

14 June 2016

Anthony Witherdin  
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Dear Anthony,

**Modification to Part 3A Concept Plan No MP 09\_0082 (MOD 1)**

Thank you for the opportunity and extension of time to provide comment on the proposed modification to the Transitional Part 3A Concept Plan No. MP09\_0082, sought under Section 75W of the *Environmental Planning & Assessment Act (EP&A Act)*. In this regard the comments offered in this submission are those of the relevant Council officers.

Following a review of the application and supporting documents, it is considered that there are a number of issues in the application that require clarification:

1. The Voluntary Planning Agreement (VPA) between Shellharbour City Council (SCC) and Lend Lease, executed on 15 September 2014, applies to the *whole* of the Calderwood Urban Development Project (CUDP) to which the Part 3A Concept Plan No. MP09\_0082 applies, including the land in Wollongong City Council (WCC) (refer to clause 2.3(b) of the VPA).
2. The VPA provides a statutory mechanism under S93F of the *EP&A Act* through which the contributions payable to SCC (in compliance with Condition C12 of the Part 3A Concept Plan No. MP09\_0082) can be imposed by the Council when determining Part 4 applications. Contributions are payable on approximately 4,800 dwellings to which the Part 3A Concept Plan No. MP09\_0082 has been granted, inclusive of the dwellings to be developed on land within WCC. The SCC VPA requires that the VPA be registered on lands within the WCC Local Government Area at the appropriate time.
3. The Planning Agreement between SCC and Lend Lease does *not* prohibit a statutory mechanism under Section 93F, 94 or 94A of the *EP&A Act*, such as a Section 94 Contributions Plan (S94 Plan) or VPA being prepared and adopted to facilitate the contributions payable to WCC in accordance with the requirements the Part 3A Concept Plan No. MP09\_0082 at both C12 and Point 5 of the Statement of Commitments. Although the SCC VPA applies to land in WCC, it provides for the contributions payable to SCC only.

Council would like to advise that the proposed modifications to Condition C12 of the Part 3A Concept Plan No. MP09\_0082 are **not supported** for the following reasons:

1. The application for modification is sought under the now repealed Section 75W of the *EP&A Act*. Whilst this section does not limit the circumstances in which the Minister may modify a determination (s75W(7)) it specifically states that *The Minister's approval for a modification is not required if the project as modified will be consistent with the existing approval under this Part (s75W(2))*. As the proposed modification to Condition C12 of Part 3A Concept Plan No. MP09\_0082 simply involves inclusion of contribution details that are consistent with the intent of Condition C12 a modification is not required. Instead, those details should be incorporated into either: a VPA between WCC and Lend Lease; or into a S94 Plan that should be prepared, exhibited, and adopted. For this reason, pursuant to s75W(2) the modification to the approval is unnecessary in these circumstances.
2. The Planning Assessment Commission as the delegate for the Minister was the consent authority for the Stage 1 Project Application (MP09\_0083) and imposed contribution conditions in accordance with s94B(2)(a) of the *EP&A Act*. In accordance with the determination of Part 3A Concept Plan No. MP09\_0082, subsequent development applications are to be lodged and determined under Part 4 of the *EP&A Act*, with the relevant local Council the consent authority. The Part 3A Concept Plan No. MP09\_0082 establishes the framework for the setting of contributions as part of the terms of approval at C12. It does not establish a statutory regime under which a Council can impose contributions on Part 4 applications. A Council can only impose contributions in accordance with an adopted Section 94 or 94A Contributions Plan (s94B(1)) or a Planning Agreement (s79C(1)(a)(iii)). A modification to Condition C12 as proposed does not overcome this statutory requirement, and for this reason is unnecessary in these circumstances.
3. In accordance with Section 25C(3) of the *Environmental Planning & Assessment Regulation 2000 (EP&A Regulation)* a VPA can be amended by further agreement by the parties. Council's capacity to adjust the VPA in line with Condition C12 would be thwarted should the proposed modification be approved and the Condition C12 framework removed. It is not necessary for Condition C12 of Concept Plan Approval MP 09\_0082 to reference the VPA entered into on 15 September 2014. Further, amending Condition C12 would unduly restrict the parties to that agreement should they wish to adjust the VPA in the future.
4. It is noted that the applicant is not proposing to provide certainty to the contributions required under Condition C12(d) of the Concept Plan Approval, and that the timing and final scope of works remains undetermined. It is considered that modifying Conditions C12(a) to C12(c) in the manner proposed would result in the rationalised framework of the condition becoming disjointed with Condition C12(d).

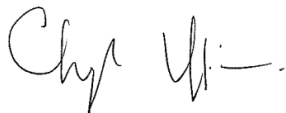
5. Modifying Condition C12 in the manner proposed will also circumvent the public process of determining local infrastructure contributions for the development through the exhibition of a VPA (as suggested by Statement of Commitment point 5) or the exhibition of a S94 Plan.

In summary, the applicant's proposal to modify Condition C12 of Part 3A Concept Plan No. MP09\_0082, even if approved, does not allow any local consent authority to require conditions to be paid through a condition of consent. This can only be done through a VPA or S94 Plan. Condition C12 provides a framework within which VPA negotiations or S94 Plan preparations would need to occur. It is therefore not appropriate to remove or alter the framework that Condition C12 provides, and if done, may preclude either council from preparing a S94 Plan or VPA for the site in accordance with the *EP&A Act*, and/or amend an existing VPA in accordance with the *EP&A Regulation*.

For the reasons outlined in this letter, it is considered that the application to modify Condition C12 of Part 3A Concept Plan No. MP09\_0082 should not be approved.

Please contact me on 4221 6128 should you wish to discuss the content of this submission.

Thank you

A handwritten signature in black ink, appearing to read 'Cheryl Lappin'.

Cheryl Lappin  
**Acting Group Manager City Strategy**