



Our ref: 09123
18 February 2013

Joint Regional Planning Panel (Sydney East)

By Email

Attention: Angela Kenna

Dear Angela

RE: 2012SYE092 – Leichhardt - D/2012/429 - Demolition, remediation, mixed use development (residential, retail & industrial), parking, new road, sales office /display units, signs & subdivision - 118-120 Terry Street, Rozelle

We refer to the above matter which is to be considered by the Panel on 20 February 2013. We have reviewed the assessment report and draft conditions of consent prepared by Leichhardt Council. The DA has been part of a longer planning process involving the rezoning of the land and we have worked closely with both Council and the local community to ensure the highest quality outcome for the redevelopment of this presently derelict site.

Whilst we concur generally with Council's assessment and support the recommendation for approval, there are a number of matters relating to the draft conditions of consent that we would like to draw to your attention. Some of these have already been raised with Leichhardt Council and they have indicated support for amendments.

Each of the matters in contention are discussed below.

Deferred commencement conditions

We are of the view that none of these matters are of such significance to the overall development to warrant being dealt with as deferred commencement conditions. Regardless, if it is the case that the Panel agree with Council's approach we request amendments to the deferred commencement conditions as discussed below.

Condition 01 – Interface with 126 Terry Street

This condition reads:

"01. The area of the site which constitutes the landscaped space above the loading dock/carpark immediately adjacent to the side lightwell and rear courtyard servicing 126 Terry Street is to be treated in the following manner:

a) The finished level of the courtyard/landscaped area is not to exceed RL 34.6.

- b) There is to be a palisade style open metal fence only erected adjacent to the lightwell opening, on the development site, to prevent unauthorised access to 126 Terry Street (This palisade fence may be omitted subject to written agreement being obtained from the owner/s of 126 Terry St)..*
- c) Landscape planting in front of the lightwell opening is to constitute leafy shrubs of sufficient height and density to restrict sightlines into the lightwell.*
- d) The landscaped area immediately adjacent to the rear courtyard of 126 Terry Street is not to result in any solid fencing higher than the level of the fence currently between the two properties. Open palisade metal fencing is to be used for security, supported by dense landscaping including ground covers and shrubs, for privacy.*

Details, including a cross-section and planting schedule, demonstrating compliance with the above are to be submitted to Council."

Being a podium area above a carpark, the landscaped areas are provided in the form of planter boxes, the finished level of which sits above the 'trafficable' paths within this area. The relevant levels are shown in the following sketches. As can be seen, the proposed finished level of the trafficable areas is at RL34.6m as required. The planted areas have a higher finished level however these will be densely planted (as required) and will be accessible for maintenance purposes only. The required security fencing will be located on the boundary so the landscaping areas can be suitably maintained.

Accordingly to clarify the intent of the condition, we request that a) be amended to read as follows:

- a) *The finished level of the trafficable areas of the podium adjacent to 126 Terry Street~~courtyard/landscaped area~~ is not to exceed RL 34.6.*

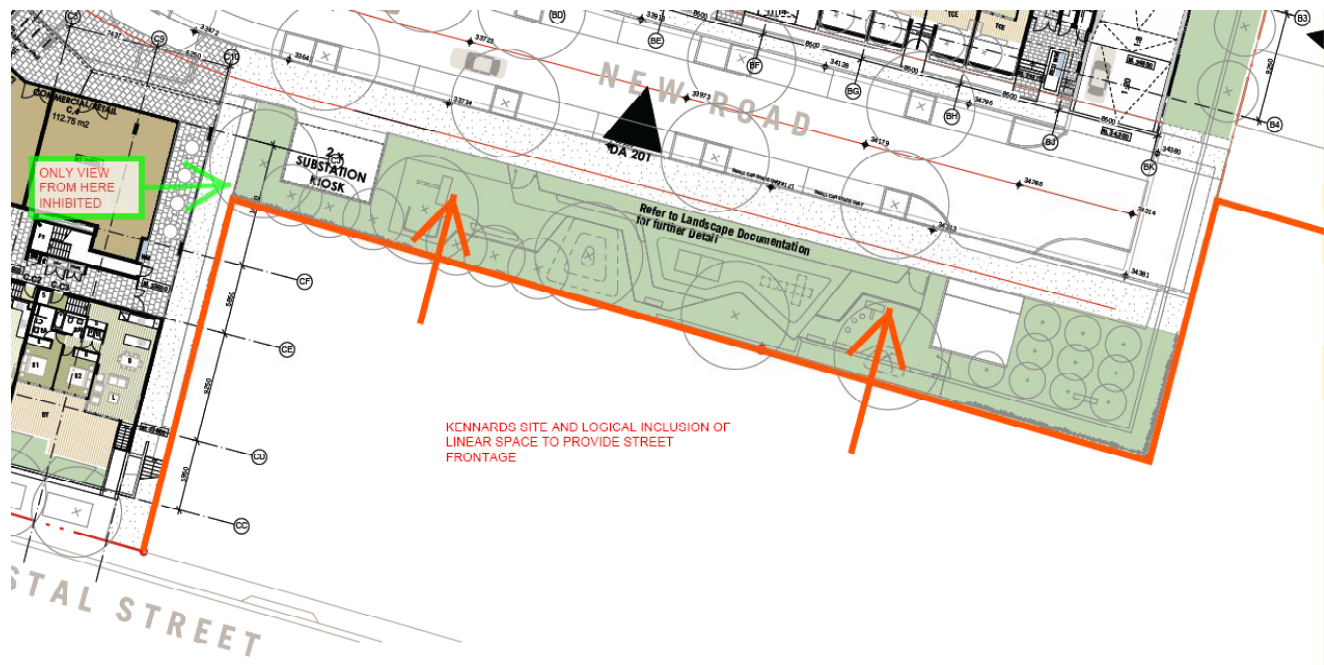


Condition 03 - Design & embellishment of linear park

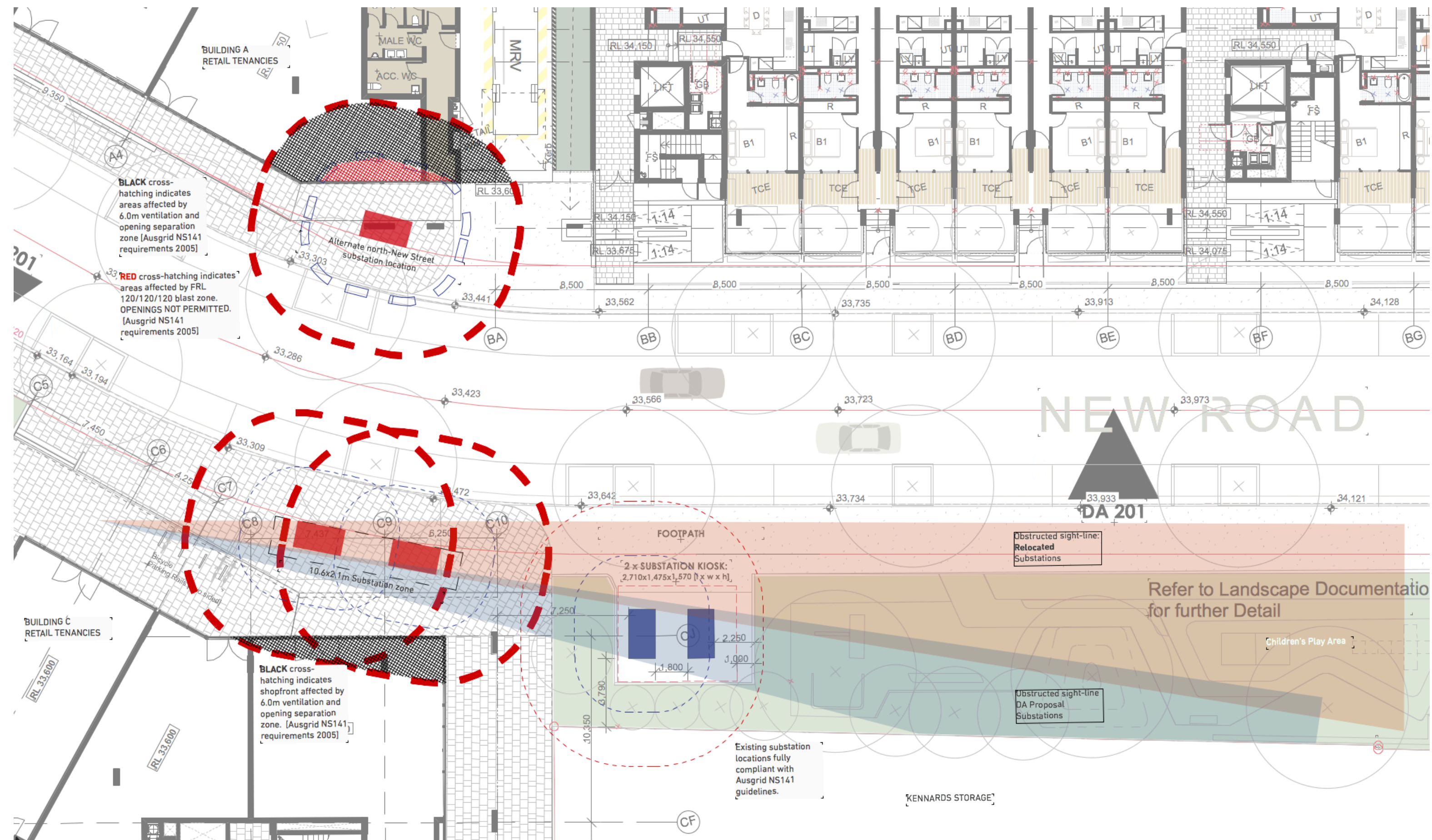
We request that this condition be amended as discussed below. However before this discussion it is important to understand the nature of this space and its background.

The area is not a 'park' as this implies it is a public space. It is private 'communal' open space that is not to be dedicated to Council. Over and above the public benefits negotiated by the Council and provided by the VPA, the applicant has made the offer that this private open space be made accessible to the public, only during daylight hours. We note that in preliminary discussion about the VPA, Council made it clear that due to the limited nature of this strip of land, it would not be accepted by Council as a public benefit under the VPA.

Due to the nature of the space, it has not been designed to be an integral part of the development. Its medium to long term use is likely to be part of the redevelopment of the adjoining large 'Kennards' site as this space would given that site frontage to the New Street and ensure that future buildings do not 'turn their back' on this street. It is effectively 'left over' space that can only logically be used for temporary landscaping/open space until adjoining land is developed (see following diagram).



It is excess to the site specific DCP provisions which require 2000sqm of communal open space. In this regard even without this area the development provides over 4000sqm of communal space. Given this, it would not be unreasonable for the applicant to make this a landscaped area only, without any recreation use.



As noted above, it is not intended that this area is 'integrated' with the adjacent retail area because it is potentially only a 'short term' use and because it is will be privately owned and as such, public liability is a significant issue. In this regard the ability for users of the immediately adjoining retail area to be able to supervise children using the park is not encouraged as it is designed for small children and small children should be supervised at close quarters. The proposed substations and perimeter planting inhibit the view from the closest retail space (C04) and this is seen as a positive in this context, not a negative as portrayed by Council (see above).

Therefore having regard to the above, whilst the applicant will continue to work with Council to achieve the best outcome for this space, Council should acknowledge that this is not public land and ultimately its design should predominantly rest with the applicant. Notwithstanding, there is general agreement about the nature of the space, and in accordance with part a) of the condition, further details will be submitted to provide for additional play equipment for small children. Therefore there are only 2 aspects of the conditions that we request to be amended.:

In relation to part b) of the condition - As the area will be privately owned and managed, it is essential that maintenance costs and public liability risks are minimised. Accordingly the 'hard' elements of the area have been minimised. Whilst the applicant agrees to providing bicycle racks, additional infrastructure in the form of bubblers and tables, which can potentially be vandalised and are maintenance intensive, are not appropriate in this context. The design of the space is for 'short stay' visits only and it is envisaged that the adjoining neighbourhood centre will provide ample food and drink opportunities.

Accordingly, as seating is already provided, part b) of this condition should be amended to only refer to bicycle racks;

In relation to part g) of the condition, we maintain that the proposed location of the substations provides for the best overall outcome for the development. Council's only objection to the proposed location is because "it will visually and physically separate the park from the other public domain areas outside the shops/cafes etc immediately adjacent". However as noted above this is only the case from the closest retail space (C4) and this is considered a positive outcome as supervision of children using the park from this space should not be encouraged in this context. Further, the alternate solution provided by Council (p63 of the assessment report) creates the following issues:

- It creates a 2x10m obstacle for pedestrians and creates a 'pinch point' in an otherwise generous public forecourt for the development;
- It blocks views to and from the street from the main retail and adjoining public areas, to a greater extent than the proposed location (see sketch over). It also inhibits views to and from the proposed pedestrian path linking the New Street with Crystal Street. It is unable to be screened by landscaping to minimise its visual impact. The new neighbourhood centre is the active 'heart' of the development and its design and function should not be compromised;

- It is potentially non compliant with Ausgrid requirements. No building ventilation is able to be provided within the areas denoted by the red dotted circles on the sketch below. Achieving compliance would severely compromise the design of retail space 04 and this, in conjunction with visual impediment of the substations, will significantly devalue this tenancy.

The option of location one of the substations on the northern side of the street is also not an option as it would result in non-compliance with Ausgrid requirements.

The above matters are shown in the diagram on the following page.

Accordingly part g) of this condition should be deleted.

Condition 04 - Design and location of roundabout in Terry Street and stormwater management

This condition includes many requirements not relating to the key issue of the roundabout design and it would be more appropriate to include these in the standard conditions. In any event there are issues with some of these requirements as discussed below.

The applicant has undertaken a preliminary analysis of a roundabout designed to comply with the requirements of part c) of this condition and also x). These requirements read as follows:

“c) The proposed roundabout at the Terry Street/ Margaret Street and new road intersection must be redesigned to address the following specific issues:

- A Medium Rigid Vehicle entering the roundabout from the new road and from Margaret Street must be able to undertake left turns without crossing into oncoming traffic in Terry Street.*
- A Medium Rigid Vehicle entering the roundabout from Terry Street, in both directions, must be able to undertake right turns into the new road and Margaret Street without crossing the approach centre line markings.*
- Swept path analysis must be provided for the U turn movement in Terry Street from the north east approach.*
- A raised pedestrian crossing (Zebra crossing) must be provided in Terry Street on the south western approach to the intersection to provide a safe location for pedestrians to cross Terry Street. The proposed kerb ramps on either side of Terry Street on the north eastern approach must be deleted.*
- The roundabout requires significant redesign to address the above issues, including but not necessarily limited to:*
 - *Realign the central roundabout island.*
 - *Widen and realign the new road kerb to generally align with Margaret Street on both sides.*
 - *Relocate the kerb return on the north west corner (Margaret Street/ Terry Street corner) to the north west.*

- *Relocate the kerb return on the south west corner (New road / Terry Street corner) to the south west."*

"x) The design must be in accordance with the relevant requirements of Austroads and all Australian Standards."

As indicated in the following plans from Aecom, full compliance will result in some unforeseen and/or unacceptable outcomes:

- As indicated in diagram 1, compliance for an MRV turning left into Terry Street from Margaret Street would result in a footpath width on the northern side of the Margaret/Terry Street intersection to be reduced to less than 1.8m. In our view, this is an unacceptable outcome. Further we note that this is an existing situation unrelated to the site, that is not altered or affected by the proposal. Accordingly, the reference to Margaret Street in condition 4c)i. should be deleted.
- As indicated in diagram 1, left hand turns into and out of New Street will reduce footpath widths to as little as 2.8m. It will result in the loss of an existing street tree which is required to be retained by condition 54 and also the loss of parking spaces. Whilst this outcome is not desirable, it would be acceptable to the applicant if Council is satisfied that it achieves compliance with part c)i.

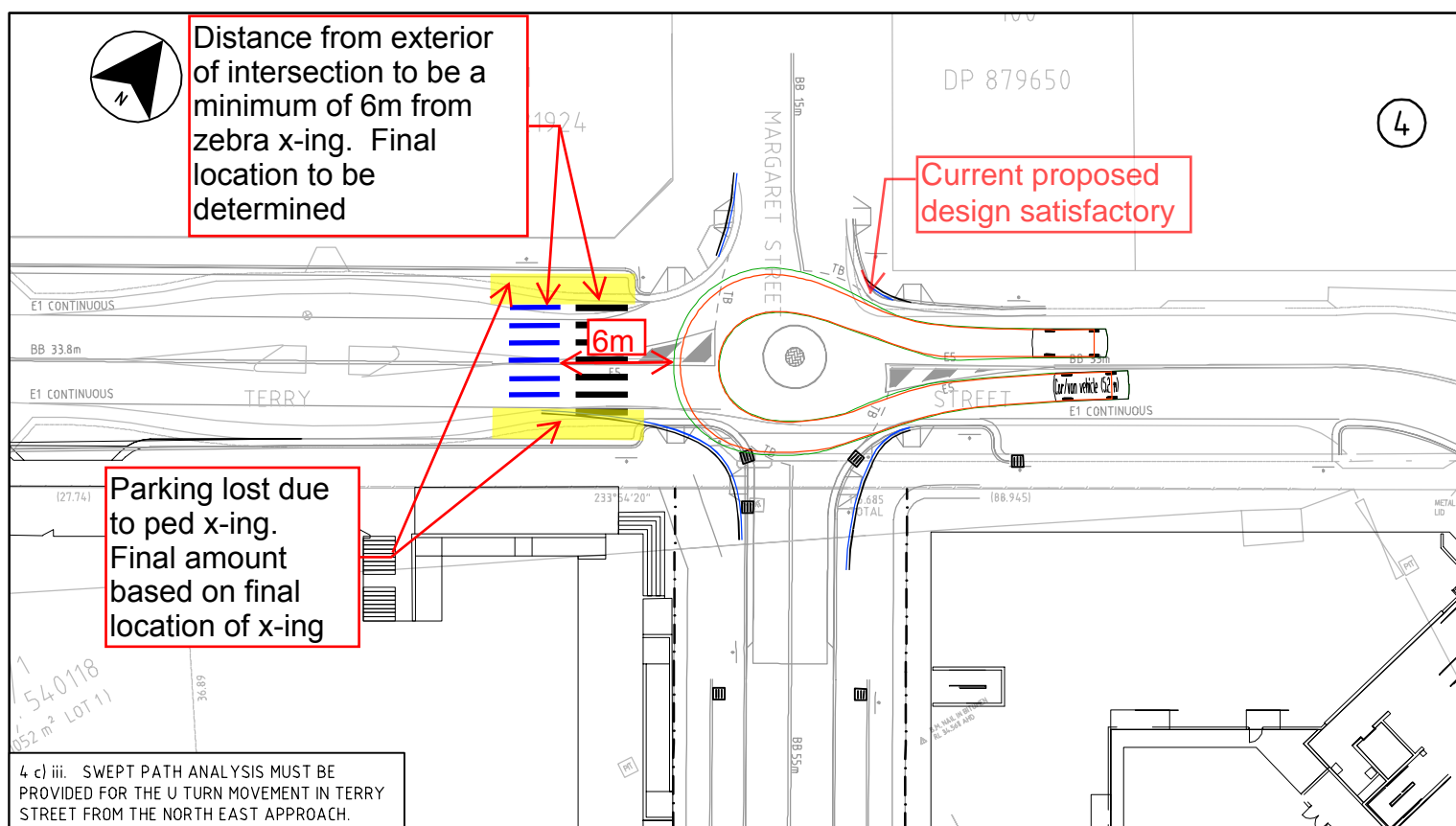
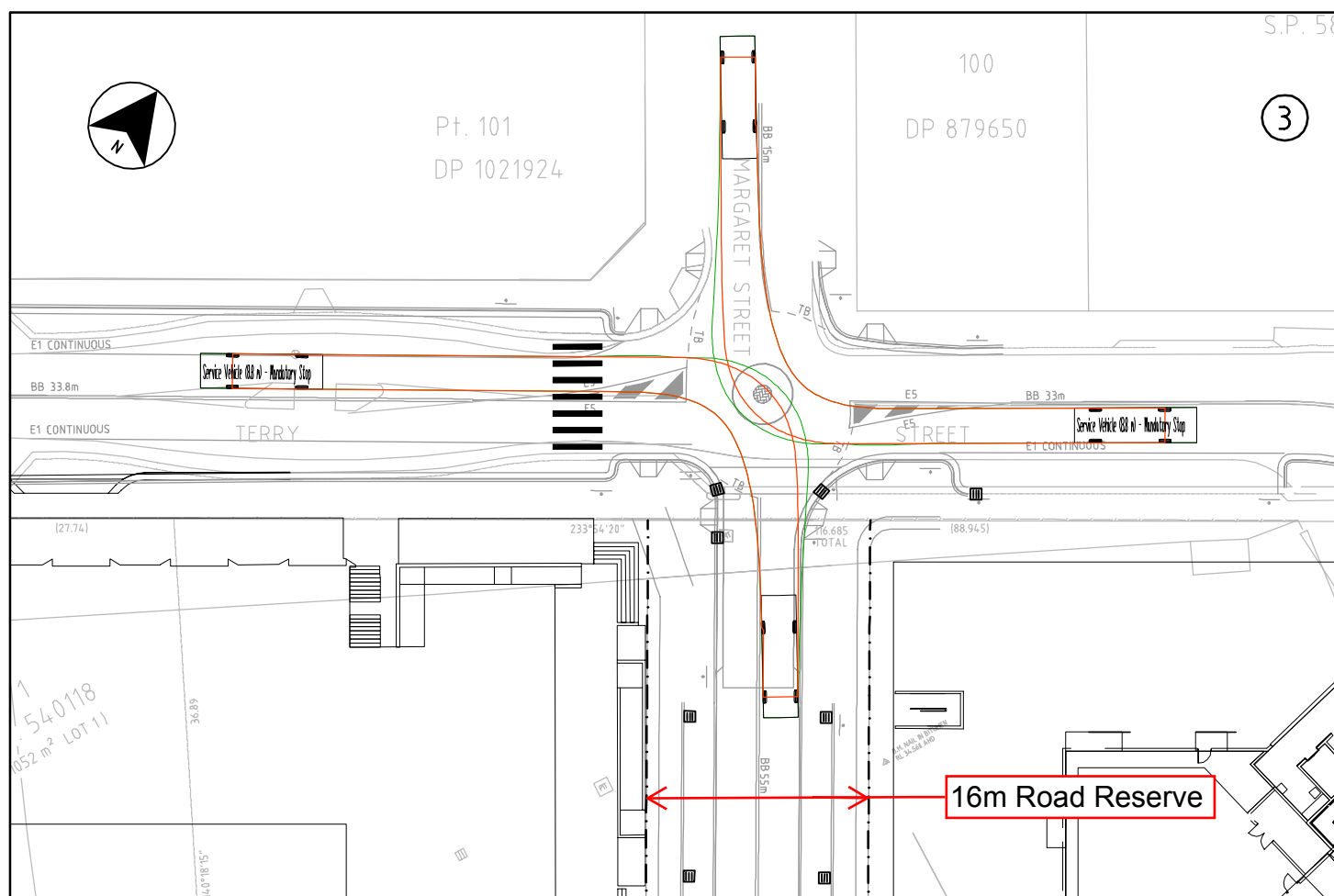
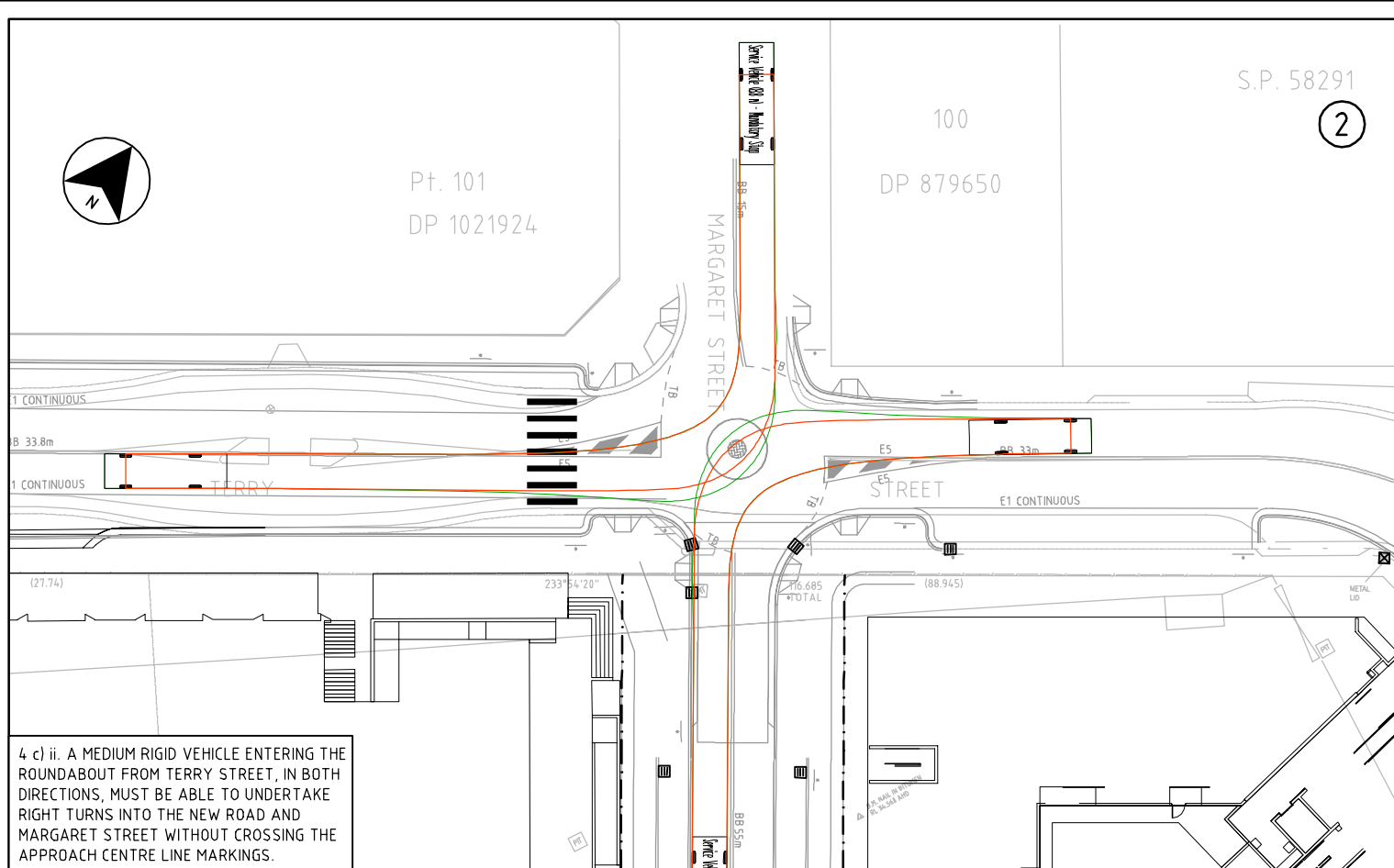
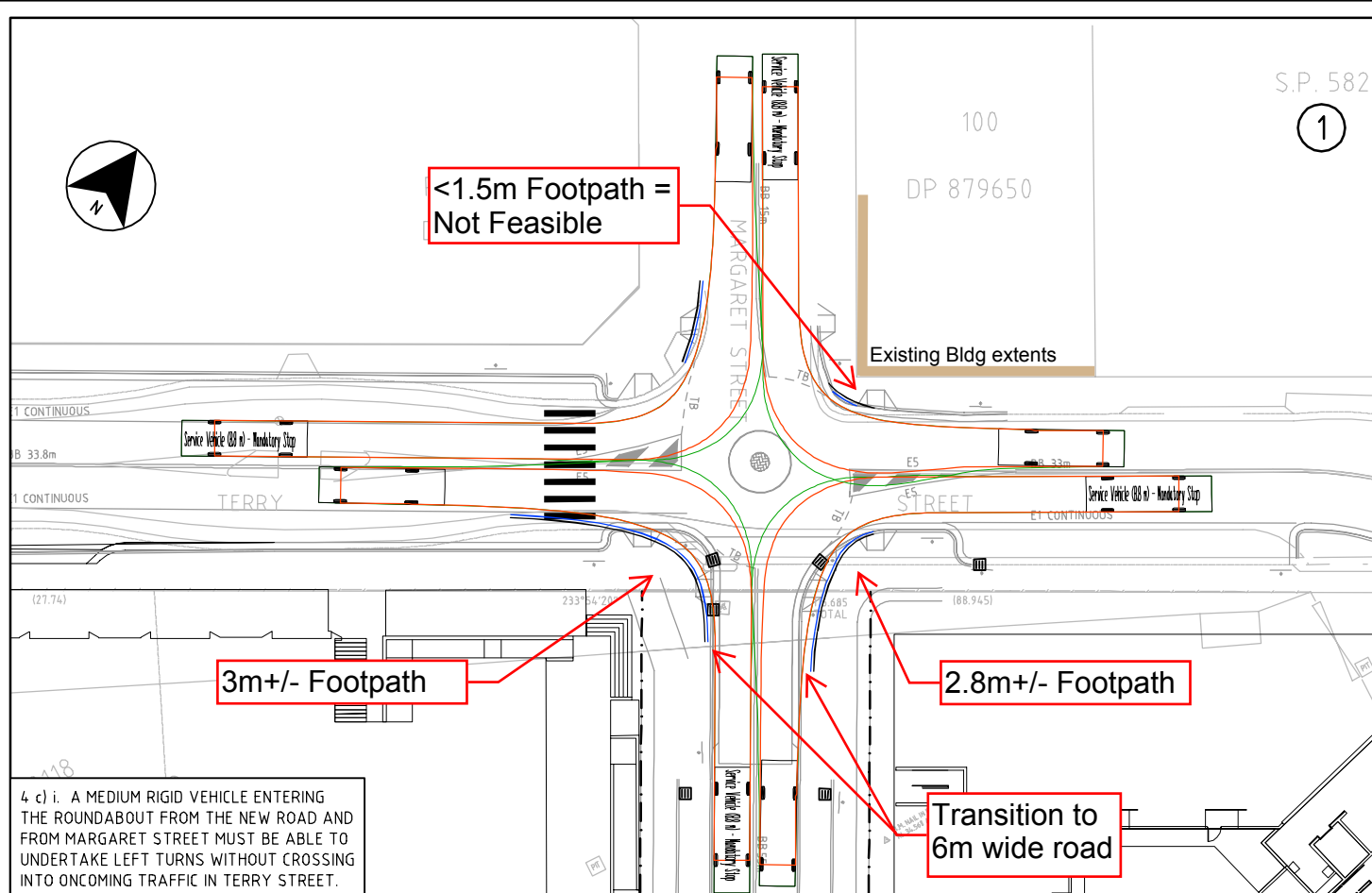
Diagram 4 indicates the requested U turn movement. The amendments indicated above will allow this movement to be accommodated.

Part q) of this condition requires:

"Reconstruction of the sandstone kerb, concrete gutter and asphalt footpath at the Crystal Street frontage and extending on that side of the road to the southern eastern intersection of Crystal Street with Victoria Road, except where deemed by Council to be in very good condition. Note that this will also require the reconstruction of existing vehicle crossings."

The extent of reconstruction potentially required by the above is shown in the diagram below.

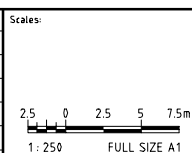
It is inappropriate and unnecessary for this development to have to reconstruct any kerb and footpath that is beyond the site frontage. Accordingly this part of the condition should be modified to only refer to the Crystal Street frontage.



NOTE: REVISED KERB LOCATIONS SHOWN INDICATE TURNING PATHS TO ALLOW FOR GENERAL PRACTICE (BLUE) AND APPROXIMATE COMPLIANCE WITH AUSTRoads STANDARDS (BLACK). RAISED PEDESTRIAN CROSSING PROXIMITY TO BE REVIEWED FOR SAFETY COMPLIANCE TO AUSTRoads STANDARDS.

NOT FOR CONSTRUCTION

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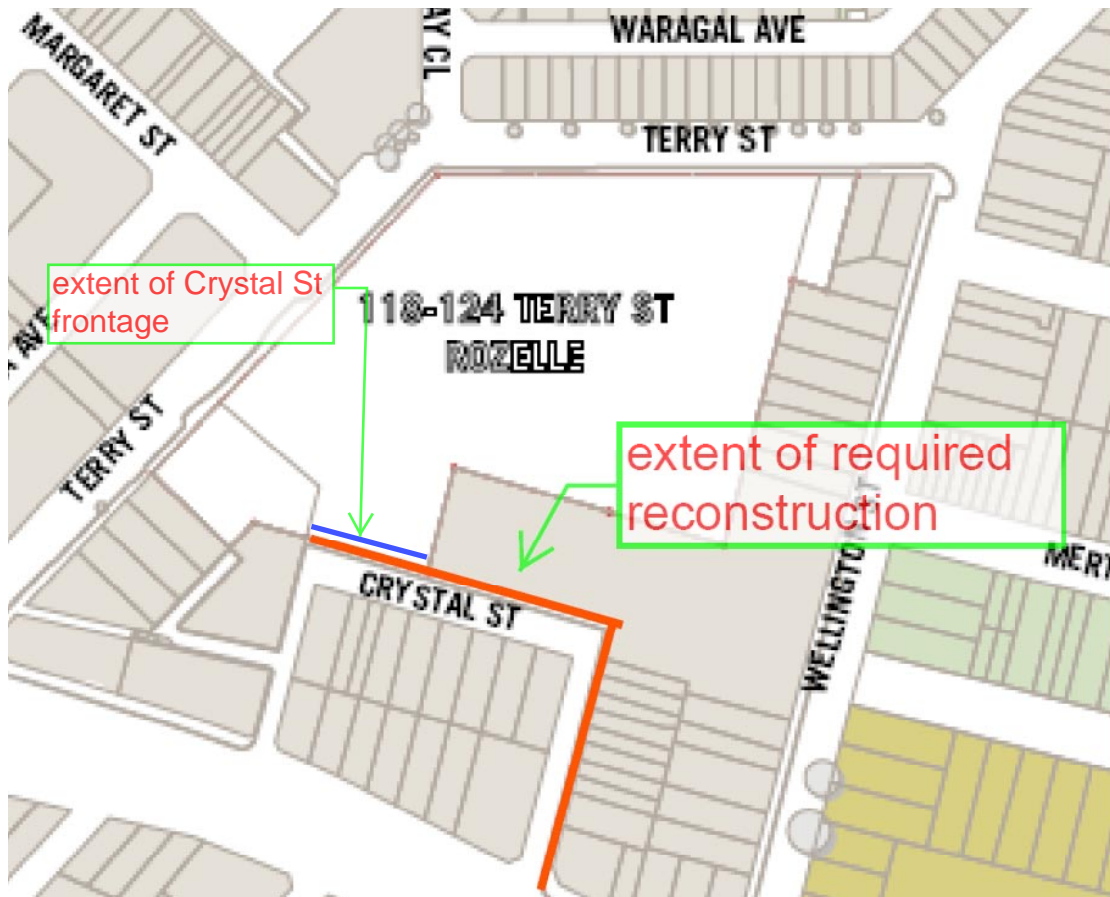
Client :

Designer :

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Project		TERRY ST ROZELLE	
Title		TERRY ST ROZELLE MARGARET ST TRUCK TURNING PATH - 8.8m	
Status	SKETCH	Drw No.	60223916-SKE-CI-0011
Rev.	01		



General conditions of consent

Before discussion specific conditions, we draw your attention to the note relating to the general conditions which states:

"The following conditions of consent including any other conditions that may arise from resolution of matters listed in the above condition, will be included in an operational Development Consent. The operational Development Consent will be issued by Council after the applicant provides sufficient information to satisfy Council in relation to the conditions of the deferred commencement consent."

The applicant's lawyer, Mr Stuart Simington of Lindsay Taylor Lawyers has reviewed the above and advises:

1. In my view, the Note involves a misconception as to the effect of satisfaction of deferred commencement conditions.
2. Section 80(3) of the *Environmental Planning and Assessment Act 1979 (EPA Act)* provides as follows:

A development consent may be granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority, in accordance with the regulations, as to any matter specified in the condition. Nothing in this Act prevents a person from doing such things as may be necessary to comply with the condition.

3. It follows from s80(3) that a deferred commencement condition must specify one or more matters which are to be done to the satisfaction of the consent authority prior to the consent operating.
4. The notice of determination of a consent subject to a deferred commencement condition is issued in the normal way save for one matter. Unlike an ordinary notice of determination, it is not to be endorsed with a date from which the consent operates: see cl100(4)(a) of the *Environmental Planning and Assessment Regulation 2000 (EPA Reg)*.
5. Once, the consent authority is satisfied of the relevant matter/s, it must give a separate notice to the applicant of the date from which the [previously issued but undated] consent operates: see cl100(4)(b).
6. However, the giving of the notice under cl100(4)(b) does not alter the terms of the consent previously issued. It also follows that there is no power for a consent authority to impose conditions which modify the stated terms of the [undated] consent when satisfying itself of a matter of deferred commencement.
7. The only way in which satisfaction of a deferred commencement condition could have that result or effect is if the 'matter' as satisfied is called up by an operative condition. For example, if deferred commencement condition 'A' requires the preparation of a plan meeting certain criteria, an operative condition of the consent could require compliance with the plan so prepared.

In other words Council cannot amend the general conditions as a result of the process of satisfying the deferred commencement conditions. Therefore the note must be deleted. However the intent can be provided for by a condition such as:

"XX. Any plans or documentation submitted to satisfy the deferred commencement conditions of this consent, if accepted by Council as satisfying those conditions, form part of this consent and override any of the general conditions in the event of any inconsistency"

An example of this would be deferred commencement condition relating to the roundabout design, where as detailed above, satisfaction of this condition will result in the loss of a street tree specified as to be retained in general condition 54.

Condition 7 – reference to plans and documents

The following errors have been identified:

- DA100 should be Rev C dated 25/1/13;
- Landscape Sections DA306 – Revision A was prepared by Turner & Associates not Aspect Studio;
- The Integrated Water Cycle Plan should be Rev G dated 28/9/12;
- The Acoustic Report should be dated 6/2/13 not 6/2/12.

Conditions 10-13 Voluntary Planning Agreement

The applicant's lawyer, Mr Stuart Simington of Lindsay Taylor Lawyers has reviewed these conditions and advises:

1. The heading of condition 10 indicates that it purports to be a condition imposed 'pursuant' to the VPA. However, the VPA contains no such authority - nor could it.
2. The condition then purports to require certain monetary contributions. But whereas the VPA imposes an obligation on Anka (being the party to the VPA), the condition seems to impose an obligation on the person carrying out the development which may not be Anka.
3. There is extensive caselaw which confirms that s94 is the only source of power to impose a conditions requiring monetary contributions as conditions of development consent. In this case, however, s94 is inapplicable to the development because it is excluded by clause 7.1 of the VPA.
4. There are also other problems with the condition. For example, the condition refers to a clause (cl8 of Schedule 1) of the VPA which does not exist.
5. For all of these reasons, in my view the condition ought to be deleted.
6. However, as well as being unlawful, it is also unnecessary. A contravention of the VPA is directly enforceable against ANKA as a breach of the EPA Act: see s122, 123 and 124.
7. It is also enforceable against any subsequent owner of the land owing to registration of the VPA which has now been effected.
8. It would not be inappropriate for there to be a condition linking the carrying out of the development with the proper performance of the VPA as follows:

The VPA between Anka Constructions Pty. Ltd and Leichhardt Municipal Council dated 14 September 2012 shall be performed in connection with the carrying out of the development.

Another issue is that we believe that the apportionment of the required contribution between 'public purposes' and affordable housing to be incorrect. Easy resolution of such issues can occur if the details are not part of the consent.

In view of the above we request that conditions 10-12 be deleted and condition 13 be modified not to relate to the VPA and relocated to that part of the consent dealing with "Prior to Occupation" matters.. If considered necessary, the applicant would not be opposed to a general condition as outlined above.

Condition 15d)

This condition requires:

“d) The design must make provision for stormwater runoff from uphill/upstream properties/lands between the development site and Wellington Street which currently drain towards the site. The design must include the collection of such waters and discharge to the public drainage system.

The design, supported by adjustments to finished surface levels if required, must ensure that stormwater runoff from the development site is not directed onto the adjoining properties between the development site and Wellington Street.”

It is requested that certain points be clarified by the following amended condition. In this regard, it is only overland flow that is required to be dealt with and the discharge point is not to a public drain but an existing drain on the Kennards site.

“The design must make provision for existing overland stormwater runoff from uphill/upstream properties/lands between the development site and Wellington Street which currently drain towards the site. The design must include the collection of such waters and discharge to the drainage system currently located between the Kennards Site and the development site.

The design supported by adjustments to finished surface levels on the development site if required, must ensure that stormwater runoff from the development site is not directed onto the adjoining properties between the development site and Wellington St.”

Condition 23 Access Management Plan

Council has verbally advised that this condition was included in error.

Condition 32 – Disabled parking spaces

This condition conflicts with condition 72 which refers to 35 spaces (not 36). It should be amended to state a ‘minimum of 35’.

Conditions 41 and 42

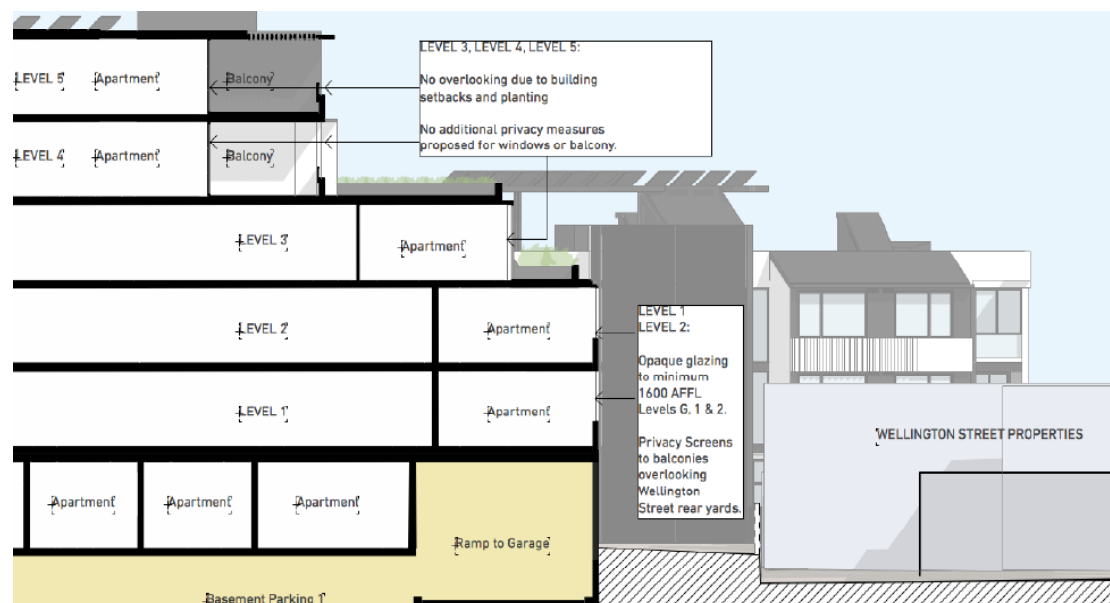
These conditions state:

“41. To ensure reasonable privacy for the adjoining properties in Wellington Street, windows directly facing those properties must have a minimum sill height of 1.6m above finished floor level. Alternatively, the window/s may be permanently fixed to this height (that is windows are not to swing or lift open) with obscure glazing provided ventilation requirements of the Building Code of Australia are met. Details must be provided prior to the issue of a Construction Certificate to the satisfaction of the Certifying Authority.”

“42. A 1600mm high privacy screen must be erected along the edge of any deck or terrace which would otherwise allow direct overlooking into the rear of adjacent

properties located in Wellington St to ensure reasonable privacy for the adjoining property/s. Each privacy screen must be 75% obscure, permanently fixed and made of durable materials. Details must be provided prior to the issue of a Construction Certificate to the satisfaction of the Certifying Authority."

We believe that these requirements are only intended to apply to Levels 1 and 2 of Building B as there are no openings in Building A and Levels 3, 4 and 5 of Building B are stepped back in a manner that inhibits overlooking (see diagram below).



Also overlooking from ground level will not be possible due to landscaping and fencing.

Accordingly Condition 41 should be amended to insert the following words between the words "windows" and "directly", and in Condition 42 between the words "terrace" and "which": "in Levels 1 and 2 of Building B".

Condition 50

This condition includes the following words:

"The proposed structure(s) to be erected must stand wholly within the boundaries of the allotment. No portion of the proposed structure, including gates and doors during opening and closing operations, shall encroach onto adjoining properties or upon public property."

However the proposed awnings extend over the property boundary in the New Street. Accordingly the condition should be amended to exclude awnings.

Condition 67

This is a duplicate of condition 63 and should be deleted.

Condition 72

This condition conflicts with the approved plans which were amended in accordance with the request in Council's letter of 8 November 2012:

"(w) A total of 18 visitor parking spaces must be provided for the residential dwellings (only 17 provided) in accordance with the Planning Proposal."

Accordingly the number of visitor spaces should be amended to 18 spaces and the amount of residential spaces amended to 212.

Condition 74

This condition states:

"74. The Principal Certifying Authority is to be satisfied that all landscape works, including tree planting, have been undertaken in accordance with the approved plan(s) and conditions of consent. A copy of an active Landscape Management contract for the maintenance of the landscaping for a period of not less than three years after the installation is to be provided prior to the issue of the Occupation Certificate."

This condition is considered onerous as it is beyond normal commercial practice to have management contracts longer than 1 year. There are standard conditions that require appropriate on-going maintenance of landscaping and 1 year is adequate to ensure the establishment of new planting. Accordingly the reference to three years should be amended to one year.

Condition 81

This condition relates to a positive covenant for stormwater system maintenance. It is requested that the following reasonable amendments be made:

| "c) If the Proprietor fails to comply with a) or b) above, ~~the~~ the Council shall have the right to enter upon the land referred to above, at all reasonable times to inspect, construct, install, clean, repair and maintain in good working order all pits, pipelines, trench barriers and other structures in or upon the said land which comprise the OSD and OSR or which convey stormwater from the said land; and recover the costs of any such works from the proprietor."

Condition 102

This is a duplicate of condition 99 and should be deleted.



Condition 103

This is a duplicate of condition 100 and should be deleted.

Conclusion

The applicant has worked long and hard with Council on the development of the site and we are hopeful that Council will agree to the above amendments to the proposed draft conditions. Failing that, we ask that you agree to the amendments as they are not unreasonable and in our view will ensure the best overall outcome for the development and the local community.

Thank you for your consideration of this matter.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'B. Brown', with a long horizontal flourish extending to the right.

Brett Brown
Director

CC Adele Cowie Leichhardt Council (by Email)