

The General Manager  
Warrignah Council  
Civic Centre  
725 Pittwater Road  
Dee Why NSW 2099  
DX 9118 Dee Why

Dear Sir/Madam

**S96 (AA) MODIFICATION APPLICATION TO DA NO 2007/0856  
18 MARMORA STREET, FRESHWATER NSW 2096**

**1.0 Introduction**

In support of this Section 96 (AA) application please find enclosed:

1. One (1) completed S96 Application Form;
2. Three (3) copies of this letter-form Statement of Environmental Effects; and
3. One (1) electronic copy of all documentation.
4. Three (3) copies of attached appendices including:
  - a. Development Consent – DA 2007/0856 (**Appendix 1**);
  - b. Development Consent – MOD 2013/0112 (**Appendix 2**);
  - c. Development Consent – MOD 2014/0052 (**Appendix 3**);
  - d. Development Consent – MOD 2014/0117 (**Appendix 4**);
  - e. Geo Tech Report (**Appendix 5**);
  - f. Inflow Investigation letter (**Appendix 6**);
  - g. Letter from NSW Office of Water (**Appendix 7**);
  - h. Approved Drawing A-0100 (B) and A-0101(B) (**Appendix 8**);and
  - i. Consolidated Conditions (**Appendix 9**).

This application letter for a Section 96(AA) has been prepared by Moorgate Property Pty Ltd (Moorgate Property). It supports a S96(AA) application to Warringah Council to delete and amend a number of conditions from the approved mixed use development (DA2007/0856) at 18 Marmora Street, Freshwater, Sydney, NSW, 2096.

The proposal is for minor amendments to the approved conditions of consent, a majority of which are to be deleted/amended so that they are up-to-date with the most recent approved plans. Therefore it is expected that no notification is necessary for the proposed. It is requested that the assessing officer determine notification is not required (in accordance with Section A.7 of the *Warringah Development Control Plan 2011 (WDCP)*).

The following conditions of consent are proposed to be deleted as part of this application:

- **Condition 2;**
- **Condition 3 and 3A;**
- **Condition 7; and**
- **Condition 17.**

The following conditions of consent are proposed to be amended as part of this application:

- **Condition 32;**
- **Condition 42;**
- **Condition 4 (of conditions that must be complied during demolition and building work);**
- **Condition 7 (of conditions that must be complied during demolition and building work);**
- **Condition 89; and**
- **Condition 114.**

The proposed amendments do not present any environmental impacts and the proposal will remain the same as that approved under the previous approvals.

Development Consent under Section 96(AA) of the *Environmental Planning and Assessment Act, 1979* states:

- (1) *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:*
  - (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*
  - (b) *it has notified the application in accordance with:*
    - (i) *the regulations, if the regulations so require, and*
    - (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*
  - (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, 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.*

The proposed modifications provide for minor changes to the approved development consent and do not have any environmental impact. No changes to the building footprint, elevations, overall design or use of the site are to occur and changes will only be to the approved development conditions. Therefore the proposed development is considered to be substantially the same as required by Section 96 (AA).

DA Consent 2007/0856 was granted consent by the Land and Environmental Court of New South Wales - accordingly it is considered that Section 96(AA) is the most appropriate mechanism for the proposed modifications to the consent.

## 2.0 Background

Development Consent (**DA 2007/0856**) was granted by the Land and Environment Court of New South Wales on 3<sup>rd</sup> April 2009 for a mixed commercial retail and residential development. A copy of this consent is attached as **Appendix 1** of this report.

A Section 96 (AA) application (**MOD 2013/0112**) was approved by Warringah Council on 6<sup>th</sup> October 2013 to amend original plans, subdivide land into two (2) lots and stage the construction and occupation of the development. A copy of this consent is attached as **Appendix 2** of this report.

Following this a Section 96 (AA) application (**MOD 2014/0052**) was approved on the 29<sup>th</sup> May 2014 to delete Condition 114-Lawrence St Median Strip, Condition 116-Tree protection and Condition-117 Acoustic fencing. A copy of this consent is attached as **Appendix 3** of this report.

A Section 96 (AA) application (**MOD 2014/0117**) was later approved to amend Condition 1 for alterations to the approved plans; this was granted consent on the 10<sup>th</sup> October 2014. A copy of this consent is attached as **Appendix 4** of this report.

Under this application Moorgate Property is now applying for consent to delete Condition 2,3,3A,7 and 17 along with amending Condition 32, 42, 4 (of conditions that must be complied during demolition and building work), 7 (of conditions that must be complied during demolition and building work), 89 and 114 of the approved mixed use development (**DA 2007/0856**) at 18 Marmora Street, Freshwater, Sydney, NSW, 2096.

## 3.0 Detail of Conditions

**Condition 2** of DA Consent 2007/0856 refers to approved storm water drainage works. The existing wording is as follows:

### *2. Approved Stormwater Plan*

*The stormwater drainage works are to be generally in accordance with the drainage plan submitted by Thomsonkane, drawing number 6134-1h DAH-00 P6, DAH-01 P5, DAH-02 P6, DAH-03 P6, DAH-05 P6, DAH-06 P5, DAH-07 P5 and DAH-08 P1 dated 19.02.08 and 15.11.07 and DAH-04 P6 dated 28.04.08.*

**Condition 3** of DA Consent 2007/0856 refers to approved landscaping plans. The existing wording is as follows:

### *3. Approved Landscaping Plan*

*Landscaping works on the site are to be undertaken generally in accordance with the Landscaping Plans numbered LC01 Issue C and LC02 Issue B prepared by Selena Hannan Landscape Design dated 27/02/2009.*

*3A. The landscape plan is to be amended to reflect the relocation of building D and to include additional native canopy trees in the setback.*

**Condition 7** of DA Consent 2007/0856 refers to changes to windows on the original approved plans. The existing wording is as follows:

*7. Changes to Windows – Building D*

*All windows on the first floor of the eastern elevation of building D are to be either obscure glass or are to have a minimum sill height of 1.7m from the first floor, floor level. Amended plans which satisfy these requirements are to be submitted to the certifying Authority prior to the issue of the construction certificate.*

**Condition 17** of DA Consent 2007/0856 refers to waterproofing/tanking of basement level. The existing wording is as follows:

*17. Waterproofing/Tanking of Basement Level*

*The basement area is to be permanently tanked or waterproofed. Details of the waterproofing/tanking are to be prepared by a suitably qualified Engineer and submitted and approved by the Certifying Authority prior to the issue of the Construction Certificate.*

**Condition 32** of DA Consent 2007/0856 refers to design for access and mobility. The existing wording is as follows:

*32. Design for Access and Mobility*

*Building C must be designed to comply with the requirements of Australian Standard AS1428.2-1992 Design for Access and Mobility – Enhanced and additional requirements- Buildings and facilities and Units 7 and 9 must be designed to comply with the requirements of AS4299- Adaptable Housing. Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of Construction Certificate.*

**Condition 42** of DA Consent 2007/0856 refers to the Home Building Act. The existing wording is as follows:

## 42. Home Building Act

(1) Building work that involves residential building work (within the meaning and exemptions provided in the Home Building Act 1989) must not be carried out unless the Principal Certifying Authority for the development to which the work relates:

- (a) in the case of work to be done by a licensee under that Act:
  - (i) has been informed in writing of the licensee's name and contractor licence number, and
  - (ii) is satisfied that the licensee has complied with the requirements of the Home Building Act, or
- (b) in the case of work to be done by any other person:
  - (i) has been informed in writing of the person's name and owner-builder permit number, or
  - (ii) has been given a declaration, signed by the owner of the land, that

states that the reasonable market cost of the labour and materials involved in the work is less than the amount prescribed for the purposes of the definition of owner-builder work in section 29 of that Act, and is given appropriate information and declarations under paragraphs (a) and (b) whenever arrangements for the doing of the work are changed in such a manner as to render out of date any information or declaration previously given under either of those paragraphs.

Note: The amount referred to in paragraph (b)(ii) is prescribed by regulations under the Home Building Act 1989. As at the date on which this Regulation was gazetted, that amount was \$3,000. As those regulations are amended from time to time, that amount may vary.

(2) A certificate purporting to be issued by an approved insurer under Part 6 of the Home Building Act 1989 that states that a person is the holder of an insurance policy issued for the purposes of that Part is, for the purposes of this clause, sufficient evidence that the person has complied with the requirements of that Part.

(3) If arrangements for doing residential building work are changed while the work is in progress so that the information submitted to Council is out of date, further work must not be carried out unless the Principal Certifying Authority for the development to which the work relates (not being the Council), has given the Council written notice of the updated information.

***Reason: Prescribed - Statutory. (DACGDhba)***

**Condition 4** (conditions that must be complied during demolition and building work) of DA Consent 2007/0856 refers to vehicle crossings during demolition and building work. The existing wording is as follows:

### *4. Vehicle Crossings*

*The provision of 2 vehicle crossings, 6 metres wide to Lawrence Street and 3 metres wide to Marmora Street, in accordance with Warringah Council Drawing No A4-3330/1 Normal and specifications. An authorised Vehicle crossing contractor shall construct the vehicle crossing and associated works within the road reserve in plain concrete. All redundant laybacks and crossings are to be restored to footpath/grass. Prior to the pouring of concrete, the vehicle*

*crossing is to be inspected by Council and a satisfactory "Vehicle Crossing Inspection" card issued.*

**Condition 7** (conditions that must be complied during demolition and building work) of DA Consent 2007/0856 refers to layback construction. The existing wording is as follows:

*7. Layback Construction*

*A layback, 6 metres wide to Lawrence street and 3 metres wide to Marmora Street (excluding the wings), is to be constructed in accordance with Warringah Council Drawing No A4-2276 and specifications.*

**Condition 89** of DA Consent 2007/0856 refers to design for access and mobility. The existing wording is as follows:

*89. Design for Access and Mobility – Residential Component*

*Prior to the issue of an interim/Final Occupation Certificate provision shall be made for access to and within Building C for persons with a disability in accordance with the provisions of Australian Standard AS 1428.2-1992 Design for access and Mobility – Enhanced and additional requirements – buildings and facilities. Units 7 and 9 shall comply with the requirements of AS4299 – Adaptable Housing.*

**Condition 114** of DA Consent 2007/0856 refers to design for access and mobility. The existing wording is as follows:

*114. Lawrence St Median Strip*

*The extension to the median strip in Lawrence Street and shown on plan DA07D, shall be constructed by the applicant at its cost, but only if the approval is granted by the local traffic authority.*

#### **4.0 Proposed Modifications**

This Section 96(AA) Application seeks to delete Condition 2, 3, 7 and 17 along with amending Condition 32, 42, 4 (of conditions that must be complied during demolition and building work), 7 (of conditions that must be complied during demolition and building work), 89 and 114 of the approved mixed use development (**DA 2007/0856**) at 18 Marmora Street, Freshwater, Sydney, NSW, 2096.

The modification/removal of Condition 2, 3, 3A, 7, 32, 4 (of conditions that must be complied during demolition and building work), 7 (of conditions that must be complied during demolition and building work), 89 and 114 are proposed so the conditions will directly relate to the most recent approved plans (modified by MOD 2014/0117). The abovementioned Conditions relate to the original approved plans and are obsolete to the most recent approval.

The removal of Condition 17 is proposed as tanking of the basement has been proven to be unnecessary.

Condition 42 regarding the Home Building Act is out of date in regards to legislation changes, it is requested Council replace detail in condition 42 to reflect current Home Building Act requirements.

To reflect the proposed modifications to the relevant conditions, text proposed to be deleted is indicated by 'strikethrough' text and text proposed to be added is indicated by **bold** text as follows:

~~2. Approved Stormwater Plan~~

~~The stormwater drainage works are to be generally in accordance with the drainage plan submitted by Thomsonkane, drawing number 6134-1h DAH-00 P6, DAH-01 P5, DAH-02 P6, DAH-03 P6, DAH-05 P6, DAH-06 P5, DAH-07 P5 and DAH-08 P1 dated 19.02.08 and 15.11.07 and DAH-04 P6 dated 28.04.08.~~

~~3. Approved Landscaping Plan~~

~~Landscaping works on the site are to be undertaken generally in accordance with the Landscaping Plans numbered LC01 Issue C and LC02 Issue B prepared by Selena Hannan Landscape Design dated 27/02/2009.~~

~~3A. The landscape plan is to be amended to reflect the relocation of building D and to include additional native canopy trees in the setback.~~

~~7. Changes to Windows – Building D~~

~~All windows on the first floor of the eastern elevation of building D are to be either obscure glass or are to have a minimum sill height of 1.7m from the first floor, floor level. Amended plans which satisfy these requirements are to be submitted to the certifying Authority prior to the issue of the construction certificate.~~

~~17. Waterproofing/Tanking of Basement Level~~

~~The basement area is to be permanently tanked or waterproofed. Details of the waterproofing/tanking are to be prepared by a suitably qualified Engineer and submitted and approved by the Certifying Authority prior to the issue of the Construction Certificate.~~

~~32. Design for Access and Mobility~~

~~Building C must be designed to comply with the requirements of Australian Standard AS1428.2-1992 **1428.1-2009** Design for Access and Mobility – Enhanced and additional requirements- Buildings and facilities and ~~Units 7 and 9 C03 and C06~~ must be designed to comply with the requirements of AS4299- Adaptable Housing. Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of Construction Certificate.~~

## 4. Vehicle Crossings

The provision of 2 vehicle crossings (**one (1) per each stage of development**), 6 metres wide to Lawrence Street (**For stage 2 only – Lot 2 DP 1181713**) and 3 metres wide to Marmora Street (**for stage 1 only – Lot 1 DP 1181713**), in accordance with Warringah Council Drawing No A4-3330/1 Normal and specifications. An authorised Vehicle crossing contractor shall construct the vehicle crossing and associated works within the road reserve in plain concrete. All redundant laybacks and crossings are to be restored to footpath/grass. Prior to the pouring of concrete, the vehicle crossing is to be inspected by Council and a satisfactory "Vehicle Crossing Inspection" card issued.

## 7. Layback Construction

A layback, 6 metres wide to Lawrence street (**for stage 2 of the development**) and 3 metres wide to Marmora Street (**for stage 1 of the development**) (excluding the wings), is to be constructed in accordance with Warringah Council Drawing No A4-2276 and specifications.

### *89. Design for Access and Mobility – Residential Component*

*Prior to the issue of an interim/Final Occupation Certificate provision shall be made for access to and within Building C for persons with a disability in accordance with the provisions of Australian Standard AS ~~1428.2-1992~~ **1428.1-2009** Design for access and Mobility – Enhanced and additional requirements – buildings and facilities. ~~Units 7 and 9 C03 and C06~~ shall comply with the requirements of AS4299 – Adaptable Housing.*

### *114. Lawrence St Median Strip*

*The extension to the median strip in Lawrence Street and shown on plan DA07D, shall be constructed **(In stage 2 of the development)** by the applicant at its cost, but only if the approval is granted by the local traffic authority.*

## **5.0 S96 ASSESSMENT**

The site is zoned both B2 Local Centre and R2 Low Density Residential under the provisions of the *Warringah Local Environmental Plan 2011* (WLEP 2011), the proposal is minor and remains consistent with the objectives of the B2 and R2 zones. The proposal will delete/amend existing conditions so that they directly relate to the most recent approved plans. Additionally, Condition 17 is proposed to be deleted as it is considered unnecessary and not required.

### ***Condition 2 & 3***

Condition 2 and 3 directly refer to the original approved plans submitted with DA 2007/0856, the landscaping and engineering plans have been modified in MOD2014/0117 (located within Condition 1B) as indicated in **Appendix 4**. Therefore it is considered Condition 2 and 3 are obsolete and should be deleted to reflect most recent amendments.

### ***Condition 7***

Condition 7 also refers to the original approved plan submitted under DA 2007/0856, plans approved in MOD2014/0117 meet all of Council's requirements in regards to windows. As a result there is no need for Condition 7.

### ***Condition 17***

A Geo Tech report (**Appendix 5**) prepared by J&K Geotechnics concludes that '*Tanking measures over long term are considered unwarranted*'. Further investigation of the subject site's inflow rate by J&K Geotechnics (**Appendix 6**) provides clarification that the approximate inflow rate to the basement is about 0.02ML/year which is significantly lower than NSW Office of Water's (NOW) requirement of 3ML/year to stipulate a tanked basement. Furthermore a letter from NOW addressed to Council (**Appendix 7**) sanctions that '*general terms of approval are not required for the basement construction*'. Therefore it is considered that tanking/waterproofing the basement as required by Condition 17 is unnecessary.

### ***Condition 4 & 7 (of conditions that must be complied during demolition and building work) & 114***

As DA2007/0856 was amended by MOD 2013/0112 to be a staged construction and occupation (for the commercial and residential development) it is considered unnecessary to provide two (2) vehicle crossings during demolition and construction work as specified in Condition 4 (of conditions that must be complied during demolition and building work). It is considered only necessary to provide one (1) vehicle crossing that directly relates to the staged development (residential [stage 1] – Marmora St, Commercial [stage 2] – Lawrence St). Similarly with Condition 7 (of conditions that must be complied



during demolition and building work) one (1) layback is only be necessary for each stage of construction. Additionally Condition 114 is concerned with Lawrence Street (stage 2 - commercial frontage) therefore should be amended so that it is directed only to stage 2 of the development.

### ***Condition 32 and 89***

Condition 32 and 89 relate to the design and access for mobility which directly refer to the original approved plans. The most recent approved plans (MOD 2014/0117) identify the accessible units as C03 and C06. Attached in **Appendix 8** is Drawing NO A-0100 (B) and A-0101 (B) from approved plans in MOD2014/0117 which identify accessible units as C03 and C06. Therefore Condition 32 and 89 do not refer to current approvals thus are requested to be amended. Further to this Australian standard 1428.2-1992 has been replaced by AS 1428.1-2009, hence it is requested Council update to current standards.

### ***Condition 42***

As detailed above Condition 42 regarding the Home Building Act is out of date in regards to legislation changes, it is requested Council replace detail in condition 42 to reflect current Home Building Act requirements.

## **6.0 Consolidation of DA Conditions**

To ensure clear and concise conditions of consent for the purposes of issuing Construction Certificate and Occupation Certificate it is requested that Council provide a set of consolidated conditions. Attached in **Appendix 9** is a set of consolidated conditions compiled by Moorgate Property as we understand to be relevant following all development approvals.

## **7.0 Conclusion**

It is considered that the initial assessment contained in the previous Section 96 application, prepared by Don Fox Planning will remain the same and cover the proposed amendments in this application therefore favourable consideration is requested.

The proposal has been assessed against the matters for consideration under Section 79C of the *Environmental Planning and Assessment Act 1979* including relevant provisions of *Warringah Local Environmental Plan 2011*.

It is therefore recommended that Council grant development consent to the proposal.

In the interim, please do not hesitate to contact us if you require any further information.

Regards,



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## **APPENDIX 1**

Development Consent – DA 2007/0856

## **APPENDIX 2**

Development Consent – MOD 2013/0112

## **APPENDIX 3**

Development Consent – MOD 2013/0112

## **APPENDIX 4**

Development Consent – MOD 2014/0117

## **APPENDIX 5**      Geo Tech Report

## **APPENDIX 6**

### Inflow Investigation letter

## **APPENDIX 7**

Letter from NSW Office of Water



## **APPENDIX 8**

Approved Drawing A-0100 (B) and A-0101(B)

## **APPENDIX 9**

## Consolidated Conditions