



ACN: 146 035 707 ABN: 54 146 035 707
Suite 7, Level 7, 100 Walker St,
North Sydney NSW 2060
P 02 9929 6974
enquiries@willowtreeplanning.com.au

The General Manager
Lake Macquarie City Council
Box 1906
Hunter Region Mail Centre

Attention: BRIAN GIBSON - SENIOR DEVELOPMENT PLANNER

**SECTION 4.55 (1) MODIFICATION APPLICATION
DEVELOPMENT CONSENT 731/2016
46 & 56 WILSONS ROAD MOUNT HUTTON**

Dear Brian,

Reference is made to the subject development consent that was approved on 11 April 2017 by the Hunter and Central Coast Joint Regional Planning Panel (JRPP) for the:

Demolition of Existing Coles and Construction of New Coles and Specialty Shops

Following review of the conditions of consent, it is apparent that condition 26 was imposed erroneously in respect of the construction of the bus stop on Wilsons Road. Review of the Lake Macquarie City Council Development Contributions Plan Charlestown Contributions Catchment – 2015 confirms that the works in Condition 26 for improvement of the bus shelter are by definition a work-in-kind under the Contributions Plan.

Accordingly, it is unreasonable for the Council to require bus shelter works to be constructed in Condition 26 and then to also impose a condition requiring a monetary contribution for the construction of those same works.

Attached at **Appendix 1** is the legal advice obtained from Minter Ellison Lawyers which confirms the above and the cost schedule (**Appendix 2**) which details the monetary value of the works associated with condition 26.

Modification is therefore sought to condition 51 of Development Consent DA731/2016 to reduce the monetary contributions by \$35,000 that are payable to Council.

The amended condition is proposed to read as follows (amendments in red):

51. Contribution to Provision of Public Amenities and Services (Sec. 94)

- (a) In accordance with the provisions of Section 94 of the Environmental Planning and Assessment Act 1979 and the Lake Macquarie City Council Development Contributions Plan Charlestown Contributions Catchment - 2015, the monetary contributions in the attached Contributions Schedule must be paid to Council for the purposes identified in that Schedule.*

Stage 1 for the supermarket component and a construction certificate would be issued for only this stage of the development once levies are paid in full for stage 1 being:

Total floor space = 8389 square metres with a credit of 7540 square metres (supermarket only) which is a total of \$531,038.17 (valid until 14th February 2018).

Stage 2 for the remaining retail outlets and a construction certificate would be issued for only this stage of the development once levies are paid in full for stage 2 being:

*Total floor space = 13983 square metres with a credit of 13089 square metres (retail only) which is a total of \$**232,781.90** (valid until 14th February 2018).*

.....

.....

Pursuant to Section 4.55 of the *Environmental Planning & Assessment Act 1979* (EP&A Act), the condition is proposed to be modified. For reference, section 96(1) of the EP&A Act states:

*(1) **Modifications involving minor error, misdescription or miscalculation** A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify a development consent granted by it to correct a minor error, misdescription or miscalculation. Subsections (1A), (2), (3), (5) and (6), section 96AB and Division 8 do not apply to such a modification.*

Having regard to the above, the subject Modification Application qualifies for consideration pursuant to Section 4.55 (1).

Council's prompt assessment of this application is appreciated before the stage 2 contributions are paid prior to issue of Construction Certificate 2 in late March 2018.

Should you require further information, please contact the undersigned

Yours Faithfully,



Andrew Cowan
Director
Willowtree Planning Pty Ltd
ACN 146 035 707

ENCLOSED:

APPENDIX 1 – LEGAL ADVICE

APPENDIX 2 – COST OF WORKS SCHEDULE

MinterEllison

16 February 2018

BY EMAIL: acowan@willowtreeplanning.com.au

Andrew Cowan
Director
Willowtree Planning Pty Limited
Suite 7, Level 7, 100 Walker Street
North Sydney NSW 2060

Dear Andrew

Advice with respect to DA731/2016 section 94 contributions for Mount Hutton Shopping Centre

1. Introduction

1.1 You have asked us to provide advice as to:

- (a) Whether the development contributions figure of \$786,516.78, imposed as a condition of Development Consent for DA731/2016 (**Development Consent**), has been calculated lawfully and in accordance with the Council's development contributions plan; and
- (b) Whether an offset for public domain works required as a condition of the Development Consent is available, either by negotiation with the Council or on appeal to the Court.

2. Background

2.1 The development consent for DA731/2016 is described as:

Retail Premises – Shopping Centre Redevelopment - Demolition of Existing Coles and Construction of New Coles and Specialty Shop

2.2 Condition 8 of the Development Consent provides:

8. Pedestrian Access

Scrubby Creek

The pedestrian crossing/walkway between the Scrubby Creek boundary and the shopping centre car park shall be raised above the finished surface level of the car park and vehicle accessway to clearly delineate the pedestrian path in accordance with the requirements of AS2890.

Wilsons Road

The direct pedestrian entry from Wilsons Road to the new shopping centre entry shall be a minimum width of 4m. Any parking adjacent to the walkway shall be parallel to the walkway and should be short term parking (drop-off/pick up zone or similar), with landscaping and street furniture to be provided along the walkway area. Details in this regard are to be submitted to and approved by Council prior to the issue of any construction certificate for the pedestrian entry/Stage 3b works.

Level 40 Governor Macquarie Tower 1 Farrer Place Sydney
GPO Box 521 Sydney NSW 2001 Australia DX 117 Sydney
T +61 2 9921 8888 F +61 2 9921 8123 minterellison.com



Shared Path/Cycleway

Prior to the issue of a Construction Certificate for the Specialty Shop buildings, a plan is to be submitted to and approved by Council identifying the location for a Shared Path/Cycleway between the west boundary of 72 Wilsons Road to the Scrubby Creek pedestrian entry into the Shopping Centre in accordance with the requirements of the Mount Hutton Town Centre Area Plan. The width of the Shared Path/Cycleway shall be in accordance with Council's Cycleway/Share Path requirements and constructed prior to the issue of any Occupation Certificate for the Stage 3a Specialty Shops.

Temporary Access during construction

The Construction Management Plan required by this consent shall include provision/maintenance of a temporary 4m wide pedestrian walkway to the entry of the shopping centre during construction works.

- 2.3 Condition 26 of the Development Consent provides, relevantly:

Bus Shelter and Footpath Widening

The existing bus shelter along Wilsons Road shall be upgraded to be consistent with the proposed development, in accordance with Council's Standard Drawing EGSD-801. Additionally, the footpath between the Wilsons Road bus shelter and vehicle entry/exit shall be widened from the kerb to the property boundary.

- 2.4 Condition 51 of the Development Consent provides, relevantly:

51. Contribution to Provision of Public Amenities and Services (Sec. 94)

- (a) *In accordance with the provisions of Section 94 of the Environmental Planning and Assessment Act 1979 and the Lake Macquarie City Council Development Contributions Plan Charlestown Contributions Catchment - 2015, the monetary contributions in the attached Contributions Schedule must be paid to Council for the purposes identified in that Schedule.*

...

- (d) *The contributions shall be paid to Council as follows:*
- Development Applications involving subdivision – prior to the release of the Subdivision Certificate;*
 - Development Applications involving building work – prior to the release of the first Construction Certificate;*
 - Development Applications involving both subdivision and building work – prior to the release of the Subdivision Certificate or first Construction Certificate, whichever occurs first;*
 - Development Applications where no Construction Certificate or Subdivision Certificate is required – prior to the commencement of any construction work or prior to any occupation, whichever occurs first;*
 - Complying Development Certificates - prior to any work authorised by the application or certificate commencing.*

It is the professional responsibility of the Principle [sic] Certifying Authority to ensure that the monetary contributions have been paid to Council in accordance with the above provisions.

...

- 2.5 The Contributions Fee Schedule of the Development Consent provides:

DESCRIPTION	FEE AMOUNT
CMH-Roads-Capital-R005/R006/R007-CPI	\$778,562.76
CMH-Roads-Land-R005/R006/R007-LVI	\$6,085.47

<i>CMH-Public Transport Facilities-CPI</i>	<i>\$695.13</i>
<i>CMH-Plan Preparation & Administration-CPI</i>	<i>\$2,173.40</i>
TOTAL	\$787,516.76

2.6 You have indicated that the estimated cost for the works in Conditions 8 and 26 are as follows:

- (a) shared pathway and footbridge: \$143,600
- (b) bus shelter: \$35,000
- (c) widened footpath to Wilsons Road: \$53,000

2.7 Council has, by email dated 13 November 2017, expressed the view that the applicable Contributions Plan 'does not identify the shared cycle path' and that 'Council would not be likely to support the offset against section 94 contributions'.

3. Summary of advice

3.1 Having regard to the conditions of the Development Consent and the content Contributions Plan, we are of the view that the issues raised by your request for advice are as follows:

- (a) Are Conditions 8 and 26 lawfully imposed?
- (b) Do Conditions 8 and 26 provide a material public benefit and can they be characterised as a work-in-kind under the Contributions Plan?
- (c) Would Condition 51 imposing a requirement for monetary contributions be upheld by a Court on a merit appeal, having regard to the characterisation of Conditions 8 and 26 in subparagraph (b) above?
- (d) Is an offset available for the works required by Condition 8 or Condition 26?

3.2 We are of the view that:

- (a) Conditions 8 and 26 are lawfully imposed and in all likelihood would be upheld on a merit appeal in the Land and Environment Court.
- (b) The works in Condition 8 provide a material public benefit but are not a work-in-kind under the Contributions Plan.
- (c) The works in Condition 26 for improvement of the bus shelters are by definition a work-in-kind under the Contributions Plan.
- (d) It is unreasonable for the Council to require bus shelter works to be constructed in Condition 26 and then to also impose a condition requiring a monetary contribution for the construction of those same works.
- (e) A Court is likely to uphold a merit appeal against the imposition of Condition 51 on the basis of that it is in part "double dipping".
- (f) The decision to grant an offset is solely at the discretion of the council, but may by negotiation be granted, having regard to the prospects of succeeding in having Condition 51 altered on appeal.
- (g) Condition 8 provides a material public benefit but a decision on whether to grant an offset for the works carried out in accordance with Condition 8 is at Council's discretion.
- (h) On the basis of the information we have been provided, we are not able to ascertain whether the pedestrian access and footpath widening form an essential part of the Violet Town/Wilsons Road intersection upgrade. If they do, an application for an offset by negotiation may be granted for the same reasons relating to double-dipping provided above at (d) and in more detail at paragraph 6.25.

4. Legislative provisions

Environmental Planning and Assessment Act 1979

- 4.1 Development contributions are regulated by Division 6 of the *Environmental Planning and Assessment Act 1979 (EPA Act)*. Section 94(1) provides that development contributions can be required by a consent authority granting development consent if the consent authority is satisfied that the development will or is likely to require the provision of or increase the demand for public amenities and public services within the area, being the local government area.
- 4.2 Section 94(2) provides that a condition may be imposed only to require reasonable contribution for the provision, extension or augmentation of the public amenities concerned.
- 4.3 Section 94B further limits the power to impose development contributions, providing that a condition under s 94 or 94A may be imposed only if it is of a kind allowed by and is determined in accordance with a contributions plan.
- 4.4 Section 94B(3) provides that a condition under section 94 may be disallowed or amended by the Court on appeal because it is unreasonable in the particular circumstances of that case, even if it was determined in accordance with the relevant contributions plan.

Development Contributions - Practice Note July 2005

- 4.5 Section 94EA(3) of the EPA Act provides that the regulations may make provision for or with respect to the preparation and approval of contributions plans, including the format, structure and subject-matter of plans.
- 4.6 Section 26(1) of the *Environmental Planning and Assessment Regulation 2000* states that a contributions plan must be prepared having regard to any relevant practice notes adopted for the time being by the Secretary.
- 4.7 The current *Development Contributions - Practice Note July 2005* indicates that a material public benefit could be offered as a means of partial or full settlement of a condition of consent requiring a s 94 contribution.
- 4.8 The Practice Note indicates a material public benefit could be:
 - *a work in kind which is undertaking a work that is specifically listed in the works schedule of a development contributions plan for which a monetary contribution would normally be sought.*
 - *the provision of certain public amenities or services that may or may not exist in the area such as a community facility, that is not included in a development contributions plan.*

Lake Macquarie City Council Development Contributions Plan Charlestown Contributions Catchment - 2015

- 4.9 Lake Macquarie City Council's *Development Contributions Plan Charlestown Contributions Catchment – 2015 (Contributions Plan)* purpose and objectives are set out at paragraph 1.3 and states:

This Plan has been prepared to satisfy the requirements of the Act, which enables Council or an accredited certifier to levy contributions from development for the provision of community infrastructure that is required to meet the demands of that development. Contributions may be in the form of a monetary contribution, dedication of land to Council or the provision of a material public benefit, which may include work commonly referred to as a 'work-in-kind'.

In order to levy contributions under the Act, the consent authority must be satisfied that the proposed development will or is likely to require the provision of or increase the demand for the community infrastructure for which the levy is being required as detailed in the provisions of this Plan.

4.10 The Contributions Plan states in summary on page iv:

The works to be provided by funds generated by this Plan are summarised in Table E4. A specific code has been applied to the individual projects referred to in the full Schedule of Works at Appendix B.

4.11 The Works Schedule at Appendix B includes, relevantly:

Facility Ref	Description	Cost attributable to New Development
R-005	Intersection Upgrade – South Street/Merrigum Street	\$2,472,000
R-006	Intersection Upgrade – Warners Bay Road/Dunkley Pde/Bayview Rd	\$499,446
R-007	Intersection Upgrade – Violet Town Road/Wilsons Road	\$2,700,000
PT-001	Upgrade signposted bus stops to bus shelters (7 shelters)	\$252,000

4.12 Paragraph 1.4 provides that the plan applies to land within the local government area of Lake Macquarie City Council known as the *Charlestown contributions catchment*.

4.13 Paragraph 1.5 provides that the development forms to which the Contributions Plan applies as follows:

- *residential development which would result in the creation of additional private lots/dwellings or in the case of non-private residential development, additional dwellings, beds or people.*
- *non-residential development including development resulting in a change of use, where the new use results in additional demands for community infrastructure; and*
- *non-residential development in the Charlestown Town Centre which is unable to provide the full on-site car parking requirement under Council's DCP due to site constraints or because it is desirable to deter vehicles from interfering with pedestrian movement and public spaces.*

4.14 The types of community infrastructure addressed by the Contributions Plan are described at paragraph 2.2.1 and include, relevantly:

Under this Plan, the consent authority will require development contributions for the following 'community infrastructure':

- *Local roads, including:*
 - *Road and footpath infrastructure; and*
 - *Traffic management facilities;*
- *Local public transport facilities including bus stop improvements*
- *...*

4.15 The relevant development form for DA731/2016 under the Contributions Plan is non-residential development where the new use results in additional demands for community infrastructure. Conditions 8 and 26 of the Development Consent also relate to the types of community infrastructure considered by the Contributions Plan, being the improvement of pedestrian access and footpath infrastructure (including cycleways), and improvement of public transport bus shelters, respectively.

4.16 We turn to the sections of the Contributions Plan that address in detail the applicable types of community infrastructure.

Community infrastructure

4.17 Section 4 deals with community infrastructure and contributions and provides as follows:

4.1 Local Roads

4.1.1 Introduction

The projected development within the Contributions Catchment will generate additional demand for use of local roads by vehicular, bicycle and pedestrian traffic and this demand will require augmentation of existing infrastructure due to the additional pressures on that infrastructure. This section outlines the nature of the existing local road environment and the rationale for the augmentation of this infrastructure.

...

4.1.3 Nexus to development

Future development within the Contributions Catchment will be responsible for 5,620 new private dwellings and 940 rooms/beds in non-private accommodation creating 12,620 new residents. In addition, future development will generate additional 42,450m² of retail premises floor space, 48,750m² of business premises and office premises floor space and 57,760m² of industry, warehouse or distribution centre, storage premises and depot floor space creating 4,710 new workers.

...

Public transport facilities

4.2.1 Introduction

The projected development within the Contributions Catchment will generate additional demand for public transport and this demand will require upgrading of public transport facilities such as bus laybys and shelters and linkages to bus stops and rail nodes.

4.2.2 Existing Facilities

The Contributions Catchment is currently serviced by bus public transport services with no direct rail services. There are however, bus services which link the Catchment to rail services at Cardiff, Kotara and Adamstown. Bus services comprise:

- *Routes numbers 100, 111, 310, 313, 317, 320, 322, 339, 349, 350;*
- *School bus services; and*
- *Numerous bus stops and bus laybys.*

4.2.3 Nexus to development

Future development will be responsible for 12,620 new residents and 4,710 additional workers within the Contributions Catchment.

Based on Journey to Work data and the current population's travel choices, this could equate to 300 additional residents and 120 additional non-resident workers using public transport facilities within the Catchment for their typical daily journeys.

This additional usage of public transport facilities will generate a demand for greater capacity and a higher level of amenity and accessibility at and leading to bus stop environments.

Whilst public transport rolling stock is provided by the State Government and/or through public-private partnerships, public transport services are supported by associated infrastructure such as bus laybys, bus shelters and pedestrian and bicycle connections to bus and rail nodes. The responsibility for provision of this infrastructure typically falls to Council as it is often located on Council-owned land.

- 4.18 The community infrastructure addressed by the Contributions Plan includes, relevantly, the provision of improved pedestrian and bicycle connections to public transport and the need for improved bus shelters, are also provided for in Conditions 8 and 26 of the Development Consent.

Formula

- 4.19 The formula for calculating development contributions are also set out in the Contributions Plan and the index for local road works and public transport facilities are as follows:

Local road works

$$\text{Contribution rate} = \frac{\text{Total Apportioned Cost of Facilities within Local Roads Sub-Catchment}}{\text{per PVT} \quad \text{Total Attributable PVTs within Local Roads Sub-Catchment}}$$

Local public transport facilities

$$\text{Contribution rate} = \frac{\text{Total Cost x Apportionment}}{\text{per new worker} \quad \text{Total Additional Workers}}$$

$$= \frac{\$252,000 \times 24.1\%}{4,710}$$

$$= \frac{\$60,732}{4,710}$$

$$= \$12.89 \text{ per worker.}$$

- 4.20 The Council provided, by email dated 9 December 2016, a breakdown of how the contributions were calculated, as follows:

Section 94 development Contributions - DA/731/2016 - Wilsons Road Mount Hutton
The figures below are subject to indexation and are valid until 14/2/2017

	GLFA			Number of Peak Vehicle Trips per 100m ² of GLFA (Table E3)	Number of Workers per 100m ² of GLFA (Table E3)	Total Number of Workers	Total Number of Peak Vehicle Trips	Indexed Contribution per Trip (Table E2 - 2. Mount Hutton/Windale)	Indexed Contribution per Worker (Table E1)	Total Contribution
	Existing	Proposed	Net Increase							
Supermarket	7,540	8,389	849	14.7	2.0	17.0	124.8	\$4,165.88		\$780,614.70
Retail	13,089	13,983	894	7.0	4.0	35.8	62.6			
Total for Local Roads	20,629	22,372	1,743			52.7	187			
Public Transportation									\$13.12	\$692.02
Plan Preparation and Administration									\$41.03	\$2,163.66
Grand Total										\$783,470.38

- 4.21 These calculations appear to be made in accordance with the formula.

Offsets

- 4.22 Offsets are described at paragraph 4.2.3 and allow for works-in-kind or material public benefit (MPB) to be accepted in lieu of the applicant satisfying its obligations under the Contributions Plan. The paragraph provides, relevantly:

Council is under no obligation to accept works-in-kind or material public benefit offers and in considering any such offer, will assess the benefits to the Council and the Community and give due consideration to relevant matters including the following:

- the extent to which the works/MPB satisfies the purpose for which the contribution was sought;*
- the works-in-kind being facilities which are already included in the Plan;*
- the extent to which the MPB satisfies a community need or may reduce the demand for levied items;*
- the impending need to construct the works for which the contributions are to be offset;*
- the provision of the works/MPB will not prejudice the timing, the manner or the orderly provision of public facilities included in the works program or the financial integrity of Council's Plan;*
- an assessment of the shortfall or credit in monetary contributions as a result of the proposal;*
- the availability of supplementary funding to make up the shortfall in contributions;*
- locational and other factors that may affect usability;*
- impact of recurrent operational and maintenance costs; and*

- (j) *the provision of the works/MPB must not result in piecemeal delivery of infrastructure or likely to result in the need to reconstruct the works due to future nearby developments (i.e. normally the works will need to relate to a whole street block or a defined precinct).*

In accepting material public benefits other than a work-in kind, Council must be satisfied that the offer provides a substantial benefit to the community not envisaged by the Plan and that this benefit warrants Council accepting responsibility in fulfilling the intent of the Plan notwithstanding a reduction in expected cash contributions.

A 'work in-kind' relates to the undertaking of a specific or equivalent work specified in the Plan, and is therefore more readily capable, in comparison to other material public benefits of meeting the above criteria. However, Council may not accept an off-set to the cash otherwise required to be paid which exceeds the quantum of cash payable under the facility category that relates to the work-in kind.

4.23 'Work-in-kind' is defined in the Contributions Plan as follows:

'work-in-kind' means the carrying out of work which is identified in the costed works schedule which form part of this Plan in return for a reduction in the amount of monetary contributions (but not a reduction in the total quantum of contributions) required for the same category of contribution.

4.24 'Material public benefit' is also defined:

'material public benefit' means a facility or work which is offered by a developer as a finished entity either in return for a reduction in the amount of monetary contributions required for the same category of contribution or as an additional or partial additional benefit under a Planning Agreement.

5. Case law

5.1 The following general principles apply to the imposition of contributions as a condition of a development consent.

5.2 In *Lake Macquarie City Council v Hammersmith Management Pty Limited* [2003] NSWCA 313, the Court of Appeal identified that a condition can only be validly imposed under s 94 of the EPA Act if:

- (a)
 - (i) the development will or is likely to require the provision of the public amenities or public services in question, or
 - (ii) the particular development will or is likely to increase the demand for the public amenities in question, and
- (b) the condition satisfies the three questions tests under *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 2 WLR 379; [1980] All ER 731 (***Newbury***).

5.3 The Newbury test requires that a condition must satisfy the following three limbs:

- (i) it must have a planning purpose and not any ulterior one;
- (ii) it must relate to the permitted development to which it is annexed; and
- (iii) it must be fairly and reasonably related to the development such that it could not be so unreasonable that no reasonable planning authority could have imposed it.

5.4 Section 94 does not require proof of a direct connection between the development and the amenities provided (*Toadolla Co Pty Ltd v Dumaresq Shire Council* (1992) 78 LGERA 261) but there does need to be a connection between the development and the amenity to satisfy increase in demand. The third limb in *Newbury* that a condition fairly and reasonably related to the development would satisfy the connection: *Russo v Burwood Municipal Council* [1996] NSWCA 459.

- 5.5 Section 94 is the exclusive power for a consent authority to impose a consent condition requiring monetary contribution to be paid. However, that does not preclude a consent authority imposing, as a condition of a development consent, that a developer undertakes work off-site at its own expense, even if that work might or would benefit the public. Such a condition is expressly authorised by section 80A(1)(f) of the EPA Act, but must be related to the development and not be unreasonable (*Fairfield City Council v N&S Olivieri Pty Ltd* [2003] NSWCA 41).
- 5.6 Section 94 obliges the developer to make a contribution to the cost of identified community facilities and services for the net demand generated by the development. The developer is entitled to a credit for any demand already existing or not generated by the development for specific services and amenities (*Meriton Apartments Pty Ltd v Council of the City of Sydney* [2011] NSWCA 17)(**Meriton**).
- 5.7 Section 94B empowers the Court on an appeal to reduce the amount of a contribution that is unreasonable in the particular circumstances of the case: *Rose Consulting Group v Baulkham Hills Shire Council* [2003] NSWCA 266.

6. Advice

- 6.1 Having regard to the conditions of the Development Consent and the content Contributions Plan, we are of the view that the issues raised by your request for advice are as follows:
- (a) Are Conditions 8 and 26 lawfully imposed?
 - (b) Do Conditions 8 and 26 provide a material public benefit and can they be characterised as a work-in-kind under the Contributions Plan?
 - (c) Would Condition 51 imposing a requirement for monetary contributions be upheld by a Court on a merit appeal, having regard to the characterisation of Conditions 8 and 26 in subparagraph (b) above?
 - (d) Is an offset available for the works required by Condition 8 or Condition 26?

Are Conditions 8 and 26 lawfully imposed?

- 6.2 Council has imposed Conditions 8 and 26 for improvements to pedestrian and cycleway access to public transport facilities, and bus shelter improvements, respectively. We have assumed, based on the information available to us, that these works relate to the development in the Development Consent by filling gaps in the infrastructure required by the development.
- 6.3 As held in *Fairfield v Olivieri*, section 80A(1)(f) of the EPA Act expressly authorises a condition imposing the carrying out of works off-site. We are of the view that the works required by Conditions 8 and 26 have a planning purpose, and are fair and reasonably related to the development and meet the *Newbury* test. As such, we are of the view that Conditions 8 and 26 are lawfully imposed and in all likelihood would be upheld on a merit appeal in the Land and Environment Court.
- 6.4 The question then becomes whether Conditions 8 and 26 require works that are caught by the Contributions Plan such that the monetary contributions required by Condition 51 are unreasonable.

Characterisation of Conditions 8 and 26 under the Contributions Plan

- 6.5 To validly impose a development contribution, section 94 requires a consent authority, in this case Lake Macquarie City Council, to be satisfied that the development will or is likely to require the provisions of or increase the demand for public amenities and public services within the area. Such a condition may be imposed only to require a reasonable contribution: (section 94(2)).
- 6.6 A development contribution may only be required if it is allowed by and in accordance with a contributions plan (Section 94B). The Contributions Plan identifies the works for which the Condition 51 development contributions are sought in the Works Schedule at Appendix B. The nexus to new development is further described in Section 4, stating that projected development in the catchment area will generate 'additional demand for use of local roads by vehicular, bicycle and pedestrian traffic', the nexus being an 'additional 42,450m² of retail premises floor space'.

The additional demand on public transport *'will require upgrading of public transport facilities such as bus laybys and shelters and linkages to bus stops and rail nodes'*.

- 6.7 Council has imposed Conditions 8 and 26 for improvements to pedestrian and cycleway access to public transport facilities, and bus shelter improvements, respectively. We are of the view that Conditions 8 and 26 are the same type of amenities for which the Contributions Plan imposes a levy, being those amenities discussed in the paragraph 6.6 immediately above.

Characterising the works in Condition 8

- 6.8 The works with respect to the cycleway and the pedestrian access are improvements to and construction of community infrastructure identified in the Contributions Plan. In section 4.1.1 – 4.1.3, it states that an increase in retail premises floorspace will *'generate additional demand for use of local roads by vehicular, bicycle and pedestrian traffic'*. In section 4.3.3, the Contributions Plan states *'public transport services are supported by associated infrastructure such as bus laybys, bus shelters and pedestrian and bicycle connections to bus and rail nodes'*.
- 6.9 Having regard to these sections in the Contributions Plan, we are of the view that Condition 8 provides a number of works that are directly related to the types of community infrastructure identified in the Contributions Plan and as such unquestionably provide a material public benefit.
- 6.10 The Works Schedule in Appendix B provides a full schedule of works for which amounts are levied. It will be necessary to determine with certainty whether the pedestrian access forms part of the proposed Violet Town/Wilsons Road intersection upgrade and whether the bus shelter is one of the seven bus shelters slated for upgrade in accordance with the relevant works identified above in paragraph 4.11.
- 6.11 On the face of the documents we have reviewed, it is not clear whether the direct pedestrian entry from Wilsons Road to the shopping centre forms part of the intersection upgrade for Violet Town Road/Wilsons Road. If it is, then it will fall within the scope of the Works Schedule in Appendix B.
- 6.12 For abundant caution, this advice proceeds on the basis that the works identified in Condition 8, being the pedestrian access and cycleway provide a material public benefit but do not fall within the scope of the Works Schedule in Appendix B and therefore, by definition, cannot be considered a 'work-in-kind'. Please advise us if you have further information that suggests the pedestrian access entry from Wilsons Road to the new shopping centre would form part of the intersection upgrade, as this may affect the conclusions in our advice.

Characterising the works in Condition 26

- 6.13 A review of the locations of the public transport upgrades in Appendix C indicates that the bus stop on Wilsons Road is one of the seven bus shelters included in the Works Schedule. On the basis of the information we have been provided, we are of the view that the improvements to the bus shelter required by Condition 26 fall within the scope of the Works Schedule and can be considered a work-in-kind. Please advise if this is not understanding is not correct.
- 6.14 This advice proceeds on the basis that the bus stop shelter improvements in Condition 26 is one of the seven identified within the Works Schedule in Appendix B.
- 6.15 Having determined that the works in Condition 26 are of a type that falls within the scope of the Works Schedule, and that the works in Condition 8 do not fall within the scope of the Works Schedule, we turn now to the question as to whether the contributions have been levied in accordance with the Contributions Plan.

Have the contributions in Condition 51 been calculated lawfully and in accordance with the Contributions Plan?

- 6.16 The contributions required by Condition 51 have been calculated in accordance with Table E3 of the Contributions Plan, having regard to the net increase in demand that the shopping centre and retail shops create. The Works Schedule identifies the intersection upgrades for which contributions have been levied and we note that these are the intersections on main roads leading to the Mount Hutton shopping centre and in that regard reasonably relate to the development. We are of the view that the contributions have been calculated in accordance with the formula in the Contributions Plan and in that respect have been calculated lawfully.

- 6.17 However, as we are of the view that the bus shelter works required by Condition 26 falls within the Works Schedule in Appendix B, the Council will be receiving both a 'work-in-kind' as well as a monetary contribution for the same works, being the improvements to the Mount Hutton bus shelter. In our view, the Council is effectively "double dipping" with respect to the bus shelter works. This does not apply to Condition 8 because the works required by Condition 8 are not a work-in-kind, though they may provide a material public benefit. The question then becomes whether Condition 51 requiring the monetary contributions for works constructed under Condition 26 is one which on merit appeal would be upheld on the basis of reasonableness.

Does Condition 51 meet the Newbury test?

- 6.18 For a condition to be valid under s 80A of the EPA, the condition must satisfy the *Newbury* test.
- 6.19 The *Newbury* test requires that for a condition to be valid, it must:
- (a) have a planning purpose and not any ulterior one;
 - (b) relate to the permitted development to which it is annexed; and
 - (c) be fairly and reasonably related to the development such that it could not be so unreasonable that no reasonable planning authority could have imposed it.
- 6.20 It can be accepted that, read alone, Condition 26 has a planning purpose (first limb of the *Newbury* test), relates to the development granted in the Development Consent (second limb), and that the development is likely to increase the demand for public amenities, and are fair and reasonably related to the development (third limb).
- 6.21 In relation to Condition 51, *Hammersmith* clarified that a condition under section 94 is valid if:
- (a) the development will or is likely to require or increase the demand for the amenities; and
 - (b) the condition satisfies the test set out in *Newbury*.
- 6.22 It can be accepted that Condition 51 has a planning purpose and relates to the development.
- 6.23 Turning to whether the condition fairly and reasonably relates to the development, we are mindful of section 94(2) of the EPA Act which requires that Condition 51 may only require a reasonable contribution for the provision, extension or augmentation of the public amenities concerned.
- 6.24 Whether something is reasonable will turn on all the circumstances of the case. In our view, a reasonable contribution is one that is determined by a contribution rate that reflects the actual and expected costs of the amenities for which the Contributions Plan provides. That is a calculation on the net demand generated by the development, with the developer being entitled to any credit for existing amenities (*Meriton*).
- 6.25 Ultimately, in the circumstances of the case, we are of the view that the bus shelter works required by Condition 26 are the same amenities for which the Contributions Plan is developed and it would be unreasonable to collect a monetary contribution for the cost of constructing amenities that have already been built. To do so is to double-dip and we are of the view that a Court would uphold an merit appeal against the imposition of Condition 51 in that regard on the basis that it fails the third limb of the *Newbury* test.

Is there an offset available for the works required by Condition 8 or 26?

- 6.26 The Contributions Plan provides that an offset is available at the discretion of the Council, and the Practice Note also indicates that offsets are a matter of discretion. There is therefore no legal requirement for a Council to grant an offset. However, as we have found above that there is an element of double-dipping in relation to Condition 26, there is a reasonable case for granting an offset in lieu of initiating Court proceedings to have Condition 51 imposed as per the reasoning set out above at paragraph 6.25.
- 6.27 Further, we note that your estimation of the cost of the works in Condition 26 at \$35,000 are equivalent to the cost calculated in the Contributions Plan (which estimates the cost of the seven bus shelters to be \$252,000 which is approximately \$36,000 each). Once constructed, the bus shelter is an existing amenity for which a developer is entitled to a credit (*Meriton*).

6.28 As we are of the view that Condition 8 provides a material public benefit, there are grounds to consider an offset on this basis, however, as noted above in paragraph 4.22, Council is under no obligation to accept offers of works-in-kind or material public benefit, and as such the discretion remains with Council. We note, however, our comments at paragraphs 6.11 and 6.11 in relation to the characterisation of the works required by Condition 8 and whether they form part of the Wilsons Road intersection upgrade. If those works formed an intrinsic part of the intersection, then consideration of whether there has been double-dipping with respect to those upgrades would be required.

7. Conclusion

7.1 The following provides a concluding summary of our advice.

- (a) Conditions 8 and 26 are lawfully imposed and would be upheld on a merit appeal in the Land and Environment Court.
- (b) The works in Condition 8 provide a material public benefit but are not a work-in-kind under the Contributions Plan.
- (c) The works in Condition 26 for improvement of the bus shelters are by definition a work-in-kind under the Contributions Plan.
- (d) It is unreasonable for the Council to require bus shelter works to be constructed in Condition 26 and then to also impose a condition requiring a monetary contribution for the construction of those same works.
- (e) A Court is likely to uphold a merit appeal against the imposition of Condition 51 on the basis that it is in part "double-dipping" and fails the third limb of the *Newbury* test.
- (f) The decision to grant an offset is solely at the discretion of the council, but may by negotiation be granted, having regard to the prospects of succeeding in having Condition 51 altered on appeal.
- (g) Condition 8 provides a material public benefit but a decision on whether to grant an offset for the works carried out in accordance with Condition 8 is at Council's discretion.
- (h) On the basis of the information we have been provided, we are not able to ascertain whether the pedestrian access and footpath widening form an essential part of the Violet Town/Wilsons Road intersection upgrade. If they do, an application for an offset by negotiation may be granted for the same reasons relating to double-dipping provided above at (d) and in more detail at paragraph 6.25.

Yours faithfully
MinterEllison



John Whitehouse
Partner

Contact: Jeremy Farrell T: +61 2 9921 8521
jeremy.farrell@minterellison.com
Partner: John Whitehouse T: +61 2 9921 4285
OUR REF: 1192739 YOUR REF: DA731/2016

Andrew Cowan

From: Evan Torbica <Evan.Torbica@urbandevelop.com.au>
Sent: Friday, 19 January 2018 8:32 AM
To: Andrew Cowan
Cc: Kevin Schraader; 'Jessica Groenheide'; Jeff Curnow
Subject: RE: S14.15_LMF_Pad Site Traffic Feedback and S94 offset

Andrew,

Refer following estimates of costs from our builder.

- Shared Pathway and Bridge - \$143,600
- Bus Shelter - \$35,000
- Widened Footpath to Wilsons Rd - \$53,000

As you can see they are quite high especially considering we are paying over \$700k in S94s as well.

Evan Torbica

urban

M: 0423 742 210

P: (02) 8298 6400

D: (02) 8298 64 03

Syd: 1204 Lvl 12, 220, George Street, Sydney NSW 2000

Melb: Level 5, 49 Exhibition Street Melbourne Vic 3000

E: evan.torbica@urbandevelop.com.au

W: www.urbandevelop.com.au

Development Partners | Delivery Experts | Development Partners | Delivery Experts |
Development Partners | Delivery Experts |

From: Andrew Cowan [mailto:acowan@willowtreeplanning.com.au]

Sent: Friday, 19 January 2018 8:21 AM

To: Evan Torbica <Evan.Torbica@urbandevelop.com.au>

Cc: Kevin Schraader <Kevin.Schraader@charterhall.com.au>; 'Jessica Groenheide' <Jessica.Groenheide@charterhall.com.au>; Jeff Curnow <Jeff.Curnow@urbandevelop.com.au>

Subject: RE: S14.15_LMF_Pad Site Traffic Feedback and S94 offset

Evan,

Can you confirm the monetary value of the public domain works (footpath etc.) which Character Hall are required to construct?

I've spoken to Minters about this and they have requested this information to form an in-principle position.

Thanks,

Andrew Cowan
Director