



7 January 2020

DB 16-122

General Manager
Northern Beaches Council
PO Box 82
Manly NSW 1655

Dear Sir,

**Re: S4.56(1) Application to modify consent to Development Application N0123/17 -
Demolition of an existing aged care facility and construction of a new
residential aged care facility at 184 Garden Street, Warriewood**

1 INTRODUCTION

We write on behalf of Opal Aged Care Pty Ltd (Opal) in reference to the consent to DA N0123/17 - Demolition of an existing aged care facility and construction of a new residential aged care facility at 184 Garden Street, Warriewood.

Condition 22 of the consent refers to a detailed site investigation of the site. It states:

22. A detailed site investigation (including sampling, testing and remediation if necessary) is to be prepared by a suitably qualified independent consultant in accordance with the recommendations in the Preliminary Site Investigation Report, as referenced in this consent, and is to be carried out as per EPA guidelines and the requirements of SEPP 55 - Remediation of Land. This report is to be provided to the Certifying Authority prior to the release of the relevant Construction Certificate. The findings of the detailed site investigation should be reported in accordance with EPA (2001) to provide the data to confirm that the site is suitable for the proposed land uses, or (should contamination be identified) to inform a remedial action plan to make the site suitable for the proposed development.

In accordance with this condition, a detailed site investigation has been undertaken and a remedial action plan prepared:

- *Detailed Site Investigation Opal Seaside Aged Care 184 - 194 Garden Street, Warriewood, NSW dated 3 September 2019 - Report No. 55792/124344 (Rev 0) prepared by JBS&G Australia Pty Ltd ("DSI");*
- *Remedial Action Plan Opal Seaside Aged Care 184-194 Garden Street, Warriewood, NSW dated 3 September 2019 – Report No. 55792/124336 (Rev 0) prepared by JBS&G Australia Pty Ltd ("RAP").*

Copies of these reports are provided for information (**Attachments 1 and 2**).

On the basis of previous investigations the DSI found that site contaminants are restricted to both friable (FA) and non-friable (bonded) asbestos in fill material found on the site, lead at levels exceeding the adopted health-based criterion at one location and aesthetic impacts. No other contaminants of concern exceeded the adopted health based or ecological assessment criteria applicable to the proposed residential land use as aged care facility. Based on the results of the DSI, fill materials were noted to be generally similar across the site and impacted with asbestos. As a conservative approach, all site fill materials were classified as General Solid Waste (non-putrescible) / Special Waste (Asbestos Waste) (GSW&S). The DSI recommended the development of a RAP to guide the required remediation to enable the site to be considered suitable for the permissible land uses as an ongoing aged care facility.

The RAP identified the preferred remedial strategy to be the use of cap and cover of impacted fill materials in alignment with the final built form of engineered concrete slabs of buildings, permanent hardstand pavements of car parks and roadways and landscaping of garden and open space areas. Surplus fill and two identified hot spot areas will be classified and disposed to appropriately licenced landfill.

The remediation works are classified as Category 2 Remediation Works as per the meaning provided in SEPP 55 and will not require specific development consent under the Environmental Planning and Assessment Act 1979.

The RAP concluded that:

- subject to the successful implementation of the measures described in this RAP and the limitations in Section 13 of the RAP, the risks posed by contamination can be managed in such a way as to be adequately protective of human health and the environment; and
- the site can be made suitable for use as an ongoing aged care facility with implementation of an ongoing long term Environmental Management Plan, consistent with a residential land use with garden/accessible soils (NEPC 2013).

A draft long term environmental management plan has been prepared for the site:

- *Environmental Management Plan for Opal Aged Care Facility* dated 24 October 2019 – Ref J001852 Rev 2 prepared by SESL Australia.

A copy of the EMP is provided in **Attachment 3**.

Remediation and validation works are being undertaken over two stages in alignment with the proposed redevelopment of the site. It is anticipated that the remediation will occur over two stages in alignment with the proposed redevelopment stages under the development consent. A NSW EPA accredited Site Auditor, Dr Lange Jorstad of Geosyntec Consultants, has been engaged to audit the site investigation, remediation and validation work at the site, and a Site Audit Statement and a Site Audit Report will be issued to the consent authority at completion of remediation and validation of each stage.

In order for the site audit statements and site audit reports to be issued, there needs to be a mechanism for the EMP to be made enforceable over time. This can be achieved by attaching the following condition to the development consent:

22A. Where a long-term Environmental Management Plan (EMP) forms a condition to a Site Audit Statement in relation to the long-term management of any residual contamination remaining onsite, the EMP must be approved by the Site Auditor prior to the issue of the Site Audit Statement. The owner of the land is required to comply with the ongoing obligations of any EMP which forms part of any final Site Audit Statement for the site. A covenant shall be registered on the title of the land binding the owners and future owners to be responsible for the implementation of the EMP.

The application seeks to modify the consent in accordance with the provisions of Section 4.56(1) of the EP&A Act for the following reasons:

- the applicant has opted to lodge the application with Council rather than the Land and Environment Court;
- the consent as modified will be substantially the same as the development as originally approved.

The modification seeks to ensure that asbestos contamination on the site will be managed in accordance with all relevant statutory requirements.

Opal has instructed BBC Consulting Planners to prepare this submission and the attached supporting information to form part of the Section 4.56(1) application.

2 LAND TO WHICH THIS SECTION 4.56(1) APPLICATION RELATES

The land to which this development application relates is the Opal Seaside Nursing Home located at No 184 Garden Street, Warriewood NSW 2102. The real property description of the site is Lot 2 in Deposited Plan 595174. The site is owned by Principal Healthcare Finance Pty Limited (being Opal Aged Care). This is the same land to which the consent relates.

3 CONSENT SOUGHT TO BE MODIFIED

The consent to which this application relates is that granted pursuant to Development Application N0123/17 granted by the Land and Environment Court on 8 October 2018. This consent was for demolition of an existing aged care facility and construction of a new residential aged care facility.

4 REQUESTED MODIFICATION

As discussed above Council is requested to modify the consent by including an additional condition of consent being:

22A. Where a long-term Environmental Management Plan (EMP) forms a condition to a Site Audit Statement in relation to the long-term management of any residual contamination remaining onsite, the EMP must be approved by the Site Auditor prior to the issue of the Site Audit Statement. The owner of the land is required to comply with the ongoing obligations of any EMP which forms part of any final Site Audit Statement for the site. A covenant shall be registered on the title of the land binding the owners and future owners to be responsible for the implementation of the EMP.

5 PRESCRIBED FORM

The prescribed requirements for a Section 4.56(1) application are established in Clause 115(1) of the Environmental Planning and Assessment Regulation 2000. Council has integrated these requirements into a form for its own administrative purposes. A completed copy of this form accompanies this correspondence.

6 CONSIDERATION OF RELEVANT PROVISIONS OF SECTION 4.56(1)

Relevant Provisions

Section 4.56(1) of Environmental Planning and Assessment Act 1979 states:

“4.56 Modification by consent authorities of consents granted by the Court

(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.

(1A) 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 4.15 (1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

(1B) (Repealed)

(1C) The modification of a development consent in accordance with this section is taken not to be the granting of development consent under this Part, but a reference in this or any other Act to a development consent includes a reference to a development consent as so modified.

(2) After determining an application for modification of a consent under this section, the consent authority must send a notice of its determination to each person who made a submission in respect of the application for modification.

(3) The regulations may make provision for or with respect to the following:

(a) the period after which a consent authority, that has not determined an application under this section, is taken to have determined the application by refusing consent,

- (b) the effect of any such deemed determination on the power of a consent authority to determine any such application,*
- (c) the effect of a subsequent determination on the power of a consent authority on any appeal sought under this Act.*

In relation to **Section 4.56(1)(a)**, Council can be satisfied that the development as approved under DA N0123/17 will be substantially the same development once modified in accordance with this application. The proposal does not alter the scope of the original development which remains a residential care facility. There is no change to the appearance, functionality, use or scale of the development or to access arrangements.

The requirements of **Section 4.56(1)(b), (c) and (d)** are to met by Council as required in its consideration of this application.

Section 4.56(1A) of the EP&A Act further states:

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 4.15 (1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

The following section assesses the proposed modifications under the relevant heads of consideration of Section 4.15 of the Environmental Planning and Assessment Act 1979.

Section 4.15(1)(a) – Statutory Planning Considerations

Section 4.15(1)(a) of the EP&A Act requires the consent authority to take into consideration:-

- “(a) the provisions of:*
 - (i) any environmental planning instrument, and*
 - (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*
 - (iii) any development control plan, and*
 - (iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and*
 - (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and*
 - (v) any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),**that apply to the land to which the development application relates”*

The modification does not alter any of the findings made by Council, the planning panel or the Land and Environment Court in the assessment of the DA in relation to relevant planning instruments, including the Pittwater LEP 2014, and the Pittwater DCP P21.

The modification facilitates an effective mechanism for managing contamination on the site in compliance with relevant planning legislation including State Environmental Planning Policy

No 55 – Remediation of Land, the Environmental Planning and Assessment Act 1979 and the Contaminated Land Management Act 1997.

Section 4.15(1)(b) – Environmental, Social and Economic Impacts

Section 4.15(1)(b) of the EP&A Act requires the consent authority to consider:

- (b) *the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality*

The relevant matters are addressed below.

Impacts on the Natural Environment

The proposed modification will have no negative impact on the natural environment. It will have a positive impact in providing a mechanism for the on-going management of contamination on the site.

Bushfire Impacts

The site is mapped as being prone to bushfire. The modification does not alter the findings and/ or recommendations made within the Bushfire Hazard Assessment Report prepared by Building Code & Bushfire Hazard Solutions P/L (ref: 161187, dated 22nd February 2016, revised 9th August 2017) which accompanied the original Development Application.

Other Amenity Impacts

The modification does result in any adverse impact on the amenity of adjoining or adjacent properties or in the amenity of the local area.

Section 4.15(1)(c) – The Suitability of the Site

Section 4.15(1)(c) of the EP&A Act requires the consent authority to consider:

- “(c) *the suitability of the site for the development*”

The original development consent as modified remains highly appropriate for the site. The development and design outcomes of the approved development will be unchanged.

Section 4.15(1)(d) – Submissions

Section 4.15(1)(d) of the EP&A Act requires the consent authority to consider:

- “(d) *any submissions made in accordance with this Act or the regulations*”

Any relevant submissions in relation to this Section 4.56(1) application will need to be considered by Council in due course.

Section 4.15(1)(e) – The Public Interest

Section 4.15(1)(e) of the EP&A Act requires the consent authority to consider:

“(e) *the public interest.*”

The public interest is generally best served by the modified development that is reasonable and appropriate, that is consistent with the approved plans, and that does not create any significant adverse impacts on the environment or on neighbouring properties. In this regard, the requested modification is in the public interest.

7 SUMMARY

This Section 4.56(1) application seeks approval for modification to the consent to N0123/17 to improve the design and provide additional facilities for residents. It is suitable for approval because:

- the development as modified is for substantially the same development as approved;
- the requested modifications are of minor environmental impact and gives rise to no significant additional impacts; and
- the modifications will have no adverse effects on the amenity of adjoining land.

The modification for which consent is sought does not alter the original findings made in relation to DA N0123/17 regarding the reasonableness and appropriateness of the development when considered in the light of the matters listed in Section 4.15 of the Environmental Planning and Assessment Act 1979. The requested modification will have no significant adverse environmental impacts. The development as modified will be substantially the same as the development originally approved.

We trust that you find this application acceptable. If any further details are required, or if further justification is required in support of the requested modification, please do not hesitate to contact the undersigned on (02) 9211 4099.

Yours faithfully
BBC Consulting Planners



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Attachment 1 – Detailed Site Investigation Report



Attachment 2 – Remedial Action Plan



Attachment 3 – Environmental Management Plan