



12 March 2010
Our Ref: 5565H.42DK

The Director-General
Department of Planning
GPO Box 39
SYDNEY 2001

By email: Anthony.Witherdin@planning.nsw.gov.au

Dear Anthony,

**Section 75W Modifications
Concept Plan Application No 06_0094; and
Project Application No 07_0032
Sandon Point Residential Subdivision**

1.0 INTRODUCTION

Stockland has been examining the conditions of the Project Approval (MP 07_0032) and there are five conditions in relation to Aboriginal and European Archaeology that warrant review. The five conditions are:

Part B Prior to Issue of a Construction Certificate

- Condition B50 – Conservation Agreement
- Condition B51 – Archaeological Investigations

Part E – During Construction

- Condition E30 – Impact of Below Ground (Sub-surface) Works – Non-Aboriginal Objects
- Condition E31 - Impact of Below Ground (Sub-surface) Works – Aboriginal Objects
- Condition E32 – Final Excavation Report(s) – Archaeological works

Stockland is therefore submitting an application under Section 75W of the Environmental Planning and Assessment Act, 1979 to modify the Project Approval in relation to these conditions. Associated with the proposed amended conditions are amendments to the Statements of Commitments for the Concept Plan and Project Applications. The reason for the modifications and the proposed amendments is discussed in turn in the balance of this letter.

A cheque for the \$750 application fee and political disclosure statement will be forwarded separately.

2.0 PROPOSED MODIFICATION

2.1 Condition B50 – Conservation Agreement

Condition B50 currently reads as follows:

In accordance with the Statement of Commitments, a draft Voluntary Conservation Agreement under the National Parks and Wildlife Act, 1974 should be prepared regarding the cultural heritage of the site and shall be prepared in consultation with the National Parks and Wildlife Service (NPWS-DECC) and submitted to the CA prior to the issue of a Construction Certificate.



Should the National Parks and Wildlife Service (NPWS-DECC) not wish to enter into a conservation agreement for the site, then any relics found on the site are to be collected and dealt with as per the conditions relating to heritage in other parts of this determination.

We consider that this condition warrants review for several reasons:

- A Voluntary Conservation Agreement (VCA) under the National Parks and Wildlife Act, 1974 is an agreement that is attached to land and should identify that part of the land to which the agreement relates. In the case of the proposed subdivision this is not feasible as there will be 181 lots making such an Agreement impractical. The VCA is not considered an appropriate mechanism for a residential subdivision of the nature proposed. A VCA would be appropriate if land with significant Aboriginal cultural heritage was retained as a single parcel of land (such as open space). No such land within the Project application site area has been identified of such significance.
- On 16 February 2007, Minister Debus declared approximately 14ha of foreshore area at Sandon Point an Aboriginal Place under s84 of the National Parks and Wildlife Services Act 1974. In doing so, it is our understanding that this provided superior protection for Aboriginal culture for the Sandon Point locality than could be achieved through a VCA.
- This Aboriginal Place declaration focused on the area of Sandon Point that studies have shown to be rich in artefacts and significance. The proposed development area had been subject to numerous archaeological assessments which specifically addressed the issue of archaeological potential. There was a high degree of agreement between the reports done for the Commission of Inquiry (COI) and for Stockland and no Potential Archaeological Deposits (PADs) were identified. Had the studies found the Project application site area to be rich in Aboriginal artefacts and significance the declaration would have presumably extended to the Project application site, but it does not.
- The intent of the VCA in relation to Aboriginal heritage, as stated in Section 69C(1)(d) of the NPW Act, is to conserve areas in which Aboriginal objects, or Aboriginal places, of special significance are situated. Given the findings of previous reports which have not identified PADs, the intent can still be achieved through the implementation of proposed Conditions E30, E31 and E32 of the Project approval which put in place appropriate safeguards.

Proposed Modification

Stockland therefore proposes that the Project approval be modified by:

1. Deleting Condition B50; and
2. Deleting the Commitment which reads "*A voluntary conservation agreement would be provided with the implementation of the Project Plan approval, if required.*"

To ensure consistency with No. 2 above, Stockland proposes that the Concept Plan approval be modified by:

1. Deleting the Commitment which reads "*Stockland will undertake to enter into a Voluntary Conservation Agreement with DEC.*"

2.2 Condition B51 – Archaeological Investigations

Condition B51 currently reads as follows:

Sample test excavation shall be carried out in the areas identified in Figure 6 of the Desktop Assessment of Archaeological Potential, prepared by Susan McIntyre-Tamwoy, Heritage Consultant, April 2007, prior to commencement of works in those areas. In this regard, test excavation does not need to be carried out prior to commencement of works in Stage 5 of this subdivision.

All Archaeological Investigations must be done in consultation with the Aboriginal community as outlined in the Statement of Commitments.

As noted in our letter to the Department of Planning dated 2 July 2009, the condition (then numbered B54) appeared to be placed in the wrong Part of the consent. The condition requires sample test excavation in certain areas prior to commencement of works. However, the condition has been incorrectly placed in Part B – prior to issue of a construction certificate.

The condition stems from a recommendation in the Desktop Assessment of Archaeological Potential, prepared by Susan McIntyre-Tamwoy, Heritage Consultant dated April 2007 which states as a note to Figure 6 at page 19 that “*indicative areas to be covered by sample test excavation program prior to construction....*” (Our emphasis).

We propose that this condition be deleted as the intent of this condition is adequately covered by Condition E31 which we discuss below.

Proposed Modification

Stockland therefore proposes that the Project approval be modified by deleting Condition B51.

2.3 Condition E30 - Impact of Below Ground (Sub-surface) Works – Non-Aboriginal Objects

Condition E30 currently reads as follows:

If any archaeological relics are uncovered during the course of the work in any stage of the project, then all works shall cease immediately in that area and the NSW Heritage Office contacted. Depending on the possible significance of the relics, an archaeological assessment and an excavation permit under the NSW Heritage Act 1977 may be required before further works can continue in that area.

Section 75U(1)(c) of the EPA Act provides that an approval under Part 4, or an excavation permit under section 139, of the Heritage Act 1977 is not required for an “*approved project*”. The Project approval is an “*approved project*” as defined in the EPA Act. The Project approval therefore conflicts with the provisions of the EPA Act.

The EA for the Concept Plan addressed European Heritage and noted at page 52 that “*potential impacts to European heritage are insignificant given the past disturbances of the site and prior demolition of Woodlands Cottage and the Thirroul brickworks. The COI [Commission of Inquiry] did not find any restraint to future development, having regard to non-indigenous heritage, but recommends that such historical items be incorporated into interpretative measures within the ultimate development of the site.*”

The Desktop Assessment of Archaeological Potential, prepared by Susan McIntyre-Tamwoy, Heritage Consultant dated April 2007 notes a small area on Figure 6 where there might be some potential for non-indigenous heritage. Susan McIntyre Tamwoy has based this potential on her review of the *Submission to the Commission of Inquiry – European Heritage* prepared by Graham Brooks and Associates, 2003.



In our opinion, the condition as presently worded is inconsistent with the EPA Act. To ensure that matters of European heritage are adequately managed through the Project approval we recommend that Condition E30 be modified.

Proposed Modification

Stockland therefore proposes to modify Condition E30 as follows:

E30 - Impact of Below Ground (Sub-surface) Works – Non-Aboriginal Objects

Archaeological test investigation of the areas identified in blue shading on Figure 6 of the Desktop Assessment of Archaeological Potential, prepared by Susan McIntyre-Tamwoy, Heritage Consultant dated April 2007 should be undertaken prior to works commencing in that area. Relics that are salvaged during the archaeological test investigation shall be analysed, recorded and documented by an appropriately qualified heritage consultant. Any relics discovered shall be conserved in situ or placed in a depository as determined appropriate by a suitably qualified archaeologist in consultation with the NSW Heritage Branch of the Department of Planning.

2.4 Condition E31 - Impact of Below Ground (Sub-surface) Works – Aboriginal Objects

Condition E31 currently reads as follows:

In the event that future works during any stage of the project disturb Aboriginal cultural materials, works at or adjacent to the material must stop immediately. Temporary fencing must be erected around the site and the material must be identified by an independent and appropriately qualified archaeological consultant. The Regional Archaeologist of the Cultural Heritage Unit of the Department of Environment and Climate Change, The Northern Illawarra Local Aboriginal Land Council (LALC), the Wadi Wadi Coomaditchie Aboriginal Corporation, the Korewal Eloura Jerrungurah Tribal Elders Corporation, and the Wodi Wodi Elders Corporation must be informed. These groups will advise on the most appropriate course of action to follow. Works must not resume at the location without the prior written consent of the Department of Environment and Climate Change, the Illawarra LALC and the Aboriginal Corporations.

The condition as worded requires works to stop in the event of any Aboriginal cultural material being found, and then a process of consultation entered into with numerous parties and further work being unable to recommence until agreement is reached between DECCW, the Illawarra LALC and Aboriginal Corporations. The condition in effect stop works indefinitely for any relic and hands over control of the timing of redevelopment of the site to third parties. This is an unreasonable requirement and one that carries a large degree of uncertainty, can potentially stop works indefinitely and imposes unknown delays and costs on carrying out the project. The condition should be reconsidered to achieve a more practical and reasonable approach taking into account the studies that have taken place on the site.

The majority of the site has been extensively disturbed by activities and particularly removal of topsoil which is most likely to have removed evidence of Aboriginal occupation. Historical disturbances of the site are summarised in Section 2.2 of the Desktop Assessment of Archaeological Potential, prepared by Susan McIntyre-Tamwoy, Heritage Consultant dated April 2007 which states:

“The effects of these landuses on Aboriginal archaeological sites are an important factor in the survivability of the physical remains of the sites. Clearly all activities that modified the natural ground surface will have reduced the likelihood of finding intact archaeological remains. Clearing of trees will have removed any scarred or carved trees that might once have been located here and removal of stumps will also have disturbed surface evidence of middens

and campsites. More significant removal of soil will have in most cases removed all physical evidence. The area occupied by the former brick pits has had all topsoil and clay deposits to a depth such that any evidence of Aboriginal occupation in this area that might once have existed will have been removed.”

The site has been studied extensively and there is a high degree of agreement between the reports prepared for the site. These reports have not identified areas of Potential Archaeological Deposits (PADs). However, given the sensitivity of the site, Stockland's Aboriginal heritage consultant has adopted a conservative approach for the site and has identified areas where there is a potential for some topsoil and these areas are shaded on Figure 6 of the Desktop Assessment of Archaeological Potential, prepared by Susan McIntyre-Tamwoy, Heritage Consultant dated April 2007.

In order to keep local Aboriginal groups informed and involved, and to recognise that the potential for relics is limited, we propose that Condition E31 be amended as set out below.

Given that PADs have not been identified, there is a case for not requiring further test excavation of the site. Accordingly, paragraph (a)(i) of the proposed modified condition below has been proposed as an optional component of the condition which can be deleted if, upon review, the Department of Planning consider test excavation is not warranted.

Proposed Modification

Stockland therefore proposes to modify Condition E31 as follows:

E31 - Impact of Below Ground (Sub-surface) Works – Aboriginal Objects

- (a) Prior to the commencement of sub-surface works:
 - (i) archaeological sample test excavation is to be carried out in the areas identified in Figure 6 of the Desktop Assessment of Archaeological Potential, prepared by Susan McIntyre-Tamwoy, Heritage Consultant dated April 2007 (optional);
 - (ii) the Aboriginal community is to be provided with the opportunity to walkover the development area to allow for community collection of Aboriginal cultural materials should any be discovered;
 - (iii) To satisfy (ii) above the Northern Illawarra Local Aboriginal Land Council (LALC), the Wadi Wadi Coomaditchie Aboriginal Corporation, the Korewal Eloura Jerrungurah Tribal Elders Corporation, the Wodi Wodi Elders Corporation and Sandon Point Aboriginal Tent Embassy, shall be given 7 days notice of the time and arrangements for the walkover.
 - (iv) any community collection of Aboriginal cultural material should be carried out under the supervision of a qualified archaeologist;
 - (v) the location of each item of cultural material must be recorded using GPS co-ordinates and analysis of artefacts must occur in a comparable manner as that of any Aboriginal cultural material retrieved from the programme of archaeological test excavation; and
 - (vi) any objects recovered from community collection must be deposited with the Australian Museum once analysis has taken place.
- (b) If human remains are disturbed in, on, or under the land during the course of sub-surface works, the proponent must:
 - (i) not further disturb or remove those remains;
 - (ii) immediately cease all work at the particular location;
 - (iii) notify DECCW's Environmental Line on 131 555 and the local police as soon as practicable and provide any available details of the remains and their location; and
 - (iv) not recommence work at the particular location unless authorised in writing by DECCW.



2.5 Condition E32 - Final Excavation Report(s) – Archaeological works

Condition E32 currently reads as follows:

After archaeological works are undertaken, a copy of the final excavation report(s) shall be prepared and lodged with the Heritage Council of NSW, the Local Studies Library and Local Historical Society in the Wollongong local government area. The Proponent shall also be required to nominate a repository for the relics salvaged from any historical archaeological investigations.

In light of amendments to Conditions E30 and E31 proposed above, Condition E32 should be amended as follows:

Proposed Modification

Condition E32 - Final Excavation Report(s) – Archaeological works

After archaeological works are undertaken, a copy of the final excavation reports shall be prepared and lodged with the following organisations:

- (a) For reports on Non-Aboriginal Objects (Condition E30) with the NSW Heritage Branch of the Department of Planning, Local Studies Library and Local Historical Society in the Wollongong local government area; and
- (b) for report(s) on Aboriginal Objects (Condition E31) with the AHIMS of DECCW and with the Illawarra Local Aboriginal Land Council, the Korewal Eloura Jerrungurah Tribal Elders Corporation, The Wadi Wadi Coomaditchie Aboriginal Corporation, the Wodi Wodi Elders Council, Sandon Point Aboriginal Tent Embassy and the Local Studies Library and Local Historical Society in the Wollongong local government area.

Stockland is happy to discuss the proposed modifications to the conditions and is keen to work with the Department of Planning and DECCW in order to achieve a set of conditions that achieve an appropriate outcome and are readily capable of being implemented. Should you have any further questions, please do not hesitate to contact David Kettle.

Yours faithfully

DON FOX PLANNING PTY LIMITED

A handwritten signature in black ink, appearing to read 'D. Kettle', written over a horizontal line.

DAVID KETTLE
SENIOR TOWN PLANNER

Reviewed: A handwritten signature in black ink, appearing to read 'Mee', written over a horizontal line.