



**TOWER 2, LEVEL 23
DARLING PARK, 201 SUSSEX ST
SYDNEY NSW 2000**

URBIS.COM.AU
Urbis Pty Ltd
ABN 50 105 256 228

28 November 2016

Planning Panels Secretariat
GPO Box 39
Sydney NSW 2001

Dear Sir/Madam,

DA/2016/0005 6-14 WALKER STREET & 11-24 MARQUET STREET, RHODES RESPONSE TO RECOMMENDED CONDITIONS OF CONSENT

We write on behalf of Walker Street Developments Pty Ltd (Applicant) to provide a response to the independent planning assessment report and recommended conditions of consent. The Applicant requests a number of amendments to the following recommended conditions of consent:

1. Deferred commencement conditions
2. Approved Plans and Supporting Documents (*Condition 1*)
3. Staging of Construction Certificates
4. Height (*Condition 7*)
5. Long Service Levy (*Condition 20*)
6. Continuous awnings (*Condition 23*)
7. Obtaining a Construction Certificate for Building Works (*Condition 24*)
8. Planning Agreement s.93F – Bank Guarantee/Bond (*Condition 48*)

Each of these requested changes are described in detail below:

1. AMENDMENTS SOUGHT TO RECOMMENDED CONDITIONS OF CONSENT

1.1. DEFERRED COMMENCEMENT APPROVAL

Billbergia Group and the City of Canada Bay Council executed the Memorandum of Understanding regarding the improvement works at the Concord Road / Averill Street intersection at Rhodes on the 24th and 25th of November 2016 (Refer to **Attachment A**). We therefore respectfully request that the Deferred Commencement Conditions are deleted from the final conditions of consent to be issued.

1.2. APPROVED PLANS AND SUPPORTING DOCUMENTS

A number of the drawings and reports listed in the table under Condition 1: Approved Plans and Supporting Documents include incorrect references. The dates on these drawings are provided in the following table and we ask Condition 1 be amended.

Reference/Dwg No	Title/Description	Prepared By	Dates
DA-0201/31	Basement 08	SJB Architects	14.11.2016 14.10.2016
DA-0209/31	Podium	SJB Architects	14.11.2016 14.10.2016
DA-0210/31	Level 02	SJB Architects	14.11.2016 14.10.2016
DA-0601/31	Section 01	SJB Architects	02.09.2016 15.11.2016
DA-0602/31	Section 02	SJB Architects	15.09.2016 15.11.2016
DA-0603/31	Section 03	SJB Architects	15.09.2016 15.11.2016
DA-0604/31	Section 04	SJB Architects	15.09.2016 15.11.2016
S151081 S151081 Issue C	Public Domain Lighting	Northrop	18.12.2015 31.08.2016

1.3. STAGING OF CONSTRUCTION CERTIFICATES

The proposed development will involve a number of construction stages, and we request the recommended conditions of consent be amended to reflect the construction stages and the staged issuing of Construction Certificates. The breakup of different construction stages with separate Construction Certificates is to be as follows:

- Demolition – Subject to Separate DA (no CC required for demolition)
- CC1 – Bulk excavation, piling and shoring wall
- CC2 – Substructure up to Podium
- CC3 – Tower A Structure
- CC4 – Tower A Façade, Fitout landscaping etc.
- CC5 – Tower B Structure, Façade, Fitout, landscaping etc. + Retail Centre fitout and balance of all works. Potentially a separate CC for the Retail Centre fitout
- CC6 – Works within the Road Reserve

The way the recommended conditions of consent are worded are such that they assume a single Construction Certificate being issued for all construction works. In light of the staged construction and issuing of construction certificates in stages described above, we respectfully request that the conditions be amended appropriately to suit this arrangement.

We provide the following list of conditions that are precedent on the issue of a Construction Certificate that are requested to be amended to suit the staged issuing of Construction Certificates. We request that the following table be inserted as a new Note 4 in Condition 1 of the conditions of consent as follows:

Note 4

The satisfaction of conditions prior to the issue of a Construction Certificate is to be in accordance with the Construction Certificate Stage included in the following table:

Construction Certificate Stage	Conditions precedent on issue of a Construction Certificate
CC1 – Bulk excavation, piling and shoring wall	19. Damage Deposit for Council Infrastructure 21. Amendments to Approved Plans 22. Construction Management Plan 31. Damage Report 38. Construction Management Plan 43. Kerb Side Parking Arrangements

Construction Certificate Stage	Conditions precedent on issue of a Construction Certificate
	<p>49. Detailed Stormwater Drainage Sydney Design</p> <p>50. Certification of the Stormwater Drainage System Design</p> <p>51. Construction or Redirection of a Stormwater Pipeline</p> <p>52. Erosion and sedimentation controls</p> <p>54. Silt Arrestors and Gross Pollutant Traps</p> <p>55. Dilapidation Report</p> <p>56. Acid Sulphate Soils – Detailed Assessment</p> <p>59. Telecommunications</p>
CC2 – Substructure up to Podium	<p>14. Southern Exit to public car park</p> <p>17. Access for People with Disabilities</p> <p>18. Disabled Toilets</p> <p>23. Continuous Awnings</p> <p>28. Vehicular Access Ramps</p> <p>29. Bicycle Storage Provision</p> <p>32. Footpath Design Levels</p> <p>35. Vehicular Crossings</p> <p>36. Redundant Vehicular Crossings and Ancillary Works</p> <p>37. Speed Hump and Stop Sign on Exit</p> <p>39. Vehicular Access Points</p> <p>40. Redundant Vehicular Crossings and Ancillary Works.</p> <p>42. Bollards</p> <p>44. BASIX Commitments</p> <p>45. Energy Australia Requirements</p>

Construction Certificate Stage	Conditions precedent on issue of a Construction Certificate
	53. Rainwater Reuse 58. Electricity Substation
CC3 – Tower A Structure	N/A
CC4 – Tower A Façade, Fitout, and landscaping.	25. Landscape Maintenance Strategy 26. Landscape Plan 27. On Slab Landscaping
CC5 – Tower B Structure, Façade, Fitout, landscaping etc. + Retail Centre fitout and balance of all works. Potentially a separate CC for the Retail Centre fitout.	N/A
CC6 – Works within the Road Reserve	34. Submission of Plans for Works within the Road Reserve. 41. Separate Approval for Works in the Public Road (External Works) – Section 138 Roads Act.

We also request that each condition referred to in the above table include the word “relevant” in front of the words “Construction Certificate”, and include reference to the proposed new Not 4 to be included under Condition 1.

1.4. HEIGHT

To avoid confusion we propose that recommended condition 7 be amended to accurately reference the point from which the height of buildings and structures have been measured on the drawings listed in Condition 1, which is the average relative level of the plaza level.

Condition 7 sets out the maximum height of the proposed development for each building and the heliostat, which are understood to be taken from the drawings referenced in Condition 1. Drawing DA-501 shows the maximum height of the heliostat to be 143.4 metres (RL 156), the average relative level of the plaza level.

We seek to amend the condition 7, as follows:

7. Height

"The maximum height measured from the average Finished Floor Level (FFL) of the plaza which is at RL12.60 of the proposed development shall be:

- Tower A on Site 1A is 127m (RL139.6m)
- The Heliostat on top of Tower A shall be ~~143.3~~ 143.4 (RL 156); and
- Tower B on Site 1B is 91.5m (104.1m).

1.5. LONG SERVICE LEVY

Recommended Condition 20 refers to the requirement to THE pay long service levy under Part 5 of the *Building and Construction Industry Long Service Payments Act 1986*, with respect to the building work and to provide proof that payments have been made to Council prior to the issue of a construction Certificate.

Walker Street Developments Pty Ltd has received approval from the Long Service Corporation for instalment payments, and that all instalments must be made directly to the Corporation (Refer to **Attachment B**).

The correspondence from the Long Service Corporation includes an instalments plan, which is subject to change based on the value of works.

We respectively request that recommended Condition 20 be amended to read, as follows:

20. Long Service Levy Payments

The payment of a long service level as required under part 5 of the *Building and Construction Long Service Payments Act 1986*, in respect to the building work, and in this regard, proof that the levy has been paid, is to be submitted to **the Long Service Corporation in accordance with the following instalment plan accepted by the Long Service Corporation in its letter dated 7 April 2016 (Instalment No. 9000480):** ~~Council prior to the issue of a Construction Certificate. Council acts as an agent for the Long Services Payment Corporation and the levy may be paid at Council's Office.~~

Instalments	Due Date	Amount Due
1 st	Prior to works commencing	\$235,620.00
2 nd	01/09/2017	\$235,620.00
3 rd	01/02/2018	\$235,620.00
4 th	01/07/2018	\$235,620.00
5 th	01/12/2018	\$235,620.00
	Total Levy Payment	\$1,178,100.00

Note: The amount due may change depending on the value of work.

1.6. CONTINUOUS AWNINGS

Recommended Condition 23 provides requirements for the height of awnings above the completed footpaths. The maximum height of awnings proposed along the building frontages are within the range of 3 metres to 4.5 metres above the level of completed footpaths, with the exception of lobby entries, which are proposed at a higher height. The proposed height of the awning above building entries signifies the building entries in the streetscape, and assists in the providing legibly pedestrian access points to proposed buildings.

We request recommended Condition 23 be amended as follows:

23. Continuous awnings

The awnings over the footpaths, as indicated on the approved drawings, shall not encroach within 600mm from the face of the kerb. The height of the completed awning shall not vary from within the range of 3 metres to 4.5 metres above the completed footpath, **with the exception of awnings in front of building entry lobbies**. The awnings shall be detachable from the building without causing any concealed structure failure. Provision for awning cut outs shall be made for existing and/or new trees. Detailed in this regard must be indicated on the architectural plans to be submitted with the Construction Certificate.

1.7. OBTAINING A CONSTRUCTION CERTIFICATE FOR BUILDING WORKS

Condition 24 requires that if demolition works forms part of the extent of works approved in the same application, then demolition must not commence prior to the issue of a Construction Certificate. We note that demolition of existing buildings was approved in a separate consent DA2016/0271. We also note that under the EP&A Act 1979 demolition works do not require a Construction as there is no construction works.

We request that recommended Condition 24 be amended as follows:

24. Obtaining a Construction Certificate for Building Work

This Development Consent does not constitute approval to carry out construction work. Construction work may commence upon the issue of a Construction Certificate, appointment of a Principal Certifying Authority (PCA), and lodgement of Notice of Commencement.

~~Please note that if demolition works form part of the extent of works approved in the same application, then demolition must not commence prior to the issue of a Construction Certificate.~~

1.8. PLANNING AGREEMENT S.93F – BANK GUARANTEE/BOND

Recommended Condition 48 requires a Bank Guarantee/Bond for an amount agreed by Council to cover the cost of works involved in the Voluntary Planning Agreement. We have sought advice from Gadens Lawyers on this recommended condition. (Refer to **Attachment C**). Gardens acted for Walker Street Developments Pty Ltd on the drafting of the VPA.

Gardens Layers have advised that the only “works” that Walker Street Developments Pty Ltd are undertaking under the VPA is the recreation centre. Walker Street Developments Pty Ltd are

undertaking those works as Council's contractor and it will effectively use monetary contributions (paid at the time of a Subdivision Certificate for the various stages) to pay for those works. This is not a situation where Walker Street Developments Pty Ltd is providing works in kind in lieu of a monetary contribution. The unique nature of the "works" contribution under the VPA explains why the VPA does not require the payment of any security for these works.

A council's ability to impose conditions on development consent is largely constrained by section 80A of the EP&A Act 1979. In relation to condition concerning the payment of security, section 80A provides:

(6) *Conditions and other arrangements concerning security*

A development consent may be granted subject to a condition, or a consent authority may enter into an agreement with an applicant, that the applicant must provide security for the payment of the cost of any one or more of the following:

- (a) making good any damage caused to any property of the consent authority (or any property of the corporation) as a consequence of the doing of anything to which the consent relates,*
- (b) completing any public work (such as road work, kerbing and guttering, footway construction, stormwater drainage and environmental controls) required in connection with the consent,*
- (c) remedying any defects in any such public work that arise within 6 months after the work is completed.*

It is noted that a condition of this nature is recommended at Condition 19. It is outside the scope of section 80A(6) to require the payment of security in relation to VPA works. The VPA must itself provide sufficient mechanisms for the enforcement of its obligations, which can include the payment of security:

Section 93F

(3) *A planning agreement must provide for the following:*

- (g) the enforcement of the agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer.*

Gadens Lawyers advise that it is not lawful for a council to supplement a VPAs own negotiated enforcement provisions by requiring the payment of security by way of condition of development consent.

We respectfully request that Condition 48 be deleted.



2. CONCLUSION

We thank the Sydney Central Planning Panel and the City of Canada Bay for consideration of our requested amendments to the recommended conditions of consent. We would be pleased to discuss the requested changes with Council prior to the Panel meeting on the 1 December 2016.

If you have any questions please don't hesitate to contact me on (02) 8233 9953.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Murray Donaldson".

Murray Donaldson
Director

- CC The General Manager, City of Canada Bay Council
Narelle Butler, Manager, Statutory Planning, City of Canada Bay Council
Tony McNamara, Director of Planning & Environment, City of Canada Bay Council
Samuel Lettice, Coordinator (Fast Track), City of Canada Bay Council
Bill McGarry, Development Director, Billbergia Group
- Enc Attachment A: Signed MOU between City of Canada Bay Council and Billbergia Group regarding improvement works at Concord Road / Averill Street intersection at Rhodes.
Attachment B: Approval to pay levy by instalments prepared by the Long Service Corporation dated 7 April 2016.
Attachment C: Legal advice prepared by Gadens Lawyers on recommended Condition 48.



**ATTACHMENT A: SIGNED MOU BETWEEN CITY OF CANADA BAY COUNCIL AND
BILLBERGIA GROUP REGARDING IMPROVEMENT WORKS AT CONCORD ROAD /
AVERILL STREET INTERSECTION AT RHODES**

Memorandum of Understanding
Between
City of Canada Bay Council
and
Billbergia Group

PREAMBLE

The City of Canada Bay (Council) and Billbergia have entered into this Memorandum of Understanding to progress Road Upgrading requirements identified as part of the Planning Proposal for The Station Precinct Proposal and to be included in any Conditions of Consent for any potential Development Approval.

1. PURPOSE

- 1.1. The purpose of this Memorandum is to outline the needs and requirements for providing additional traffic capacity at the Avril St/Concord Road intersection.
- 1.2. This MOU does not bind either party to providing or obtaining the Development Consent. It is to be seen as a commitment to investigate works required to allow assessment of the Development Application to continue
- 1.3. Both parties agree to provide the necessary resources and to work together to fulfil the intention of this *MOU*.
- 1.4. This *MOU* will be supported by any further Agreements which will contain detailed specifications of the nature and extent of activities to be undertaken by the Parties to this *MOU* and shall be negotiated in accordance with the terms and conditions required at such time.

2. CITY OF CANADA BAY RESPONSIBILITIES

COUNCIL AGREES:

- 2.1. To provide available traffic counts and road safety studies relevant at the subject site
- 2.2. To work co-operatively and in a timely manner to assess options provided for the enhancement of this intersection.
- 2.3. To use the studies provided as a basis for assessing the traffic impacts of the proposed works in the area known as Station Precinct.
- 2.4. That this information shall be used in the assessment of the Planning Proposal and any subsequent development application that is in accordance with the approved planning proposal.

3. BILLBERGIA GROUP RESPONSIBILITIES

BILLBERGIA GROUP AGREES:

- 3.1. To undertake traffic modelling and subsequent concept designs for proposals to meet Council and RMS requirements for the upgrading of the intersection of Avriil St and Concord Road that result from the proposed Development Application for Station Precinct in Rhodes.
- 3.2. To accept these approved concepts as part of the Designs Submitted for the Development Application.
- 3.3. To enter into a Works Authorisation Deed (WAD) with RMS to undertake the works as required by RMS and Council.
- 3.4. To fully fund and undertake the works required to improve the capacity of the Avriil St / Concord Rd intersection in accordance with the WAD.
- 3.5. To complete all works required in the WAD, prior to the approval of any Construction Certificate allowing any works above existing kerb Level of Marquette St and within the area bounded by Marquette St, Walker St, Gauthorpe St and Mary St.
- 3.6. That that these works may include but not be limited to
 - 3.6.1. Extension of the right turn lanes in Concord Rd
 - 3.6.2. Works in Avriil St to negotiate potential changes to parking in Avriil St.

4. CONDITIONS OF THE MEMORANDUM

- 4.1. This document sets out an understanding which has been reached and as such is not intended to be legally binding or to create rights which might be enforceable at law.
- 4.2. Notwithstanding this alliance, each party acknowledges that the other remains independent and free to pursue other partnerships and that no rights are conferred by this Memorandum

or otherwise which will permit one to speak on behalf of the other or jointly or commit the other to a course of action which has not been previously agreed.

- 4.3. Nothing in this document commits or purports to commit Council to providing any form of approval or Development Consent.
- 4.4. All Confidential Information disclosed by either party will at all times be subject to a duty of confidence which must not be disclosed to any other party and further is not be used for any other purpose other than that for which it has been intended according to this MOU.


5. TERM OF THE MEMORANDUM

- 5.1. This Memorandum commences on the date that it is executed on behalf of both parties and terminates upon issue of a Construction Certificate referred to in Clause 3.5 of this MoU.
- 5.2. Both parties can agree prior to that date to extend the duration of the operation of this understanding.
- 5.3. Where it is necessary for the parties to enter into specific and individual program/project contracts with each other then these shall be negotiated in good faith and on a case by case basis.

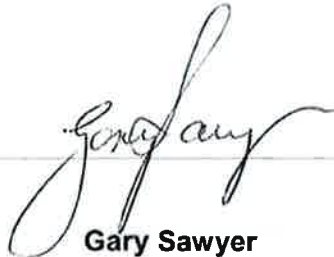
6. DISPUTE RESOLUTION

- 6.1. Any Party may give notice to the other Party of a dispute concerning the operation of this MOU.
- 6.2. Where there is a dispute between the Parties arising out of or in relation to this MOU, the Parties will attempt to resolve the issue by negotiation in the first instance.
- 6.3. If a dispute cannot be resolved between the Parties within seven (7) days of the commencement of negotiations, it will be referred for resolution by an Arbitrator nominated by the Chairperson of the chapter of the Institute of Arbitrators and Mediators Australia

Signed: _____


Bill McGarry
Director, Billbergia Group

Signed: _____


Gary Sawyer
General Manager
City of Canada Bay

Date: 25 November 2016

Date: 24/11/16



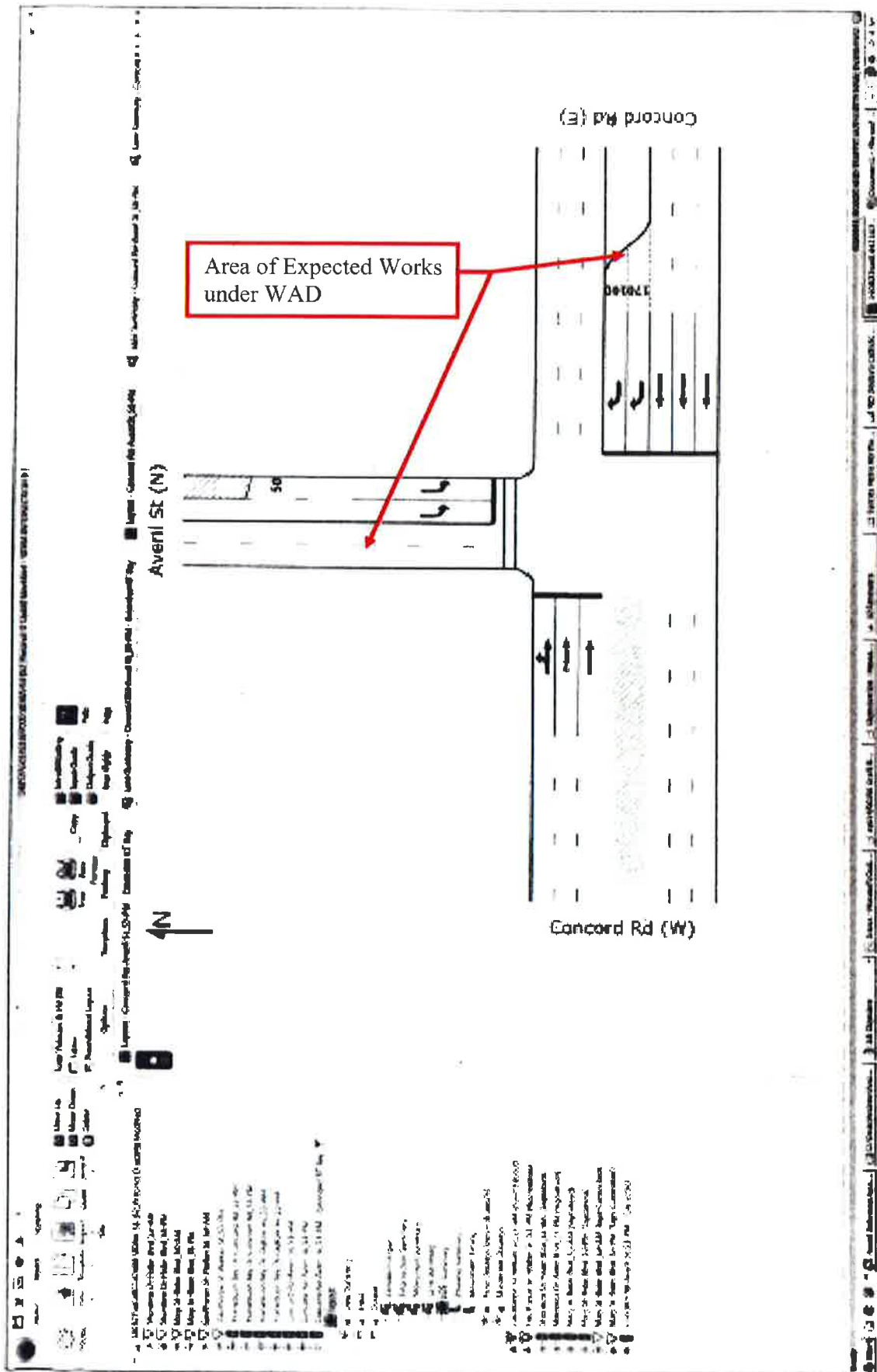
Area of Expected Works
under WAD

AERIAL PHOTO OF CURRENT CONCORD ROAD / AVERILL STREET INTERSECTION

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PROPOSED RIGHT TURN BAY EXTENSION CONFIGURATION TO ADDRESS QUEUE OVERSPILL

PROPOSED RIGHT TURN BAY EXTENSION CONFIGURATION TO ADDRESS QUEUE OVERSPILL





**ATTACHMENT B: APPROVAL TO PAY LEVY BY INSTALMENTS PREPARED BY THE
LONG SERVICE CORPORATION DATED 7 APRIL 2016**

Instalment No. 9000480
7 April 2016

WILLIAM MCGARRY
WALKER STREET DEVELOPMENT
LOCKED BAG 1400
MEADOWBANK NSW 2114

APPROVAL TO PAY LEVY BY INSTALMENTS

The Corporation has approved your application to pay the levy by instalments on the following project:

D.A. Number :	DA2016/0005
Council/Authority:	CANADA BAY COUNCIL, CITY OF
Value of work:	\$336,600,000
Levy payable:	\$1,178,100
Work address:	6-14 WALKER STREET RHODES NSW 2138

Based on the details provided, your payment schedule is attached. Instalment payments have been calculated over the duration of the project with the first instalment, payable prior to the release of an approval by the consent authority.

All instalment payments **must** be made directly to the Corporation.

It should be noted that failure to pay an instalment by the due date may result in the total amount of the instalments unpaid becoming due and payable and the application of penalty interest at the rate of 2% per month or part thereof.

Please note that the attached instalment plan is subject to the approving authority's determination the value of work. Where there is no contract value or no determination by the approving authority on the value of work, the Corporation may make a determination on the work value. Should any variation to a determination occur then the value of work, the total levy payable and the instalment amounts may also vary.

Should you require any further information please contact me on 13 14 41.

Yours sincerely



Sherry Ryan
Team Leader - Levies

Instalment No. 9000480
7 April 2016

LEVY PAYMENT INSTALMENTS PLAN

D.A. Number: DA2016/0005
Council/Authority: CANADA BAY COUNCIL, CITY OF
Value of work: \$336,600,000
Levy payable: \$1,178,100
Work address: 6-14 WALKER STREET
RHODES NSW 2138

Please pay the instalments by the due date shown in the following instalment plan.

Instalments	Due Date	Amount Due
1st	Prior to works commencing	\$235,620.00
2nd	01/09/2017	\$235,620.00
3rd	01/02/2018	\$235,620.00
4th	01/07/2018	\$235,620.00
5th	01/12/2018	\$235,620.00
	TOTAL LEVY PAYABLE	\$1,178,100.00



ATTACHMENT C: LEGAL ADVICE PREPARED BY GADENS LAWYERS TO RECOMMENDED CONDITION 48

Our reference Christina Renner 33618035
Direct line 9931 4701
Email christina.renner@gadens.com
Partner responsible Christina Renner

gadens

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Australia

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gadens.com

25 November 2016

Bill McGarry
Walker Street Development Pty Ltd
Locked Bag 1400
MEADOWBANK NSW 2114

Dear Bill

Walker Street: Station Street Precinct Stage 1, DA2016/0005

You have asked us to review condition 48 of the draft conditions of consent recommended by Council to the JRPP in relation to your above development application.

This condition is as follows:

48. Planning Agreement s.93F - Bank Guarantee/Bond

*A Bank Guarantee/Bond for the amount agreed by Council to cover the cost of the works involved in the Voluntary Planning Agreement shall be submitted to Council **prior to the issue of a Construction Certificate by the Accredited Certifier.** The Bank Guarantee shall be registered with Council and a stamped copy recording the receipt of the Guarantee by Council shall be produced for the **Accredited Certifier prior to the issue of the Construction Certificate.***

We note that "the Voluntary Planning Agreement" referred to in this condition has already been entered into by the applicant.

The only "works" involved in this Voluntary Planning Agreement is the construction of the recreation centre, which the applicant will be undertaking as Council's contractor (subject to a separate Design and Construct Contract between the parties). Council will effectively use the monetary contributions already received under the Voluntary Planning Agreement (to be paid at subdivision certificate for various stages) to pay for the recreation centre works. The public benefit here is that the recreation centre will effectively be delivered "at cost" to Council, making it much cheaper than it would otherwise be if Council were to engage an external contractor.

This is not a situation where the applicant is providing works in kind in lieu of a monetary contribution, in which case the payment of a bond is common. The unique nature of the "works" contribution under This Voluntary Planning Agreement explains why the Voluntary Planning Agreement does not itself require the payment of any security for these works.

A council's ability to impose conditions on a development consent is largely constrained by section 80A of the *Environmental Planning and Assessment Act 1979*. In relation to conditions concerning the payment of security, section 80A provides:

(6) Conditions and other arrangements concerning security

A development consent may be granted subject to a condition, or a consent authority may enter into an agreement with an applicant, that the applicant must provide security for the payment of the cost of any one or more of the following:

- (a) making good any damage caused to any property of the consent authority (or any property of the corporation) as a consequence of the doing of anything to which the consent relates,*
- (b) completing any public work (such as road work, kerbing and guttering, footway construction, stormwater drainage and environmental controls) required in connection with the consent,*
- (c) remedying any defects in any such public work that arise within 6 months after the work is completed.*

Draft condition 19 is a condition of this nature and it is expressly authorised by section 80A(6). The subsections (a)-(c) provide an exhaustive list of the matters for which a council can require the payment of security, as is clear from the use of the words “any one or more of the following”.

It is outside the scope of s 80A(6) to require the payment of security in relation to works to be carried out under a Voluntary Planning Agreement. The Voluntary Planning Agreement must **itself** provide sufficient mechanisms for the enforcement of its obligations, which can include the payment of security:

Section 93F

(3) A planning agreement must provide for the following:

(g) the enforcement of the agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer.

It is, in our view, not lawful for a council to supplement the negotiated enforcement provisions of a Voluntary Planning Agreement by requiring the payment of security by way of condition of development consent. Such a condition exceeds Council’s ability to impose conditions requiring the payment of security. Draft condition 48 is therefore not lawful and should be objected to.

Yours sincerely



Christina Renner
Partner