



14285  
12 June 2014

Carolyn McNally  
Secretary  
Department of Planning and Environment  
23-33 Bridge Street  
SYDNEY NSW 2000

Dear Ms. McNally

**SECTION 75W MODIFICATION (MOD4) – MP08\_0238  
1 DENISON STREET, NORTH SYDNEY**

We write to you on behalf of the proponent Eastmark Holdings Pty Limited, seeking an amendment to Project Approval MP08\_0238 pursuant to Section 75W and Clause 12 of Schedule 6A of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

The application seeks further technical wording modifications to the conditions of consent. These amendments will allow physical commencement of the consent to proceed without triggering conditions which are better and appropriately satisfied at later stages of the development due to the nature of information required to be submitted. A tracked changes version of the proposed amendments to the conditions is provided at **Attachment A**.

The EAR should be read in conjunction with the following drawings also submitted with this application which relate to some of the Initial Works:

- Architectural Drawings prepared by HDR Rice Daubney (**Attachment B**)
- Fire, Electrical, Hydraulic Services Plans prepared by Aurecon (**Attachments C, D & E**)

**1.0 CONSENT PROPOSED TO BE MODIFIED**

Project Approval MP08\_0238 was granted by the Department of Planning and Environment (DoPE) on 25 February 2010 for demolition of existing buildings and erection of a mixed use development comprising a retail/commercial building and a hotel building at 77 – 81 Berry Street (now known as 1 Denison Street) and 88 Walker Street.

This consent has since been modified three times, as follows:

- MP08\_0238 MOD 1 - Modify Building Design and Public Open Domain and Amend Conditions of Consent;
- MP08\_0238 MOD 2 – Technical amendments to wording of conditions to allow for the staged construction of the two separate buildings; and
- MP08\_0238 MOD 3 – Extension of the approved Construction Hours.

**2.0 PROPOSED STAGING OF THE DEVELOPMENT**

As alerted to in MOD 2 it is proposed to stage the development in the following manner:

- Enabling Works phase;
- Early works, including demolition and excavation;
- Construction of the commercial building; and

- Construction of the hotel building.

The Enabling Works would include engineering and building works to services and other site preparation works that would then enable demolition and excavation to proceed.

The mod 2 application sought to make clear which conditions of consent would be required to be satisfied for the Enabling Works phase and those which were required to be satisfied in the subsequent stages of development. To avoid any doubt in this regard it was proposed to insert an additional condition stating the following:

*B56 Enabling Works*

*The construction of the development is to be carried out in phases. The Construction Certificate can be issued for the Enabling Works as generally shown on the Rice Daubney plans at Attachment C of the Section 75w application.*

*Notwithstanding the requirements of any other condition of this consent, a Construction Certificate can be issued for the Enabling Works following satisfaction of the following conditions:*

- B9 Long Service Levy*
- B10 Security Bond Schedule*
- B22 Required Trunk Drainage Diversion Works – submission and approval of plans by Council under Roads Act 1993*
- B28 Services to be underground*
- B29 Sydney Water*
- B40 Works Zone*
- B51 Construction Management Plan*
- C3 Statement of Compliance with Australian Standards*
- C5 24 Hour Contact Telephone Number*

Unfortunately the above condition was not included in the Notice of Determination for MOD 2 and as such there are many conditions of consent which are triggered by the Enabling Works notwithstanding that they are irrelevant to the works being undertaken, or would be more appropriately satisfied in subsequent stages of the development. For example:

Condition B7(iv) refers to the upgrading of street lights along all of the site frontages. As there is no timing in this condition it must be assumed that it is required to be satisfied prior to the issue of the first Construction Certificate (CC). This is notwithstanding that the upgrading of the streetlights would be better undertaken once the construction of the building is in its final stages so as to ensure that the new street lights are not damaged during the early works.

Another example is conditions B50 Outdoor lighting. This condition requires details of outdoor lighting to comply with the relevant Australian Standard and is to be satisfied prior to the issue of 'a' CC. Again it must be assumed that this condition is to be satisfied prior to the issue of the first CC notwithstanding that the Enabling Works proposed do not involve any area of the development where outdoor lighting would be required.

In addition to the above some of the proposed changes to the wording of the conditions were not adopted as proposed and as such are also triggered by the Enabling Works notwithstanding that this was not the intention of the Department. An example of this is condition B4 – which relates to monetary contributions for the commercial building. The proposed wording in relation to the timing of the satisfaction of this condition was the following in MOD 2:

*(3) Timing and Method of Payment*

*The contribution shall be paid in the form of cash or bank cheque, made out to North Sydney Council. For accounting purposes, the contribution may require separate payment for each of the categories above and you are advised to check with Council. Evidence of the payment to Council shall be submitted to the Certifying Authority prior to the issue of a Construction Certificate **for works other than Enabling Works.***

However, the approval is worded to the following effect:

(3) Timing and Method of Payment

*The contribution shall be paid in the form of cash or bank cheque, made out to North Sydney Council. For accounting purposes, the contribution may require separate payment for each of the categories above and you are advised to check with Council. Evidence of the payment to Council shall be submitted to the Certifying Authority prior to the issue of a Construction Certificate **for construction of the building excluding demolition, excavation and shoring.***

As the proposed Enabling Works do involve construction of part of the approved building, being the construction of plant rooms to service the new retail space it can be interpreted that the Enabling Works trigger condition B4 even though it is only intended that the contributions be paid post completion of the demolition, excavation and shoring works. For this reason we are seeking to further clarify the timing of conditions that were also amended as part of MOD 2 to remove any uncertainty or doubt. In the case of the above condition the following wording is proposed.

### 3.0 PROPOSED MODIFICATIONS TO CONSENT

The proposed modifications to the conditions of consent are shown in the tracked changes table at **Attachment A**. Insertions are shown in *blue italics* and deletions are shown in ~~red strikethrough~~.

Ensuring that the conditions are clear and unambiguous is crucial when considering the law regarding physical commencement of a development. Eastmark Holdings has sought legal advice in respect of the conditions of consent in order to ensure that the Enabling Works undertaken will be undertaken lawfully and all of the precursor conditions satisfied accordingly. This is particularly important in this instance where the chances of a legal challenge are high given the strong opposition to the application. It is therefore important that the draft conditions are adopted as proposed in this application and we therefore cordially request that the Department gives serious consideration to this request.

### 4.0 ENVIRONMENTAL ASSESSMENT

The application involves technical changes to the wording of the conditions which relate to procedural issues only. There is no change proposed to the design, land use or construction of the building. Consequently there is no change to the environmental impact of the approved development and no change in terms of the development's compliance with the relevant planning controls.

### 5.0 CONCLUSION

This modification application seeks to further clarify the technical wording modifications to the conditions of consent to allow physical commencement of the consent to proceed without triggering conditions which are better satisfied at later stages of the development. There are no changes proposed to the approved development in terms of the physical appearance or operation of the development nor to the public benefits it will deliver.

The amendments will simply clarify the requirements of the conditions of consent in relation to the proposed staging of the development. In light of this we have no hesitation in recommending the application for approval. Should you have any queries about this matter, please do not hesitate to contact me on 02 9409 4944 or [jbuchanan@jbaurban.com.au](mailto:jbuchanan@jbaurban.com.au).

Yours faithfully



Jennie Buchanan  
Associate