

12 September 2016

Anthony Witherdin  
Acting Director, Modification Assessments  
NSW Planning & Environment

Email: [natasha.harras@planning.nsw.gov.au](mailto:natasha.harras@planning.nsw.gov.au)

Dear Anthony,

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

Thank you for the opportunity to provide further 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)*.

Due to the complexities of the proposed modifications we would also appreciate the opportunity to discuss this application and our submissions, with yourself and relevant officers. In this regard we would like to request a meeting or teleconference.

The applicant's response to submissions dated 25 August 2016 has been reviewed and the following comments are provided.

#### **1. Council submission dated 14 July 2016**

The proposed modifications to Condition C12 of the Part 3A Concept Plan No. MP09\_0082 continue to be **not supported** for the reasons put forward in our original submission (included at **Attachment 1**). The applicant's response letter does not adequately respond to, or address the issues raised in our submission dated 14 July 2016. The matters put forward in that submission are reiterated.

#### **2. Consistency with Land and Environment Court judgement**

The applicant's response to submissions (page 3) identifies that the Land and Environment Court found that: *the contributions payable should be apportioned across the entire anticipated 4,800 dwelling yield over the life of the Calderwood development*. The proposed modifications put forward by the applicant (page 7) appears to seek to distribute the contribution payable to development in the Wollongong City Council Local Government Area only, being only 800 of the total 4,800 dwellings, and only at the later stages of the development.

The proposed modification therefore appears to be inconsistent with the findings of the Land and Environment Court and the intent of the judgement.

### 3. Additional proposed modification –Statement of Commitments

In the response to submissions, the applicant has also proposed additional modifications to the Concept Plan that did not form part of the original modification application, being to amend the Statement of Commitment Number 5 and replace it with 4 commitments (5, 5A, 5B and 5C).

Statement of Commitment 5 currently requires the developer to enter into a Planning Agreement with the relevant Council and is required to facilitate the contributions payable under Concept Plan Condition C12.

Proposed commitment 5B appears to attempt to enforce monetary contributions in the absence of a Section 94 Contributions Plan or Planning Agreement. It is unclear how a Concept Plan Statement of Commitments could be used as a mechanism for a Council to impose conditions requiring the payment of contributions on a development application.

Section 94D of the *EP&A Act* applies where the Minister is the consent authority. As the relevant local council will be the consent authority for future development applications, the statement on page 6, paragraph 2, appears to be both incorrect and irrelevant. In accordance with S94B(2) of the *EP&A Act*, only where the Minister is the consent authority can contributions be imposed outside of a contributions plan.

It is unclear which method of indexation is being referred to in proposed 5B.

The proposed amendments to Statement of Commitment 5 are not supported for the reasons stated above.

For clarity, the applicant's conclusion is responded to in the table below:

<b>Response to Submissions 5.0 CONCLUSION</b>	<b>Shellharbour City Council response</b>
Mod 1 seeks to clarify the contributions payable under the Concept Plan.	The modification is not considered appropriate or necessary. The Concept Plan Approval provides a framework to which a S94 Plan or Planning Agreement is to be based on.
It is proposed to ensure that the Concept Plan is consistent with the VPA executed between Lend Lease and SCC.	It is not necessary to amend the Concept Plan Approval following the VPA. The VPA was entered into on the basis of and in accordance with the framework of the Concept Plan Approval.
It also seeks to ensure that the Concept Plan reflects the principles established in the LEC Decision in relation to contributions to be delivered by Lend Lease to WCC.	As stated at point 3 of this submission, the proposed modifications do not accurately reflect the principles established in the LEC judgement.

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

Please contact Melissa Ballinger on 4221 6350 to arrange a suitable time to discuss the content of this submission and the application.

Kind Regards,

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

Cheryl Lappin  
**Acting Group Manager City Strategy**

**Attachment 1:** Shellharbour City Council submission dated 14 July 2016

## Attachment 1: Shellharbour City Council submission dated 14 July 2016



Administration Centre  
Lamerton House, Lamerton Crescent  
Shellharbour City Centre  
NSW 2529

Postal Address  
Locked Bag 155  
Shellharbour City Centre  
NSW 2529

14 June 2016

Anthony Witherdin  
Acting Director, Modification Assessments  
NSW Planning & Environment

p. 02 4221 6111  
f. 02 4221 6016  
e. [records@shellharbour.nsw.gov.au](mailto:records@shellharbour.nsw.gov.au)  
[www.shellharbour.nsw.gov.au](http://www.shellharbour.nsw.gov.au)

DX 26402 Shellharbour City Centre

Email: [natasha.harras@planning.nsw.gov.au](mailto:natasha.harras@planning.nsw.gov.au)

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)(iia)). 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



Cheryl Lappin  
Acting Group Manager City Strategy