

## SUTHERLAND SHIRE COUNCIL ASSESSMENT REPORT

<b>Panel Reference</b>	PPSSSH-129
<b>DA Number</b>	MA22/0284
<b>LGA</b>	Modification of Approved DA19/0333 Sutherland Shire
<b>Proposed Development:</b>	<p>S4.56 modification to DA19/0333 – Consent was given by the Land and Environment Court for demolition of existing structures, tree removal, and construction of a mixed-use development with supermarket and speciality stores at ground level, 120 residential apartments above and basement car parking below.</p> <p>The proposed modification seeks to change the wording of the following conditions of consent:</p> <ul style="list-style-type: none"> <li>• 7A relating to trunk drainage construction and design;</li> <li>• 8C – as executed trunk drain design prior to CC; and</li> <li>• 12 relating to timing of contributions payment.</li> </ul>
<b>Street Address:</b>	Lot 26, 27, 28 and 29 in DP 10066, Lot D DP 387699, Lot X DP 396618, Lots A and B in DP 449572, 41-51 President Avenue and 178-186 Willarong Road, Caringbah
<b>Applicant/Owner:</b>	D Nelson
<b>Date of Modification lodgement</b>	2 December 2022
<b>Number of Submissions:</b>	Public: None Agencies: Two (2) – NSW Water & Transport for NSW Sydney Trains
<b>Recommendation:</b>	Approval
<b>Regional Development Criteria (Schedule 6 of the SEPP (Planning Systems) 2021)</b>	<p>4.56 application for an existing approval with a capital investment of more than \$30,000,000 as nominated under Schedule 6(2) of State Environmental Planning Policy (Planning Systems) 2021.</p> <p>The consent applies to a development with a capital investment value of the project as \$79,694,291.</p> <p>The Act and Regulations do not provide for 4.56 modification applications that are subject to SSPP criteria to be delegated to Council.</p>
<b>List of all relevant s4.15(1)(a) matters</b>	<ul style="list-style-type: none"> <li>• Environmental Planning Instruments: <ul style="list-style-type: none"> <li>◦ State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP).</li> <li>◦ State Environmental Planning Policy (Biodiversity and Conservation) 2021. (Biodiversity and Conservation SEPP)</li> <li>◦ State Environmental Planning Policy (Transport and Infrastructure) 2021</li> <li>◦ State Environmental Planning Policy (Industry and Employment) 2021</li> <li>◦ State Environmental Planning Policy (State and Regional Development) 2011.</li> <li>◦ State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.</li> <li>◦ State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development (SEPP 65).</li> <li>◦ Sutherland Shire Local Environmental Plan 2015 (SSLEP 2015).</li> </ul> </li> <li>• Development Control Plans <ul style="list-style-type: none"> <li>◦ Sutherland Shire Development Control Plan 2015 (SSDCP 2015).</li> </ul> </li> <li>• Sutherland Shire Contributions Plan 2016</li> <li>• Planning Agreements: Nil</li> <li>• Provisions of the Environmental Planning and Assessment Regulation 2021: Nil</li> </ul>
<b>List all documents submitted with this report for the Panel's consideration</b>	<ul style="list-style-type: none"> <li>• Application Form</li> <li>• Survey Plan</li> <li>• Construction Management Plan</li> <li>• [2020] NSWLEC 1458 Judgement - Coles Group Property Developments Ltd v Sutherland Shire Council</li> <li>• S.4.56 Planning Statement</li> <li>• RFI Response Letter</li> <li>• Letter from WaterNSW</li> <li>• Letter from TfNSW Sydney Trains</li> <li>• Photographs taken of the site and surrounds</li> </ul>
<b>Report prepared by:</b>	David Sheehan, Senior Development Assessment Officer Sutherland Shire Council
<b>Report date</b>	9 June 2023

### Summary of s4.15 matters

Have all recommendations in relation to relevant s4.15 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?

**Yes**

*e.g. Clause 7 of SEPP 55 - Remediation of Land, Clause 4.6(4) of the relevant LEP*

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**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**

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**Special Infrastructure Contributions**

Does the DA require Special Infrastructure Contributions conditions (S7.24)?

**Not Applicable**

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

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**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*

**No**  
**(\* note officers**  
**report exhibited**  
**publicly prior to**  
**meeting)**

## **REPORT SUMMARY**

### **REASON FOR THE REPORT**

The application is for the modification of a development approval pursuant to s.4.56 of the Environmental Planning and Assessment Act 1979.

State Environmental Planning Policy (Planning Systems) 2021, requires this application to be referred to the Sydney South Planning Panel (SSPP) as the development approved by the Land and Environment Court has a capital investment value of more than \$30 million. A 4.56 amendment of the consent requires determination by the Regional Panel.

The consent pertains to a project with a value of \$79,694,291. This is unchanged from the value of that approved by the Land and Environment Court (LEC).

### **APPROVED DEVELOPMENT**

The approved mixed-use development (DA19/0333) comprises tree removal, the demolition of existing structures and the construction of shop top housing. This includes a supermarket, liquor store, specialty stores, 120 residential apartments and undercroft and basement car parking. The detailed fit out of the supermarket and liquor store are approved in addition to advertising signs and signage zones.

Approved works also include supporting civil infrastructure, public domain and landscape works.

The development was approved by the LEC on 29 September 2020.

### **PROPOSAL**

The application (as amended) is for modification of DA19/0333 to amend conditions to allow early works to occur on site and to delay the payment of developer contributions until the occupation certificate.

### **THE SITE**

The site is located within the Caringbah Commercial Core and comprises a large parcel of land fronting President Avenue, Willarong Road and President Lane. It is comprised of 8 parcels of land with a total site area of 6,452m<sup>2</sup>. A Coles supermarket stands on the site, along with several commercial buildings. Demolition had commenced on site at the time writing this report.

### **ASSESSMENT OFFICER'S RECOMMENDATION**

THAT:

- A. That pursuant to the provisions of Section 4.56 of the Environmental Planning and Assessment Act 1979, the modification of Development Consent No. DA19/0333 for demolition of existing

structures and the construction of a mixed use development including retail tenancies, shop top housing and carparking, including ancillary works on Lots 26, 27, 28 and 29 in DP 10066, Lot D DP 387699, Lot X DP 396618, and Lots A and B in DP 449572, 41-51 President Avenue and 178-186 Willarong Road, Caringbah be approved and the conditions modified as detailed in **Appendix “A”** of the report.

## **ASSESSMENT OFFICER’S COMMENTARY**

### **1.0 SITE DESCRIPTION AND LOCALITY**

The site is located within the Caringbah Commercial Core and comprises a large parcel of land fronting President Avenue, Willarong Road and President Lane. It is comprised of 8 parcels of land with a total site area of 6,452m<sup>2</sup>. A Coles supermarket stands on the northern portion of site, along with several commercial buildings which, at the time of preparation of this report, were in the process of demolition.

The site falls from east to west and from north to south, with the lowest part of the site towards the mid-point of the western boundary. The RL at this point is 30.16. The highest point of the site is the north-east corner at RL 34.15. The low point on the site is burdened by an approximate 4.6m wide Council stormwater drainage easement running east-west. The easement contains twin 1050mm diameter reinforced concrete pipes (RCPs), which are to be removed and realigned as part of the approved works under DA19/0333, and are the main subject of this modification application.

There were a number of large tree species around the perimeter of the site, many of which have been recently removed as part of the approved works. Three large trees remain on the Willarong Road frontage, as required by DA19/0333.

To the north of the site is a two-way laneway which provides access to and from the Council owned carpark. This laneway is a land parcel known as 178R Willarong Road (Part Lot 1 DP 1055589) which is owned by Rail Corporation New South Wales. This land is managed by Council on a long-term lease basis. The land presently provides vehicle access and parking for commuters and visitors to the Caringbah Centre. North of the laneway is the Cronulla to Sutherland railway corridor.

Directly east of the site is the Council carpark and the rear of shops and mixed-use development which front the Kingsway. The southern part of the site fronts President Lane / Park Lane which provide vehicle and pedestrian access to the Council car park. A McDonalds restaurant is located on the south-east corner of President Lane / Park Lane.

To the west of the site on the adjacent side of Willarong Road are older style residential apartment buildings of varying size and height (between 2 – 5 storeys). A Council-owned drainage easement runs east-west through the middle of Willarong Road and the residential apartments, facilitating an overland flow path. The land is developed by way of a concrete path providing pedestrian access from

Willarong Road through to Curtis Street. South-west of the site across the intersection of Willarong Road and President Avenue is a Woolworths and associated parking.

An aerial photo showing the location of the site is shown below, along with a zoning extract and an image depicting the approximate location of existing stormwater pipes that currently burden the site. (Refer **Figures 1 – 3**).



Figure 1: Aerial photo of the site (shaded in yellow) and immediate locality



Figure 2: Approximate location of stormwater infrastructure burdening the site (indicated in broken yellow line, with the site identified in yellow shading)

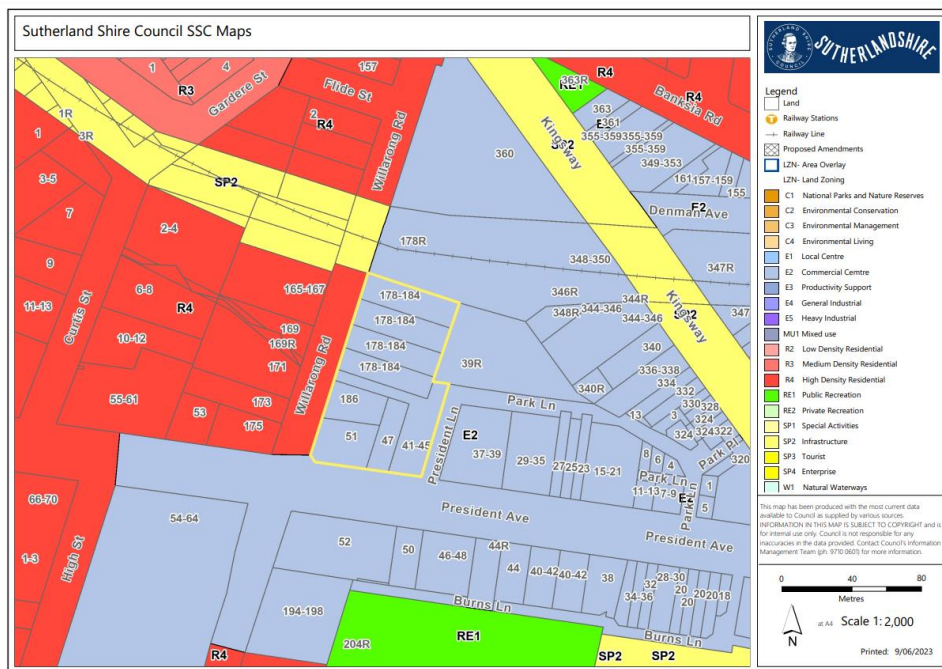


Figure 3: SSLEP 2015 Zoning Extract (Site boundaries are identified in yellow). The site is zoned E2 Commercial Centre

## 2.0 DESCRIPTION OF PROPOSAL

The application seeks to modify DA19/0333 to allow early works to occur on site and to delay the payment of developer contributions to the occupation certificate at the above property. In particular the following amendments are sought:

- *Condition 7. Trunk drainage construction*

Condition 7 of the consent currently states as follows:

*Prior to the issue of any Construction Certificate for bulk excavation or the built form approved by this Development Consent, the realigned trunk drainage pipeline within President Ave, subject property and Willarong Road must be fully operational and to the satisfaction of the Director, Shire Planning.*

Currently this condition prevents the issue of a construction certificate for bulk excavation or the built form until such time as the realigned trunk drainage system is operational.

The applicant sought to allow bulk excavation to occur prior to the completion of the trunk drain. It was proposed to remove the words 'bulk excavation' from the condition to allow this to occur.

Council officers expressed concerns that allowing bulk excavation to occur could affect the integrity of the Council's asset prior to the operation of the replacement stormwater main. In response the application has been amended to allow preparatory remediation zone excavation, shoring, and substation installation work to occur if sufficiently distanced from the trunk infrastructure. A construction management plan has been submitted to define these works.

- *Condition 8.C. Trunk drainage design*

Condition 8.C is currently written as follows:

#### **C. Before Construction Certificate**

*Prior to the issue of any Construction Certificate relating to the approved built form*

- i) *A Works-As-Executed drawing (WAED) of the stormwater trunk drainage system must be prepared by a Registered Surveyor. This drawing must detail the alignment of pipelines and pits. An original or a colour copy must be submitted to Sutherland Shire Council.*
- ii) *The supervising engineer must certify the WAED of the stormwater trunk drainage system was constructed to their satisfaction and in accordance with the Development Consent, and Public Domain Technical Manual.*
- iii) *CCTV and associated condition report of the realigned stormwater trunk drainage system must be provided to Council's Stormwater and Waterway Manager for review and comment.*
- iv) *Approval from Council's Stormwater and Waterway Manager, to the effect that the stormwater trunk drainage system is to their satisfaction and satisfies the design requirements in "A" above must accompany the application for a Construction Certificate relating to the built form*

The application as lodged sought to:

- introduce flexibility regarding the construction material permitted for the replaced pipework;
- remove reference to installation of pipework by way of jacking techniques; and

- require work-as-executed paperwork for the realigned drainage to be linked to the issue of the first occupation certificate rather than a construction certificate for the built form.

Council officers expressed concerns regarding longevity of different pipe construction material and insufficient detailing of the impacts associated with alternative construction techniques. In response the application has since been amended, and now seeks only to modify the wording of the condition to link the work-as-executed paperwork to commencement of bulk excavation rather than the construction certificate for the built form. No amendment is proposed to the material type or construction methodology, noting there is sufficient flexibility in the condition as currently drafted to consider alternative installation methodologies subject to agreement with Council's stormwater and waterways team. The condition as sought by the proponent is as follows:

### **C. Before Construction Certificate**

Prior to the ~~commencement of bulk excavation~~ *issue of any Construction Certificate relating to the approved built form*

- i) *A Works-As-Executed drawing (WAED) of the stormwater trunk drainage system must be prepared by a Registered Surveyor. This drawing must detail the alignment of pipelines and pits. An original or a colour copy must be submitted to Sutherland Shire Council.*
  - ii) *The supervising engineer must certify the WAED of the stormwater trunk drainage system was constructed to their satisfaction and in accordance with the Development Consent, and Public Domain Technical Manual.*
  - iii) *CCTV and associated condition report of the realigned stormwater trunk drainage system must be provided to Council's Stormwater and Waterway Manager for review and comment.*
  - iv) *Approval from Council's Stormwater and Waterway Manager, to the effect that the stormwater trunk drainage system is to their satisfaction and satisfies the design requirements in "A" above must accompany the application for a Construction Certificate relating to the built form*
- *Condition 12. section 7.11 contributions*  
Condition 12 requires the payment of developer contributions prior to the issue of a construction certificate.

As lodged, the proposal sought to amend this requirement to allow payment prior to the first occupation certificate. As this option is not supported by Council officers, the applicant, in discussion with Council, has since confirmed a preference for 12 month payment plan.

## **3.0 BACKGROUND**

A history of the development proposal is as follows:

- *Approved Development*

On 29 September 2020, approval was granted by the LEC to DA19/0333 for demolition of existing structures, tree removal, and construction of a mixed-use development with supermarket and speciality stores at ground level, 120 residential apartments above and basement car parking below. The decision was finalised by Council on the NSW Planning Portal on 1 July 2021 and pursuant to section 8.17(3) of the Act the operational date of DA19/0333 is 1 July 2021.

- The current application was received on 2 December 2022 and accepted by the SSPP on 6 February 2023.
- The application was placed on exhibition with the last date for public submissions being 20 March 2023. No submissions were received.
- A 'kick off' briefing was held between Council, the Applicant and the SSPP on 6 March 2023. The record of the kick off briefing identified the following issues:
  - *Condition 7*
    - i) *Whether trunk drainage and area around can remain in-situ to prevent damage while early works are undertaken elsewhere on the site.*
  - *Condition 8Aii*
    - i) *Current wording allows for suitable alternative to "jacking" technique. Sufficient information on the suitable alternative is required to either modify or satisfy the condition to ensure significant tree will not be impacted.*
  - *Condition 8C*
    - i) *Whether requirement prior to construction certificate (CC) for works, other than built form CC.*
  - *Condition 12*
    - i) *Note there will only be one occupation certificate at the completion of the development and Council's concern that payment of whole s7.11 contribution should not be linked to this milestone. Also, note applicant's concern that payment of whole s7.11 contribution should not be linked to first CC. Consider staging arrangement for payment.*
- On 30 March 2023, Council officers wrote to the applicant and advised the following:
  - i) The proposed amendments to Condition 7 could not be supported due to the potential impact upon the integrity of the Council's asset prior to the operation of the replacement stormwater main.
  - ii) In light of the above, consideration should be given to amending the scope to outline early works sought, which would be considered favourably by Council officers, as long as they are distanced from, and will not undermine, the stormwater main.
  - iii) In the event the above was acceptable, submission of a drawing / construction management plan detailing the excavation, demolition, contiguous piles, the actual location of the pipelines (not the easement), the angle of repose or shoring and levels of excavated soils.

- iv) The applicant was advised that the amendments to Condition 8.A(ii) and 8.C were unable to be supported as proposed due to:
  - the likely significant long term financial implications to Council associated with alternative materials for pipe construction. It was requested that this be removed from the proposal;
  - Insufficient supporting documentation had been provided to justify the construction methodology and impact upon trees to be retained. It was requested that this be removed from the proposal, noting alternative techniques were contemplated by the condition without the need for formal amendment to the condition; and
  - Repositioning the requirement for work-as-executed documentation to the occupation certificate stage would fail to ensure the objective of the condition, which is to ensure that the trunk drainage is satisfactorily positioned and functioning prior to decommission of the existing pipework. It was suggested that alternative wording be forwarded.
- On 13 April 2023 the applicant responded with a revised scope of amendments accompanied by a Construction Management Plan.
- On 1 May 2023 Council officers wrote to the applicant and advised:
  - ii) that the response did not adequately address the request for further information, specifically Point 1, wherein a drawing/ construction management plan was requested detailing works in relation to the actual location of the pipeline (not the easement). The applicant was further advised that Council's engineers were concerned that the location of the pipeline was unknown, and that the pipe would need to be located by a surveyor and shown on diagrams, along with a long section showing the proposed depth of excavation in relation to the pipe; and
  - iii) that in relation to the request to delay payment of developer contributions to the occupation certificate a bank guarantee would be required for the full amount, or alternatively a 12-month instalment plan could be arranged, however would attract interest, require a deed of agreement, and would be subject to review by Council's Chief Financial Officer (CFO). The applicant was advised that there could be no guarantees that this second option would be accepted.
- On 12 May 2023, the applicant requested an extension of time to prepare the survey, and confirmed their preference to enter into a 12 month instalment plan.
- A survey plan and revised construction management plan were lodged on 16 May 2023 and are relied upon in this assessment report.

#### **4.0 ADEQUACY OF APPLICANT'S SUBMISSION**

In relation to the Statement of Environmental Effects, plans and other documentation submitted with the application and after a request from Council, the applicant has provided adequate information to enable an assessment of this application.

## **5.0 NATURE OF MODIFICATION SOUGHT**

This application proposes the modification of Development Consent No. DA19/0333 pursuant to Section 4.56 of the EP&A Act.

In accordance with s.4.56(a), the application relates to minor amendment to conditions only. Quantitatively there will be no change to the approved number of apartments, size of the supermarket, gross floor area, building height or the physical appearance of the approved development. Qualitatively, the staged construction and contribution arrangements will not affect the approved use or purpose, or delivery of public benefits associated with the development. The development as modified will remain substantially the same development as the development for which the consent was originally granted.

The application has been notified in accordance with the requirements specified at s.4.56(b) and (c) and no submissions were received.

The relevant matters specified within s.4.15(1) are considered within the relevant sections of this report and considered acceptable. Consideration has been given to the judgment decision issued by the LEC (**Appendix “B”**), which raises no matters of particular relevance to the current proposed modifications.

An assessment of the type of modification proposed has been carried out in accordance with the provisions of the Environmental Planning and Assessment Regulation 2021 (EP&AR 2021) and the type of modification application submitted pursuant to s.4.56 is appropriate.

## **6.0 PUBLIC PARTICIPATION**

The application was advertised in accordance with the provisions of Chapter 42 of Sutherland Shire Development Control Plan 2015 (SSDCP 2015) and, as the approved application constituted Integrated Development, the modification application was notified for the 28 day period specified within Schedule 1 of the Environmental Planning and Assessment Act 1979. It is noted that Council's Community Engagement Strategy was adopted by Council in May 2023 and replaces Chapter 42, however is of no effect as both the submission and notification of the application predate the adoption of the new strategy.

314 adjoining or affected owners were notified of the proposal and no public submissions were received. Submissions received from Sydney Trains and Water NSW are addressed within the specialist comments and external referrals (Section 8) of this report.

## **7.0 STATUTORY CONSIDERATIONS**

The subject land is located within Zone E2 Commercial Centre pursuant to the provisions of Sutherland Shire Local Environmental Plan 2015. The proposed development relates to commercial premises and shop top housing, which are permissible land uses within the zone with development consent.

The following Environmental Planning Instruments (EPI's), Development Control Plans (DCP's), Codes or Policies are relevant to this application:

- State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP).
- State Environmental Planning Policy (Biodiversity and Conservation) 2021.
- State Environmental Planning Policy (Transport and Infrastructure) 2021
- State Environmental Planning Policy (Industry and Employment) 2021
- State Environmental Planning Policy (State and Regional Development) 2011.
- State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
- State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development (SEPP 65).
- Sutherland Shire Local Environmental Plan 2015 (SSLEP 2015).
- Sutherland Shire Development Control Plan 2015 (SSDCP 2015).
- Section 7.11 Development Contribution Plan 2016 – Caringbah Centre Precinct.
- Sutherland Shire Council Environmental Specification – Waste Collection for New Multi-Unit Dwellings and Residential Flat Buildings (SSCES – Waste Collection).

### **7.1 State Environmental Planning Policy (Planning Systems) 2021**

DA19/0333 met the considerations for regionally significant development in accordance with SEPP (State and Regional Development) 2011, (now renamed the Planning Systems SEPP). The current modification application, being submitted pursuant to cl.4.56, requires determination by the SSPP. Accordingly, the current report and recommendations are prepared for the SSPP for consideration.

### **7.2 State Environmental Planning Policy (SEPP) considerations**

The overall development and site is subject to several SEPPs as identified within Section 7.0. The performance of the development against the considerations within these instruments was taken into account during the assessment of DA19/0333.

The current proposed modifications are minor in nature and will have no bearing on the existing level of consistency with these provisions. In respect of the Transport and Infrastructure considerations, Sydney Trains has been consulted and advises no concerns with the proposal. The proposed modifications and the overall development will remain acceptable with respect to the SEPPs that apply to the land and development.

### **7.3 Sutherland Shire Local Environmental Plan 2015**

The statement of compliance below contains a summary of applicable development standards and a compliance checklist relative to these. As with Point 7.2 above, the proposed modification does not change the quantitative elements of the development approved under DA19/0333.

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**Sutherland Shire Local Environmental Plan 2015**

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CLAUSE	REQUIRED	APPROVED (DA19/0333)	PROPOSED (MA22/0284)	COMPLIANCE
<b>Clause 4.3 – Height of Buildings</b>	20m (southern portion)	31.12m	No change	N/A (No change)
	30m (northern portion)	23.6m	No change	N/A (No change)
<b>Clause 4.4 – Floor Space Ratio</b>	Site A: 3:1 (16,755.6m <sup>2</sup> )	2.83:1 (15,793.8m <sup>2</sup> )	No change	N/A (No change)
	Site B – 2.5:1 (2,168.1m <sup>2</sup> )	3.61:1 (3,127.3m <sup>2</sup> )	No change	N/A (No change)

## **8.0 SPECIALIST COMMENTS AND EXTERNAL REFERRALS**

The application was referred to the following internal and external specialists for assessment and the following comments were received:

### **8.1 Water NSW**

The modification application was referred to Water NSW on the basis that DA19/0333 was approved subject to General Terms of Approval (GTA) for temporary construction dewatering. The current modification relates to staging of work occurring below ground. On 23 February 2023 Water NSW advised of no concerns with the proposal, no change to the issued GTAs, and confirmed that the GTAs remain current. A copy of the letter is attached at **Appendix “C”**. It is recommended that a copy of the GTAs are attached to the notice of determination of the modification application.

### **8.2 TfNSW (Sydney Trains)**

The modification application was referred to Sydney Trains in accordance with Section 2.98 of the Transport and Infrastructure SEPP. On 24 February 2023 Sydney Trains advised of no additional comments on the proposed development works and confirmed that all conditions and comments applied to the previous application (DA19/0333) are still applicable. A copy of the letter is attached at **Appendix “D”**.

### **8.3 Stormwater and Waterways Asset Engineer**

The application was referred to Council’s stormwater and waterways asset engineer who raised several concerns with the initial proposal – principally regarding insufficient justification in relation to amendments to the construction methodology and new pipe material, along with concern that bulk excavation could jeopardise the ongoing operation of existing stormwater pipes, prior to their realignment. Revised plans and documentation has largely resolved these issues, and the stormwater and waterways assets engineer is supportive of the amended proposal subject to conditions as follows:

- i). *The CMP be amended to explicitly state the batter is 2H:1V from 1000mm from the outside of the pipes.*
- ii). *Locating the pipes by exposing the pipe at regular intervals (as stated per Item 2 of the Sequence of Works in the CMP) is to be included in the consent conditions. This*

*must be undertaken carefully to not affect the stability of the existing pipes, nor their performance.*

- ii). *The CMP is to be included as part of the approval.*

With the exception of ii), which is covered by a more onerous condition recommended by the development engineer (see below), the above are incorporated within recommended conditions.

#### **8.4 Engineering (Assessment team)**

Council's development engineer has undertaken an assessment of the revised application and advised that subject to suitable wording of the conditions of development consent, including a requirement for a surveyor to accurately survey the location of the pipeline, no objection is raised to the proposal.

#### **8.5 Public Assets Engineer**

Council's public assets engineer has undertaken an assessment of the revised application and was supportive of the proposal, that being that the new pipeline remained reinforced concrete, no change to the methods of pipe installation, and the construction works being positioned outside the zone of influence of the existing pipeline.

#### **8.6 Developer Contributions Administrator**

Council's contributions administrator has undertaken an assessment of the revised application and provided two potential options for delayed payment - a) a bank guarantee is required to permit delayed payment of contributions to the construction certificate, or b) a 12 month payment plan in accordance with a deed of agreement. These options have been discussed with the applicant who has advised their preference for option b), and accordingly, suitable conditions have been imposed.

### **9.0 ASSESSMENT**

A detailed assessment of the application has been carried out having regard to the matters for consideration under Section 4.56 and 4.15(1) of the EP&A Act. The following matters are considered important to this application.

#### **9.1 Proposed Modifications**

The application seeks to amend conditions 7, 8 and 12 of DA19/0333. Each of these amendments are addressed below, along with assessment against relevant statutory and non-statutory considerations as specified by s4.15(1) of the Act.

##### **9.1.1 Condition 7 – Trunk drainage Construction**

The condition currently states:

#### **7. Trunk Drainage Construction**

##### **A. Before Construction**

*Prior to the issue of any Construction Certificate for bulk excavation or the built form approved by this Development Consent, the realigned trunk drainage pipeline within President Ave,*

*subject property and Willarong Road must be fully operational and to the satisfaction of the Director, Shire Planning.*

The proposal (as amended during assessment by the application) seeks to amend this condition by way of adding the following text:

*“Note: piling, remediation, sewer relocation and substation construction is able to commence prior to the realigned trunk drainage being fully operational.”*

The intent of the condition is to restrict any substantial works taking place on site which may affect the integrity of Council's asset which currently traverses though the site, until such time as the replacement stormwater trunk main is operational. Although not referenced in the wording suggested by the applicant, a construction management plan (CMP) has been submitted which outlines the proposed preparatory work and identifies that a suitable exclusion area will be maintained around the pipeline during this work. The revised proposal has been reviewed by Council's engineers who are satisfied that the intent of the condition can be maintained however have suggested alternative wording to:

- ensure that the pipeline is accurately surveyed prior to construction and an updated CMP prepared;
- clarify the horizontal and vertical extent of batter 1m either side of the existing stormwater infrastructure, and
- to refer to the works to the extent identified on the submitted CMP, within the condition itself.

The above will ensure that the applicant can progress preparatory works on site whilst at the same time maintaining the integrity of Council's operational trunk stormwater infrastructure and the public interest. No objection is therefore raised, subject to the inclusion of amendments as proposed by Council's engineers. It is recommended that Condition 7 read as follows (old text in ~~strike through~~ and new text in blue):

## **7. Trunk Drainage Construction**

### **A. Design**

- i) The alignment of Council's stormwater drainage infrastructure (pipelines that traverses No.41-45, 47 & 51 President Avenue and 186 Willarong Road) shall be accurately detailed on Construction Management Diagrams sheets AR-01-0100B & AR-01-0101B prepared by CQ Studio.
- ii) The works "exclusion zone" shall be increased in width to accommodate the outer diameter of the pipes + 1m beyond to outer eastern and western wall of the pipelines + the clearance between the pipelines + the associated 1 vertical to 2 horizontal batters.
- iii) A Registered Surveyor must certify the alignment of Council's pipelines and the required "exclusion zone" detailed on the required amended Construction Management Diagrams sheets AR-01-0100B & AR-01-0101B by CQ Studio, as being correct.

## **~~A.~~ B. Before Construction**

Prior to the issue of any Construction Certificate for bulk excavation\* or the built form approved by this Development Consent, the realigned trunk drainage pipeline within President Ave, subject property and Willarong Road must be fully operational and to the satisfaction of the Director, Shire Planning.

Despite the above, excavation and associated preliminary works to the extent detailed in Construction Management Diagrams sheets AR-01-0100B & AR-01-0101B by CQ Studio as amended to accord with Part A (above) is permitted prior to bulk excavation.

**Note: \*Bulk excavation is all works that exceed the depth and extent set out in the Construction Management Diagrams.**

It is also proposed that Condition 1 be amended to ensure the approved plans reference the construction management diagrams.

### **9.1.2 Condition 8.C – Trunk Drainage Design**

Condition 8.A. and 8.B. detail the design and construction requirements for the realigned trunk stormwater drainage.

Condition 8.C effectively requires completion of the realigned infrastructure along with works-as-executed drawings, sign-off from the supervising engineer and Council's Stormwater and Waterways Manager, prior to the issue of a construction certificate.

As mentioned elsewhere in this report, the proponent seeks to commence some early works on site, as detailed on the submitted construction management plan, and maintain an exclusion zone around the existing operational trunk infrastructure. The applicant seeks to amend Condition 8.C to refer to 'prior to bulk excavation' as opposed to a construction certificate. Bulk excavation (and therefore any other potential further stages) will be delayed until such time as the trunk infrastructure is completed. For the reasons explored within 10.3.1, no objection is raised to this amendment and the recommended amendment to Condition 8.C. is provided below and within **Appendix "A"**. (old text in ~~strikethrough~~ and new text in blue):

## **~~C. Before Construction Certificate~~ Prior to Bulk Excavation**

Prior to ~~the issue of any Construction Certificate relating to the approved built form~~ any bulk excavation occurring on site:

- i) A Works-As-Executed drawing (WAED) of the stormwater trunk drainage system must be prepared by a Registered Surveyor. This drawing must detail the alignment of pipelines and pits. An original or a colour copy must be submitted to Sutherland Shire Council.
- ii) The supervising engineer must certify the WAED of the stormwater trunk drainage system was constructed to their satisfaction and in accordance with the Development Consent, and Public Domain Technical Manual.
- iii) CCTV and associated condition report of the realigned stormwater trunk drainage system must be provided to Council's Stormwater and Waterway Manager for review and comment.

- iv) Approval from Council's Stormwater and Waterway Manager, to the effect that the stormwater trunk drainage system is to their satisfaction and satisfies the design requirements in "A" above must accompany the application for a Construction Certificate relating to the built form

**Note: \*Bulk excavation is all works that exceed the depth and extent set out in the Construction Management Diagrams.**

### **9.1.3 Condition 12 – Section 7.11 Contributions**

Condition 12.B(2) requires the payment of contributions to be made prior to the release of the first construction certificate 'for any such building'. The relevant wording is provided below:

#### *B. Contribution Timing*

*(1) ...*

*(2) If no Construction Certificate in respect of the erection of any building to which this consent relates has been issued on or before 25 September 2022, the Section 7.11 monetary contribution required under condition 12 must be paid before the issue of the first Construction Certificate after that date for any such building.*

The condition requires monetary contribution of \$2,300,000.00 toward the cost of regional and local public domain works contained in the Works Programme of the Development Contribution Plan. The proponent has sought to delay payment until the Occupation Certificate.

As a matter of course, it is Council procedure to request that developer contribution payments are made prior to the issue of a construction certificate. This is in accordance with Chapter 2 of the Section 7.11 Development Contribution Plan 2016 which defers to clause 146 of the EP&A Regulation 2000 (now clause 20, Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021) which states:

*"20 Compliance with conditions of development consent*

*A certifier must not issue a construction certificate for building work under a development consent unless the following have been complied with—*

*(a) ...*

*(b) a condition of the development consent, referred to in the Act, section 7.11 or 7.12, requiring the payment of a monetary contribution or levy before building work is carried out,*

*(c) ..."*

Chapter 2 of the 2016 Contribution Plan provides the following exceptions to the above:

*"The only exceptions to this requirement are where works in kind, material public benefit, dedication of land or deferred payment has been approved by Council. In such cases, Council will issue a letter confirming that an alternative payment method has been agreed with the applicant."*

Council's contributions officer has advised of the following options:

- a) *defer payment to Occupation Certificate which requires a bank guarantee for the full amount and allow for indexation, or*
- b) *a 12 month instalment plan that would attract a fixed interest and include indexation charged on 1/07/2023. The repayment plan needs to be finalised prior to the issue of the occupation certificate or the end of the 12 month instalments, whichever comes first. A Deed of Agreement would be required. It is noted that this option is subject to review by Council's Chief Financial Officer, and there is no guarantee that this will be accepted.*

Of the above options, the proponent has confirmed a preference for option b. In support of the payment plan the following justification has been provided:

*The application was made to defer the contribution as a result of various factors which this development has endured from 2019-2020 and until now.*

*The payment is required to be delayed in timing in order for the project to commence. Given the current climate in the industry, it has become more crucial that these payments are delayed in timing to enable the projects to commence. Further, it is becoming more apparent that funding projects need to have strict fiscal compliance. As a result of the COVID-19 pandemic, it is now standard practice and a key requirement by funders that these payments are made after the projects have commenced as further security of project outcome delivery, in which large funding institutions require these delayed payments as a key aspect of our funding requirements. Overall, the strategic and financial reason for the delay in timing of payment is to ensure the projects commence without any unnecessary delays.*

*Further, the application was and still remains to be in response and as necessary, to the COVID-19 response relief measures that resulted in a series of directions deferring the timing of infrastructure contributions payments such as local contributions or levies, until the issuance of an occupation certificate. We note that this requested review of the timing for payment is necessary for the project also in circumstances where the overarching delay stemmed from ongoing delays and systematic on flow of delays in being able to obtain infrastructure materials.*

Council's Chief Financial Officer has considered the above request and has confirmed that a payment plan will be supported. On this basis a suitable amendment to the condition has been recommended and is provided below and within **Appendix "A"**. This amendment will require a deed of agreement to be provided and executed prior to the issue of a Construction Certificate issued for bulk excavation work, and completion of payment within 12 months (deleted text in ~~strikethrough~~ and new text in ~~blue~~).

## 12. Section 7.11 Contributions - Section 7.11 Development Contribution Plan 2016 - Caringbah Centre Precinct

### A. Before Construction

Pursuant to Section 7.11 of the Environmental Planning and Assessment Act 1979 and Sutherland Shire Council Section 7.11 Development Contribution Plan 2016, a total monetary contribution of \$2,300,000.00 must be paid to Sutherland Shire Council toward the cost of regional and local public domain works contained in the Works Programme of the Development Contribution Plan.

This contribution has been assessed and calculated in accordance with the Development Contribution Plan on the basis of 120 proposed residential apartments with a concession for 5 existing allotments.

Infrastructure & Facilities	Contribution Required
Local open space and public domain works	\$1,702,944.00
Regional open space	\$597,056.00

The contribution will be indexed on 1 July in each year in accordance with the Consumer Price Index (All Groups Index) for Sydney.

The formula to index a contribution rate is:

$$\text{New Contribution Rate} = \text{Current Contribution Rate} \times \frac{\text{Current CPI}}{\text{Previous year's CPI}}$$

### B. Contribution Timing

~~(1) The Section 7.11 monetary contribution that is required to be paid under Condition 12 of this Development Consent must be paid before the issue of the first Occupation Certificate in respect of any building to which this consent relates, except as provided by condition 88(2).~~

~~(2) If no Construction Certificate in respect of the erection of any building to which this consent relates has been issued on or before 25 September 2022, the Section 7.11 monetary contribution required under condition 12 must be paid before the issue of the first Construction Certificate after that date for any such building.~~

Payment shall be made in accordance with a Deed of Agreement and periodic payment plan, in accordance with Council requirements and the provisions of the Development Contributions Plan. The Deed of Agreement must be executed prior to the issue of any Construction Certificate for bulk earthworks or the built form. Full payment shall be made within 12 months of the date of issue of the construction certificate for bulk excavation works or prior to the issue of any occupation certificate, whichever comes first.

Note: Interest is payable at the current maximum interest on overdue rates and charges. This arrangement is subject to indexation which is charged on the 1st July each year on the balance outstanding at the time. All costs associated with this payment arrangement is to be borne by the developer/ consent holder, and any failure to meet any payment, in full, will result in the arrangement becoming void. This shall be reflected in the Deed of Agreement.

## 10.0 DEVELOPER CONTRIBUTIONS

Section 7.11 contributions were levied on the original DA19/0333. The proposed modification does not increase the demand for public facilities and therefore the Section 7.11 contributions remain unchanged. The proposed modification to defer payment of contributions is discussed within the assessment section of this report and an amended condition regarding the staging of payment is recommended.

## **11.0 DECLARATION OF AFFILIATION**

Section 10.4 of the EP&A Act requires the declaration of donations/gifts in excess of \$1000. In addition Council's development application form requires a general declaration of affiliation. In relation to this development application a declaration has been made that there is no affiliation.

## **12.0 CONCLUSION**

The subject land is located within Zone E2 Commercial Centre pursuant to the provisions of Sutherland Shire Local Environmental Plan 2015. The proposed development relates to commercial premises and shop top housing, which are permissible land uses within the zone with development consent.

In response to public exhibition, no public submissions were received.

The proposed modifications to the approved development are minor in nature, relating to the staging of early works on the site and the timing of developer contributions only. These modifications are considered acceptable in principle, albeit with differently worded conditions than as suggested by the proponent for the reasons discussed within this report. In addition to these conditions, a change to Condition 1 - Approved Plans, is also recommended to ensure the consent references construction management diagrams.

This application satisfies the requirement that the development to which the consent as modified relates will remain substantially the same development as that originally granted consent. Further, consultation with relevant public authorities and approval bodies has been undertaken in respect to the modification sought by this application, and their support received.

The application has been assessed having regard to the matters for consideration under Section 4.15 of the EP&A Act, together with the provisions of SSLEP 2015 and all relevant Council DCPs, Codes and Policies. Following detailed assessment, it is considered that the modification application No. MA21/0331 can be supported.

## **RESPONSIBLE OFFICER**

The officer responsible for the preparation of this Report is David Sheehan – Senior Development Officer

Author: David Sheehan; Senior Development Officer

Report endorsed by Sue McMahon, Development Assessment and Certification Manager