

1 June 2020

Our Ref: 20-116 AK

Mr John McKee
General Manager
Locked Bay 1006
GORDON, NSW, 2072

Dear Mr McKee,

RE: S4.56 MODIFICATION APPLICATION TO DA0197/18 IN RELATION TO 376-390 PACIFIC HIGHWAY, 1 BALFOUR STREET AND BALFOUR LANE, LINDFIELD

This report has been prepared for Coles Group Property Developments (CGPD) Ltd by City Plan Strategy and Development Pty Ltd to accompany an application under Section 4.56 of the Environmental Planning and Assessment Act 1979 (the Act).

The application seeks to modify several of the conditions of the subject consent for a mixed use development to enable more efficient and cost effective construction of its two key construction phases. Subsequent to consent being obtained for the original development, CGPD entered into negotiations with developers to undertake construction in two phases. CGPD will undertake the civil works associated with the approved relocation of Balfour Lane (Stage 1) and the developer will subsequently undertake the balance of the work (Stage 2).

As currently framed, most conditions of the consent do not differentiate between the construction stages and it would be necessary to fulfil all conditions of the consent prior to (as relevant) construction or occupation certification, regardless of whether some conditions are relevant to the particular construction works.

As a consequence, this has burdensome time and cost implications for the construction of the development and practical difficulties given the two different construction teams. This application therefore seeks to modify several conditions in order to reduce costs and overall construction time without in any way changing the intent and efficacy of the conditions. Every condition will remain to be satisfied as relevant to the particular stage of construction.

1. THE APPROVED DEVELOPMENT

Consent No. DA0197/18 was granted by the Land and Environment Court (LEC) on 29 August 2019 for:

Lot consolidation, demolition of existing supermarket, partial demolition of heritage item, relocation of Balfour Lane and construction of a 6 storey mixed use building comprising shop top housing including

70 apartments, Coles supermarket, liquor store, basement parking and associated works - part heritage item

This consent applies to the site located at 376-390 Pacific Highway, 1 Balfour Street and Balfour Lane, Lindfield, which is legally described as Lot B DP 311374, Lot 1 DP 431968, Lot 12 DP 629035, Lot A DP 364213, Lot D DP 372380 and Lot 7 DP4195.

2. PROPOSED MODIFICATION

2.1. Conditions to be Modified

The approved development was accompanied by the following staging plans prepared by Christansen O'Brien Architects, which outlined that Stage 1 is mainly limited to the construction of the new Balfour Lane and Stage 2 is mainly limited to removal of the existing Balfour Lane and the construction of the new mixed use building (refer to Table 1).

Table 1: Approved Staging

Staging Plan Reference	Summary of Stage
ST-01-A Revision DA2 ST-01-B Revision DA2	Relocation of Balfour Lane
ST-02 Revision DA2	Removal of existing Balfour Lane, demolition of existing building and construction of mixed use development

This application seeks to modify the following conditions of consent, taking into consideration the above approved stages of the development.

Table 2: Conditions to be modified

Condition	Proposed wording (changes highlighted in red)	Reason
Condition 15 - Archival Recording of Buildings (heritage Items).	Prior to the commencement of any Stage 2 works on site, the Principal Certifier shall be satisfied that an archival report has been completed and submitted to Council's Heritage Advisor for 386-390 Pacific Highway Lindfield (Churchers Restaurant).....	"Churchers Restaurant" is located along the Pacific Highway. Therefore, the proposed Stage 1 works, which are located along Balfour Lane/Street, will not impact this heritage item. It is therefore proposed to link this condition to Stage 2, which includes the partial demolition of this heritage item.
Condition 16 - Dilapidation	Prior to the commencement of any works Stage 2 works , the Applicant must obtain a	This condition outlines that dilapidation reports are required for properties along

Survey & report (private property)	<p>dilapidation report on the identified private property/ies below and the Principal Certifier shall be satisfied that a dilapidation report on the visible and structural condition of relevant structures on the following properties has been completed and submitted to Council:</p> <ul style="list-style-type: none"> 2-4 Highfield Road (southern side of the main school building) 2-4 Highfield Road (existing structures within the playground including retaining structures and COLA) 402 Pacific Highway <p>406 Pacific Highway</p>	<p>both the Pacific Highway and Highfield Road. Stage 1 works are located along Balfour Lane/Street only. Given Stage 1 work will not impact these properties, it is proposed to link this condition to Stage 2 works only, which include the demolition and construction of the proposed mixed use building.</p>
Condition 22 - Noise & Vibration management Plan	<p>Prior to the commencement of any Stage 1 and Stage 2 works, a noise and vibration management plan is to be prepared by a suitably qualified expert addressing the likely noise and vibration from demolition, excavation and construction, of the proposed development, relating to the relevant stage only and provided to the Principal Certifier. The management plan is to identify amelioration measures to achieve the best practice objectives of AS 2436-2010 and NSW Department of Environment and Climate Change Interim Construction Noise Guidelines. The report shall be prepared in consultation with any geotechnical report that itemises equipment to be used for excavation works.</p> <p>The management plan shall address, but not be limited to, the following matters where relevant to each stage of the development only:</p> <ul style="list-style-type: none"> i. identification of the specific activities that will be carried out and associated noise sources ii. identification of all potentially affected sensitive receivers, including residences, 	<p>Given there are different developers responsible for each stage of this development, it is proposed to prepare 2 separate noise and vibration management plans, specific to the scope of work for each stage.</p>

	<p>churches, commercial premises, schools and properties containing noise sensitive equipment</p> <p>iii. the construction noise objective specified in the conditions of this consent</p> <p>iv. the construction vibration criteria specified in the conditions of this consent</p> <p>v. determination of appropriate noise and vibration objectives for each identified sensitive receiver</p> <p>vi. noise and vibration monitoring, reporting and response procedures</p> <p>vii. assessment of potential noise and vibration from the proposed demolition, excavation and construction activities, including noise from construction vehicles and any traffic diversions</p> <p>viii. description of specific mitigation treatments, management methods and procedures that will be implemented to control noise and vibration during construction</p> <p>ix. construction timetabling to minimise noise impacts including time and duration restrictions, respite periods and frequency</p> <p>x. procedures for notifying residents of construction activities that are likely to affect their amenity through noise and vibration</p> <p>xi. contingency plans to be implemented in the event of non-compliances and/or noise complaints</p>	
Condition 23 - Support for Council Roads, footpaths, drainage reserves	<p>Council property adjoining the construction site must be fully supported at all times during all demolition, excavation or building works, associated with the relevant stage only. Details of shoring, propping and anchoring of works adjoining Council property, prepared by a qualified structural engineer and/or geotechnical engineer, must be submitted to and approved by the Principal Certifier, before the commencement of any works. A copy of these details must also be forwarded to</p>	<p>Given there are different developers for each stage of this development, it is proposed to amend this condition to make relevant to different stages.</p>

	Council. Backfilling of excavations adjoining Council property or any void remaining at completion of construction between the building and Council property must be fully compacted prior to the completion of works.	
Condition 24 - SEPP 55 'Remediation of Land' Investigation Requirements	<p>In accordance with the Geo-Logix letter dated 14/05/2018 and the staging plans referred to in condition 1 of the development consent, prior to the issue of a construction subdivision certificate for Stage 01 (new Balfour Lane) the following must occur:</p> <ul style="list-style-type: none"> i. Detailed Site Investigation (DSI) comprising soil, groundwater and soil vapour testing in relation to Stage 01; ii. Preparation of a Remedial Action Plan for Stage 01 if required; and iii. Remediation and Validation if required to confirm the Stage 1 area shown on the approved staging plan drawings Nos ST-01-A and ST-01-B as suitable for redevelopment. <p>Prior to the issue of a construction certificate for Stage 02 (Mixed use development) the following must occur:.....</p>	<p>It is proposed to make this condition applicable at Subdivision Certificate stage rather than Construction Certificate stage, to avoid the requirement of an early works package for remediation prior to a Construction Certificate being released.</p> <p>Should this be required at Construction Certificate stage then this will cause a delay for commencing and disturbing the site area. It will also result in having an open area exposed while the Construction Certificate is being released.</p>
Condition 35 - Long Service levy	A Construction Certificate, for each relevant stage only , shall not be issued until any long service levy payable under Section 34 of the Building and Construction Industry Long Service Payments Act 1986 (or where such levy is payable by instalments, the first instalment of the levy) has been paid for that stage only . Council is authorised to accept payment. Where payment has been made elsewhere, proof of payment is to be provided to Council.	Given there are different developers for each stage of the project, it is proposed to amend the wording of this condition to stage payment of the long service levy, based on the milestones of each relevant stage.
Condition 46 - Ausgrid requirements	Prior to issue of any Construction Certificate for each Stage of the development (i.e. Stage 01 and Stage 02) , Ausgrid must be contacted regarding power supply only relative to each individual stage , for the subject development. A written response, detailing the full requirements of Ausgrid	<p>Given there are different developers for each stage of this development, it is proposed to amend this condition to make relevant to different stages.</p> <p>Additionally, no Occupation Certificate is required for Stage 1, given it only</p>

	<p>(including any need for underground cabling, substations or similar within or in the vicinity of the development) shall be submitted and approved by the Certifier for approval prior to issue of any Construction Certificate for the relevant stage only.</p> <p>Any structures or other requirements of Ausgrid shall be indicated on the plans issued with the Construction Certificate (for the relevant stage only), to the satisfaction of the Certifier and Ausgrid. The requirements of Ausgrid must be met in full prior to issue of a Subdivision Certificate (for Stage 1) and an Occupation Certificate (for Stage 2).</p>	<p>involves the relocation of Balfour Lane. It is proposed to replace "Occupation Certificate" with "Subdivision Certificate", for Stage 1 only.</p>
<p>Condition 54 - Infrastructure damage security bond and inspection fee</p>	<p>To ensure that any damage to Council property as a result of construction activity is rectified in a timely matter:</p> <p>(a) All work or activity undertaken pursuant to this development consent must be undertaken in a manner to avoid damage to Council property and must not jeopardise the safety of any person using or occupying the adjacent public areas.</p> <p>(b) The applicant, builder, developer or any person acting in reliance on this consent shall be responsible for making good any damage to Council property and for the removal from Council property of any waste bin, building materials, sediment, silt, or any other material or article.</p> <p>(c) The Infrastructure damage security bond and infrastructure inspection fee must be paid to Council for each Stage of the development (i.e. Stage 01 and Stage 02) by the applicant prior to both the issue of the Construction Certificate for that stage and the commencement of any earthworks or construction. The bond value will be determined based on the impact to the direct surrounding works being undertaken in each relative stage only.</p>	<p>Given there are different developers for each stage of the project, it is proposed to amend the wording of the security bond and to make relevant to each stage of the project.</p> <p>Additionally, there is no Occupation Certificate associated with Stage 1 (relocation of Balfour Lane). It is therefore proposed to amend the wording, to release the bond, once the final Subdivision Certificate has been received.</p>

	<p>(d) In consideration of payment of the infrastructure damage security bond and infrastructure inspection fee, Council will undertake such inspections of Council Property as Council considers necessary and will also undertake, on behalf of the applicant, such restoration work to Council property, if any, that Council considers necessary as a consequence of the development. The provision of such restoration work by the Council does not absolve any person of the responsibilities contained in (a) to (b) above. Restoration work to be undertaken by Council referred to in this condition is limited to work that can be undertaken by Council at a cost of not more than the Infrastructure damage security bond payable pursuant to this condition.</p> <p>(e) Release of the bond — Upon receipt of the Final Subdivision Certificate for Stage 01 Council will undertake an inspection of Councils Infrastructure and release the Stage 01 bond if no damage is found. Upon receipt of the Final Occupation Certificate for Stage 02 Council will undertake an inspection of Councils Infrastructure and release the Stage 02 bond if no damage is found.</p> <p>For development relating to more than 2 dwellings, there will be a six months holding period after the receipt of the final occupation certificate, after which you may request Council to return any bond monies.</p> <p>If there is damage found to Council property the bond will not be released until the damage has been rectified to Council's satisfaction.</p>	
Condition 69 - Tree planting on Nature strip	<p>Prior to the issue of the Occupation Subdivision Certificate for Stage 01-B the following species shall be planted, at no cost to Council, in the nature strip fronting the property along Balfour Street. The tree/s used shall be a minimum 25 litres and</p>	<p>No Occupation Certificate is required for Stage 1, given it only involves the relocation of Balfour Lane. It is proposed to replace "Occupation Certificate" with "Subdivision Certificate".</p>

	massed planting 200mm container size specimen/s:.....	
Condition 80 - Post Construction Dilapidation Report	<p>A suitably qualified person shall prepare a post construction dilapidation report at the completion of the construction works of each relevant Stage only. This report is to ascertain whether the construction works created any structural damage to adjoining buildings, infrastructure and roads. The report is to be submitted to the Principal Certifier. In ascertaining whether adverse structural damage has occurred to adjoining buildings, infrastructure and roads, the Principal Certifier must:</p> <ul style="list-style-type: none"> ▪ compare the post-construction dilapidation report with the pre-construction dilapidation report ▪ have written confirmation from the relevant authority that there is no adverse structural damage to their infrastructure and roads <p>A copy of this report is to be forwarded to Council at the completion of construction works</p>	It is proposed to amend the wording of this condition to make relevant to each individual stage of the project. Each developer, for each stage of the project, will be responsible for the completion of individual dilapidation reports.
Condition 102 - Completion of Landscape Works	Prior to the issue of the Subdivision Occupation Certificate for Stage 01-B, the Principal Certifier is to be satisfied that all landscape works within the new Balfour Lane, including the removal of all environmental weed species as listed in Council's Weed Management Policy and/or species listed within Council's Development Control Plan, have been undertaken in accordance with the approved plan(s) and conditions of consent.	No Occupation Certificate is required for Stage 1, given it only involves the relocation of Balfour Lane. It is proposed to replace "Occupation Certification" with "Subdivision Certificate".
Condition 117 - Certification of Drainage Works	Prior to issue of the Subdivision Occupation Certificate for Stages 01 (A and B) and the Occupation Certificate for Stage 02 , the Principal Certifier is to be satisfied that:.....	No Occupation Certificate is required for Stage 1, given it only involves the relocation of Balfour Lane. It is proposed to amend this clause into the 2 separate stages of the development.

Condition 118 - Works As executed Plans for stormwater management and disposal	Prior to issue of the Subdivision Certificate for Stage 01 (A and B) and Occupation Certificate for Stage 02 , a registered surveyor must provide a works as executed survey of the relevant completed stormwater drainage and management systems. The survey must be submitted to and approved by the Principal Certifier prior to issue of the relevant Subdivision or Occupation Certificate . The survey must indicate:	No Occupation Certificate is required for Stage 1, given it only involves the relocation of Balfour Lane. It is proposed to amend this clause into the 2 separate stages of the development.
Condition 124 - Infrastructure Repair	Prior to issue of a Subdivision Certificate for Stage 01 or an Occupation Certificate for Stage 02 of the development and upon completion of any works which may cause damage to Council's property, the Principal Certifier must be satisfied that any damaged public infrastructure caused as a result of construction works (including damage caused by, but not limited to, delivery vehicles, waste collection, contractors, sub-contractors, concrete vehicles) is fully repaired to the satisfaction of Council and at no cost to Council.	No Occupation Certificate is required for Stage 1, given it only involves the relocation of Balfour Lane. It is proposed to amend this clause into the 2 separate stages of the development.
Condition 130 - Special Conditions to be satisfied prior to the issue of a subdivision certificate	1. The Application for the subdivision certificate is to show the new Balfour Lane being dedicated to Council as public road; and 2. Prior to the release of any subdivision certificate the new part of Balfour Lane is to be constructed and landscaped, or a bond entered into for those work , to the Council's satisfaction.	It is proposed to amend this wording to allow either the construction and landscaping of Balfour Lane or a bond to be entered into for these works.

2.2. Supporting Documentation

The subject Section 4.56 Modification Application is supported by the following documentation:

- Heritage Statement prepared by City Plan Heritage (Appendix 1).
- Acoustic Statement prepared by Renzo Tonin & Associates (Appendix 2).

3. MATTERS FOR CONSIDERATION UNDER SECTION 4.56

Section 4.56 of the Environmental Planning and Assessment Act, 1979 (the Act) confers on a consent authority the power and discretion to modify a consent granted by the Court under the Act.

The relevant provisions of the Act state:

(1) A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court and subject to and in accordance with the regulations, modify the development consent if:

(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and

(b) it has notified the application in accordance with:

(i) the regulations, if the regulations so require, and

(ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and

(c) it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person, and

(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

Subsection 4.56 (1A) states as follows:

(1A) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

Section 4.56 of the EP&A Act enables a consent authority to modify a development consent granted by the Court upon application being sought by the applicant or any other person entitled to the act on the consent, provided that the consent authority as part of the assessment process, take into consideration the following matters.

3.1. Substantially the Same Development (Section 4.56(1)(a))

In response to Section 4.56(1)(a), “substantially the same developments” means “essentially or materially or having the same essence” according to Pearlman C.J. in *Schroders Australian Property Management Ltd v Shoalhaven City Council and Anor* (1999) NSWLEC 251. Accordingly, it is the substance of the proposal relative to the substance of the development as originally approved.

The development, as modified would essentially and materially the same, given the proposed amendments are purely administrative, modifying the wording of the existing conditions, to ensure they directly relate to each applicable stage of the development.

This application does not propose any changes to the approved building or works. It also does not propose any changes to the intensity of the development such as the number of apartments, quantum of GFA, size of the supermarket or number of parking space.

We therefore consider that the development (as modified) will remain substantially the same as the development that was originally approved.

3.2. Section 4.15(1) Considerations (Section 4.56(1A))

The environmental assessment matters relevant to the proposed modified development under Section 4.15(1) (a), (b), (c), (d) and (e) of the Act are addressed below:

3.2.1. Environmental Planning Controls

The principal planning controls and key considerations applying to the development are contained in:

- Environmental Planning and Assessment Act, 1979;
- Environmental Planning and Assessment Regulation 2000; and
- Ku-ring-gai Local Environmental Plan (Local Centres) 2012.

Given the proposed amendments are procedural and administrative modifications to the conditions of consent, the modified proposal remains consistent with the relevant provisions of those controls as detailed in the original application and as subsequently assessed by Council in granting the consent.

3.2.2. Environmental Impacts

Heritage

The proposed amendments, specifically the amendment to Condition 15, is supported by a statement from City Plan Heritage (Appendix 1).

Given Stage 1 of the development only relates to the relocation of Balfour Lane with no other demolition works of existing buildings, in particular those associated with the heritage item (Churchers Restaurant), City Plan Heritage does not believe it is relevant to Stage 1 of the approved development.

Preparation of an Archival Recording of the heritage item in the format required under Condition 15 can be undertaken as part of Stage 2. The change in timing to the satisfaction of Condition 15 will not impact on the ability to undertake adequate archival photography and documentation of the heritage item and its context.

Alternatively, if necessary, archival photography can be undertaken prior to the relocation of Balfour Lane with the report being submitted as part of Stage 2 for the satisfaction of Condition 15.

Acoustic

Renzo Tonin & Associates has provided an Acoustic Statement (Appendix 2) to support the modification to Condition 22.

Renzo Tonin & Associates are supportive of the proposed amendment, given it only relates to a minor rewording of the condition to allow for Stages 1 and 2 to be undertaken at different times and to have separate Construction Noise and Vibration Management Plans submitted for each stage.

It should be noted that Condition 74 still requires compliance with EPA NSW Assessing Vibration - A Technical Guideline and Condition 77 requires excavation, demolition and construction noise be managed in accordance with the EPA NSW Interim Construction Noise Guideline and the approved noise and vibration management plan, which are still relevant to the development.

3.2.3. Site Suitability

Investigations for the approved development demonstrate that the site is suitable for the proposed amendments and capable of accommodating development of the intensity approved.

The suitability of the site has therefore been comprehensively addressed and considered by virtue of the granting of development consent by the Land and Environment Court. The proposed modification is considered substantially the same development because there is no material change to the location, form, scale and function of the approved development. The suitability of the site, as such, remains unchanged.

3.2.4. The Public Interest

Pursuant to *Ex Gratia P/L v Dungog Council* ([2005] NSWLEC 148), the question that needs to be answered is “*Whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development?*”

As demonstrated in this Statement, there are no unreasonable impacts that will result from the proposed development (as modified). Therefore, the benefits associated with more efficient and cost effective construction of the development outweigh any disadvantage and as such the proposed development will be in the public benefit interest.

4. CONCLUSION

This application is to modify consent DA0197/18 for 376-390 Pacific Highway, 1 Balfour Street and Balfour Lane, Lindfield under Section 4.56 of the Act. The proposed amendments are procedural and administrative amendments only, which do not change the nature or intensity of the approved development in any way.

The combined changes, being amendments that maintain the integrity of the approved development and the intent of the conditions, will have no identifiable environmental impacts. Accordingly, the modifications are within the ambit of Section 4.56 of the Act.

In summary, we conclude as follows:

- the proposed amendments are intended to enable more efficient and cost effective construction of the proposed development based on the stages being undertaken separately by different ‘developers’ and construction teams;
- the proposed modifications will have minimal environmental impact;



- the development as modified is "substantially the same development" as the development for which consent was originally granted;
- the development as modified is appropriate when assessed against relevant matters for consideration under Section 4.15(1) of the Environmental Planning and Assessment Act, 1979; and
- the benefits associated with construction efficiencies outweigh any impacts associated with modifications and its approval is therefore in the public interest.

Should you require any further clarification or information in respect to this application, please contact the undersigned on (02) 8270 3500.

Yours Sincerely,

A handwritten signature in dark ink, appearing to be 'D. Ryan', with a long horizontal stroke extending to the right.

David Ryan
Executive Director

22 July 2020

Our Ref: 20-116 AK

Bonnie Yue
Ku-ring-gai Council
Locked Bag 1006
GORDON NSW 2072

Dear Bonnie,

RE: 376-384 & 386-390 Pacific Highway and 1 Balfour Street, Lindfield NSW 2070 (Reference: MOD0117/20)

City Plan Strategy and Development (City Plan) represents Coles Group Property Developments Ltd (CGPD), the proponent of the modification application.

In response to Council's letter, dated 17 July 2020, Geologix have updated its letter (attached) to refer to the different stages of the development. Specifically, the letter outlines that the additional contamination work for Stage 1 (Balfour Lane) should be undertaken prior to the subdivision certificate, consistent with the proposed modification.

We also request that the application includes the modification of Condition 1 of the consent, as demonstrated in the table below (changes highlighted in red), to reference the updated letter from Geologix.

Original Wording	Proposed Wording
Letter from Geo-Logix to Howard Hathorn regarding satisfaction of SEPP 55 requirements 14/05/2018	Letter from Geo-Logix to Howard Hathorn regarding satisfaction of SEPP 55 requirements 21/07/2020

I trust that this additional information addresses Council's concerns. Should you require any additional information please do not hesitate to contact the undersigned on (02) 8270 3500.

Yours Sincerely,



David Ryan
Executive Director