Hills
Description of Approved Development	Demolition of existing buildings and construction of a mixed use development comprising basement car parking, three-storey retail/commercial building, 10 residential apartments in two buildings and a detached dwelling and stratum subdivision.
Site Address Details	5 and 5A Lawrence Street, Freshwater being Lots A & B in DP 37558 and 18 Marmora Street, Freshwater being Lot 9 in DP 103521.

Clause 115 Requirement	Details
Description of Proposed Modification	Modify various conditions of the Consent to allow the staged construction and occupation of the development, remove the underground pedestrian access from the development, remove Condition 95 relating to the consolidation of lots, and remove Condition 115 relating to the right of way as described in the schedule at Appendix A .
Statement Describing Intent of Modification	Modification under Section 96AA of the EP&A Act to address the matters outlined above.
Description of Expected Impacts	The proposed modifications will result in no material change to the Court approved development, with the exception of the removal of the underground pedestrian access. No adverse environmental impacts are expected as a result of the modifications.
Confirm Development will Remain Substantially the Same as that Originally Approved	The proposed modifications are minor and will not result in any material change to the development, with the exception of the removal of the underground pedestrian access. The development will be constructed and occupied in stages, and will remain substantially the same as that approved.
Owners Consent	Provided with Section 96AA modification application documentation.
Application to Court or Consent Authority	The proposed modifications are being made to the consent authority (Warringah Council) pursuant to Section 96AA of the EP&A Act.
Clause 115(3)	

4 Description of the Proposed Modifications to the Development

The Consent issued in the Court Judgement approved the erection of a mixed use retail, commercial office and residential development, consisting of the demolition of existing buildings and construction of four (4) new buildings, including a:

1. Three storey retail and commercial office building fronting Lawrence Street with separate basement car parking;
2. Three storey apartment-style building situated in the centre of the site with no street frontage and shared basement car parking;
3. Three storey apartment-style building at the rear (northern) end of the site with no street frontage and shared basement car parking; and
4. Two storey detached dwelling with frontage to Marmora Street.

A copy of the Court approved plans under the Consent is provided at **Appendix C**.

The Court approved mixed use development also comprises the subdivision of the site to create two (2) lots for the proposed retail/commercial building (in a proposed Lot A) and residential buildings (in a proposed Lot B) (refer to the Consent at **Appendix B**). The proposed subdivision included a stratum lot for the proposed underground pedestrian access (also in a proposed Lot A).

This Section 96AA application for modification relates to various matters which are discussed below. A schedule which details all proposed modifications to the Consent is provided at **Appendix A**.

4.1 Construct Development in Two (2) Stages

It is proposed to construct the two key components of the Court approved Mixed use development (being the retail/commercial component and residential component) in two (2) stages, with Stage 1 comprising the residential development. The staged construction and occupation of the proposed mixed use development would be contained within the allotments formed as part of the Court approved subdivision. A plan of subdivision being DP 1181713 prepared by Rob Kiprovich dated 7 December 2012 is provided at **Appendix D** which details the proposed two lot Torrens title subdivision of the subject site (as stratum subdivision is no longer required as a result of the removal of the pedestrian tunnel, discussed below).

AE&D Consulting has provided advice dated 11 June 2013 in regard to the issuing of separate final Occupation Certificates for multiple buildings under the one development consent (**Appendix E**). This advice confirms that with the proposed staging of the construction of the mixed use development involving separate Construction Certificates for the residential buildings and for the commercial building, final Occupation Certificates can be issued for each proposed building once it is completed.

Having regard to the treatment of stormwater for the proposed allotments, Building Services Engineers (BSE) has provided a stormwater assessment of the proposed staging of the proposal dated 29 May 2013 (**Appendix F**). BSE outlines that as the approved stormwater drainage design was split into two (2) components with separate discharge points to Lawrence Street (for the retail/commercial component) and Marmora Street (for the residential component), the proposed staging of the development can be accommodated without adverse effect on the approved stormwater design.

4.2 Remove Underground Pedestrian Access

The Court approved mixed use development also comprised the provision of an underground pedestrian access including stairs and a path from the basement car parking level of the residential development through to the commercial building fronting onto Lawrence Street, via a pedestrian access path at the side of the retail/commercial building. Investigations undertaken subsequent to the issue of the Consent have identified that the proposed underground pedestrian access would conflict with the existing sewer main linking several properties to the west with the sewer main situated in Marmora Street.

Byrne & Associates has provided advice dated 12 June 2013 in regard to the location of the sewer main and location of the pedestrian access linking the residential buildings with the commercial buildings in Lawrence Street (**Appendix G**). The advice provided by Byrne & Associates concludes that due to insufficient sewer fall, extensive relocation works and difficulties in obtaining consent from all affected adjoining land owners, the adjustment of the sewer main to suit the proposed underground pedestrian path is not practical or economically viable. Accordingly, it is proposed to remove the pedestrian access from the development proposal. The proposed subdivision of the site is no longer required to accommodate the pedestrian access. The proposed plan of subdivision at **Appendix D** details the proposed two lot Torrens title subdivision.

4.3 Delete Condition 95 – Consolidation of Lots

The Consent for the mixed use proposal issued by the Court in *Minnici v Warringah Council* [2009] NSWLEC 1098 included approval of a proposed subdivision of the subject site into two (2) allotments (see **Appendix B**) and as shown on the Plan of Subdivision (see **Appendix D**). Therefore Condition 95 which requires the consolidation of Lot 9 Section 2 in DP 10321 and Lots A & B in DP 37558 prior to the issue of an interim/final Occupation Certificate, should be deleted.

4.4 Delete Condition 115 – Right of Carriageway

The adjoining landowner, Mr Peter Davey (on behalf of the Davey/Roberts family) of Lot A in DP 356986 (to the west) has advised the applicant, Frank Minnici that they are not prepared to grant a right of way from the Council's public car park to access the adjoining Church site at Lot 1 in DP 10321 due to problems with an unlocked gate and concerns with crime prevention and safety issues (see **Appendix I**). Hence the applicant, Frank Minnici requests that Council delete Condition 115 as the right of carriageway from Council's public car park to the Church site through the rear of the adjoining commercial properties cannot be achieved.

5 Statutory Assessment

5.1 Section 96AA of the Act

Section 96AA of the Act applies to modifications by consent authorities of a development consent granted by the Court. Specifically, s96AA provides that:

"A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court and subject to and in accordance with the regulations, modify the development consent if:"

5.1.1 Substantially the Same Development

"(a) 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"

The proposed modifications will result in no material changes to the approved mixed used development, with the exception of the removal of the underground pedestrian access, which will not alter the approved retail/commercial development or the residential development. The proposed modifications will not alter the mixed use development such that the modified development would not be viewed as substantially the same as that originally approved.

5.1.2 Notification

"(b) 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 modifications of a development consent,"*

The proposed modification will be subject to the notification requirements of Warringah Development Control Plan 2011, as determined by the Consent Authority.

5.1.3 Notify Previous Objectors

"(c) it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person"

When determining the appropriate notification requirements for the proposed modifications to the Conditions of Consent, the consent authority may notify, or make reasonable attempts to notify each person who made a submission in respect to DA 2007/0856 (as assessed by Warringah Council in 2008).

5.1.4 Consideration of Submissions

"(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"

Should Council notify the subject application in accordance with s96AA(b), it must consider any submissions made during a notification period.

Subsections (1B), (1C), (2) & (3) of s96AA do not apply to the proposed modification. Subsection (1A) is addressed below.

5.2 Section 79C(1) of the Act

5.2.1 Any Environmental Planning Instrument, Proposed Instrument, Development Control Plan, Planning Agreement, the Regulations or any Coastal Zone Management Plan (Section 79C(1)(a))

State Environmental Planning Policy No. 65 – Design Quality for Residential Flat Development

The proposed modifications will not result in any material changes to the external residential flat buildings design, internal layout, building siting or finishes of the approved mixed use development. Accordingly the proposed modifications will remain generally consistent with the provisions of State Environmental Planning Policy No. 65 – Design Quality for Residential Flat Development as approved by the Court.

Warringah Local Environmental Plan 2000

The Court approved mixed use development was assessed by the Council and the Court under the provisions of the former Warringah Local Environmental Plan (WLEP) 2000. WLEP 2000 has been replaced by WLEP 2011, with the exception of land deferred from that LEP. WLEP 2011 presently applies to the subject site, however the provisions of WLEP 2000 are of greater relevance to the proposed modifications to the Conditions of Consent as they relate to development as approved by the Court on 3 April 2009. Relevant provisions of WLEP 2000 are discussed below.

Commissioner Bly in his Court Judgement in *Minnici v Warringah Council [2009] NSWLEC 1098* agreed that the mixed use development is consistent with the Desired Future Character Statements and objectives of the H1 and H2 Localities under the former WLEP 2000, including the manner in which the development responds to the interface between the two Localities and to the Marmora Street residential streetscape.

The proposed modifications to the consent for the mixed use proposal will not result in the development being inconsistent with the desired future character statements or objectives of the H1 and H2 Localities, and will not result in a modification of the approved uses or to the architectural design of the mixed use proposal. The development as modified will remain consistent with the general planning controls of WLEP 2000.

Warringah Local Environmental Plan 2011

WLEP 2011 is the current environmental planning instrument which applies to the subject site. However the Court approved development was assessed under the provisions of WLEP 2000 and therefore these provisions are more relevant to the assessment of the proposed modifications. Notwithstanding, the provisions of WLEP 2011 are addressed below.

The subject site is partially located within the B2 Local Centre zone (being No. 5 and 5A Lawrence Street) and partially within the R2 Low Density Residential zone (being No. 18 Marmora Street). The approved mixed use development is defined as a “commercial premises” (including “office premises” and “retail premises”), “residential flat buildings” and a “dwelling house” under WLEP 2011.

Development for the purpose of a commercial premises is permissible within the B2 Local Centre zone, however residential flat building development is now a prohibited development within the B2 zone. Dwelling house development is permissible with consent

within the R2 zone. As the development was approved under WLEP 2000 and not WLEP 2011, the permissibility of the development under that instrument takes precedence.

No change to the lot size, building height or floor space ratio of the development is proposed. The proposed modifications (including staging of the construction and occupation of the development) will not result in the mixed use proposal being inconsistent with the general planning controls of WLEP 2011.

Warringah Development Control Plan 2011

At the time of Court Judgement in *Minnici v Warringah Council* [2009] NSWLEC 1098 WDCP 2011 did not apply to the subject site.

The proposed modification relates to the staging of the development, removing the pedestrian tunnel, removing reference to consolidation of the site (which was approved for a two (2) lot subdivision) and removing the right of way. WDCP 2011 does not set out any provisions which are relevant to the proposed modifications, including controls relating to the staging of the development or relevant to pedestrian access.

Warringah Section 94A Contribution Plan

A cost analysis of the modified development has been provided by WT Partnership (**Appendix I**) which indicates the estimated costs of the development as modified. The schedule at **Appendix A** provides modifications to Condition 27 as they relate to Section 94 contributions to allow for the payment of fees over the two stages of works.

5.2.2 The Likely Impacts of that Development (Section 79C(1)(b))

Building Services Engineers (BSE) has provided a stormwater drainage assessment of the proposed staging of the development dated 29 May 2013 (**Appendix F**). BSE outlines that as the approved design was split into two (2) components with separate discharge points to Lawrence Street (for the retail/commercial component) and Marmora Street (for the residential component), the proposed staging of the development can be accommodated without adverse effect on the approved stormwater design.

The proposed modifications are minor and will have no material impact upon the Court approved development, with the exception of the removal of the pedestrian tunnel linking the residential development with the commercial building and Lawrence Street. For these reasons, the mixed use development proposal as modified by the proposed Conditions of Consent will not result in any additional adverse environmental, traffic or amenity impacts upon the subject site or adjoining properties.

5.2.3 The Suitability of the Site for the Development (Section 79C(1)(c))

The mixed use retail, commercial and residential development (as proposed to be modified) is consistent with the Desired Future Character Statement for both the H1 and H2 Localities within WLEP 2000, under which the original Development Application was assessed by Council and the Court. The site is considered to be well located for the mixed use development and has sufficient area and appropriate dimensions to accommodate the retail/commercial and residential development. For these reasons, notwithstanding the proposed modifications to the conditions of development consent, the subject site is still considered to be highly suitable for the mixed use retail, commercial and residential development.

5.2.4 Any Submissions (Section 79C(1)(d))

In accordance with WDCP 2011, the proposed modifications may be placed on public notification by Council. Any submissions received by Council will be considered in the assessment of the proposed modified development.

5.2.5 The Public Interest (Section 79C(1)(e))

The public interest will be served by the mixed use development of the site in an orderly and economic manner. The proposed modifications to the conditions of consent are generally consistent with the relevant planning provisions and the modified development is worth of Council's support and approval.

6 Conclusion and Recommendation

For the reasons outlined in this Report, DFP support approval by Council of this Section 96AA application for modification of the Consent granted by the Court in *Minnici v Warringah Council [2009] NSWLEC 1098* on 3 April 2009 for the demolition of existing development and erection of a new mixed retail, commercial and residential development as staged works.

As the proposed modifications to the conditions of the consent for the Court approved mixed use development proposal are relatively minor and inconsequential, the development will remain substantially the same as the approved development and the modifications will not give rise to any adverse environmental traffic or amenity impacts in the locality.

Accordingly, we are of the opinion that the Section 96AA application should be approved by Council as the Consent Authority and that the conditions of consent appended to the judgement of *Minnici v Warringah Council [2009] NSWLEC 1098* be modified as detailed in the schedule at **Appendix A**.