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| Item No: | R3 Recommendation to Council |
| Subject: | EARTHWORKS AND DEWATERING PROVISIONS IN THE WOOLLAHRA LEP 2014 AND WOOLLAHRA DCP 2015, AND THE PROHIBITION OF EXCAVATION AND DEWATERING IN THE DOUBLE BAY SETTLEMENT ZONES. |
| Authors: | Kelly McKellar, Team Leader Strategic Planning Anne White, Manager - Strategic Planning |
| Approver: | Scott Pedder, Director - Planning & Place |
| File No: | 21/95851 |
| Reason for Report: | To provide Council with the advice of the Woollahra Local Planning Panel in relation to a planning proposal to amend the Woollahra Local Environmental Plan 2014 to enhance the existing provisions related to earthworks and associated groundwater dewatering. To obtain Council's approval to proceed with the planning proposal as amended based on the advice of the Woollahra LPP To report on the public exhibition of Draft Woollahra Development Control Plan 2015 (Amendment No.18) – Groundwater (Hydrogeology) and to obtain Council's approval of the Draft DCP. To respond to Council's resolution to investigate mechanisms to prohibit excavation and dewatering in the most impacted zones in the Double Bay settlement zones. |

Recommendation:

- A. THAT Council note the advice provided by the Woollahra Local Planning Panel on 20 May 2021 for the planning proposal to amend the Woollahra Local Environmental Plan 2014 to enhance the existing provisions related to earthworks and associated groundwater dewatering.
- B. THAT the planning proposal, as contained in **Annexure 1** of the report to the Environmental Planning Committee of 11 October 2021, be forwarded to the Department of Planning, Industry and Environment requesting a gateway determination to allow public exhibition.
- C. THAT Council request the Minister for Planning and Public Spaces authorise Council as the local plan-making authority in relation to the planning proposal, to allow it to make the local environmental plan under section 3.36 of the *Environmental Planning and Assessment Act 1979*.
- D. THAT Council approve the *Draft Woollahra Development Control Plan 2015 (Amendment No. 18)* as attached at **Annexure 2** of the report to the Environmental Planning Committee meeting of 11 October 2021.

1. Background

On 25 February 2019, Council considered a Notice of Motion relating to concerns raised by residents about cracking and structural movement in houses in Double Bay. Subsequently, on 25 February 2019 Council resolved:

THAT Council:

- A. *Staff meet with concerned Double Bay residents and outline the approval process that was undertaken in relation to the DA and dewatering of 4-8 Patterson Street, Double Bay and other sites that have been approved for dewatering in Double Bay.*
- B. *Follow up with the NSW Department of Primary Industry to ascertain the results of their enquiries into this issue.*
- C. *Obtain a report from an expert hydro-geologist (and/or appropriate expert) informing Council as to whether there is any short, medium or long-term impacts associated with excavation, subterranean building and dewatering in the Double Bay area on the structural and geological integrity of Double Bay residential and commercial buildings, with a view to informing any amendments required to existing planning controls.*

In response to Part C of Council's resolution, GHD were engaged in August 2019 to undertake an assessment of geotechnical and hydrogeological impacts associated with development in the Double Bay settlement zones. The study area comprises land in the Double Bay Catchment and focused on development that has the capacity to intersect with the water table, including development with one or more basement levels.

GHD provided Council with the *Double Bay Hydrogeological Geotechnical Impacts - Groundwater and Geotechnical Assessment Report* (the Report), and the *Double Bay Hydrogeological Geotechnical Impacts – Proposed Changes to the planning provisions*.

On 12 April 2021, the GHD's Report and staff responses identifying which changes were and were not supported, was presented to the *Environmental Planning Committee* (EPC). This included recommended amendments to the Woollahra LEP 2014, Woollahra DCP 2015, and Council's Development Application Guide (DA Guide). Subsequently, on 26 April 2021 Council resolved:

- A. *THAT a planning proposal be prepared to amend the Woollahra Local Environmental Plan 2014 consistent with the staff recommendations identified in Table 1 of Annexure 4 of the report to the Environmental Planning Committee meeting on 12 April 2021.*
- B. *THAT the planning proposal be referred to the Woollahra Local Planning Panel for advice.*
- C. *THAT the advice of the Woollahra Local Planning Panel be reported to a future meeting of the Environmental Planning Committee.*
- D. *THAT a draft development control plan is prepared and publicly exhibited to amend the Woollahra Development Control Plan 2015, consistent with the staff recommendations identified in Table 2 of Annexure 4 of the report to the Environmental Planning Committee meeting on 12 April 2021.*
- E. *THAT staff review the proposed controls in the draft development control plan to identify if these can be applied to Rose Bay and Bellevue Hill, and that this review is reported to a future meeting of the Environmental Planning Committee.*
- F. *THAT staff implement a condition of consent which ensures that, where relevant, the applicant has an appropriate current insurance policy to cover the reinstatement/repair of damages to surrounding properties as a result of the subject DA.*

- G. *THAT staff prepare a report which advises on mechanisms that can be utilised to prohibit excavation and dewatering in the most impacted zones in the Double Bay Floodplain (see the Double Bay Settlement zones in Figure 2 of the report to the Environmental Planning committee of 12 April 2021) including investigating:*
- *Amending the Local Environmental Plan (LEP),*
 - *Amending the Development Control Plan (DCP), and*
 - *Rezoning.*

2. Progress

In response to Council's resolution from 26 April 2021, Council staff have undertaken the following:

| Relevant parts of Council's resolution | Actions undertaken |
|--|--|
| <ul style="list-style-type: none">Parts A, B and C | <p><i>Amendments to the Woollahra LEP 2014 – see Section 3 of this report</i></p> <p>Staff prepared a planning proposal to amend the Woollahra LEP 2014, consistent with Table 1 of Annexure 4 to the EPC report of 12 April 2021.</p> <p>The planning proposal seeks to amend <i>Clause 1.2 Aims of Plan</i> and <i>Clause 6.2 Earthworks</i> of Woollahra LEP 2014 to enhance the existing provisions related to earthworks and associated groundwater dewatering based on the recommendations provided by GHD.</p> <p>On 20 May 2021, the planning proposal was referred to the <i>Woollahra Local Planning Panel</i> (Woollahra LPP) for advice. The advice provided by the WLPP is discussed in Section 3 of this report.</p> |
| <ul style="list-style-type: none">Parts D & E | <p><i>Amendments to the Woollahra DCP 2015</i></p> <p>Staff presented a report to the EPC on 10 May 2021 recommending amendments to the Woollahra DCP 2015. Subsequently on 24 May 2021, Council resolved, in part, to exhibit the draft DCP.</p> <p>The Draft Woollahra DCP 2015 (Amendment No 18) was placed on public exhibition from 30 June 2021 to 13 August 2021.</p> <p>The amendments to the Woollahra DCP 2015 and outcome of the public exhibition are discussed in Section 4 of this report.</p> |
| <ul style="list-style-type: none">Part F | <p><i>Condition of a development consent for insurance</i></p> <p>Council's Development Control Team have prepared a standard condition of consent to require an appropriate insurance policy (where relevant). This will be included in Council's standard development application (DA) conditions of consent. Where relevant, this condition will be applied to development with below ground structures.</p> |

| Relevant parts of Council's resolution | Actions undertaken |
|--|---|
| <ul style="list-style-type: none">Part G | <p><i>Mechanisms to prohibit excavation and dewatering in the most impacted zones in the Double Bay Settlement zones</i></p> <p>In response to Part G, Council staff have sought independent legal advice to address this issue. The outcome of the investigation is discussed in Section 5 of this report.</p> |

3. Amendments to the Woollahra LEP 2014

Staff prepared a planning proposal to amend the Woollahra LEP 2014, consistent with Table 1 of Annexure 4 to the EPC report of 12 April 2021. The planning proposal seeks to amend *Clause 1.2 Aims of Plan* and *Clause 6.2 Earthworks* of Woollahra LEP 2014 to enhance the existing provisions related to earthworks and associated groundwater dewatering based on the recommendations provided by GHD.

3.1. Advice from the Woollahra Local Planning Panel

On 20 May 2021 the Woollahra LPP considered a report on the planning proposal to amend *Clause 1.2 Aims of Plan* and *Clause 6.2 Earthworks* of Woollahra LEP 2014 to enhance the existing provisions related to earthworks and associated groundwater dewatering based (see **Annexure 3**).

At that meeting, the Woollahra LPP provided the following advice to Council:

THAT the Woollahra Local Planning Panel advises Council to proceed with the planning proposal (at Annexure 1) to amend the Woollahra Local Environmental Plan 2014 to enhance the existing provisions related to earthworks and associated groundwater dewatering based on the recommendations provided by GHD Pty Ltd, subject to introducing a provision into Cl 6.2 Earthworks (part 3) in relation to the structural stability of surrounding properties.

The planning proposal (at **Annexure 1**) has been updated, specifically *Section 4: Explanation of provisions*, to reflect the advice of the Woollahra LPP.

3.2. Progressing the planning proposal

Subject to the Council's decision, the updated planning proposal will be referred to the Department of Planning, Industry and Environment (DPIE) seeking a gateway determination. This will allow the planning proposal to be placed on public exhibition.

The public exhibition of the planning proposal will be undertaken in accordance with the requirements of the *Environmental Planning and Assessment Act 1979* (the Act), the *Environmental Planning and Assessment Regulation 2000* (the Regulations), the *Woollahra Community Participation Plan 2019* (Participation Plan) and the gateway determination.

The gateway determination will specify the duration of the public exhibition period. This period is usually a minimum of 28 days, which is consistent with Council's standard practice for the exhibition of a planning proposal. Public notification of the exhibition will comprise:

- A weekly notice in the local newspaper (the Wentworth Courier) for the duration of the exhibition period.
- A notice on Council's website.

- Notifications to local community and business groups and relevant state agencies.

To streamline the plan-making process, the Minister can delegate some plan-making powers to Council for routine matters. In this case, Council may request authorisation to exercise the functions of the Minister to make an LEP under section 3.36 of the Act. Part C of the recommendation for this report deals with this request. After public exhibition, the planning proposal and submissions received will be reported to Council.

4. Amendments to the Woollahra DCP 2015

Council staff prepared *Woollahra DCP 2015 (Amendment No 18)* (Draft DCP), which will apply to the whole LGA. The objectives of the plan are to:

- a) Strengthen the existing objectives and controls to minimise the impacts of groundwater drawdown as a consequence of underground structures.
- b) Ensure there are no adverse hydrogeological impacts on any surrounding properties and infrastructure, both during and after construction.
- c) Apply additional technical requirements to the Double Bay settlement area based on the analysis provided by GHD Pty Ltd.

The proposed amendments in the Draft DCP will support the proposed amendments to the Woollahra LEP 2014 contained in the planning proposal. However, these two processes do not need to progress concurrently.

On 10 May 2021, the EPC considered a report on the Draft DCP (see **Annexure 4**) and on 24 May 2021, Council resolved:

- A. *THAT the report on the review to expand the application of draft amendments to Chapter E2 Stormwater and Flood Risk Management of the Woollahra Development Control Plan 2015 be received and noted.*
- B. *THAT Council resolve to exhibit Draft Woollahra Development Control Plan 2015 (Amendment No 18) as contained in the late correspondence tabled to Council Meeting on 24 May 2021.*

4.1. Public Exhibition

The Draft DCP and supporting material were placed on public exhibition for 45 days from Wednesday 30 June 2021 to Friday 13 August 2021 (inclusive). This extended exhibition period took into account the school holidays during this time. Public exhibition was consistent with the requirements of the EP&A Act), the Regulations and the Participation Plan. Public exhibition included the following:

1. Seven weekly notices in the Wentworth Courier providing details of the exhibition, appearing on 30 June 2021, 7, 14, 21, 28 July and 4, 11 August 2021.
2. A public exhibition webpage for the Draft DCP and supporting material on Your Say Woollahra. This webpage was visited by 63 people during the exhibition period.
3. A notice on Council's website in the Notifications section.
4. A notification letter or email sent to the following stakeholders:
 - Darling Point Society
 - Double Bay Residents Association
 - HarbourView Neighbourhood Watch and Residents Group
 - Point Piper Residents Association

- Queen Street and West Woollahra Association
- Rose Bay Residents Association
- The Paddington Society
- The Watsons Bay Association
- Vacluse West Residents Association
- Vacluse Progress Association
- Water NSW
- Department of Planning, Industry and Environment

4.2. Submissions

We received one submission during the public exhibition period from the Double Bay Residents' Association. A redacted copy of this submission is attached at **Annexure 5**.

In general, the submission supports the proposed amendments to the Woollahra DCP 2015 to strengthen our objectives and controls to minimise the impacts of groundwater drawdown as a consequence of underground structures. A summary of the issues raised relating to the contents of the Draft DCP is included in the **Table 1** below.

The submission also supports the prohibition of excavation and dewatering in the 'most impacted zones' in Double Bay. This issue is addressed in Section 5 below.

Table 1: Summary of DCP issues raised and response from staff

| Issues raised | Staff response |
|---|---|
| Preliminary 1. General support for the aims of the Draft DCP. Commentary that objective b) is unduly limited to hydrology. | Commentary on the objective of the Draft DCP is noted. |
| 2.4.2 – Objectives 2. Suggest that Council re-examines and rationalises proposed objectives. <ul style="list-style-type: none"> • Concern that proposed Objective 1 may be overly narrow. • Suggest that consideration is given to s.4.15 of the Act which refers to environmental impacts on site suitability and both the natural and built environments. • Suggested amended objective is as follows: <i>To ensure that the site is suitable for excavation and associated dewatering.</i> | <p>The suite of objectives were drafted on the technical advice of engineering consultants GHD. However, it is noted that Objective O1 was amended in response to issues raised by Councillors during the EPC meeting of 10 May 2021. This amendment will increase the emphasis on the environmental / ecological impacts of groundwater dewatering and use terminology consistent with <i>Clause 6.2 Earthworks</i> of the Woollahra LEP 2014.</p> <p>Council staff do not support including a more general objective with regards to the natural and built environment or the sites. As noted above, the objectives were drafted as a suite of provisions based on the technical advice of engineering consultants GHD in relation to the issues identified in the Double Bay settlement zone. Council staff recommend proceeding with the Draft DCP consistent as exhibited.</p> |

Table 1: Summary of DCP issues raised and response from staff

| Issues raised | Staff response |
|---|--|
| <ul style="list-style-type: none"> Concerned about the relationship with controls in B3.4 Excavation. | <p>Additionally, it is noted that site suitability is generally outside the scope of a DCP, and is a matter that should be addressed via higher order planning instrument such as an LEP. Staff do not support an objective which relates to the sites suitability to accommodate the proposed works.</p> <p>With regards to s.4.15 Evaluation (previous s.79C) of the Act, this section establishes the matters for consideration for all DAs. It is appropriate for a clause of this nature to be located in the Act, referring to impacts on both natural and built environment and site suitability.</p> <p>In relation to the issues raised regarding the relationship of the proposed objectives with Chapter B3.4 Excavation, staff note that the controls in each section to the DCP must have corresponding objectives. The controls in 2.4.2 are prepared in accordance with the objectives of 2.4.2. The controls in B3.4 must be consistent with the relevant objectives in that chapter.</p> <p>No changes to the proposed objectives are recommended.</p> |
| <p><i>Discharge to groundwater</i></p> <p>3. Recommend amending controls C4 to C6 to require that the DA documentation <i>must</i> demonstrate how the ground water is to be disposed of <i>without</i> using Council's stormwater system.</p> | <p>The current control C3 requires that groundwater is not discharged to Council's stormwater network, including stormwater pipes, pits and/or kerb and gutter. Site tanking should be provided.</p> <p>As part of the DA process, the required reports and plans are to demonstrate compliance with all the applicable DCP controls which includes illustrating how ground water is to be disposed of without using Council's storm water system, once completed.</p> <p>The DCP does not preclude the use of Council's storm water system during the construction process, as there would be no other mechanism to facilitate its disposal.</p> <p>No changes to the Draft DCP are recommended.</p> |
| <p><i>Dilapidation reports</i></p> <p>4. Suggest that DAs involving below ground structures should be required to prepare dilapidation reports for all surrounding properties which are likely to be affected (not only neighbouring) and that the report must be submitted to Council prior to commencing work.</p> | <p>Staff note that requirements for dilapidations reports are determined based on an individual basis for each DA, and the nature of the works proposed.</p> <p>No changes to the Draft DCP are recommended.</p> |

Table 1: Summary of DCP issues raised and response from staff

| Issues raised | Staff response |
|---|--|
| 5. Applicants must provide Council with dilapidation reports prior to commencing work. | Council staff agree that providing the dilapidation reports prior to commencing construction is best practice, and DAs are conditioned with this requirement. No changes to the Draft DCP are recommended. |
| Hydrogeological and technological reports 6. Support the new requirement that temporary changes to ground water level must not exceed 0.2 from the average monitored pre-construction level. Concerns are raised that an applicant can justify an increased change in water level and this could impact on the adjoining residents. 7. Regarding a class S site, unable to comment on the Australian Standard which we do not have access to. | Support is noted. Concerns regarding applicants justifying an increased ground water change are noted. All applications are assessed on a case by case basis, and are assessed on merit. Reports must be prepared by appropriately qualified professionals. No changes to the Draft DCP are recommended. In response to this issue, Council staff included the relevant Australian Standard in the FAQs on the Council's exhibition webpage. It is recommended that this table is integrated into Council's DA Guide so that it is easily accessible. No changes to the Draft DCP are recommended. |

It is noted that a number of issues raised in the submission are beyond the scope of the Draft DCP. However, a summary of the key matters raised and a response from staff is addressed in **Table 2** below.

Table 1: Summary of other issues raised and response from staff

| Summary of issues raised | Staff response |
|---|---|
| <ul style="list-style-type: none"> Lack of enforcement regarding groundwater entering the stormwater network; Reports are unreliable, inaccurate, incomplete, misleading and flawed; Council must engage additional geotechnical and hydrogeological engineering staff to ensure that the above steps are met and to ensure they can take place cross examinations in judicial proceedings. Conditions of consent should require surety bonds to persons likely to be affected. | <p>In relation to enforcement, Council's compliance staff respond to matters reported consistent with the relevant legislation, noting that in most cases the certifier is initially responsible under the Act for ensuring the conditions of consent are met.</p> <p>Furthermore, Council's engineering staff are appropriately qualified to review the reports to ensure they are consistent with the relevant DCP provisions, DA Guide requirements and are prepared by appropriately qualified professional staff. There is no requirement to employ in house specialist geotechnical and hydrogeological engineering staff.</p> <p>Council has prepared a condition relating to "insurance cover in case of potential damage to adjoining properties" which is considered to be sufficient to address this matter. In terms of surety bonds, Council staff have been previously advised that bonds cannot be utilised for private matters.</p> |

4.3. Post-exhibition administrative amendments

Council staff recommend that post exhibition administrative amendments are made to the Draft Plan. These amendments are grammatical/administrative and minor in nature. These post exhibition are highlighted in yellow in **Annexure 2**.

4.4. Next Steps

Having considered the matters raised in the submission, staff recommend that the Draft DCP contained in **Annexure 2** is approved by Council.

The process for amending a DCP is set out in the EP&A Act and the Regulation. The Draft DCP was prepared and publicly exhibited in accordance with these requirements.

If Council resolves to proceed with these amendments (as amended post exhibition) and approves the Draft DCP, these will come into effect on the date that a notice of Council's decision is published on Council's website and in the Wentworth Courier (or on a later date specified in the notice).

5. Mechanisms to prohibit excavation and dewatering in the most impacted zones in the Double Bay Settlement zones

In response to Part G of Council's resolution of 26 April 2021, Council staff commissioned confidential legal advice which is attached.

Having reviewed this advice, it confirms our staff's position that there is no planning mechanism or reasonable grounds to prohibit excavation or dewatering for the Double Bay Settlement zones. We can provide the following summary:

- Excavation or dewatering is an aspect of 'development' rather than being a land use in its own right
- Excavation or dewatering is a reasonable element of development and prohibiting excavation would prevent appropriate and permissible development in the Settlement zones e.g. footings, minor earthworks, site levelling and soil removal.
- It is technically possible to include a provision in the Woollahra LEP 2014. However, this would require a rework of the Woollahra LEP 2014 (which may not be possible via the constraints of the *Standard Instrument (Local Environmental Plans) Order 2006*).
- To justify this prohibition, and to seek an amendment to the Woollahra LEP 2014, the DPIE would require a technical document justifying this prohibition. Such information does not exist. The report by GHD provides a drawdown limit to an acceptable value of 0.2m for the Double Bay area, which is more restrictive than the current drawdown limit.
- Should Council prohibit excavation or dewatering via the Woollahra LEP 2014, it would still be permissible as exempt and complying development under *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*
 - To prevent excavation or dewatering via complying development, the Settlement zones should be identified as environmentally sensitive land in the Woollahra LEP 2014.
 - To prevent excavation or dewatering via exempt development, the Settlement zones should be identified as environmentally sensitive area in the Woollahra LEP 2014.
 - Council has no technical evidence to support the Settlement zones being identified as either environmentally sensitive area or environmentally sensitive land.

- Should excavation or dewatering become prohibited then under Part 5 of the Regulations this prohibition would not apply to an existing use.
- It is not possible to prohibit excavation or dewatering via the Woollahra DCP 2015.

6. Staff recommendation

As the result of further investigations, staff have confirmed that it is not reasonably practical to prohibit excavation or dewatering in the Woollahra LEP 2014. Our proposed approach is to amend the Woollahra LEP 2014 and Woollahra DCP 2015 by strengthening the existing objectives and controls to minimise the impacts of excavation and ground water dewatering as a consequence of below ground structures.

Accordingly, Council Staff recommend that:

- Council resolve to proceed with the planning proposal (at **Annexure 1**) as amended on the advice of the Woollahra LPP. The planning proposal seeks to amend the Woollahra LEP 2014 to enhance the existing provisions related to earthworks and associated groundwater dewatering based on the recommendations provided in GHD's report.
- Council resolve to approve the *Draft Woollahra DCP 2015 (Amendment 18)* as amended (at **Annexure 2**).

7. Conclusion

Engineering consultants GHD were engaged to undertake an assessment of geotechnical and hydrogeological impacts associated with development in the Double Bay settlement zones. GHD's report recommended amendments to the Woollahra LEP 2014 and Woollahra DCP 2015.

On 26 April 2021 Council resolved to proceed with amending the relevant planning controls and identified further areas for investigation. Accordingly, staff have undertaken the following:






- Preparation of a planning proposal to amend the Woollahra LEP 2014 to enhance the existing provisions related to earthworks and associated groundwater dewatering based on the recommendations provided by GHD. The planning proposal was referred to the Woollahra LPP for advice on 20 May 2021.

Subsequently, staff have amended the planning proposal to incorporate the changes recommended by the Woollahra LPP. Staff recommend that Council resolve to submit the planning proposal (at **Annexure 1**) to the DPIE requesting a gateway determination to allow public exhibition.

- Preparation of a Draft DCP to amend the Woollahra DCP 2015. The *Draft Woollahra DCP 2015 (Amendment 18)* was publicly exhibited between Wednesday 30 June 2021 and Friday 13 August 2021. One submission was received during the public exhibition period. Council staff have reviewed the matters raised in the submission and whilst not recommending changes in response to the submission, do recommend some minor amendments to the Draft DCP. Staff recommend that Council approve the Draft DCP as contained in **Annexure 2**.
- Commissioned legal advice to investigate potential mechanisms to prohibit excavation and dewatering in the most impacted zones in the Double Bay settlement zones. Staff note that there is no reasonable or practical planning mechanism to prohibit excavation or dewatering. It is recommended that Council take no further action in relation to the prohibition of excavation in the Double Bay settlement zones.

In summary, our approach is to amend the Woollahra LEP 2014 and Woollahra DCP 2015 to strengthen objectives and controls to minimise the impacts of excavation and ground water dewatering as a consequence of below ground structures. Based on our investigations and the confidential legal advice, Council staff are of the opinion that this is the most appropriate approach available within the constraints of the current planning framework.

Annexures

1. Planning Proposal - Earthworks and Dewatering - Draft Planning Proposal - September 2021 (Annexures removed) [↓](#) 
2. Draft Woollahra Development Control Plan Amendment No 18 - Exhibited version with post exhibition amendments (Annexures Removed) [↓](#) 
3. Report to WLPP meeting of 20 May 2021 (Annexures Removed) [↓](#) 
4. Report to EPC 10 May 2021 (Annexures removed) [↓](#) 
5. Draft Woollahra Development Control Plan - Amendment No 18 - Submissions - Redacted [↓](#) 
6. Legal advice regarding the Prohibition of Excavation and Dewatering in Double Bay (*circulated under separate cover*) - **Confidential**