



STATE SIGNIFICANT DEVELOPMENT:

Section 96(1A) Modification

**Amend Condition A4 to delete the requirement for
payment of Affordable Housing contributions**

**157 – 163 Cleveland Street, Redfern
SSD-4949-2011 MOD 6**



Secretary's Environmental Assessment Report
Section 96(1A) of the
Environmental Planning and Assessment Act, 1979

June 2014

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Cover photo: photomontage of northwest elevation (Source: Applicant's EIS)

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1. INTRODUCTION

This application seeks approval to modify development consent SSD-4949-2011 under Section 96(1A) of the Environmental Planning and Assessment Act 1979 (the EP&A Act) by deleting the requirement for payment of Section 94F Affordable Housing contributions.

1.1 Site and Locality

The site is located at 157-163 Cleveland Street, Redfern. The site has frontages to Cleveland Street to the north, Abercrombie Street to the west, Hart Street to the east and Hudson Street to the south. The site is located south-west of the Sydney Central Business District, within short walking distance of both Redfern and Central Railway Stations. The site is within close proximity to several tertiary educational establishments including Sydney University, University of Technology Sydney and Notre Dame University. The site falls within the Redfern Waterloo area as defined in the State Environmental Planning Policy (State and Regional Development) 2011. The site location is shown in **Figure 1** below.

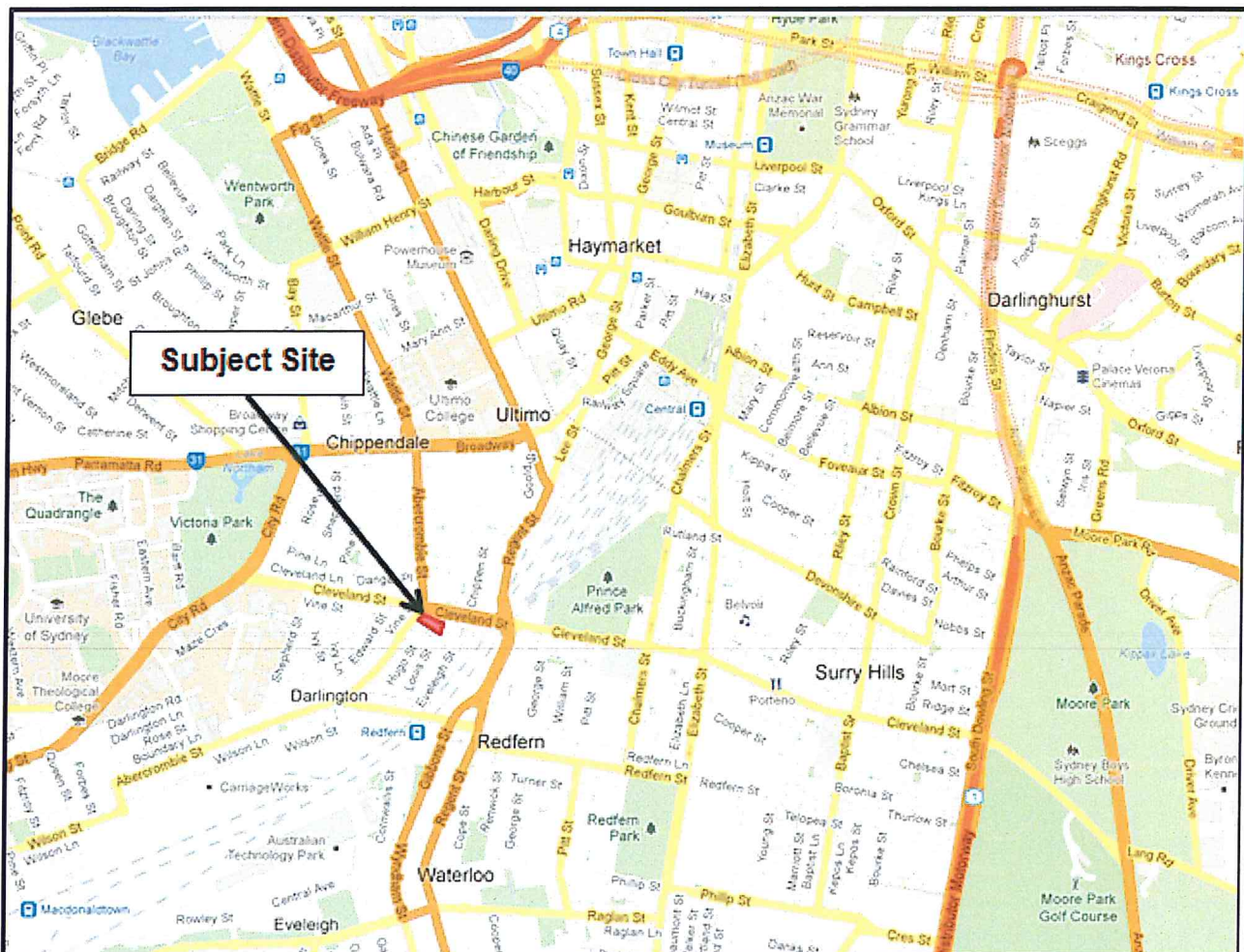


Figure 1: Site Location (Source: Google Maps)

The site has an area of 3,360m² and was previously occupied by buildings, consisting of a warehouse on the eastern part of the site. The majority of buildings associated with the site have now been demolished for construction of the approved development. However, the façade to the warehouse building (originally two factories) along Hart Street has been retained. The subject site is illustrated in **Figure 2**.



Figure 2: Subject Site (source: Nearmap)

1.2 State Significant Development Approval

On 16 May 2012, the then Director General, as delegate for the former Minister for Planning and Infrastructure approved a State Significant Development Application (SSD-4949-2011) for the redevelopment of the site for student accommodation. The Development Application included:

- construction of part 2 and part 5 storey building and partial retention of existing facades to Cleveland and Hart Streets;
- total GFA of 10,080 m²;
- total of 404 bedrooms with capacity for up to 461 students;
- provision of communal facilities including reception/lobby, administration room, meeting room, internet/study area, TV/games room, laundry room and communal kitchen;
- landscaped central courtyard; and
- site identification signs to Cleveland Street and Hudson Street.

1.3 Modifications

The department has approved 5 Section 96 applications to SSD-4949-2011:

- MOD 1, approved on 9 August 2012, to amend Condition A4 to defer the requirement to pay the Section 94F Affordable Housing contributions (originally required by the release of Construction Certificate) prior to the Occupation Certificate being obtained;
- MOD 2, approved on 19 October 2012, to amend Conditions E4 and D9 relating to green star rating and hours of work, amendments to Conditions B3 relating to external signage on the Cleveland and Hudson Street frontages, materials and finishes and a new condition A7 relating to external signage;
- MOD 3, approved on 31 January 2013, to amend condition D2 (b) relating to Aboriginal and European Archaeology, and for demolition and reinstatement of the Hart Street elevation;
- MOD 4, approved on 14 August 2013, to reduce the number of student beds, modify the internal layout of the middle wing, fenestration changes in the central wing and increase the size of the awning at Cleveland and Abercrombie Street; and

- MOD 5, approved on 30 September 2013, to modify condition E4 relating to Green Star rating for the development, to enable consideration of the Green Star Rating under a Custom Tool developed in consultation with the Green Building Council of Australia.

Other applications to SSD-4949-2011 include:

- MOD 7 which sought to defer payment of s94F contributions to 12 months after the issue of the final Occupation Certificate, but has since been withdrawn; and
- MOD 8 is currently being considered by the department and seeks to amend condition D2 relating to archaeology and increase the coverage of the awning at Cleveland and Abercrombie Street.

2. PROPOSED MODIFICATION

Urbanest Pty Ltd (the applicant) has lodged a modification application under Section 96 (1A) of the EP&A Act to modify SSD-4949-2011 (MOD 6). The proposed modification seeks to amend condition A4 of the approval to delete the requirement for payment of Section 94F Affordable Housing contributions on the basis that the condition is unlawful and unenforceable.

As approved, condition A4 provides as follows, with the relevant sections relating to Section 94F Affordable Housing contributions highlighted in bold:

"A4 Development Levy Contributions

In accordance with Part 4, Division 6 and Division 6A of the Act, the Applicant shall pay the following monetary contributions:

- a) *Amount of Contribution*
 - (i) *Section 94A development levy- \$587,779.52; and*
 - (ii) **Section 94F Affordable Housing contributions- \$59 per every m² of gross floor area, as at 2006, indexed to inflation (contact the Sydney Metropolitan Development Authority for confirmation of current rate).**
- b) *Timing and Method of Payment*
 - (i) *The contribution shall be paid in the form of cash or bank cheque, made out to the Sydney Metropolitan Development Authority (SMDA).*
 - (ii) *Evidence of the payment of the Section 94A development levy to the SMDA shall be submitted to the Certifying Authority prior to the issue of the Construction Certificate for above ground works.*
 - (iii) **Evidence of the payment of the Section 94F Affordable Housing contributions to the SMDA shall be submitted to the Certifying Authority prior to the issue of the Occupation Certificate.**

The proposal seeks to delete items (a)(ii) and (b)(iii) of the condition above.

The original proposal also sought to amend the design of the awning at Abercrombie and Cleveland Street. This aspect of the proposal has since been removed from the application and is proposed for consideration as part of MOD 8.

3. STATUTORY CONTEXT

3.1 Modification of Approval

Section 96(1A) of the EP&A Act requires the consent authority to be satisfied that the following matters are addressed in respect of all applications which seek modifications to approvals:

That the proposed modification is of minimal environmental impact.

The department is satisfied that the proposed modifications will have minimal environmental impacts. Relevant environmental impacts are considered in **Section 5** of this report.

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).

The proposed amendment seeks to delete the requirement for payment of Section 94F Affordable Housing contributions. The proposed modification does not result in any additional adverse impacts on the surrounding locality. On this basis, should the proposed modification be approved it will result in a development that is substantially the same to that which was originally approved.

It has notified the application in accordance with the regulations.

The Development Application was notified in accordance with the Regulations. Details of the notification are provided in **Section 4** of this report.

It has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

City of Sydney Council and Urban Growth NSW object to the proposed modification. Details of the objections are outlined in **Section 4**, and considered in **Section 5** of this report.

No public submissions were received in relation to the modification request.

3.2 Environmental Planning Instruments

State Environmental Planning Policy (State & Regional Development) 2011

The original approval was State Significant Development under Clause 2 of Schedule 2 of State Environmental Planning Policy (State and Regional Development) 2011 as the site falls within the area defined as the Redfern-Waterloo area and has a capital investment value in excess of \$10 million.

State Environmental Planning Policy (Major Development) 2005

The site is located within the Redfern Waterloo area and is zoned Business Zone - Mixed Use by the State Environmental Planning Policy (Major Development) 2005 (Major Development SEPP). The approved student accommodation use is permissible within the zone.

3.3 Delegation

Under the Minister's delegation of 14 September 2011, the Planning Assessment Commission (PAC) may determine applications under delegated authority where:

- the relevant local council has made an objection; and/or
- a political disclosure statement has been made; and/or
- there are less than 25 public submissions in the nature of objections.

As City of Sydney Council objects to the proposal the matter is referred to the PAC for determination under delegated authority.

4. CONSULTATION

The application was notified in accordance with the Environmental Planning & Assessment Regulation 2000. The modification request was made available on the department's website and referred to the City of Sydney Council and Urban Growth NSW for comment. Due to the nature of the proposed modification, the modification request was not exhibited by any other means.

Council and Urban Growth NSW Comments

Both Council and Urban Growth NSW object to the proposed modification and contend that Section 94F Affordable Housing contributions remain applicable to the development for the following key reasons:

- the student housing does not constitute affordable housing nor does it qualify for an exemption pursuant to the Redfern Waterloo Affordable Housing Contribution Plan 2006 (Contributions Plan);

- the product, nature and characteristics of student accommodation of shared rooms and facilities for students is different to identified affordable housing types such as private one bedroom apartments and studio rental properties; and
- the development is a commercial venture, unlike affordable housing, and no guaranteed rental level or link to ability to pay is provided as required under NSW Housing Affordable Housing Guidelines. Also, unlike affordable housing, rental levels are able to exceed the local affordable rental levels, and it is noted the proposal appears to concentrate on median rent levels.

Council and Urban Growth NSW have not commented on the applicant's contention surrounding the legal applicability of Section 94F Affordable Housing contributions (as discussed in **Section 5** below).

No public submissions were received in relation to the modification request.

5. CONSIDERATION OF PROPOSED MODIFICATION

The applicant originally sought to delete the requirement for payment of Section 94F Affordable Housing contributions on the basis that the approved student accommodation facility is a form of affordable housing as it will alleviate pressure on the demand for existing and future affordable housing stock in the area, including boarding houses.

However, following the submissions from Council and Urban Growth NSW, and the applicant's response to submissions, the applicant provided legal advice (**Appendix A**) which contends that Section 94F Affordable Housing contributions imposed under condition A4 are unlawful and unenforceable for the following reasons:

- the application of Section 94F Affordable Housing contributions may only be imposed if it is authorised by a contributions plan;
- the Redfern-Waterloo Affordable Housing Contributions Plan 2006 does not apply to State Significant Developments. The Contributions Plan only applies to:
 - Part 3A projects (which includes transitional Part 3A projects); and
 - development under Part 4 with Capital Investment Value of less than \$5 million;
- no other contributions plan for Section 94F Affordable Housing contributions applies to the development; and
- the development is not a transitional Part 3A project, nor is there any basis to interpret the reference to Part 3A in the Contributions Plan as a reference to State Significant Development under Part 4.

Given the above, the applicant seeks to delete the requirement for payment of Section 94F Affordable Housing contributions.

Department's Consideration

In the department's original assessment of the State Significant Development application, Section 94F Affordable Housing contributions were imposed pursuant to the Redfern-Waterloo Affordable Housing Contributions Plan 2006. Consequently, the approval requires the payment of Affordable Housing contributions of approximately \$760,000 (based on current rates) to be paid prior to the issue of an Occupation Certificate.

Having carefully considered the applicant's legal advice, the department accepts the reasoning in this advice and has come to the view that Section 94F Affordable Housing contributions do not lawfully apply to the development pursuant to the Redfern-Waterloo Affordable Housing Contributions Plan 2006. Specifically, the department concurs that the Redfern-Waterloo Affordable Housing Contributions Plan 2006 only applies to Part 3A projects and Part 4 developments, not State Significant Developments.

The department provided the applicant's legal advice to Urban Growth NSW, which advised that it does not intend on making a further submission on the issue.

Given the above, the department recommends the deletion of the requirement for payment of Section 94F Affordable Housing contributions. It should be noted, the department did not further consider the exemption of Affordable Housing contributions on merit grounds given the legal implications of applying Section 94F Affordable Housing contributions to the development.

6. CONCLUSION AND RECOMMENDATION

The department considers that the proposed modification is consistent with the originally approved development application (SSD-4949-2011). The proposed modification does not result in any additional adverse impacts on the surrounding locality. On this basis, should the proposed modification be approved it will result in a development that is substantially the same to that which was originally approved.

The modification application has been assessed in accordance with the matters for consideration under section 96(1A) and 79C of the EP&A Act, and all relevant environmental planning instruments, and is considered acceptable.

The department considers that Section 94F Affordable Housing contributions can not lawfully be applied to this development. Accordingly, it is recommended that Condition A4 be amended to remove the requirement for payment of Section 94F Affordable Housing contributions.

It is therefore recommended that the Planning Assessment Commission:

- (a) **consider** the findings and recommendations of this report;
- (b) **determine** the modifications subject to conditions under Section 96(1A) of the Environmental Planning and Assessment Act 1979; and
- (c) **sign** the attached Instrument of Modification (**Appendix D**).

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30/5/14

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6.6.14

APPENDIX A MODIFICATION REQUEST

See the department's website at:

<http://majorprojects.planning.nsw.gov.au>

APPENDIX B SUBMISSIONS

See the department's website at:

<http://majorprojects.planning.nsw.gov.au>

APPENDIX C RECOMMENDED MODIFYING INSTRUMENT
