

Westfield Warringah Mall

Proposed Modification under s96 (1A) to
DA 2008 / 1742

November 2014

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1 Introduction

This report has been prepared by Urbis on behalf of Scentre Pty Ltd, and constitutes a section 96(1A) application to modify consent DA2008/1742 pertaining to Westfield Warringah Mall at 145 Old Pittwater Road, Brookvale.

The proposed modification is sought in respect to the wording and requirements of a number of the conditions of the development consent. The proposed modifications are largely “house-keeping” in that we are seeking to rationalise some of the conditions in order to achieve the necessary Construction and Occupation Certificates to enable the development to proceed in a practical and efficient manner.

In the majority of cases, the proposed modifications to the conditions do not change the intent of the conditions, but merely enables certain components to be delivered in a timely manner. In other cases, it is minor refinement to the conditions to ensure that they practicality relate to the approved development and are capable of implementation as appropriate.

1.1 BACKGROUND

1.1.1 DEVELOPMENT CONSENT 2008/1742

On the 16th May 2012, Warringah Council issued development consent 2008/1742 for the construction of stormwater upgrade works for Westfield Warringah Mall and watercourse bank stabilisation works. This consent was issued with deferred commencement conditions which are yet to be satisfied.

The key elements of the proposal can be summarised as follows:

- Alterations to the existing head wall located within the site where Brookvale Creek intersects with the Mall.
- Upstream bank stabilisation works for 90 metres north of the head wall.
- The construction of two 3.6m x 1.5m culverts running underground through the shopping centre site.
- The construction of the culverts under Condamine Street located immediately north of those existing and works with the Warringah Golf Club site to connect into the existing drainage infrastructure located in this area.
- Removal of existing landscaping along the frontage to Cross Street.
- Minor demolition works to facilitate the construction of the stormwater drainage system.
- Other drainage works around the western side of the centre including new inlets and pipes.

This approval followed after more than 3 years of careful peer review and authority assessment, consultation and modification to establish a viable solution. The consent was issued with a large number of conditions that were partly resolved and accepted by the applicant at the time of approval, although it was recognised at the time that conditions imposed by Council at the time were not fully agreed (or the implications fully understood) and that a further review would be required.

The applicant is now preparing to commence the project, but requires a number of minor amendments to certain conditions in order to make the consent capable of practical implementation. This submission follows previous preliminary discussions with Council officers, although primarily focussed on condition 66 at the time.

2 Proposed Modification to the Original Consent

It is proposed to modify the following conditions as detailed below:

2.1 PROPOSED AMENDMENT TO CONDITION 5

It is proposed to amend condition 5 as follows:

(c) If the development involves an excavation that extends below the level of the base of the footings of a building on adjoining land, the person having the benefit of the development consent must, at the person's own expense:

- (i) protect and support the adjoining premises from possible damage from the excavation, and*
- (ii) where necessary, underpin the adjoining premises to prevent any such damage.*

Condition 2 5(c) does not apply if the person having the benefit of the development consent owns the adjoining land or the owner of the adjoining land has given consent in writing to that condition not applying.

Reason for Amendment:

This is a minor correction to address an error in drafting.

2.2 PROPOSED AMENDMENT TO CONDITION 8

It is proposed to delete condition 8 reproduced below in strike through.

~~The Section 94A Contributions are required to be paid for this development. This amount has been calculated using the Warringah Section 94A Development Contributions Plan. The amount will be adjusted at the time of payment according to the quarterly CPI (Sydney – All Groups Index).~~

~~Warringah Section 94A Development Contributions Plan~~

~~Contribution based on total development cost of \$20,058,500.00~~

| Contribution – all parts Warringah | Levy Rate | Contribution Payable |
|---|----------------------|---------------------------------|
| Total S94A Levy | 0.95% | \$190,556.00 |
| S94A Planning and Administration | 0.05% | \$10,029.00 |
| Total | 1.0% | \$200,585.00 |

~~Details demonstrating payment are to be submitted to the Certifying Authority prior to the issue of the Construction Certificate.~~

The applicant is proposing to enter into a Voluntary Planning Agreement (VPA) as part of this development consent in lieu of condition 8. Attached is a letter of offer from the owners to enter into a VPA for the provision of stormwater infrastructure works to the minimum value of \$200,585 which is required under condition 8.

It is therefore proposed that a condition 8 replace that existing along the following lines:

A Voluntary Planning Agreement for the provision of stormwater infrastructure works is to be prepared in accordance the owner's letter of offer dated xxxx. The voluntary planning agreement is to be executed prior to the issue of the Construction Certificate.

Reason for Amendment:

The applicant maintained during the DA assessment that section 94A contributions should not apply to the subject development for the reasons that the applicant is providing public infrastructure in the form of enhanced drainage. The outcome of this development approval is that it will be enhancing existing infrastructure as opposed to placing a burden on infrastructure which is the rationale for development contributions. This development for the public benefit is further emphasised by the works approved upstream from the Mall which are partly in Council ownership and for which Council will bear no cost for this infrastructure upgrade.

Council Officers acknowledged at the time of final DA assessment that the limitations of the section 94A Plan meant that this current condition must be imposed but could be addressed by the applicant entering into a voluntary planning agreement, providing for the infrastructure works to be provided 'in-kind'. The applicant seeks to now amend this condition requiring that a VPA be entered into to formalise this arrangement.

2.3 PROPOSED AMENDMENTS TO CONDITIONS 11, 12, 24, 25, 27 AND 28:

It is proposed to amend the last paragraph of each of the conditions 11, 12, 24, 27 and 28 as follows:

Details demonstrating compliance are to be submitted to the Certifying Authority for approval prior to the issue of ~~any~~ the Construction Certificate.

Reason for Amendment:

The current wording of the conditions means that all the obligations contained in the conditions must be satisfied prior to the PCA being able to issue a Construction Certificate. This is unreasonably limiting and will burden the delivery process, which is proposed to be managed by a series of staged construction certificates given that the project will be constructed in a series of stages.

It is proposed to amend the wording in the same manner for the five conditions to require the satisfaction of the "relevant" Construction Certificate. This will still ensure satisfaction of the condition in a timely manner (as relevant to the specific works being the subject of the CC) but not as a prerequisite to the issue of any CC.

2.4 PROPOSED AMENDMENT TO CONDITION 55, 56, 57, 58, 59, 61, 62 AND 63

It is proposed to amend the last paragraph of each of the conditions 55, 56, 57, 58, 59, 61, 62 and 63 as follows:

Details demonstrating compliance are to be submitted to the Principal Certifying Authority prior to the issue of any ~~interim~~ final Occupation Certificate.

Reason for Amendment:

The current wording of the condition requires that these conditions be satisfied prior to the issue of any occupation certificate, interim or final. It is to be noted that the project is likely to be completed in a series of stages. Given the nature of these conditions which require registration on title, it is appropriate that these be addressed prior to the issue of a final occupation certificate. This will allow the applicant to work through and create the required title encumbrances in one transaction prior to the final completion of the project.

2.5 PROPOSED DELETION OF CONDITION 14

It is proposed to amend condition 14 as follows:

The 10 metre by 7.2 metre high capacity grate located immediately to the west of the Green Street road reserve, as shown on drawing W4548 -116 by Cardno, is to be designed by a suitably qualified structural engineer to accommodate ~~heavy traffic loads and any~~ anticipated hydraulic loads. The design of the grate system shall be certified as compliant with all relevant Australian Standards and Codes by a suitably qualified structural engineer.

Details demonstrating compliance are to be submitted to the Certifying Authority for approval prior to the issue of the Construction Certificate.

Reason for Amendment:

The condition was imposed to ensure the structural integrity of the inlet grate. The inlet grate is located within the landscape zone located along the frontage to Green Street. Accordingly, it is not in a location designed to accommodate vehicle traffic and therefore the structural design should be to meet hydraulic loads only, rather than to also accommodate heavy traffic loads.

2.6 PROPOSED AMENDMENT TO CONDITION 63

It is proposed to amend condition 63 as follows:

- (b) *The positive covenant is to permit access to Lot DP 600059 and Lot 30 DP 204107 to allow the owners of Lot 100, DP 1015283, No.145 Old Pittwater Road to meet the obligations **of conditions 66 and 67(a)** of this Development Consent.*
- (d) *All **reasonable** costs related to the review and approval of the positive covenant by Council shall be borne by the applicant.*
- (e) *Warringah Council shall be nominated as the sole authority empowered to release, vary or modify such covenant. **The covenant is to be released by Council as soon as practical following the expiration of the maintenance period required by conditions 66 and 67(a) of this Development Consent.***
- (f) *Details demonstrating compliance with this conditions is to be submitted to the satisfaction of the Principal Certifying Authority prior to the release of any ~~interim~~ final occupation certificate.*

Reason for Amendment:

The consent conditions require that a legal right of access to Lot DP 600059 and Lot 30 DP 204107 is created in favour of the owners of Lot 100, DP 1015283 to fulfil the requirements of the consent. However it is important to specifically reference the conditions where such access and maintenance is required and note that this right of access is not required in perpetuity. Accordingly, the proposed amendments to subclause (b) and (e) seek to provide this clarification.

It is proposed that sub section (d) of the condition be amended to include the word 'reasonable', to ensure that any re-imbursment of costs by the applicant are fair and reasonable.

Part (f) is proposed to be amended in same manner as proposed in section 2.4 of this submission.

2.7 PROPOSED AMENDMENT TO CONDITION 64

It is proposed to amend condition 64(a) as follows:

(a) Prior to the issue ~~of the issue~~ of the Occupation Certificate, Condition 24 of Development Consent No. 96/335 for DA1996/137 is to be deleted as the bank stabilisation works satisfy the intent of this condition.

Reason for Amendment:

Typographical error only.

2.8 PROPOSED AMENDMENT TO CONDITION 65

It is proposed to amend condition 65 as follows:

Maintenance of the Trunk Drainage Network and Flood Barrier System

The land owners of Lot 100 DP 1015283, are required to maintain the trunk drainage network traversing Lot 100 DP 1015283 and all associated flood barrier systems required to provide a minimum 300mm freeboard to the existing retail floor levels in perpetuity.

The maintenance must include the following:

(a) A maintenance regime to ensure that the trunk drainage network and flood barrier system are adequately maintained to operate as per the design intent and as detailed in the Warringah Mall Flood Impact Assessment Addendum, prepared by Cardno, dated 25 January 2010.

(b) The regime must include regular inspections to detect and clear any blockages to the network.

~~*(c) Provision for a suitably qualified structural engineer to assess the structural integrity of the trunk drainage network traversing the site. A certificate is to be submitted to Council documenting the findings of the assessment. The certificate is to include recommendations for any rectification works which the structural engineer deems are necessary to maintain the structural integrity of the trunk drainage network. A certificate is to be submitted to Council every five (5) years.*~~

~~*Any rectification works required for the above must be undertaken by the proprietor at no expense to Council. Rectification works are to be carried out within twelve (12) months of the initial assessment, or where there is risk of failure, immediately. A certificate signed by a suitably qualified structural engineer is to be submitted to Council stating that the rectification works have been carried out in accordance with an approved design.*~~

Reasons for Amendment:

This application was imposed to ensure ongoing maintenance of the trunk stormwater drainage and flood barrier systems. The owners are committed to on-going maintenance of the stormwater culverts traversing through the shopping centre site and indeed it is part of good asset management practice to do so, given the significant nature of the assets and the consequences of system failure.

The imposition of conditions that require on-going assessment and the issue of certificates to Council is an unreasonable and unnecessary burden that should be deleted, hence the proposed removal of condition 65(c). To impose such a requirement is akin to asking any applicant to undertake a periodic structural assessment of a building and issue a certificate. This is not a burden imposed on other land owners, so it is not reasonable to apply in this instance either noting that this is an asset owned and maintained solely by the owners of Westfield Warringah Mall.

2.9 PROPOSED AMENDMENT TO CONDITION 66

It is proposed to amend condition 66 as follows:

Geo-technical and Channel Structure

A. *In order to monitor or rectify any (i) creek or bank instability; and*

~~*(ii) structural stability and integrity of the channel structure*~~

The persons responsible undertake the requirements of this condition as follows:

~~a) the land owner of Lot 100, DP 1015283 to monitor and rectify any creek or bank instability works undertaken under this consent in accordance with (B) as detailed in this condition, for a period of 24 months after the issue date of the Final **relevant** Occupation Certificate for the entire development~~

b) the land owner of Lot 100, DP 1015283 is to monitor the structural integrity of concrete lined channel (and associated upstream development works of Lot 100, DP 1015283, No 145 Old Pittwater Road to Old Pittwater Road as works undertaken under this consent and rectify for a period of 12 months after the issue date of the Final Occupation Certificate for the entire development in accordance with (B) as detailed in this condition,

~~c) the land owner of Lot 2 DP 600059 (upon the completion of the 24 month period stipulate in (a) above) is required to undertake the requirements detailed in (B)(I) as detailed in this condition in perpetuity~~

~~d) the land owners of Lot 2 DP 600059 and Lot 30 DP 204107 (upon the completion of the 12 month period stipulate in (b) above) is required to undertake the requirements detailed in (B)(II) as detailed in this condition below in perpetuity.~~

B. ~~The responsible person~~ **owner of Lot 100, DP 1015283** must undertake the following:

~~I). An annual~~ A geo-technical investigation regime **is** to be conducted by an appropriately qualified and practicing geo-technical engineer to review the following:

a) Undertake a geotechnical assessment of the creek banks, from Warringah Mall (on land at Lot 100, DP 1015283, No 145 Old Pittwater Road) boundary, upstream to Old Pittwater Road. The assessment is to include (but not be limited to) the following:

- i) The stability of the creek bank and potential geotechnical hazards present within and surrounding the site,
- ii) Any impacts of the works on creek bank stability,
- iii) Current levels of risk to both life and property; and
- iv) Creek bank remediation risk management measures.

b) A copy of the report is to be provided to all land owners and tenancy holders affected and / or adjacent to the creek.

A certificate is to be submitted to Council advising that the requirements of this conditions have been carried out. **The assessment and reporting is to be carried out on a minimum of 3 occasions periodically over a 10 year period from the issue of the Final Occupation Certificate.**

~~II). Provision for a suitably qualified structural engineer to assess the structural integrity of concrete lined channel (and associated upstream development works of Lot 100, DP 1015283, No 145 Old Pittwater Road to Old Pittwater Road as approved by this consent). A certificate is to be submitted to Council documenting the findings of the assessment. The certificate is to include recommendations for any rectification works which the structural engineer deems are necessary to maintain the structural integrity of the concrete lined channel. A certificate is to be submitted to Council every five (5) years.~~

~~Any rectification works required for the above must be undertaken by the persons stipulated within (A) of this condition at no expense to Council. Rectification works are to be carried out within twelve (12) months of the initial assessment, or where there is risk of failure, immediately. A certificate signed by a suitably qualified structural engineer is to be submitted to Council stating that the rectification works have been carried out in accordance with an approved design.~~

Reason for Amendment:

This condition has been amended to reflect the direction arising from pre-DA discussions and written advice from Council. In essence, the amended condition:

- Deletes any requirement for a structural assessment of the concrete lined channel;
- Removes the obligations from the owners of Lot 2 DP 600059 to undertake geotechnical reviews of bank stability upstream from the Mall and instead requires this assessment to be undertaken by the owners of Westfield Warringah Mall.
- Limits this assessment to three occasions over a 10 year period, which is considered a reasonable period to monitor change post development.

2.10 PROPOSED AMENDMENT TO CONDITION 67

It is proposed to amend condition 67 as follows:

Riparian Lands Vegetation

In order to appropriately and adequately manage the riparian zones and revegetated areas of Lot 2 DP 600059 and Lot 30 DP 204107 the lands are to be managed in accordance with the approved Environmental Management Plan (incorporating Biodiversity Management Plan and Vegetation Management Plan) detailed within this consent, the management is to be undertaken by:

- a. *the land owner of Lot 100, DP 1015283 to monitor and rectify works undertaken under this consent for a period of 24 months after the issue date of the ~~Final~~**relevant** Occupation Certificate ~~for the entire development~~*
- b. *the land owner of Lot 2 DP 600059 (upon the completion of the 24 month period stipulated in (a) above) is required to undertake the requirements detailed in this condition in perpetuity, **but limited to the management of land contained in Lot 2 DP600059.***

*A certificate signed by a suitably qualified ecologist is to be submitted to Council ~~annually~~ stating that the site monitoring has been undertaken and rectification works (if required) have been undertaken in accordance with the requirements of ~~the~~ condition **(a) above.***

Reason for Amendment:

The condition is proposed to be amended to reflect that the two year maintenance/management period should commence on completion of the specific works in the riparian corridor which is likely to be prior to the completion of the overall project.

In terms of the requirements for site monitoring and certification, this is considered appropriate for the first two years under the direct supervision of a qualified ecologist. Beyond this period, the obligation for on-going management is maintained as a responsibility of the land owner, but it is unreasonable and excessive to require that this be certified annually by a qualified ecologist.

It is further noted that the co-owners have previously agreed to provide an updated evacuation plan as part of the development consent.

The amendments to point (b) simply seek to clarify that that the obligations by the owners of Lot 2 DP600059 are limited to that land and not all the land subject to the development consent.

3 Assessment under s96(1A) of the EP&A Act

Section 96(1A) of the Environmental Planning and Assessment Act 1979 allows a Council to modify a 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.

Further, section 96(3) requires that:

In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 79C (1) as are of relevance to the development the subject of the application.

Each of these heads of consideration is addressed in turn below.

3.1 MINIMAL ENVIRONMENTAL IMPACT

The proposed modifications will not result in a development with a changed environmental impact from that already approved.

In the majority of cases, the amendment to conditions only relate to the timing of delivery of the project.

In other cases, the modifications or deletions proposed do not represent changes of real substance but rather a means by which the requirements of the conditions can be practicality and realistically implemented.

It is considered that the proposed changes will have a minimal environmental impact.

3.2 SUBSTANTIALLY THE SAME DEVELOPMENT

The proposed modifications will result in substantially the same development as that originally approved. Specifically, the amendments proposed represent refinements to the existing conditions to ensure that they are implementable and relevant to the development approval. To this extent, the proposal will remain substantially the same development as that previously approved by way of DA 2008/1742.

3.3 CONSULTATION WITH MINISTER OR RELEVANT AUTHORITY REGARDING CONCURRENCE CONDITIONS

The proposed modification does not seek to vary any conditions that were required by other authorities.

3.4 NOTIFICATION IN ACCORDANCE WITH REGULATION AND DCP

There is no requirement to notify the proposal on the basis that it is of minor environmental impact.

3.5 SECTION 79C(1) CONSIDERATION

Section 79C(1) of the EP&A Act sets out the heads of consideration for any application under Part 4 of that Act. In respect to these matters, the following comments are made:

- The proposed modifications are consistent with the provisions of the Warringah LEP 2011.
- The proposed development is consistent with the relevant DCP provisions.
- The proposal will not have any adverse environmental impact for the reasons previously mentioned.
- The proposal is in the public interest as the modifications will ensure that the development can proceed in an efficient and practical manner.

4 Conclusion

This application under section 96(1A) of the EP&A Act seeks to modify certain conditions relating to DA 2008/1742, pertaining to stormwater augmentation works associated with Westfield Warringah Mall.

The proposed modifications to the conditions do not change the intent of the conditions, but merely enables certain components to be delivered and the grant of construction and occupation certificates in a timely manner. In other cases, it is minor refinement to the conditions to ensure that they practicality relate to the approved development and are capable of implementation as appropriate.

The above assessment finds that the proposed modifications will not result in any detrimental environmental impact, and that the resultant development will be substantially the same as that originally approved.

As such, it is considered that Council should approve the modifications as proposed.

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