

## COUNCIL ASSESSMENT REPORT

<b>Panel Reference</b>	2017SCL059
<b>DA Number</b>	DA201600434.01
<b>LGA</b>	Inner West
<b>Proposed Development</b>	Application to modify Determination No. DA201600434 under Section 96 of the Environmental Planning and Assessment Act to modify Modified Determination No. 201600434 dated 5 February 2018, to reduce the extent of public domain works required by Condition 64; delete Conditions 79, 121 and 124 requiring the carrying out of drainage works to Council's stormwater system, undergrounding powerlines and repair of road pavement in Lilydale Street; and remove six (6) existing street trees in Livingstone Road.
<b>Street Address</b>	182-186 Livingstone Road and 313-319 Marrickville Road, Marrickville
<b>Applicant/Owner</b>	Mirvac Projects Pty Ltd / Inner West Council
<b>Date of DA lodgement</b>	25 September 2017
<b>Number of Submissions</b>	16
<b>Recommendation</b>	Approval subject to the imposition of appropriate conditions
<b>Regional Development Criteria (Schedule 4A of the EP&amp;A Act)</b>	<b>Section 96(2) application for a development with a Capital Investment Value (CIV) that exceeds \$5 million.</b>
<b>List of all relevant s79C(1)(a) matters</b>	<ul style="list-style-type: none"> <li>•Marrickville Local Environmental Plan 2011</li> <li>•Marrickville Development Control Plan 2011</li> </ul>
<b>List all documents submitted with this report for the Panel's consideration</b>	Nil
<b>Report prepared by</b>	SJB Planning, Consultant Town Planners for Inner West Council
<b>Report date</b>	23 February 2018

### Summary of s79C matters

Have all recommendations in relation to relevant s79C matters been summarised in the Executive Summary of the assessment report?

**Yes**

### Legislative clauses requiring consent authority satisfaction

Have relevant clauses in all applicable environmental planning instruments where the consent authority must be satisfied about a particular matter been listed, and relevant recommendations summarized, in the Executive Summary of the assessment report?  
*e.g. Clause 7 of SEPP 55 - Remediation of Land, Clause 4.6(4) of the relevant LEP*

**Not Applicable**

### Clause 4.6 Exceptions to development standards

If a written request for a contravention to a development standard (clause 4.6 of the LEP) has been received, has it been attached to the assessment report?

**Not Applicable**

### Special Infrastructure Contributions

Does the DA require Special Infrastructure Contributions conditions (S94EF)?

*Note: Certain DAs in the Western Sydney Growth Areas Special Contributions Area may require specific Special Infrastructure Contributions (SIC) conditions*

**Not Applicable**

### Conditions

Have draft conditions been provided to the applicant for comment?

*Note: in order to reduce delays in determinations, the Panel prefer that draft conditions, notwithstanding Council's recommendation, be provided to the applicant to enable any comments to be considered as part of the assessment report*

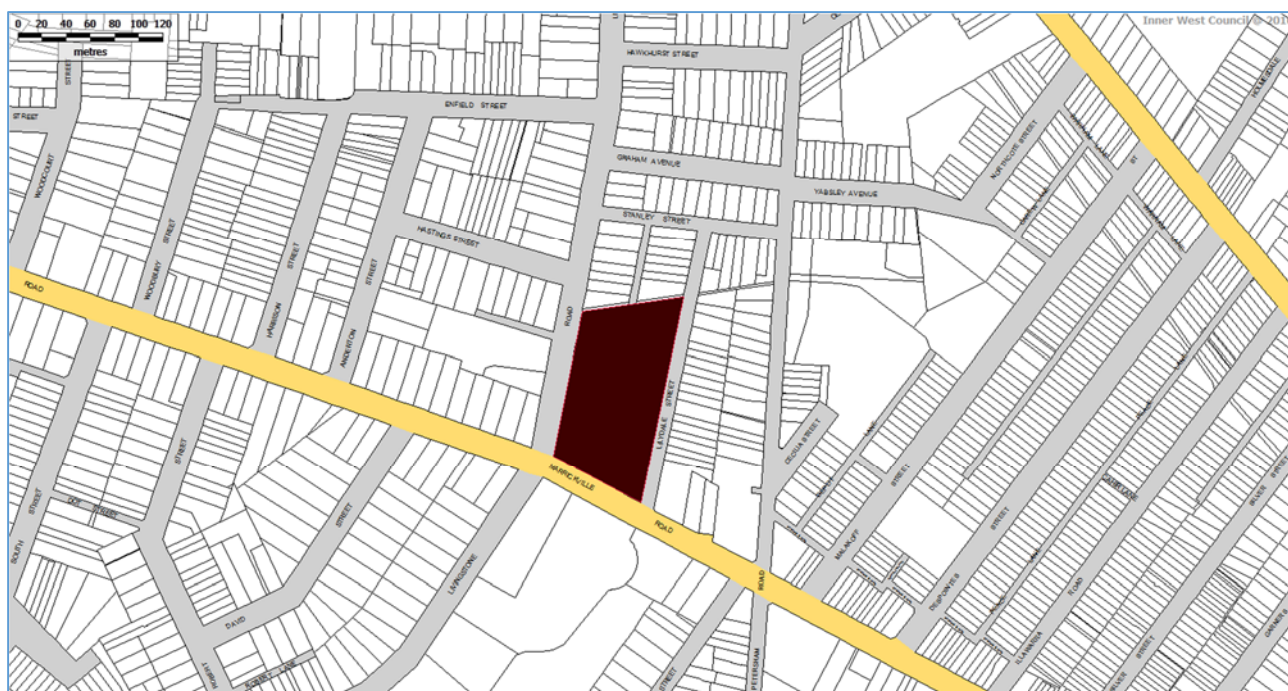
**Yes**



# INNER WEST COUNCIL

## DEVELOPMENT ASSESSMENT REPORT

<b>Application No.</b>	DA201600434.01
<b>Address</b>	182-186 LIVINGSTONE ROAD AND 313-319 MARRICKVILLE ROAD, MARRICKVILLE
<b>Proposal</b>	Application to modify Determination No. DA201600434 under Section 96 of the Environmental Planning and Assessment Act to modify Modified Determination No. 201600434 dated 5 February 2018, to reduce the extent of public domain works required by Condition 64; delete Conditions 79, 121 and 124 requiring the carrying out of drainage works to Council's stormwater system, undergrounding powerlines and repair of road pavement in Lilydale Street; and remove six (6) existing street trees in Livingstone Road.
<b>Date of Lodgement</b>	25 September 2017
<b>Applicant</b>	Mirvac Projects Pty Limited
<b>Owner</b>	Inner West Council
<b>Number of Submissions</b>	16 (including 1 submission from the Inner West Council)
<b>Value of works</b>	\$99,369,900 (CIV unchanged from original DA)
<b>Reason for determination at Planning Panel</b>	Council is owner of the subject land. The Sydney Central Planning Panel (SCPP) was the consent authority for Development Application 201600434 and the Sydney Eastern City Planning Panel is the consent authority for the s96(2) application.
<b>Main Issues</b>	Validity of Conditions Implications of the Conditions not being actioned
<b>Recommendation</b>	It is recommended that Development Consent DA201600434 be modified in accordance with the recommended changes to Conditions 64, 79, 121 and 124 as set out in Section 9 of this report.



**Figure 1:** Location Plan

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## 1. Executive Summary

This report is an assessment of the Section 96 Application (s96) to modify Development Consent DA201600434 and relates to the former Marrickville Hospital site, 182-186 Livingstone Road and 313-319 Marrickville Road, Marrickville.

Development Consent DA201600434 was approved on 18 August 2017. The full description of the approved development is as follows:

*“Alterations and adaptive reuse of the 2 former Old Nurses’ Quarters’ building to include 4 new apartments, the adaptive reuse of the former Main Ward Block to accommodate a new ‘community hub’ incorporating a public library and pavilion, the provision of a 255sqm leased area in the northern end of the former Main Ward to be retained by the Council and leased for a future commercial use, a café and children’s play area within the Community Hub area, construction of 3 new residential flat buildings with 9 affordable and 212 private dwellings comprising Building A1: 84 apartments within a new 10 storey building fronting Livingstone Road and the Community Hub to the south, Building A2: 82 apartments within a new 11 storey building fronting Livingstone Road and adjoining Building A1, Building B: 55 apartments within a new 9 storey building fronting Lilydale Street.*

*The application also includes the construction of 2 separate basements for the Community Hub and residential component incorporating car parking spaces for the Community Hub over one basement level, car parking spaces and storage for the residential buildings over 3 levels, 2 car share pods for public use, loading and servicing facilities within each basement; associated landscaping works including the construction of a new public park at the corner of Livingstone Road and Marrickville Roads, children’s playground, retention of Hospital Lane to create a north-south thoroughfare and communal and private open space within and around the proposed buildings.”*

The submitted modification application seeks to reduce the extent of public domain works required by Condition 64 and to delete Conditions 79, 121 and 124 requiring the carrying out of drainage works to Council's stormwater system, undergrounding powerlines and repair of road pavement in Lilydale Street.

The application was notified to surrounding properties and 16 submissions were received including one submission from the Group Manager Properties, Major Building Projects and Facilities, of the Inner West Council.

The applicant amended the application by seeking to further modify Condition 64 to allow for the removal and replacement of six (6) street trees located in garden beds in the Livingstone Road footpath adjacent to the site.

It is also noted that since lodgement of the s96(2) application communications have been undertaken with the applicant, including several meetings. Additional information has been submitted to Council by the applicant including a letter dated 13 December 2017 provided on a without prejudice basis, which includes suggested alternative wording for Conditions 64 and 121.

The application relates to a Council asset, being the former Marrickville Hospital Site, and accordingly the application was referred to SJB Planning NSW (town planning consultants) to carry out an independent assessment of the application.

The Sydney Central Planning Panel (SCPP) was the consent authority for Development Application 201600434 and the Sydney Eastern City Planning Panel is the consent authority for the s96(2) application.

The main issues that have arisen from the application relate to the validity of imposing the conditions of consent on the original Development Application, the extent and reasonableness of the conditions, and the implications of not having the conditions fulfilled.

The application for modification has been assessed and it is concluded that there is merit in modifying Condition 64. The deletion of Conditions 79, 121 and 124 is not supported, however it is concluded that there is merit in modifying Conditions 79, 121 and 124 so that they better relate to the extent and impacts of the development and include works to the public domain which are reasonable and are required as a result of the development.

It is recommended that Development Consent DA201600434 be modified in accordance with the recommended changes to Conditions 64, 79, 121 and 124 as set out in Section 9 of this report.

## 2. Proposal

The application is Section 96(2) Modification Application to DA 201600434.

DA201600434 was approved on 18 August 2017 and provides consent for the extensive redevelopment of the site described as follows:

*“Alterations and adaptive reuse of the 2 former Old Nurses’ Quarters’ building to include 4 new apartments, the adaptive reuse of the former Main Ward Block to accommodate a new ‘community hub’ incorporating a public library and pavilion, the provision of a 255sqm leased area in the northern end of the former Main Ward to be retained by the Council and leased for a future commercial use, a café and children’s play area within the Community Hub area, construction of 3 new residential flat buildings with 9 affordable and 212 private dwellings comprising Building A1: 84 apartments within a new 10 storey building fronting Livingstone Road and the Community Hub to the south, Building A2: 82 apartments within a new 11 storey building fronting Livingstone Road and adjoining Building A1, Building B: 55 apartments within a new 9 storey building fronting Lilydale Street.*

*The application also includes the construction of 2 separate basements for the Community Hub and residential component incorporating car parking spaces for the Community Hub over one basement level, car parking spaces and storage for the residential buildings over 3 levels, 2 car share pods for public use, loading and servicing facilities within each basement; associated landscaping works including the construction of a new public park at the corner of Livingstone Road and Marrickville Roads, children’s playground, retention of Hospital Lane to create a north-south thoroughfare and communal and private open space within and around the proposed buildings.”*

The proposed s96 Modification Application seeks to reduce the extent of public domain works required by Condition 64 and to delete Conditions 79, 121 and 124 requiring the carrying out public domain works, drainage works to Council's stormwater system, undergrounding powerlines and repair of road pavement in Lilydale Street. The application, as amended, also seeks to remove and replace street trees.



The submission made on behalf of the applicant is that the conditions in dispute cannot validly be imposed. This is because it is claimed they have no planning purpose as the works are not identified in Council's planning instruments and do not have a statutory purpose.

There are several planks to the argument however the overarching justification for the modifications are that whilst the conditioned works may indirectly benefit the development, the conditions do not relate to the development as they do not arise as a result of the development, and instead represent a general upgrade to Council's infrastructure and the public domain surrounding the site. The applicant is of the view that the conditions are unreasonable in that they do not directly relate to the development.

Further, it is claimed that the works have an estimated cost between approximately \$3 million to \$5 million, which is a substantial financial burden that was not contemplated nor raised during the assessment of the DA, and is not identified in the relevant planning documents.

Finally, it is claimed that the development itself is providing substantial public benefits through the provision of a new Community Hub, public open space, and affordable housing. The delivery of further works outside of the project scope, including general upgrades to Council's assets, are appropriately funded via the collection of s94 contributions already levied on the development and through rate revenue and grant money.

These arguments are set out in more detail in the legal opinion prepared by Allens that was submitted with the application.

The existing conditions of consent the subject of the modification application are set out below with a summary of the proposed modifications.

## 2(a) Condition 64

*"64. In order to provide satisfactory vehicular and pedestrian access, drainage, landscaping and aesthetic improvements to the public domain adjacent to the site, the following works shall be undertaken at no cost to Council:*

- (a) The public domain along all frontages of the site inclusive of footpath paving, kerb, street trees, landscaping, street furniture, street lighting etc shall be reconstructed and upgraded in accordance with the Street Tree Masterplan and the Marrickville Public Domain Design Guide;*
- (b) The construction of heavy duty vehicular crossings to all vehicular access locations and removal of all redundant vehicular crossings to the site;*
- (c) New kerb and gutter along the frontage of the site as required by Council. The kerb type (concrete or stone) shall be consistent with the majority of kerb type at this location. Council may be able to assist with the supply of stone if required. Please contact Council's Roads and Stormwater, Assets and Environment Group on 9335 2000; and*

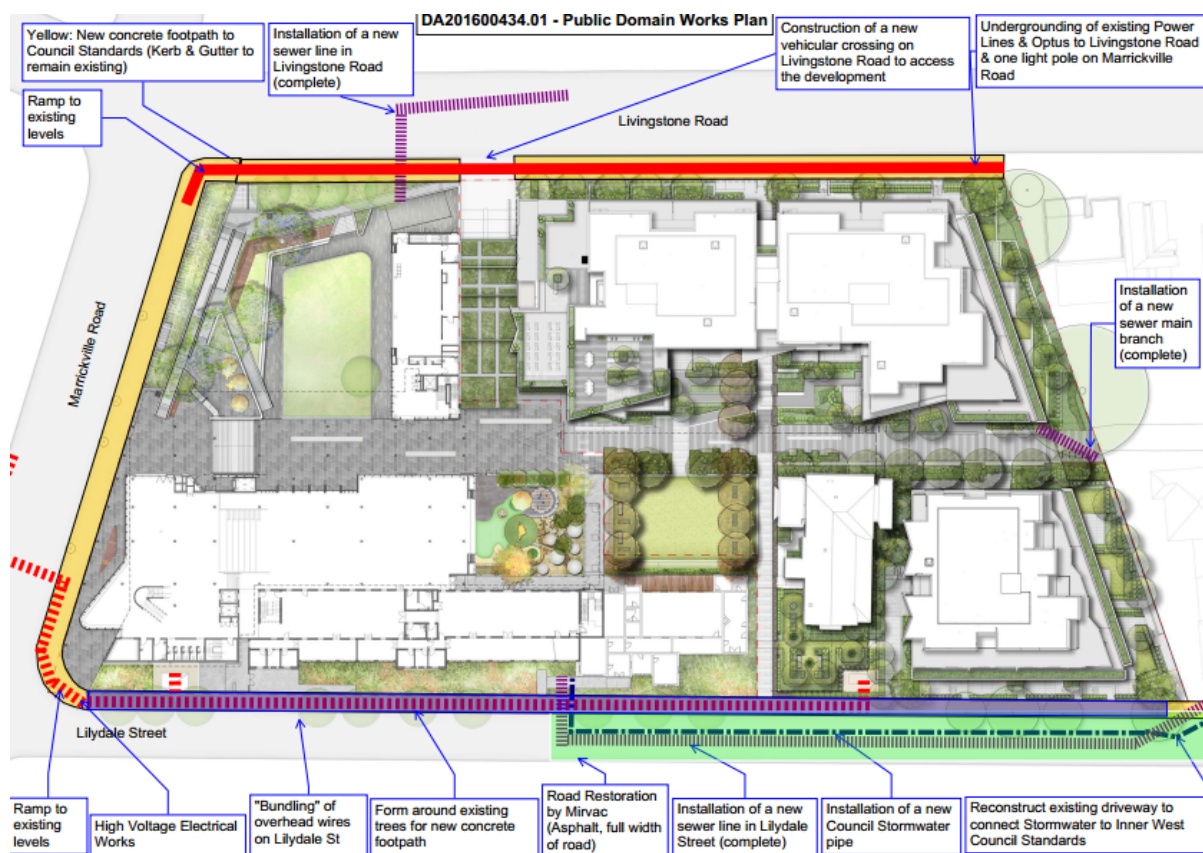
*Full detailed construction plans and specifications shall be submitted to Council for approval under Section 138 of the Roads Act 1993 before the issue of a Construction Certificate for the landscape works for the Community Hub with all works completed prior to the issue the Occupation Certificate.*

*Reason: To provide for essential improvement works to the public domain consistent with Council's desired future character for the area."*

The above condition reflects the current wording of the condition noting that it was amended in accordance s96(1A) application DA201600434.03 which was approved on 5 February 2018.

The basis of the applicant's proposal to modify Condition 64 is that the condition is unreasonable because the development does not generate the need for all of the works set out in the condition. The applicant has submitted a legal opinion which is of the view that the stated reason for implementing the condition does not warrant the provision of the works by the developer because the works are not required by the development, rather the condition has been imposed to improve the amenity of the area generally.

The applicant proposes to modify the condition to reflect the extent of works identified in a Public Domain Works Plan submitted with the s96(2) Application (refer to Figure 2)

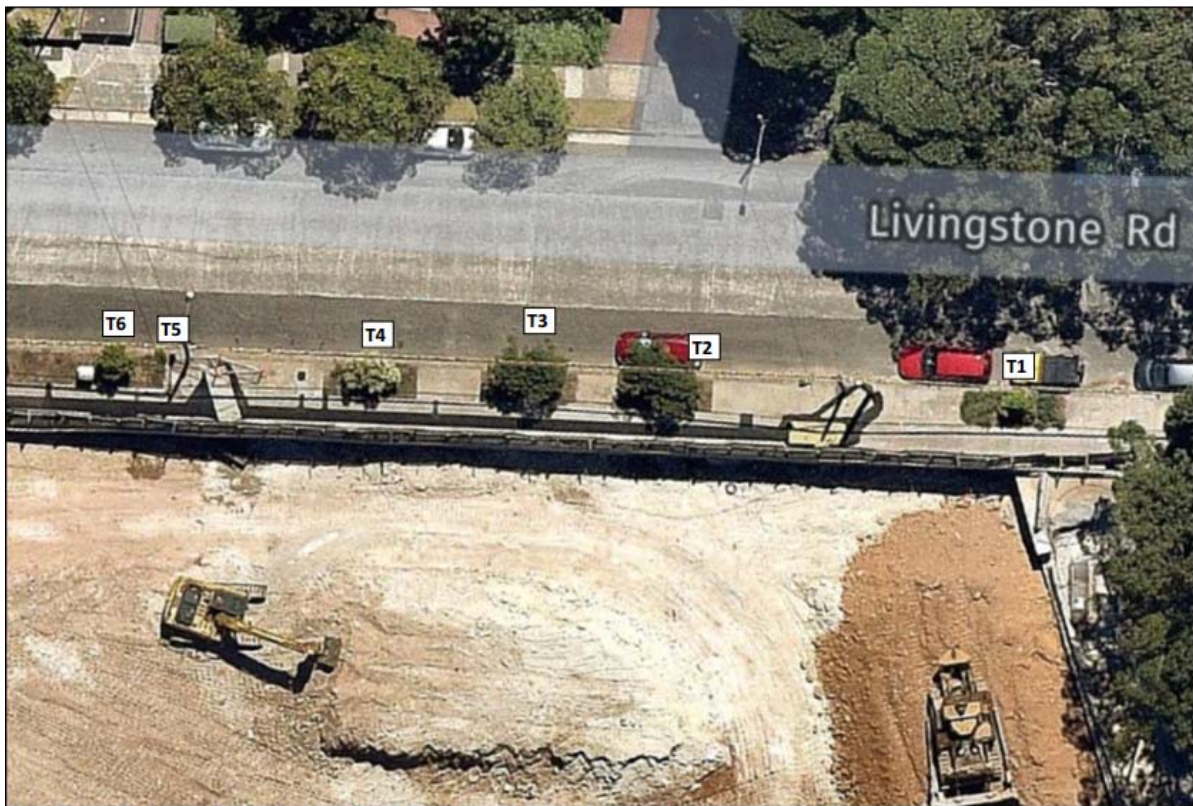


**Figure 2:** Extract of the proposed Public Domain Works Plans submitted by the applicant

It is noted that the applicant amended the current application by seeking to further modify Condition 64 to allow for the removal and replacement of six (6) street trees located in garden beds in the Livingstone Road footpath adjacent to the site. The applicant provided an arboricultural statement dated 1 February 2018 prepared by Urban Forestry Australia identifying the trees to be removed (refer to trees T1 to T6 in Figure 3).

The applicant has indicated that construction management arrangements for the approved development will necessitate the removal and replacement of the trees. Specifically, the removal of the street trees will facilitate the B Class hoarding, crane installation and the approved work zone which will be positioned in Livingstone Road and on the western edge of the site in the vicinity of the trees.

The applicant has provided an updated Preliminary Landscape Public Domain Plan which identifies five (5) replacement trees along the Livingstone Road frontage in the proximity of the existing street trees.



Nearmap™ image accessed 01/02/2018. Demonstrating the crown spread and locations of trees 1 – 6. Not to scale.

**Figure 3:** Extract from the arboricultural statement dated 1 February 2018 prepared by Urban Forestry Australia – the photo identifies the location of the subject street trees.

## 2(b) Condition 79

*“79. In order to reduce flooding at the adjacent low points in Livingstone Road and Hospital Lane, and to ensure that the risk of flooding to the site and 172 Livingstone Road is reduced the following drainage works shall be undertaken to Council’s stormwater system adjacent to the site:*

- (a) The installation of 2 additional kerb inlet pits (2.4m in length) either side the Council’s existing pit in Livingstone Road adjacent to 172 Livingstone Road;*
- (b) The 2 existing grated pits in Hospital Lane shall be replaced by 2 kerb inlet pits;*
- (c) Stormwater pit details (including structural details), layout and dimensions including connection, bedding and benching details;*
- (d) Details of road restoration and road pavement adjustment works required as a result of the stormwater works;*
- (e) Details of all adjustments to public utilities required by these works.*

*Detailed construction plans shall be submitted for the approval of Council before the issue of a Construction Certificate for landscaping works. No road or drainage works shall commence until approved plans and specifications have been issued for construction by Council under Section 138 of the Roads Act.*



Reason: *To the reduce flooding at the adjacent low points in Livingstone Road and Hospital Lane and to ensure that the risk of flooding to the site and 172 Livingstone Road is reduced.”*

The above condition reflects the current wording of the condition, noting that it was amended in accordance s96(1A) application DA201600434.03, which was approved 5 February 2018.

The applicant proposes to delete Condition 79. The applicant’s submission is that the requirements of Condition 79 relate to a general upgrade of Council’s stormwater system and the need for the upgrade is not related to the approved development. The applicant has submitted flood advice prepared by BG&E in which it is stated that the development will not adversely impact on existing flooding at the northern end of the site.

## 2(c) Condition 121

*“121. The existing overhead power cables adjacent to the site frontages must be relocated underground with appropriate street lighting and new steel poles being installed at no cost to Council and before the issue of the relevant Occupation Certificate. The street lighting shall be designed in accordance with Australian Standard AS1158-Road Lighting and the Network Standards of Ausgrid. Plans shall be submitted to and approved by Council before submission to Ausgrid for implementation.*

Reason: *To ensure appropriate lighting is provided to create a safe environment and to protect the amenity of the surrounding neighbourhood from the emission of light.”*

The applicant proposes to delete Condition 121. The application indicates that work required within the condition will not achieve, and does not relate to, Council’s objective of the condition, namely, ensuring *“appropriate lighting is provided to create a safe environment and to protect the amenity of the surrounding neighbourhood from the emission of light”*. The applicant states that the requirement to provide appropriate lighting will be provided through the redevelopment of the site and is not related to the undergrounding of powerlines.

It is noted that the applicant has provided additional information including a letter on a “Without Prejudice basis” which includes suggested alternative wording for Condition 121 as follows:

*“121. The existing overhead power cables adjacent to the Livingstone Road site frontage are to be relocated underground. The existing overhead power cables adjacent to the Lilydale Street site frontage are to be bundled together where possible.*

*The existing overhead power cable adjacent to the Marrickville Road site frontage is to be relocated underground. The single light which is serviced by this cable is to be replaced with a new light. The locations and extent are indicated on Plan titled DA201600434.01 – Public Domain Works Plan.*

*Plans shall be submitted to and approved by Council before submission to Ausgrid for implementation.”*

## 2(d) Condition 124

*“124. The existing unsatisfactory road pavement in Lilydale Street (full road width) shall be repaired before the issue of the final Occupation Certificate using a 40mm Mill and Fill treatment for the full frontage of the site in Lilydale Street. All failed section of the road pavement shall be boxed out and replaced with deep lift asphalt before the Mill and Fill treatment.*

*Reason: To provide suitable means of public road vehicle access to the development, to make the road safe for all users post the undertaking of works within the road reserve resulting from the development, and to ensure that the amenity of the area is in keeping with the standard of the development.”*

The applicant proposed to delete Condition 124. The applicant states that the requirements of the Condition are not related to the development and the Condition is unreasonable.

The applicant has also outlined that they are required to provide new asphalt following completion of the stormwater works within Lilydale Street in accordance with Development Consent DA201600430 for civil works at the site. The applicant has indicated that in accordance with that consent they have paid permanent restoration fees for Lilydale Street in the order of \$35,000.

## 3. Site Description

The subject site is known as the former Marrickville Hospital site, which is bounded by Marrickville Road, Livingstone Road, Lilydale Street, and Hospital Lane, Marrickville. It comprises the following land parcels:

- Lot 2 DP103507;
- Lot 2 DP872693; and
- Lots 36 and 37 DP3164.

It is an irregular shaped allotment comprising a site area of approximately 11,502m<sup>2</sup>. The site has street frontages of approximately:

- 172 metres along Lilydale Street;
- 120 metres along Livingstone Road; and
- 80 metres along Marrickville Road.

Access to the site is currently provided from all street frontages, together with Hospital Lane, which runs South off Stanley Street through the centre of the site.

## 4. Background and Application History

The site operated as the Marrickville Hospital from 1899 until its closure in 1991.

Marrickville Council purchased the site from NSW Department of Health in 1995.

Following this purchase, a masterplan was commissioned by Council to guide its redevelopment, prepared by GMU. The masterplan recommended that the site be used to provide substantial new community facilities, in particular, a new civic and library complex.

In October 2015, Mirvac was selected by Council as the project developer for the site including development for the purpose of substantial new community facilities (“Community Hub”).

Various applications relating to the redevelopment of the site have been determined. The works proposed within each application tend to overlap, and they are invariably interrelated. A brief overview of the DAs is provided below:

- DA201400640

This DA was approved on 20 May 2015 and provides consent for the demolition of buildings 2, 3 and 7 within the former Marrickville Hospital site and for site preparation works including removal of trees and decommissioning of utilities at the site.

- DA201400640.1

This S96 Application was approved on 21 November 2016 and amended DA201400640 by including the removal of an additional eight (8) trees and also by increasing the amount of demolition previously approved.

- DA201600430

This DA was granted deferred commencement consent on 16 December 2016 for Stage 1 civil works, including site preparation works, bulk excavation, remediation and validation works, and construction of a new stormwater line to the east of the site to connect to the existing stormwater system in Lilydale Street.

- DA201600475

This DA was granted deferred commencement consent on 16 December 2016 for Stage 2 civil works on the residential (Northern) portion of the site.

- DA201600582

This DA was approved on 23 December 2016 and provides consent for the erection of temporary project information signage on the construction hoarding along Livingstone Road, Marrickville Road and Lilydale Street frontages of the former Marrickville Hospital site.

- DA201600533

This DA was approved on 6 March 2017 and provides consent for the subdivision of the site to create two (2) parcels of land, being the Southern parcel of the site that will accommodate the community facilities and is to be retained within the ownership of Council, and the Northern parcel that will accommodate the future residential development being undertaken by Mirvac.

- DA201600434

This is the main DA for the redevelopment of the site including alterations and adaptive reuse of the two (2) former Old Nurses’ Quarters’ building to include four (4) new apartments, the adaptive reuse of the former Main Ward Block to accommodate a new ‘community hub’ incorporating a public library and pavilion, the provision of a 255m<sup>2</sup> leased area in the Northern end of the former Main Ward to be retained by the Council and leased for a future commercial use, a café and children’s play area within the Community Hub area, construction of three (3) new residential flat buildings with nine (9) affordable and 212 private dwellings. The application also includes the construction of

two (2) separate basements for the Community Hub and residential component; associated landscaping works including the construction of a new public park at the corner of Livingstone Road and Marrickville Road and a children's playground.

- DA201600434.02

On 10 October 2017 Council received a Section 96(1A) application seeking to delete Condition 71a from the determination. That application was approved on 16 October 2017.

- DA201600434.03

On 16 October 2017 Council received a Section 96(1A) application to modify Conditions relating to hot water systems, bicycle parking, car parking, waste collection, stormwater downpipes, the timing of construction drawings, minor reconfiguration of the basement level layouts and modification to address drafting errors on drawings. That application was approved on 5 February 2018.

- DA201600434.04

On 22 December 2017 Council received a further Section 96 application (DA201600434.04) seeking to modify various aspects of the approved buildings including the parapet height of Building A1 and the internal configuration, external appearance and number of dwellings related to Lilydale House. That application is under assessment.

This report is an assessment of the s96 application to modify Development Consent DA201600434 and relates specifically to four (4) conditions of consent.

The application was notified to surrounding properties and 16 submissions were received, including one submission from the Group Manager Properties, Major Building Projects and Facilities, of the Inner West Council.

## 5. Assessment

### 5(a) Section 96 of the *Environmental Planning and Assessment Act 1979*

Under Section 96 of the *Environmental Planning and Assessment (EP&A) Act 1979*, Council, when considering a request to modify a Determination, must:

- “(a) *Be satisfied that the development as modified is substantially the same development as the development for which consent was originally granted;*
- (b) Consult with any relevant authority or approval body;*
- (c) Notify the application in accordance with the regulations;*
- (d) Consider any submissions made; and*
- (e) Take into consideration the matters referred to in Section 79C as are of relevance to the development the subject of the application.”*

The application under assessment has been lodged pursuant to s96(2) of the *EP&A Act*. In this case it is considered that the development, as proposed to be modified, is substantially the same development as the development for which consent was originally granted. The proposal does not alter the categorisation, character, scale or density of the development as approved. No State authorities or bodies were required to be consulted.



The application was notified in accordance with the regulations and Council's policy. The submissions that were received have been considered under section 5(h) of this report.

### 5(b) Section 79C of the *Environmental Planning and Assessment Act 1979*

The following is a summary of the assessment of the application in accordance with Section 79C of the *EP&A Act 1979*.

In this case, the determination of the modification application in part, rests with an assessment of the conditions measured against Section 80A of the *EP&A Act* and of the recognised principles for considering the reasonableness of conditions of consent – generally referred to as the 'Newbury principles'.

The relevant provisions of Section 80A are set out as follows:

#### *"80A Imposition of Conditions*

##### *(1) Conditions—generally*

*A condition of development consent may be imposed if:*

- (a) it relates to any matter referred to in section 79C (1) of relevance to the development the subject of the consent, or*
- (b) it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 10 in relation to the land to which the development application relates, or*
- (c) it requires the modification or cessation of development (including the removal of buildings and works used in connection with that development) carried out on land (whether or not being land to which the development application relates), or*
- (d) it limits the period during which development may be carried out in accordance with the consent so granted, or*
- (e) it requires the removal of buildings and works (or any part of them) at the expiration of the period referred to in paragraph (d), or*
- (f) it requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in section 79C (1) applicable to the development the subject of the consent, or*
- (g) it modifies details of the development the subject of the development application, or*
- (h) it is authorised to be imposed under section 80 (3) or (5), subsections (5)–(9) of this section or section 94, 94A, 94EF or 94F.*

##### *(2) Ancillary aspects of development*

*A consent may be granted subject to a condition that a specified aspect of the development that is ancillary to the core purpose of the development is to be carried out to the satisfaction, determined in accordance with the regulations, of the consent authority or a person specified by the consent authority."*

The Newbury principles can be summarised as follows:

- The condition must be for a planning purpose;

- The condition must fairly and reasonably relate to the development the subject of the development application; and
- The condition must not be so unreasonable that no reasonable planning authority could have imposed it.

The applicant has argued in submissions that the conditions the subject of this modification application do not pass the above tests. This is discussed in the following paragraphs.

#### Do the conditions have a planning purpose?

It is considered that each of the conditions imposed has a planning purpose. It is also noted that for a condition which requires works the 'planning purpose' for that condition does not need only to include works that are explicitly identified within Council's planning instruments and or a development control plan.

A planning purpose for a condition requiring works can relate to other aspects of a development, such as seeking to minimise or address likely impacts associated with the development, including impacts at adjacent sites and or within the public domain. The required works may also relate to land other than the development site.

#### Condition 64

The purpose of Condition 64 is to ensure that the public domain immediately adjacent to the site is provided at a level that is safe and suitable to accommodate the increased intensity of use resulting from the development. This condition also seeks to respond to the removal and replacement of street trees, as well as controls within the DCP which require the public domain adjacent to the site to be commensurate with the new public and community infrastructure being constructed as part of the development.

On assessment of the wording of the current condition and the information provided within the application, it is acknowledged that the wording of Condition 64 could be modified to more appropriately and accurately reflect the scope of works required to the public domain to provide safe access to the site and to better achieve the planning purpose of the condition. In this regard, recommended changes to the wording of Condition 64 are set out in Section 9 of this report.

The changes to the wording also seek to identify the street trees approved to be removed, acknowledge and identify the required replacement street trees to Livingstone Road and Marrickville Road and identify the extent of kerb and gutter to be retained and replaced. The rewording also provides greater detail to the extent of works and treatments for the footpaths in order that they are finished in a manner that is commensurate with the civic development of the site and Council's Public Domain Design Guide.

#### Condition 79

The planning purpose of Condition 79 is to improve the safety (particularly with respect to pedestrian access) for future users of the development by reducing flooding at the adjacent low points in Livingstone Road and Hospital Lane. The condition seeks to ensure that the risk of flooding adjacent to the site is to a suitable level of flood protection, appropriate to the intensification of use resulting from the development.

On assessment of the current application it is acknowledged that the wording of Condition 79 could be modified to more appropriately reflect the extent of works required to provide a suitable level of flood protection commensurate with the intensification resulting from the

development. In this regard, recommended changes to the wording of the condition are set out in Section 9 of this report.

#### Condition 121

The planning purpose for Condition 121 is to ensure appropriate lighting is provided to create a safe environment for future users and residents of the site and to protect the amenity of the development and the surrounding neighbourhood from adverse light spill.

The condition seeks to enhance the heritage streetscape and to minimise conflict with vegetation. The condition also responds to the development controls within the applicable DCP which call for undergrounding and or bundling of electrical cables and the installation of appropriate street lighting.

On assessment of the current application it is acknowledged that the wording of Condition 121 could be modified to better reflect the extent of works required to achieve the planning purpose.

In particular, it is considered that the requirement of the current condition which involves the undergrounding of electrical cables in Lilydale Street for the entire Lilydale Street frontage and the subsequent reconnection of power to each of the dwellings opposite the site in Lilydale Street, is beyond the planning purpose of the condition. As such it is recommended that the wording of the condition be modified to require the aerial bundling of the electrical cables in Lilydale Street, as opposed to the undergrounding of those cables.

The recommended changes to the wording of the condition are set out in Section 9 of this report.

#### Condition 124

The planning purpose of Condition 124 is to ensure that the road pavement in Lilydale Street is suitable to provide safe vehicle access to the development, particularly having regard to the increased use resulting from the approved civic facilities and the high density residential accommodation (both of which include basement carparking).

Additionally, a planning purpose of the condition is to ensure that the damage incurred to the road surface as a result of the delivery of civil works related to the development is rectified. In this regard, it is noted that the development necessitates the installation of various utility services within the Lilydale Street road reserve.

On assessment of the current application it is acknowledged that the wording of Condition 124 could better reflect the extent of the works required to achieve the planning purpose.

Specifically, it is proposed to modify the wording of the condition to require the re-surfacing (at full width) of the Lilydale Street road reserve for the length of the road that is subject to the incursions for the delivery of the utility services.

The recommended changes to the wording of the condition are set out in Section 9 of this report.

#### Do the Conditions relate fairly and reasonably to the development?

It is considered that each of the conditions as modified by the recommendations of this report relate fairly and reasonably to the development.

### Are the Conditions reasonable?

If a condition is for a planning purpose and it relates to the development, it is more likely than not to be a reasonable condition. However, if a condition requires works and/or contributions above what is necessary to achieve the appropriate planning purpose (including satisfying any development controls and statutory requirements), then it is likely to be unreasonable. The example cited by the applicant within the submission supporting the application describes this situation as follows:

*"In Botany v Saab, Justice Basten provided the example of a Condition to contribute to the cost of upgrading a dirt road to a sealed road where the development would increase the use of the road. His Honour held that, while in those circumstances it would be reasonable to require a contribution to seal the road, it would not be reasonable or appropriate to include the expense of upgrading the road from two lanes to four. His Honour also referred to a situation where, even if a road needed upgrading, if the expense to do so as required by a council is disproportionate to the costs of a reasonable level of upgrading, the relevant Condition may be at risk of invalidity on the ground of it being imposed for an improper purpose."*

In the circumstances of the subject conditions, having passed the first two tests, conditions 64, 79, 121 and 124 (as modified in by the recommendations of this report), can be assessed against the final test.

The conditions are considered to not require anything above or beyond what is necessary to achieve the planning purposes and 'finalise' the development by providing appropriate frontage works around the site, this work being an upgrade to match the new development of the site itself which includes significant new public facilities and high density residential accommodation.

The work is not disproportionate to the scale of the development, including the cost of the works which are a product of providing what is necessary, nor the purpose of the development which in large part is to provide a new civic centre, to become a focal point of the community.

An appropriate standard of frontage works is to be expected. The works remain a relatively small component of the overall construction budget of the project and of the capitalised value of the project. Section 80A of the EP&A Act clearly allows such conditions, and conditions of this type are routinely imposed upon developments of similar types and scale and also of development of significantly lesser scale.

## 5(c) Environmental Planning Instruments

### Marrickville Local Environment Plan (MLEP) 2011

The site is zoned B2 Local Centre and R4 High Density Residential under MLEP 2011.

In accordance with Clause 4.3 of the MLEP 2011 and the Height of Buildings Map the R4 zoned portion of the site has a maximum height limit of 29m, while the B2 zoned portion of the site has a maximum building height of 32m.



As approved, the Community Hub, Building B, and Building C, are all less than the applicable height of building development standard. As approved, Building A2 and the northern end of Building A1, are 32.8m in height, and exceed the applicable height of building development standards of 32m and 29m in those locations.

The proposed s96 application does not seek to modify the height of any of the approved buildings. As such there is no change at all to the compliant and non-compliant elements of the approved development.

Clause 4.4 of the MLEP 2011 and the FSR Map set a maximum FSR of 2.05:1 for the site.

The approved development has a FSR of 2.031:1, which is less than the applicable development standard. The proposed modifications do not alter the approved FSR and the development as modified continues to comply with the development standard.

The site is located within the Civic Precinct Conservation Area and is identified in the MLEP 2011 as accommodating a Heritage Item (I101) of local significance. The proposed modifications do not involve any works to the heritage items at the site, although Condition 121 in part will improve the appreciation of the heritage civic building on the south east corner of the site and the heritage streetscape.

The proposed modification includes the removal and replacement of street trees in Livingstone Road. The removal of the street trees is development permissible with consent under the Marrickville Local Environmental Plan 2011.

The modification application does not require any further re-assessment of the proposed development against the provisions of the Marrickville Local Environmental Plan 2011.

## 5(d) Development Control Plans

The key provisions of the Marrickville Development Control Plan 2011 (DCP 2011) that are relevant to development at the site are as follows:

- Part 1 (Generic Provisions)
- Part 8.2.32 (Civic Precinct Heritage Conservation Area - HCA 30)
- Part 9.40.5.8 (Former Marrickville Hospital site – Masterplan Area MA 40.8)

The proposed modifications do not involve any changes to the approved building heights, building setbacks or the building footprints and therefore the majority of the DCP built form controls are not relevant to the proposal.

It is noted that the applicant has detailed that several of the conditions imposed as part of the development consent involve works to the public domain which are not resultant from the proposed development and do not relate to any LEP or DCP requirement and therefore there is no nexus for the imposition of those conditions in accordance with the provisions of section 80A of the *EP&A Act*.

This matter is addressed within the discussion under Section 5(b) of this report where it is noted that for a condition which requires works the 'planning purpose' for that condition may also relate to other aspects of a development, such as seeking to minimise or address likely

impacts associated with the development, including impacts at adjacent sites and or within the public domain. The required works may also relate to land other than the development site.

Notwithstanding the above, the following provisions of the Marrickville DCP are pertinent to the planning purpose of the conditions as recommended in Section 9 of this report:

- General Provisions, Tree Management, 2.20
  - 2.20.7 Compensatory Planting. Control C7 states the following:  
*“Council will require replacement tree/s to be planted as a Condition of any approval to remove a tree to effectively maintain the urban forest canopy across the LGA.”*
  - 2.20.8 General Controls. Control C10 states the following:  
*“All development proposals must be designed to maintain or improve the urban forest values of the site by minimising the impact on tree/s and planting compensatory tree/s for tree/s that are proposed for removal. This requirement applies to street trees and trees on private and adjoining land.”*
  - 2.20.8 General Controls. Control C18 states the following:  
*“The provisions of Section 2.20.7 ‘Compensatory Planting’ apply to all trees planted within the LGA.”*

Comment: These controls directly relate to the provision of replacement and compensatory street trees as required in Condition 64 as recommended section 9 of this report.

- 2.20.8 General Controls. Control C15 states the following:  
*“Development must allow for any existing overhead electrical lines to be converted into aerial bundled cabling (ABC) or redirected underground to reduce the impact upon surrounding trees.”*

Comment: This control relates to the requirement for the undergrounding of electrical lines and aerial bundling of electrical lines as required in Condition 121 as recommended section 9 of this report.

- General Provisions, 2.22 Flood Management
  - 2.22.5 Controls. Control C7 and C14 which related to residential and non-residential development both state the following:  
*“Flood-free access must be provided where practicable.”*

Comment: This control relates to the requirement for works to kerb inlets and pits in Livingstone Road and Hospital Lane as required in Condition 79 as recommended section 9 of this report.

- Strategic Context, 9.40 Marrickville Town Centre
  - 9.40.5.8 Former Marrickville Hospital site – Masterplan Area (MA 40.8). Control “C81 Hospital Lane” states the following:

*“Hospital Lane:*

- i. Must have its role as the historic axis through the site recognised as part of future development.*
  - ii. Should be prioritised as a pedestrian and cycle path with the possibility of acting as a shared-way in the mixed use precinct and as an access road in the residential precinct.”*
- 9.40.5.8 Former Marrickville Hospital site – Masterplan Area (MA 40.8). Control “C87 Open space” states the following:

*“Open Space:*

- i. A high quality public space .....*
- ii. ....*
- iii. The Hospital Lane axis must be revitalised as a public space and circulation spine for the length of the site connecting to Marrickville Road.”*

Comment: The approved development will result in a significant increase in the intensity of use of the site by pedestrians and vehicles. The above controls require Hospital Lane to be a key public access point to the new development and consequently will significantly increase the intensification of use by pedestrians of Hospital Lane.

The current level of flood protection (or level of service) in Livingstone Road (adjacent to the north west corner of the site) and Hospital Lane is currently only a 1 in 1 year storm event. Specifically, flooding at these low points can be expected at least once a year.

The Flood Risk Assessment prepared by BG&E and submitted with the application indicates that flooding of 300mm is expected during a 1 in 1 year storm at both the low points in Livingstone Road and Hospital Lane.

The proposed works to kerb inlets and pits in Livingstone Road and Hospital Lane as required in Condition 79 as recommended section 9 of this report are reasonable in that they will increase the flood protection for pedestrians to the site at key access points.

- 9.40.5.8 Former Marrickville Hospital site – Masterplan Area (MA 40.8). Control “C85 Streetscape Design” states the following:

*“Streetscape design must:*

- i. Reinforce the existing landscape character of Lilydale Street.*
- ii. Provide additional street trees to Livingstone Road in character with the existing street trees and Council’s Street Tree Master Plan.*
- iii. Extend the public domain improvements and landscape treatment along the Marrickville Road main street up to the intersection with Livingstone Road, including paving, street trees, lighting, signage and flag poles.*

- iv. *For Marrickville Road, reflect the character of the town centre and civic importance of this site and precinct, with an attractive street frontage, wide pedestrian footpath, street lighting and street trees.”*

Comment: This control directly relates to the requirement for street trees in Marrickville Road and Livingstone Road and public domain works to the frontages of the site as required in Condition 64 as recommended in section 9 of this report.

## 5(e) Any Planning Agreements

The development is not subject to a planning agreement or draft planning agreement under the provisions of section 93F of the *EP&A Act*.

## 5(f) The Likely Impacts

The development of the former Marrickville Hospital site was approved with a range of conditions to ensure the development would have minimal impact in the locality and result in positive public benefits. The development relates to a key site which is in Council's ownership and which is located within the Marrickville Town Centre.

A site specific masterplan was developed for the site which outlined the strategic planning aims for the site and built form controls. The masterplan was subsequently incorporated into the Marrickville DCP. A stated Objective of section 9.40.5.8 *Former Marrickville Hospital site – Masterplan Area (MA 40.8)* of the DCP for the redevelopment of the site is to “create a distinctive, environmentally sensitive and inviting new civic heart for Marrickville”.

Consequently, the civic and public domain outcomes, and the likely impacts to the public domain, are prime considerations for the redevelopment of the site and relevant considerations in accordance with the provisions of Section 79C(1) of the *EP&A Act*.

A series of conditions were imposed to deal with potential off site impacts that could arise from the development, including Conditions 64, 79, 121 and 124.

The conditions identified are aimed at ensuring that the works are undertaken in a safe manner and that impacts associated with the significant intensification of the use of the site resulting from the development will be minimised.

The conditions identified are also aimed at ensuring that the public domain immediately adjacent to the site is upgraded in a manner that responds to and achieves the stated planning objectives for the site (including its position as a “new civic heart for Marrickville”) and to ensure a level of service is achieved that is appropriate to, and that will adequately accommodate, the significant increase in the intensity of use resulting from the development.

One of the stated planning objectives for the redevelopment of the site in a manner commensurate with the site specific DCP provisions, is the site's elevation to a prime public space and facility within the suburb of Marrickville and thereby the LGA. The treatment and arrangement of the public domain (such as footpaths, kerbs, light poles and street trees) in the immediate vicinity of the new public facility is intrinsically linked to the development and the attainment of the stated planning objectives for the redevelopment of the site. The



conditions of consent requiring the upgrade of those public domain areas (as set out in Conditions 64, 79, 121 and 124) is considered reasonable and appropriate in this context.

It is considered that the deletion of Conditions 79, 121 and 124 as proposed would result in a poorer development outcome and would be likely to increase adverse safety impacts for future users and residents of the site and result in significantly poorer access arrangements.

### 5(g) The suitability of the site for the development

The site was considered suitable for the development as confirmed by the approval of DA201600434.

### 5(h) Any submissions

The application was notified in accordance with the Marrickville Development Control Plan for a period of 14 days to surrounding properties. A total of 16 submissions were received including a submission from the Group Manager Properties, Major Building Projects and Facilities, of the Inner West Council.

A summary of the issues raised within the submissions and comments with respect to those issues is provided in the following Table.

Issue Raised	Comment
General objection to the further erosion of the original scheme and subsequent loss of public benefit if conditions are not adhered to.	The public domain works required within the recommended modified conditions are considered reasonable, relate to the scope of the development, the planning objectives for the site, as well the intensification of use resulting from the development. The development as modified will continue to result in a significant public benefit.
Cost shifting – the claim of financial viability being undermined is not substantiated in any way. Cost shifting should not happen.	<p>It is open to the applicant to express a view on the cost of satisfying a given condition of consent, however the assessment of the application has been undertaken having regard to the relevant legislation and applicable planning controls.</p> <p>The deletion of conditions as proposed by the applicant is not supported. The conditions as recommended to be modified in this report, are considered reasonable and appropriate to the scale of the development.</p>
The applicant agreed to conditions – they can't renege now.	It is open to the applicant to seek to modify a development consent in accordance with the provisions of Section 96 of the EP&A Act.
All of the requirements imposed are valid to ensure the community isn't disadvantaged.	The assessment of the application has been undertaken having regard to the

	<p>relevant legislation and applicable planning controls. The assessment (amongst other matters) includes consideration of likely impacts upon adjacent properties, the broader community and the public interest.</p> <p>The conditions as recommended to be modified are aimed at ensuring public safety and appropriate and reasonable works to the public domain resulting from the intensification of use from the development and to ensure adverse impacts are minimised.</p>
The applicant has already changed the rules from the original scheme.	The s96 application does not involve any changes to the built form of the approved buildings (i.e. the library, or Buildings A1, A2, B and Lilydale House).
The applicant has already benefited from amendments to the original scheme at the public expense. All of the requirements imposed are valid to ensure the community isn't disadvantaged.	Refer to above comments.
<p>The Street Tree Master Plan and Marrickville Public Domain Design Guide are current documents included within the Marrickville DCP 2011. It should be anticipated by any application that assessment will be made against that DCP and as a result conditions will be imposed requiring compliance with the specific provisions. On this basis compliance with clause 64 must be non-negotiable.</p> <p>There is substantial independent evidence that all water from flood events in excess of 1:20 year flows are directed down through the site via Hospital Lane. The water flow is designed to discharge into the stormwater pit immediately North of the site in Hospital Lane. It is therefore considered necessary to augment the existing pit to cope with the designed flows through both the Library and Apartment sites.</p> <p>The undergrounding of power infrastructure is not an unusual requirement for significant developments in existing urban areas that are undergoing change. It is submitted that the applicant's intent was at all times to remove the overhead power lines as is indicated in the Statement of Environmental Effects document submitted with the</p>	<p>The recommended modifications to Condition 64 maintain the requirement for works to the public domain, and require those works to be consistent with the Street Tree Master Plan and Marrickville Public Domain Design Guide.</p> <p>The recommended modifications to Condition 79 maintain the requirement for works to the stormwater infrastructure north of the site.</p> <p>The recommended modifications to Condition 121 maintain the requirement for the undergrounding of power infrastructure in Livingstone Road and Marrickville Road and requires aerial bundling of power cables in Lilydale Street. The condition is considered reasonable and appropriate to the scale of the development, the impacts</p>

<p>Development Application in August 2016.</p> <p>It is submitted that with a substantial amount of services excavation occurring within Lilydale Street past the site resurfacing of the road for the length of the site is a reasonable condition given the standard of the adjoining development.</p>	<p>of the development and the planning purpose of the condition.</p> <p>The recommended modifications to Condition 124 better reflect the extent of the works required to achieve the planning purpose of the condition.</p> <p>Specifically, it is proposed to modify the wording of the condition to require the re-surfacing (at full width) of the Lilydale Street road reserve for the length of the road that is subject to the incursions for the delivery of the utility services.</p>
<p>Condition 64 – Mirvac has already started work on this DA and needs to make good the entire works area. The gutter, footpaths vehicle crossings need to be part of the development. If this is a private development these restrictions would be imposed.</p> <p>Condition 79 – Stormwater drainage is part of the development and needs to be included and any flooding to adjoining properties due to the development needs to be mitigated.</p> <p>Condition 121 – the installation of underground power cables has already been started.</p> <p>Condition 124 – Re-sheeting Lilydale Road. There are major works being undertaken on Lilydale Road – High Voltage underground cables, storm water connections, sewer connections – and the street surface should be re-sheeted upon completion of the project to ensure repair of works undertaken.</p>	<p>The recommended modified conditions of consent (per section 9 of this report) maintain the requirement for works to kerbs, footpaths and vehicle crossings as well as the requirement for street trees.</p> <p>The recommended modified conditions of consent (per section 9 of this report) maintains the requirement for works to address flooding at adjacent sites.</p> <p>The recommended modified conditions of consent (per section 9 of this report) maintain the requirement for the undergrounding of power cables in Livingstone Road, Marrickville Road and requires aerial bundling of power cables in Lilydale Street.</p> <p>The recommended modified conditions of consent (per section 9 of this report) modifies the requirement for re-sheeting in Lilydale Street to reflect the extent of the road which will be disturbed as a result of the development.</p>

### 5(i) The Public Interest

The public interest is best served by the consistent application of the requirements of the relevant Environmental Planning Instruments, and by Council ensuring that any adverse effects on the surrounding area and the environment are appropriately managed. The motivation behind the original conditions of consent were to ensure that the proposed development would deliver significant public benefit.

The proposed modification to delete and/or modify certain conditions as proposed by the applicant is therefore not in the public interest. Notwithstanding, the recommendations of this report which are based upon the assessment of additional information and review by Council's Engineer and Urban Forest Manager, include the modification of the subject conditions so that they better relate to the extent of the development and include works to the public domain which are reasonable and are required as a result of the development and the applicable planning controls.

## 6 Referrals

### 6(a) Internal

The application was referred to the following internal sections/officers:

- Council's Engineer
- Urban Forest Manager

#### Development Engineer

The conditions of consent subject of the application primarily relate to engineering conditions and the application was referred to Council's Development Engineer for comment.

A meeting was held with applicant and the applicant's engineers on 9 January 2018. Council's Development Engineer attended that meeting.

A summary of the Council's Development Engineer advice is provided below:

#### Condition 64

The applicant's wording for the proposed modification to 64 is not supported.

It is noted that there are many pedestrian entries at all frontages to the development and it is incumbent upon the development to ensure that the Council footpath levels are met and that safe access is provided to the development including the new public areas and residential components.

The updated Public Domain Works Plan submitted by Mirvac initially did not acknowledge the existence of trees and landscaping on Livingstone Road or indicate that they will be maintained or replaced in accordance with the Street Tree Masterplan.

Additionally, and although existing trees are shown on Marrickville Road, there is no indication that the trees are to be maintained or replaced.

Other aspects required in Condition 64 are standard requirements.

It is noted that in accordance with the approval of the previous s96(1A) (i.e. DA201600434.03, approved on 5 February 2018) the requirement for Alignment Levels was removed from Condition 64 and imposed under a new condition, Condition 64A, and the

production of the public domain works plan has been set back to before the issue of a Construction Certificate for Landscape works to assist with the timely issue of a Construction Certificate for the Community Hub.

The following modified condition is recommended:

*“64. In order to provide satisfactory vehicular and pedestrian access, landscaping and aesthetic improvements to the public domain adjacent to the site, the following works shall be undertaken at no cost to Council:*

- (a) The public domain along all frontages of the site inclusive of footpath, kerb, street trees, landscaping etc shall be reconstructed and upgraded in accordance with the Street Tree Masterplan and the Marrickville Public Domain Design Guide;*
- (b) The footpath in Marrickville Road must be constructed in accordance with the Village Palette (P1-A1). The Village Palette footpath treatment shall extend for 6m into Lilydale Street and to the vehicular crossing in Livingstone Road. The remainder of the footpaths in Livingstone Road and in Lilydale Street shall be constructed as concrete footpaths in accordance with the Local Palette footpath treatment and all existing street trees and landscaping unless otherwise approved by this consent shall be maintained.*
- (c) The construction of heavy duty vehicular crossings to all vehicular access locations and removal of all redundant vehicular crossings to the site;*
- (d) New 150mm high sandstone kerb on Marrickville Road and for missing or damaged section in Livingstone Road and Lilydale Street. The existing sandstone kerb and gutter in Livingstone Road and Lilydale Street where it is in good Condition shall be maintained and protected;*

*Full detailed construction plans and specifications shall be submitted to Council for approval under Section 138 of the Roads Act 1993 before the issue of a Construction Certificate for the Landscape works for the Community Hub with all works completed prior to the issue the Occupation Certificate.*

*Reason: To provide for essential improvement works to the public domain consistent with Council's desired future character for the area.”*

#### Condition 79

The proposal to delete this condition is not supported.

Following the meeting with applicant and BG&E on 9 of January 2018, the applicant provided additional information including an updated TUFLOW model and survey which indicate that there will be little change to flood levels adjacent to the site post development. Despite this information the works proposed by Condition 79 are justified for the following reasons:

- The proposed development of the site into a residential development and Community Hub has increased the intensification of the site and therefore the number of people that are now subject to a flood risk;

- It is reasonable that new residents and visitors to the site, including the users of the Community Hub, may expect an appropriate level of flood protection given the intensification of the site;
- The current level of flood protection (or level of service) in Livingstone Road and Hospital Lane (which provides access through the site via a public ROW) is currently only a 1 in 1 year storm event i.e. flooding at these low points can be expected at least once a year. This is unacceptable for this type and intensity of development.
- Figure 2-2 from the Flood Risk Assessment by BG&E indicates that flooding of 300mm is expected during a 1 in 1 year storm at both the low points in Livingstone Road and Hospital Lane.

For the above reasons the proposal to upgrade the pits at the low points in Livingstone Road and Hospital Lane are justified so as to increase the level of service provided to the site in terms of flood protection.

Notwithstanding the above, the condition has been reviewed and it is recommended that it be amended as follows:

- “79. In order to reduce the incidence of flooding at the adjacent low points in Livingstone Road and Hospital Lane the following drainage works shall be undertaken to Council’s stormwater system adjacent to the site:*
- (a) The kerb inlet (lintel) at Council’s existing pit in Livingstone Road (adjacent to 172 Livingstone Road) shall be increased to 3m (internal dimension);*
  - (b) The 2 existing grated pits in Hospital Lane shall be adjusted to include kerb inlets (lintels, minimum 1.2m internal);*
  - (c) Detailed construction plans shall be submitted for the approval of Council before the issue of a Construction Certificate for the Landscape works. No road or drainage works shall commence until approved plans and specifications have been issued for construction by Council under Section 138 of the Roads Act.*

*Reason: To the reduce flooding at the adjacent low points in Livingstone Road and Hospital Lane and to ensure that the risk of flooding is to a suitable level of service.”*

#### Condition 121

On review of the additional information provided with the application, the following modified condition is recommended:

- “121. The existing street lighting and overhead cabling adjacent to the site shall be upgraded as follows at no cost to Council:*
- i. The existing overhead power cables adjacent to the Livingstone Road frontage must be relocated underground;*
  - ii. The existing overhead power cables adjacent to the Lilydale Street site frontage shall be converted to Aerial Bundled Cabling; and*



- iii. *The existing overhead power cables adjacent to the Marrickville Road site frontage are to be relocated underground and the poles shall be replaced by new steel standard poles to match the existing steel light poles in the Marrickville Road shopping centre.*

*The street lighting shall be designed in accordance with Australian Standard AS1158-Road Lighting and the Network Standards of Ausgrid. Plans shall be submitted to and approved by Council before submission to Ausgrid for implementation.*

Reason: *To ensure appropriate lighting is provided to create a safe environment and to protect the amenity of the surrounding neighbourhood from the emission of light."*

#### Condition 124

On review of the additional information provided with the application, it is recommended that the condition be amended as follows to reflect the agreed works:

*"124. The road pavement in Lilydale Street (full road width) damaged by the installation of utility services related to the development (or otherwise resulting from the development works) shall be restored before the issue of the final Occupation Certificate using a 40mm Mill and Fill treatment. All failed section of the road pavement shall be boxed out and replaced with deep lift asphalt before the Mill and Fill treatment is undertaken.*

Reason: *To provide suitable means of public road vehicle access to the development, to make the road safe for all users post the undertaking of works within the road reserve resulting from the development, and to ensure that the amenity of the area is in keeping with the standard of the development."*

It is noted that with regard to the refund of restoration fees already paid, this will be assessed on its merits once an "Application for Refund" form has been submitted and the restoration works have been complete.

#### Urban Forest Manager

A summary of the advice provided by the Urban Forest Manager are provided below.

- Given the impact of this development on the public domain it is considered necessary and appropriate that additional street tree planting and tree replacement be undertaken as part of this proposal.
- In lieu of the previous proposal to transplant 3 mature date palms to the Marrickville Road frontage, a minimum of 4 x new street trees shall be provided on Marrickville Road. The tree species shall be *Liriodendron tulipifera* at a minimum container size of 400L and planted in accordance with detail 5 of the Marrickville Street Tree Master Plan. A consistent spacing of seven (7) metres shall be applied.
- The proposed removal of street trees on Livingstone Road required to facilitate works is not opposed. The suggested 5 replacement trees provided in the submitted Preliminary Landscape Public Domain Plan requires the addition of 2 more trees of the same

species (*Lophostemon confertus*) to the south (towards Marrickville Road) of the existing proposed trees. A consistent spacing of ten (10) metres shall be applied. The container size shall be a minimum of 400L and planted in accordance with detail 9 of the Marrickville Street Tree Master Plan.

- Planting detail and specification shall be submitted to Council for approval and will need to utilise technologies such as structural soil and vault systems. Replacing trees in dense urban centres is becoming increasingly difficult due to confined space and especially soil volumes. If the replacement trees are to be viable replacements they need to be planted in conditions that will allow them to thrive. Council shall be consulted with during the detailed design of the tree planting documentation.

## 6(b) External

The application was not referred to any external approval bodies.

## 7. Section 94 Contributions

Amendments to the required Section 94 contributions do not form part of this modification application.

## 8. Conclusion

The modification application seeks to amend and or delete four conditions of consent that have been imposed for specific reasons relating to the development, the impacts of the development and or the planning controls applicable to the development.

The modifications as proposed are not supported, however upon assessment of the application, the additional information provided and the advice of Council's Engineer and Urban Forest Manager, it is acknowledged that the conditions as originally imposed can be modified to better relate to the development and the applicable development controls and objectives relevant to the site. And to address the impacts associated with the development (including those external to the site).

The application is considered suitable for approval subject to the imposition of the conditions as recommended in Section 9 of this report.

## 9. Recommendation

The provisions of Section 96 and the heads of consideration under Section 79C of the *Environmental Planning and Assessment Act, 1979*, as are of relevance to the application, have been taken into consideration in the assessment of this application. The application is considered suitable for approval subject to the imposition of appropriate Conditions.

It is recommended that:

**A. THAT** the application under Section 96 of the Environmental Planning and Assessment Act 1979 to modify Modified Determination No. 201600434 dated 5 February 2018 be **APPROVED** and a modified Determination be issued with the consent being modified in the following manner:

(i) That Condition 64 be amended to read:

*“64. In order to provide satisfactory vehicular and pedestrian access, landscaping and improvements to the public domain adjacent to the site, the following works shall be undertaken at no cost to Council:*

- (a) The public domain along all frontages of the site inclusive of footpath, kerb, street trees, landscaping etc shall be reconstructed and upgraded in accordance with the Street Tree Masterplan and the Marrickville Public Domain Design Guide.*
- (b) A Street Tree Planting/Landscape Plan outlining street tree planting details must be submitted to the Council’s Urban Forest Manager’s satisfaction before the issue of a Construction Certificate for the Landscape works for the Community Hub, with all works completed prior to the issue of the Occupation Certificate. The Street Tree Planting/Landscape Plan shall include the following:*
  - i) 4 x new trees to be provided on Marrickville Road to replace the existing trees on this frontage. The tree species shall be Liriodendron tulipifera at a minimum container size of 400L and planted in accordance with Detail 5 of the Marrickville Street Tree Master Plan. A consistent spacing of seven (7) metres shall be applied. The first of the four street trees shall be setback a minimum of 7m from Livingstone Road kerb line.*
  - ii) 7 x new trees to be provided on Livingstone Road to replace the existing 6 street trees in Livingstone Road that are approved for removal as part of this determination. The tree species shall be Lophostemon confertus at a minimum container size of 400L and planted in accordance with Detail 9 of the Marrickville Street Tree Master Plan. A consistent spacing of ten (10) metres shall be applied.*
  - iii) Dimensions for tree pits and details of a vault style structural soil to allow for a total soil volume of at least 20m<sup>3</sup> for each tree to demonstrate that adequate soil volume is be provided for all trees.*
- (c) The new street trees shall be planted by a qualified horticulturist or arborist, with a minimum qualification of Certificate 3 and the planting stock shall comply with Australian Standard Tree stock for landscape use AS 2303—2015.*
- (d) The new street trees shall be maintained in a healthy and vigorous condition during an establishment period of 12 months. If any tree dies or is removed during the establishment period it shall be replaced with the same species tree in accordance with these conditions at the expense of the applicant.*

- (e) *Upon completion of planting the street trees, the applicant shall arrange an inspection by Council's Public Tree Coordinator (call 8595 2432) to approve the installation. If trees are unsatisfactory and not in accordance with these conditions they will be rejected and replaced at the expense of the applicant.*
- (f) *The footpath in Marrickville Road must be constructed in accordance with the Village Palette (P1-A1). The Village Palette footpath treatment shall extend for 6m into Lilydale Street and to the vehicular crossing in Livingstone Road. The remainder of the footpaths in Livingstone Road and in Lilydale Street shall be constructed as concrete footpaths in accordance with the Local Palette footpath treatment and all landscaping unless otherwise approved by this consent shall be maintained.*
- (g) *The construction of heavy duty vehicular crossings to all vehicular access locations and removal of all redundant vehicular crossings to the site.*
- (h) *New 150mm high sandstone kerb on Marrickville Road and for missing or damaged section in Livingstone Road and Lilydale Street. The existing sandstone kerb and gutter in Livingstone Road and Lilydale Street where it is in good Condition shall be maintained and protected. An inspection by Council's Development Engineer, to identify the existing sandstone kerb and gutter that is in good condition, is to be undertaken prior to finalising the construction plans.*

*Full detailed construction plans and specifications shall be submitted to Council for approval under Section 138 of the Roads Act 1993 before the issue of a Construction Certificate for the Landscape works for the Community Hub with all works completed prior to the issue the Occupation Certificate.*

*Reason:* *To ensure the public domain is upgraded to a level that is safe and suitable to accommodate the increased intensity of use resulting from the development, to ensure adequate replacement street trees are provided and to respond to and be consistent with the public and community infrastructure works being undertaken at the site."*

- (ii) That Condition 79 be amended to read:

*"79 In order to reduce the incidence of flooding at the adjacent low points in Livingstone Road and Hospital Lane the following drainage works shall be undertaken to Council's stormwater system adjacent to the site:*

- (a) *The kerb inlet (lintel) at Council's existing pit in Livingstone Road (adjacent to 172 Livingstone Road) shall be increased to 3m (internal dimension);*
- (b) *The 2 existing grated pits in Hospital Lane shall be adjusted to include kerb inlets (lintels, minimum 1.2m internal);*
- (c) *Detailed construction plans shall be submitted for the approval of Council before the issue of a Construction Certificate for the Landscape works. No road or drainage works shall commence until approved plans and*

*specifications have been issued for construction by Council under Section 138 of the Roads Act.*

Reason: *To the reduce flooding at the adjacent low points in Livingstone Road and Hospital Lane and to ensure that the risk of flooding is to a suitable level of flood protection appropriate to the intensification of use resulting from the development.*

(iii) That Condition 121 be amended to read:

*“121 The existing street lighting and overhead cabling adjacent to the site shall be upgraded as follows at no cost to Council:*

- i. The existing overhead power cables adjacent to the Livingstone Road frontage must be relocated underground;*
- ii. The existing overhead power cables adjacent to the Lilydale Street site frontage shall be converted to Aerial Bundled Cabling; and*
- iii. The existing overhead power cables adjacent to the Marrickville Road site frontage are to be relocated underground and the light poles shall be replaced by new steel standard poles to match the existing steel light poles in the Marrickville Road shopping centre.*

*The street lighting shall be designed in accordance with Australian Standard AS1158-Road Lighting and the Network Standards of Ausgrid. Plans shall be submitted to and approved by Council before submission to Ausgrid for implementation.*

Reason: *To ensure appropriate lighting is provided to create a safe environment, to protect the amenity of the surrounding neighbourhood and the development from adverse light spill, to enhance the heritage streetscape and to minimise conflict with vegetation.”*

(iv) That Condition 124 be amended to read:

*“124 The road pavement in Lilydale Street (full road width) damaged by the installation of utility services related to the development (or otherwise resulting from the development works) shall be restored before the issue of the final Occupation Certificate using a 40mm Mill and Fill treatment. All failed section of the road pavement shall be boxed out and replaced with deep lift asphalt before the Mill and Fill treatment is undertaken.*

Reason: *To provide suitable means of public road vehicle access to the development, to make the road safe for all users post the undertaking of works within the road reserve resulting from the development, and to ensure that the amenity of the area is in keeping with the standard of the development.”*