



planning consultants

20 April 2022  
Our Ref: 9890D.6DK\_TfNSW Conditions

Hornsby Shire Council  
PO Box 37  
HORNSBY NSW 1630

**By Email: [BJones@hornsby.nsw.gov.au](mailto:BJones@hornsby.nsw.gov.au)**

**Attention: Benjamin Jones**

Dear Benjamin,

**RE: 284 CASTLE HILL ROAD and 411 – 415, 417 – 419 OLD NORTHERN ROAD,  
CASTLE HILL  
DA/1024/2021  
TfNSW CONDITIONS**

We refer to your email dated 8 April 2022 and the conditions from Transport for NSW (TfNSW) in relation to the above development application dated 31 March 2022 (DA). As discussed during our telephone conversation on Wednesday 13 April 2022 we have reviewed the conditions and make the following comments.

#### **1.0 Nature of the Referral**

The DA was referred to TfNSW under the provisions of clause 104 of the former Infrastructure SEPP (now Section 1.212 of SEPP Transport and Infrastructure 2021). Clause 104 (and the corresponding section 1.212) is a referral requirement as opposed to a requirement for concurrence, requiring only that the consent authority give written notice of the DA to TfNSW and take into consideration any submission that TfNSW provides in response to that notice. The DA was not referred in order for the consent authority to obtain concurrence of TfNSW under the SEPP Transport and Infrastructure 2021.

Section 4.13(1) and (9) of the Environmental Planning and Assessment Act, 1979 (EP&A Act) provide as follows (emphasis added):

- (1) **General** *If, by an environmental planning instrument, the consent authority, before determining the development application, is required to consult with or to obtain the concurrence of a person, the consent authority must, in accordance with the environmental planning instrument and the regulations, consult with or obtain the concurrence of the person, unless the consent authority determines to refuse to grant development consent.*
- (9) **Giving effect to concurrence** *A consent authority that grants consent to the carrying out of development for which a concurrence has been granted must grant the consent subject to any conditions of the concurrence. This does not affect the right of the consent authority to impose conditions under section 4.17 not inconsistent with the conditions of the concurrence or to refuse consent.*

The only concurrence role for TfNSW is in relation to a future application for approval under section 138 of the Roads Act 1993 (NSW) and not a concurrence role in relation the DA. The

Roads Act is not an 'environmental planning instrument' as referred to in section 4.13(1) of the EP&A Act and accordingly the concurrence that has been provided by TfNSW pursuant to s138 of the Roads Act is not a concurrence to which section 4.13 of the EP&A Act applies.

Section 4.13(9) of the EP&A Act only requires the conditions of any concurrence to be imposed *verbatim* when concurrence under an environmental planning instrument is required. The consent authority can therefore amend the conditions provided by TfNSW, provided that they have been 'taken into consideration' as required under the SEPP Transport and Infrastructure 2021. This legal position is relevant in relation to our following comments where we suggest an alternative approach to how the TfNSW conditions could be imposed on any development consent granted to the DA.

## 2.0 Deferred Commencement

The conditions provided by TfNSW include a condition which is purported to be a deferred commencement condition.

Section 4.16(3) of the EP&A Act provides as follows:

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

Relevantly, it is the consent authority that must be satisfied as to the matters specified in a deferred commencement condition. That is, the Sydney North Planning Panel (as the consent authority) needs to be satisfied that the matter(s) have been addressed.

Section 76 of the EP&A Regulation 2021 also contains provisions regarding deferred commencement consents and how they are to be satisfied.

The purported deferred commencement condition requested by TfNSW states as follows:

1. *Detailed design plans and hydraulic calculations of any changes to the stormwater drainage system are to be submitted to TfNSW for approval, prior to the commencement of any works. Any changes to the state road drainage network shall be supported by drainage calculations, modelling and pre and post development stormwater impacts clearly identified.*

*Please send all documentation to [development.sydney@transport.nsw.gov.au](mailto:development.sydney@transport.nsw.gov.au).*

The condition does not exhibit the characteristics of a deferred commencement condition, namely:

1. The condition states that the required documentation is to be submitted to TfNSW prior to the commencement of works. That is, TfNSW is anticipating that documentation can be submitted as part of the operational conditions of the consent, not deferred commencement which must be satisfied before the consent becomes operative. This is reinforced by conditions 3 and 9 under the heading '*prior to the issue of any construction certificate*' which repeat the need for the same details.
2. The condition does not specify a time frame in which the matters are to be satisfied.
3. The condition is contrary to the EP&A Act as the consent authority must be satisfied that the deferred matters have been satisfied (not TfNSW).

We respectfully submit that TfNSW's proposed deferred commencement condition (as written) does not fulfil the legal requirements of a deferred commencement condition.

As noted above the consent authority can alter the conditions as part of the grant of development consent to the DA, as the conditions were not provided in TfNSW's capacity as a concurrence authority. We have recommended an amendment to TfNSW's conditions below.

### 3.0 Recommended Approach

#### *Option 1 – Preferred*

For the above reasons, Anglicare's preferred position is that the purported deferred commencement condition not be included in its terms in any consent to the DA, and that instead the balance of the operative conditions proposed by TfNSW be imposed subject to comments in **Section 4.0** of this letter.

#### *Option 2 - Least Preferred*

If Council or the Panel is not willing to delete the deferred commencement condition then at the very least the condition will still need to be amended to:

1. Specify a time frame in which the deferred commencement condition is to be satisfied. In this case we recommend 36 months;
2. Nominate the consent authority (not TfNSW) as the body that must be satisfied as to the deferred commencement matter; and
3. Remove the reference to 'prior to commencement of any works'.

### 4.0 Operative Conditions

In either option, the operative conditions will also need to be amended to correct anomalies:

For example:

- Conditions 5, 7, and 9 are written as matters to be satisfied prior to the commencement of works yet are contained under the heading of "Prior to issue of any Construction Certificate". These conditions need to be amended / restructured.
- Condition 8 refers to matters that require 7 days' notice of an intention to excavate below the base of footings. This is contained under the heading of "Prior to issue of any Construction Certificate". This condition needs to be transferred to a "prior to commencement of works" section of the consent.

As noted above, it is our position that Council should recommend to the Panel that TfNSW's proposed operative conditions be amended pursuant to the powers vested in the EP&A Act.

Should you have any questions in relation to the content of this letter please do not hesitate to contact David Kettle on 9980 6933.

Yours faithfully

**DFP PLANNING PTY LTD**



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DIRECTOR**

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Reviewed: 