

31 August 2017

15756

Carolyn McNally  
Secretary  
Department of Planning & Environment  
GPO Box 39, Sydney NSW 2001  
Attention: Brendon Roberts

Dear Mr Roberts,

This application has been prepared by Ethos Urban on behalf of Mirvac Projects Pty Ltd (Mircac), pursuant to section 96(1A) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) to modify Development Consent SSD 7317 which relates to the development of a commercial campus at the Australian Technology Park, Eveleigh.

The purpose of this modification request is to seek approval for the placement of mechanical exhausts, flues, vents and photovoltaics on top of the roof of Building 1 and amend the wording of Condition A14 accordingly.

This application identifies the consent, describes the proposed modifications and provides a planning assessment of the relevant matters for consideration contained in section 96(1A) of 79C(1) of the EP&A Act. Accordingly, this application is accompanied by the following documents:

- Amended Architectural Plans for Building 1 prepared by FJMT (**Attachment A**);
- Australian Government Department of Infrastructure and Regional Development Controlled Activity Variation Approval (**Attachment B**); and
- Overshadowing Imagery prepared by FJMT (**Attachment C**).

## 1.0 Consent Proposed to be Modified

Development consent (SSD 7317) was granted by the Planning Assessment Commission on 20 December 2016 for:

- Commercial campus at the Australian Technology park, including:
- site preparation works, site clearance, excavation and remediation;
- construction of three mixed use buildings with a total gross floor area (GFA) of 107,427m<sup>2</sup> comprising:
  - Building 1 for commercial/ office, retail and child care uses (GFA of 46,830m<sup>2</sup>/ height of nine storeys);

- Building 2 for commercial/ office and retail uses (GFA of 56,686m<sup>2</sup>/ height of seven storeys);
- Building 3 for retail, gym, child care, community office and commercial uses (GFA of 3,911m<sup>2</sup>/ height of four storeys).
- car and bicycle parking;
- landscaping, road and public domain works; and
- building identification signage zones.

There have been several modifications since lodged regarding this SSD:

- Modification 1 approved changes to the timing for achievement of conditions to manage construction timeframes. This modification was approved on 26 June 2017;
- Modification 2 approved changes to signage zones on Building 1, lower ground floor layout reconfiguration on Building 2 and amendments to conditions. This modification was approved on 22 August 2017; and
- Modification 3 seeks changes to the design of Building 3 (the community building).

## 2.0 Proposed Modifications to Consent

### 2.1 Modifications to Development

Due to design development and the requirements of mechanical exhaust design, Mirvac seeks approval to locate mechanical exhausts, vents and photovoltaics (PVs) on top of the roof of Building 1. The proposed locations of the exhausts, vents and photovoltaics and their maximum heights are illustrated on the revised Architectural Drawings prepared by FJMT (**Attachment A**).

It is noted that there is no change proposed to the approved roof level of Building 1.

### 2.2 Modifications to Conditions

The proposed modifications described above necessitate amendments to the consent conditions as identified below. Words proposed to be deleted are shown in ~~bold strike through~~ and words to be inserted are shown in **bold italics**.

#### 2.2.1 Condition A2: List of Approved Plans

The below list of approved plans highlights only those proposed to be changed.

##### Condition A2

The Applicant shall carry out the project generally in accordance with the:

- a) State significant development and conditions of consent (SSD 7317);
- b) Environmental Impact Statement (EIS) prepared by JBA Urban Planning Consultants Pty Ltd, dated December 2015;

- c) The Remedial Action Plan entitled 'Australian Technology Park Remedial Action Plan, 2 Locomotive Street, Eveleigh NSW dated 15 June 2016 and prepared by JBS&G;
- d) The Site Audit Report entitled 'Site Audit Report- Remedial Action Plan for Australian Technology Park dated June 2016 and prepared by Graeme Nyland of Ramboll Environ Australia Pty Ltd;
- e) Response to Submissions (RtS) and Amended Proposal prepared by JBA Urban Planning Consultants Pty Ltd, dated May 2016;
- f) Additional information submitted subsequent to the RtS; and
- g) The Section 96(1A) modification application SSD 7317 Mod 1, prepared by JBA Urban Planning Consultants Pty Ltd, dated 11 April 2017 and response to submissions dated 29 May 2017;
- h) The Section 96(1A) modification application SSD 7317 Mod 2, prepared by JBA Urban Planning Consultants Pty Ltd, dated 20 April 2017, response to submissions dated 19 June 2017 and correspondence from Ethos Urban dated 7 August 2017;
- i) ***The S96(1A) Modification and Amended Proposal prepared by Ethos Urban dated September 2017; and***
- j) **Following drawings as set out in the table below, except for:**
  - a. Any modifications which are Exempt or Complying Development;
  - b. Otherwise provided by the conditions of this consent.

## Architectural (or Design) Drawings prepared by fjmt and SISSONS

### Building 1

<b>Drawing No.</b>	<b>Rev</b>	<b>Name of Plan</b>	<b>Date</b>
<b>Fjmt-AR-DWG-11008</b>	<b>DA1</b>	<b>Level 08 Plant GA Plan</b>	<b>27.04.16</b>
<b>Fjmt-AR-DWG-11009</b>	<b>DA1</b>	<b>Roof Plan</b>	<b>27.04.16</b>
<b>Fjmt-AR-DWG-11050</b>	<b>DA4</b>	<b>Elevations – South &amp; East</b>	<b>22.03.17</b>
<b>Fjmt-AR-DWG-11051</b>	<b>DA1</b>	<b>Elevations – North &amp; West</b>	<b>27.04.16</b>
<b>Fjmt-AR-DWG-11008</b>	<b>DA5</b>	<b>Level 08 Plant GA Plan</b>	<b>25.07.17</b>
<b>Fjmt-AR-DWG-11009</b>	<b>DA7</b>	<b>Roof Plan</b>	<b>25.07.17</b>
<b>Fjmt-AR-DWG-11050</b>	<b>DA7</b>	<b>Elevations – South &amp; East</b>	<b>25.07.17</b>
<b>Fjmt-AR-DWG-11051</b>	<b>DA7</b>	<b>Elevations – North &amp; West</b>	<b>25.07.17</b>

## 2.2.2 Condition A14: Airspace Protection (Building 1)

The proposed mechanical exhausts, vents and photovoltaics on the roof of Building 1 will penetrate the protected airspace of Sydney Airport that Condition A14 seeks to protect. Accordingly, an application to Sydney Airport was submitted on 25 May 2017 to seek approval to increase the height of the intrusion of Building 1 into the prescribed airspace.

On 4 July 2017 the Australian Government Department of Infrastructure and Regional Development (DIRD) issued approval to vary condition 1 of the original controlled activity approval and allow an increase to the height of the building to a maximum of 60.9m AHD.

A copy of the approval is included at **Attachment B**.

Accordingly, approval for the following modification to Condition A14 of SSD 7317 is sought:

### **A14 Airspace Protection (Building 1)**

For the purposes of controlled activities within the protected airspace of Sydney Airport, Building 1 must not exceed a maximum height of ~~57.9m~~ **60.9m** AHD, inclusive of all lift over-runs, vents, chimneys, aerials, TV antennae, lightning rods, any roof top garden plantings, exhaust flues etc.

Separate approval must be sought under the Airports (Protection of Airspace) regulations 1996 for any cranes required to construct the building (see Condition B59).

### **2.2.3 Justification**

The revised Architectural Plans for Building 1 that were approved by the Department of Planning and Environment on 23 May 2017 clearly identify a Potential PV zone (i.e. Photovoltaic) and the location of plant as required.

In developing the design for Building 1, it became apparent that to provide effective dispersion, the mechanical exhausts and flue/vent infrastructure would need to be a minimum of 1.565m and 3m higher than the roof level of the building respectively. Furthermore, the positioning of the photovoltaics is also required to be positioned approximately 400mm above the roof sheeting level.

The proposed modification to Condition A14 will therefore provide Mirvac the opportunity to provide the required mechanical exhaust infrastructure, flues, vents and photovoltaics on to the roof of the building and the wording of Condition 14 to be in line with the conditions imposed by the Commonwealth DIRD approval (included at **Attachment B**).

## **3.0 Substantially the same development**

Section 96(1A) of the EP&A Act states that a consent authority may modify a development consent if *“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)”*.

Whilst there is no hard and fast rule when it comes to determining what constitutes 'substantially the same development' the 'substantially the same test' has been considered and approved through various cases within the Land & Environment Court.

The applied phrasing as described in *Moto Projects (No2) Pty Ltd v North Sydney Council [1999] NSWLEC 280*, requires the consent authority to undertake both quantitative and qualitative analysis:

*"The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved....Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including circumstances in which the development consent was granted)".*

Further *Moto Projects Pty Ltd v North Sydney [1999] NSWLEC 280* established the following key principles when considering what constitutes a modification:

- The verb "modify" means to alter without radical transformation.
- "Substantially" in this context means essentially or materially or having the same essence.
- A development as modified would not necessarily be "substantially the same development" simply because it is precisely the same use as that for which consent was originally granted.
- A modification application involves undertaking both a qualitative and quantitative comparison of the development as originally approved and modified.
- Although the comparative task required under Section 96 involve a comparison of the whole development being compared, that fact does not eclipse if a particular feature of the development, particularly if that feature is found to be important material or essential to the development.

With the above in mind, the development, as proposed to be modified, is substantially the same development as the development for which consent was originally granted as:

- the proposed amendments do not seek to substantially modify the approved use or building envelopes;
- the modified development retains the same design and development parameters as approved;
- the amendment to Condition A14 is administrative in nature and does not seek to materially affect the intent of the original condition;
- the environmental impacts of the modified development remain substantially the same as the approved development as outlined below; and
- the proposed modifications do not give rise to any new matters/ areas of non-compliance and are of minimal environmental impact.

## 4.0 Environmental assessment

Section 96(3) of the EP&A Act requires the consent authority to take into consideration such of the matters referred to in Section 79C (1) as are of relevance to the development, the subject of the application. The EIS submitted with the original DA addressed the following environmental impacts:

- Consistency with relevant legislation, Strategic and Statutory Plans;
- Built form and design quality;
- Public Domain and urban design;
- Transport, traffic and access;
- Aboriginal and European heritage;
- Accessibility;
- Noise and vibration;
- Civil infrastructure and utilities;
- Railway infrastructure;
- Operational waste management;
- Geotechnical implications;
- Contamination;
- Wind impacts;
- Reflectivity;
- BCA and Fire Safety;
- Social and economic impact;
- Crime prevention and public safety;
- Environmental and construction management;
- Ecologically sustainable development;
- Development contributions;
- Site suitability; and
- Public interest.

The planning assessment of the proposed modified development generally remains unchanged with respect to the above matters. The following matters however warrant further assessment.

### 4.1 Consistency with relevant legislation, Strategic and Statutory Plans

The proposed placement of mechanical exhausts, vents and photovoltaics on the roof of Building 1 does not alter the conclusions of the original assessment or SEPP 1 objection of the development

against the maximum height provisions included in Subclause 21 of Schedule 3, part 5 of *State Environmental Planning Policy (State Significant Precincts) 2005* (SEPP SSP 2005).

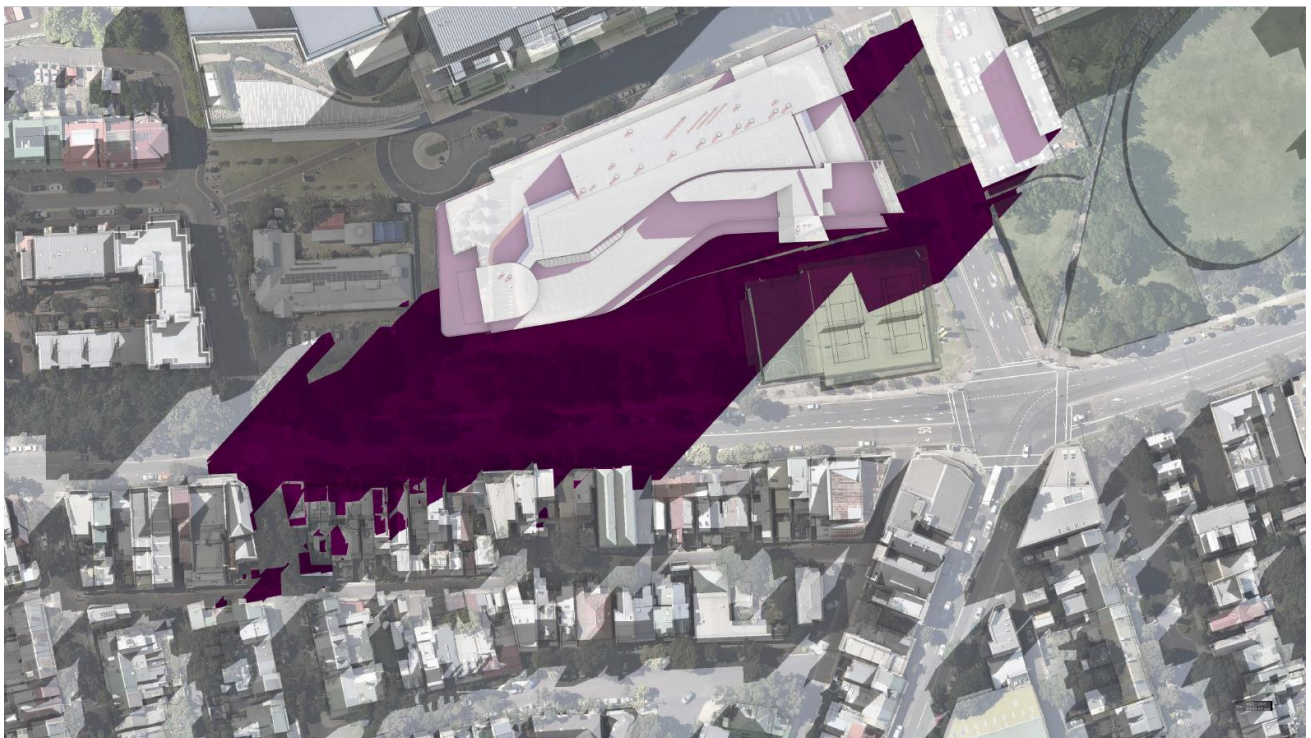
Specifically, the proposed additions to the roof of Building 1 do not result in an increase to the approved height of Building 1, for the following reasons:

- they do not constitute the addition of an additional storey to the height of the building; and
- while not applicable to the subject site, the *Standard Instrument – Principal Local Environmental Plan*, specifically excludes chimneys, flues and the like from the standard 'building height' definition which applies generally across development.

## 4.2 Built Form

One of the key aspects of the original Building 1 design that received the most comment during the public exhibition period was the building height and the potential overshadowing and visual impacts.

Significant analysis was undertaken by the Project Team to respond to the concerns and the Department, and the design was also amended to ensure that all residential properties to the south of Henderson Road receive at least two hours of direct sunlight between 9am and 3pm in mid-winter. Further shadow modelling has been completed as per **Attachment C**, and reproduced below in **Figures 1 to 3**. The approved building form shadow is shown in blue, with the proposed building form shadow shown in red. The purple shadow area is the combination of both, and indicates no additional overshadowing impacts.



**Figure 1 - 9am Shadow Analysis**

Source: FJMT



**Figure 2 - 12 noon Shadow Analysis**

Source: FJMT



**Figure 3 - 3pm Shadow Analysis**

Source: FJMT

Given their proposed positioning and setback from the edge of the building, the proposed placement of mechanical exhausts, vents and photovoltaics on to the roof of Building 1 does not alter the approved built form of Building 1, and will not give rise to any additional overshadowing impacts or visual impacts. The acute angle presented by the increase in exhaust, vents and photovoltaics will be indiscernible from normal view angles at ground level.

Specifically, any shadows cast by the proposed elements will be over the roof of the building itself and does not increase the area of overshadowing cast over neighbouring properties.

## 5.0 Conclusion

The proposed modification seeks to amend Condition A14 to reflect an increase in the maximum height of mechanical exhausts, flues and vents to 60.9m AHD. The Australia Government DIRD has issued approval to vary Condition 1 of the original controlled activity approval and allow an increase to the height of the building to a maximum of 60.9m AHD.

In accordance with section 96(1A) of the EP&A Act, the Department may modify the consent as:

- the proposed modification is of minimal environmental impact; and
- substantially the same development as development for which the consent was granted.

We trust that this information is sufficient to enable a prompt assessment of the proposed modification request.

Yours sincerely,



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Director

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