

17 March 2011

Mr Sam Haddad
The Director General
NSW Department of Planning
GPO Box 39
SYDNEY NSW 2001

ATTENTION: Cameron Sargent

Dear Cameron

BARANGAROO MAIN WORKS APPROVAL - APPLICATION FOR MODIFICATION

This letter has been prepared on behalf of the Barangaroo Delivery Authority (the Authority) to request a Modification to the Barangaroo Headland Park and Northern Cove Main Works Project Application pursuant to Section 75W of the Environmental Planning and Assessment Act, 1979.

The Main Works Project Application (MP 10 0048) was approved by the Minister for Planning on 3 March 2011. The Authority has now reviewed the Project Approval and has noted some administrative issues with the drafting of the conditions in the Terms of Approval. It is therefore seeking a modification under Section 75W to a number of the conditions, as set out below.

Condition A3

Condition A3(b) of the Main Works Approval currently provides that:

'No Approval is expressed or implied to the contours of the Headland Park and Northern Cove as depicted on the submitted plans detailed above in Condition A2 – Development in accordance with plans and documentation'.

It is requested that Condition A3(b) of the Main Works Approval be deleted as follows:

~~No Approval is expressed or implied to the contours of the Headland Park and Northern Cove as depicted on the submitted plans detailed above in Condition A2 – Development in accordance with plans and documentation'.~~

Condition A3(b) of the Main Works Approval is currently a condition of the Early Works Approval for the Headland Park. Condition A3(b) of the Main Works Approval is not appropriate and should be deleted on the basis that approval of those contours is inherent in the plans and documentation referred to in Condition A2 - Development in accordance with plans and documentation of the Main Works Approval.

Approval was specifically sought for the final contours. By inadvertently including this condition, it has the effect of the development essentially not being approved.

Condition A5

Condition A5 of the Main Works Approval currently is as follows:

*'A5 REMEDIATION ACTION PLAN (RAP) AND HUMAN HEALTH
ECOLOGICAL RISK ASSESSMENT (HHERA)*

*Prior to the commencement of any works under the RAP identified in the
Preferred Project Report - Barangaroo Headland Park Main Works:*

- (a) the HHERA and RAP must be prepared in accordance with guidelines produced or approved under s105 of the Contaminated Land Management Act, 1997.*
- (b) the HHERA must be approved by DECCW, in accordance with guidelines produced or approved under s105 of the Contaminated Land Management Act, 1997.*
- (c) the RAP must be approved jointly by DECCW and a NSW EPA accredited Site Auditor, in accordance with guidelines produced or approved under s105 of the Contaminated Land Management Act, 1997.*
- (d) the RAP must be approved by the Minister for Planning as the approval authority.'*

It is requested that Condition A5 of the Main Works Approval be modified as follows. Note that proposed additions are shown in **bold red** and proposed deletions shown as ~~strike through~~ text.

**A5 REMEDIATION ACTION PLAN (RAP) AND HUMAN HEALTH
ECOLOGICAL RISK ASSESSMENT (HHERA)**

Prior to the commencement of any **remediation** works under the RAP identified in the Preferred Project Report - Barangaroo Headland Park Main Works:

- (a) ~~the HHERA and RAP~~ A Remediation Action Plan (RAP) must be prepared in accordance with the guidelines entitled "Managing Land Contamination, Planning Guidelines, SEPP 55 - Remediation of Land" 1998 produced or approved under s105 of the Contaminated Land Management Act, 1997.**
- (b) the HHERA, referred to in the Draft Remedial Action Plan prepared by JBS Environmental Pty Ltd and dated October 2010, which Plan was included in the EA as Appendix 7 and is to be referred to in the RAP, must be approved by DECCW, in accordance with guidelines produced or approved under s105 of the Contaminated Land Management Act, 1997.**

- (c) the RAP must be approved jointly by DECCW and **approved through the issue of a Section B Site Audit Statement by** a NSW EPA accredited Site Auditor, ~~in accordance with guidelines produced or approved under s105 of the Contaminated Land Management Act, 1997.~~
- (d) **After the RAP is approved by DECCW and a Section B Site Audit Statement has been obtained,** the RAP must be approved by the Minister for Planning ~~as the approval authority.~~

The insertion of "remediation works" is sought to clarify that the Condition applies before the commencement of remediation works, in accordance with the purpose and application of the RAP. The modifications to subparagraphs (a) to (d) of Condition A5 are intended to clarify the assessment procedures for the RAP and the timing of such procedures. Additionally, the references in subparagraphs (a) to (d) to the relevant guidelines need to be changed so that it is clear which guidelines are to be applied. Some of the guidelines approved under s 105 of the Contaminated Land Management Act 1997 are irrelevant. Although the "Managing Land Contamination, Planning Guidelines, SEPP 55 - Remediation of Land" 1998 are relevant to the preparation of a RAP, they are not relevant to the preparation of a HHERA.

The words "as the approval authority" in subparagraph (d) of Condition A5 should be deleted for the following reasons:

1. Subparagraph (d) creates an independent obligation on the Authority to obtain the approval of the Minister for Planning, in his capacity as "the approval authority", before commencing any works under the RAP. This would appear to be a reference to the obligation of clause 17(1) of the *State Environmental Planning Policy No. 55 - Remediation of Land* (SEPP 55), which requires the approval by the "consent authority" of a plan of remediation prepared in accordance with the contaminated land planning guidelines.

In recent Land and Environment Court proceedings, *Australians for Sustainable Development Inc v Minister for Planning and Ors*, No. 40965 of 2010 (Proceedings), the primary contention advanced by the respondents, including the Minister, was that SEPP 55 did not apply because it only operated in respect of Part 4 development applications, not Part 3A projects. An order was made by the Minister for Planning on 2 March 2011 under section 75R(3A) of the EP&A Act which precluded clause 17 from applying to the approvals the subject of the proceedings, that is, the Early Works and Basement Car Park approvals. In the absence of the order, Justice Biscoe would have found that the Authority were required to obtain the approval of the consent authority to a plan of remediation pursuant to clause 17 because SEPP 55, including clause 17, apply to Part 3A Projects. This finding may be persuasive but is not, however, binding.

In light of the Proceedings, subparagraph (d) is problematic because if SEPP 55 does not apply to Part 3A projects, then the words "as the approval authority" in subparagraph (d) have the effect of enlivening an obligation which the Minister submitted in the Proceedings did not operate. This raises significant potential inconsistencies as well as uncertainties in relation to the timing and appropriate

processes required in order to obtain the approval of the Minister to satisfy the condition.

2. The nature of the approval required to be obtained from the Minister and the timing of such approval is not clear from subparagraph (d).

It is unclear what the words "as the approval authority" mean. As the Minister has already determined the project application and granted the Main Works Approval, he has no further powers under the EP&A Act. As was argued by the Applicant in the Proceedings, the Minister could only exercise its power as a "consent authority" under clause 17 of SEPP 55 if the Minister had before him a Part 3A project application or Part 4 development application. The words "approval authority" are similar to that of "consent authority", which suggests that subparagraph (d) mandates a separate approval process recognised under the EP&A Act either under Part 3A or Part 4 in order for the Minister to approve the RAP. This would be inconsistent with a project application which seeks specific approval for remediation works in accordance with a RAP.

In addition, subparagraph (d) of Condition A5 was not in the final draft of the terms of approval that were provided to the Authority for its consideration and comment. Accordingly, the Authority has not had the opportunity to review this aspect of the Approval and raise its concerns.

Condition A8

Condition A8 of the Main Works Approval currently provides:

‘Separate project applications are required for the use of the proposed 300 space car park and floor area associated with the Cultural Facility.’

It is requested that Condition A8 of the Main Works Approval be amended as follows:

‘Separate project applications are required for the use of the proposed ~~300 space car park and~~ floor area associated with the Cultural Facility.’

It is proposed that the words be deleted on the basis that the Barangaroo Concept Plan Approval and the Main Works Approval were intended to provide for use and development of the 300 space car park. The Main Works Project Application specifically sought approval for the construction and use of the 300 space car park. All relevant matters were considered in the Environmental Assessment and plans showing the car park layout were provided. Accordingly, it is unclear what a further project application for the use of the car park would address.

Various Conditions

Various conditions of the Main Works Approval currently provide for items or documents to be approved by Council. The proposed amendments below have been requested on the basis that Council is not the consent authority for the purposes of the works the subject of the Main Works Approval, and therefore it is not appropriate to require the approval of Council to these items. Rather, the most appropriate approval regime to apply in these circumstances is for the relevant Roads Authority, the Certifying Authority or the Director General of the Department of Planning to approve the relevant matters.

It is therefore requested that the following conditions be amended as follows.

Condition B8(a) - the reference to 'and approved by Council' in this Condition be amended as follows:

~~'and approved by Council'~~ **and approved by the Certifying Authority or the Director General of the Department of Planning (following consultation with Council)**

Condition B17 - the reference to 'made to, and approved by, Council' in this Condition be amended as follows:

~~'made to, and approved by, Council'~~ **made to, and approved by, the relevant Roads Authority (following consultation with Council)**

Condition B19 – the reference to 'Council for approval' in this Condition be amended as follows:

~~'Council for approval'~~ **the relevant Roads Authority for approval (following consultation with Council)**

Condition B19 – the reference to 'These alignment levels, as approved by Council, are then to be incorporated into the plans' in this Condition be amended as follows:

~~'These alignment levels, as approved by Council, are then to be incorporated into the plans.'~~

Condition B37(1) – Condition B37(1) be amended as follows:

~~'The applicant shall provide a system of underground street and pedestrian lighting along all roads, footpaths and within the new park in accordance with Council and Energy Australia standards. Detailed plans and construction specifications for the works shall be prepared, submitted to Council'~~ **the relevant Roads Authority for approval (following consultation with Council) and certified as complying with Council's and Energy Australia's specifications'**

Condition B37(3)(b) - Condition B37(3)(b) be deleted as follows:

~~'Lighting in footpaths along Lachlan Street, Bourke Street, Sydney Gate and the new public roads to comply with AS1158.3.1 Category P2;'~~

Should you require any further information or have any queries about this matter, please do not hesitate to contact me on (02) 9719 3118.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Nicola Gibson', written in a cursive style.

Nicola Gibson
Director