

3 July 2019

218139

Mr Jim Betts
Secretary
Department of Planning, Industry and Environment
GPO Box 39
Sydney NSW 2001

Dear Mr Betts

SECTION 4.55(1A) MODIFICATION APPLICATION THE AUSTRALIAN MUSEUM, 1 WILLIAM STREET, SYDNEY

This application has been prepared by Ethos Urban on behalf of the Australian Museum, pursuant to section 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) to modify Development Consent SSD 9452 relating to the Australian Museum at 1 William Street, Sydney (the site).

The modification seeks to remove Condition B15 relating to the payment of development contributions in accordance with the direction provided by the Department of Planning, Industry and Environment's Circular D6 and on the basis that the development is exempt from contributions under City of Sydney Council's Section 61 Contributions Plan.

This application identifies the consent, describes the proposed modifications and provides an assessment of the relevant matters contained in section 4.55(1A) of the EP&A Act. This application is accompanied by:

- Correspondence to the City of Sydney Council and accompanying legal advice (**Attachment A**);
- Confirmation of the Museum's not-for-profit status (**Attachment B**);
- QS Cost Report prepared by Altus Group (**Attachment C**); and
- Heritage Advice prepared by Orwell and Peter Phillips (**Attachment D**).

1.0 Crown development

Clause 226(1) of the *Environmental Planning and Assessment Regulation 2000* (the Regulation) provides that development carried out by a public authority (not being a Council) is Crown development. The Australian Museum is recognised as the Crown by virtue of Clause 226 of the Regulation. Section 4.6 of the EP&A Act provides that in relation to Crown applications, a consent authority is unable to impose a condition of consent without the approval of the Museum or the Minister.

2.0 Background

2.1 Consent proposed to be modified

Development consent SSD 9452 was granted by the Department of Planning, Industry and Environment on 28 February 2019 for alterations and additions to the Australian Museum, including;

- *External works including new openings in the ground level and basement level of the William Street façade of the Parkes Farmer Wing;*
- *Installation of rooftop photovoltaic panels;*

- *Internal works including raising Museum Heart floor and new escalators, stairs and amenities;*
- *Café to Level 2 and new education spaces;*
- *Tree removal;*
- *Replacement trees and landscaping; and*
- *A new bus bay on William Street.*

The consent has not previously been modified and construction of the approved development has not commenced.

2.2 Condition proposed to be modified and context

A request for an exemption from Section 61 Contributions was submitted with the original SSDA and Council made a submission objecting to a blanket exemption on the basis that they considered the proposal not to fit within the category of 'not-for-profit development' and, as a whole, did not appear to fit within the category of 'development for the sole purpose of the adaptive reuse of an item of environmental heritage'. Due to timing constraints, the Museum accepted the condition at the time to facilitate the determination of the application. This resulted in the following condition being imposed which equates to a development contribution of approximately \$575,517.64.

Development Contributions

B15 A cash contribution comprising 1% of the total cost of the development is payable to the City of Sydney pursuant to section 61 of the City of Sydney Act 1988 and the Central Sydney Contribution (Amendment) Plan 2002/ Central Sydney Development Contributions Plan 2013 in accordance with the following:

a) Prior to any Crown Certificate being issued, evidence must be provided of Council's written verification of the amount of the contribution as required in (b) below, and then that the levy has been paid to the Council in accordance with this condition. Payment may be by EFTPOS (debit card only), CASH or a BANK CHEQUE made payable to the City of Sydney. Direct debit, personal or company cheques will not be accepted.

b) The contribution must not be paid to the City of Sydney until it is accompanied by separate written verification by the City of Sydney of the specific amount payable. In order to obtain such verification, the "City of Sydney - Cost Summary Report" indicating the itemised cost of development must be completed and submitted to Council by the Certifying Authority

(CA) together with copies of the plans the subject of the application for the Construction Certificate. A copy of the required format for the "City of Sydney - Cost Summary Report" may be obtained from the City of Sydney One Stop Shop, any of the Neighbourhood Service Centres and the City of Sydney's website (www.cityofsydney.nsw.gov.au).

c) The Council will consider the documentation submitted under subclause (b) and determine the cost of the proposed development having regard to the information submitted and to such other matters as it considers appropriate and will notify the CA accordingly.

d) The items to be included in the calculation of the cost of development are demolition works, site remediation including decontamination, excavation and site preparation, construction costs, fit out, professional fees as part of the design (including design competitions) documentation and implementation process, fixed building machinery, equipment and appliances, kitchens and bar areas, car parking, air conditioning plant and equipment, services (fire, mechanical ventilation, electrical, hydraulic), ceilings, fire protection devices, installation of services (power, water, sewer, telephone), lifts and other essential machinery, floor coverings, Building Code of Australia compliance works, replacement of existing materials, fixtures and fittings, construction

related insurance, assessment and construction related fees, charges and GST and any other matter not expressly excluded in (e) below.

e) The items to be excluded in the calculation of the cost of development are the cost of land, marketing expenses (excluding display suites etc), finance and interest, building insurance after practical completion, drapery, commercial stock inventory, loose furniture, loose equipment, loose electrical appliances, minor maintenance of existing retained fixtures (patching, repainting) and stamp duty.

Since determination of SSD 9452, the Museum has confirmed their status as a not-for-profit organisation and has subsequently written to the City of Sydney Council (Council) requesting an exemption from payment of the contribution on this basis (refer to **Attachment A**). It is understood that Council has advised the Museum that an exemption will not be granted for SSD 9452 and, as such, this application is being submitted to request the removal of Condition B15 from the consent.

3.0 Proposed modifications to the consent

The proposed modification to the development consent seeks to remove Condition B15 which requires the payment of a development contribution in accordance with Section 61 of the *Central Sydney Development Contributions Plan 2013* (Section 61 Contributions Plan). The condition is proposed to be removed in accordance with the direction provided by the Department of Planning, Industry and Environment's Circular D6 and on the basis that the development is exempt from contributions under Council's Section 61 Contributions Plan.

It is noted that the payment of any contribution on the development is discretionary, and that the approval authority, in this case the Minister for Planning, while empowered to impose a condition requiring the payment of a monetary contribution is not required to under either the EP&A Act or Council's Contributions Plan.

3.1 Department of Planning, Industry and Environment's Circular D6

Circular D6 "Crown Development Applications and Conditions of Consent" provides direction to consent authorities on conditions of consent appropriate to Crown development applications. While Circular D6 was formulated in 1995, it still remains the guiding document in relation to Crown applications and development contributions.

The Circular recognises that Crown activities provide facilities which lead to significant benefits for the public in terms of essential community services and employment opportunities. Accordingly, the Circular notes the importance of ensuring that these essential community services are not delayed by unnecessary disputes over conditions of consent, including in relation to development contributions.

The Circular recognises that where the applicant is a Crown authority, the activities are not likely to require the provision of public services and amenities in the same way as development undertaken with a commercial objective. Accordingly, the Circular identifies justifiable categories of contributions towards off-site works for Crown developments providing an essential community service. The development is for alterations to an information and education facility (museum), and therefore the Circular states contributions are unwarranted for open space, community facilities, parking, and general local and main road upgrades. It is noted that drainage is listed as an appropriate category for contributions in the Circular, however, the development will not result in a need for any stormwater infrastructure upgrades and as such a contribution for this is unnecessary in the circumstances.

The Circular also states that consideration should be given to the Crown's role in providing a community service, the cost of which is accountable to all taxpayers in the State. The Australian Museum is a not-for-profit public institution which relies on government grants, donations, and community funding to provide new facilities and exhibitions for the public at large. The current use of the site and the proposed improvements are of an inherently public nature, providing important educational, cultural and economic benefits to the State. The levying of development contributions on the works would redirect taxpayer and other donated funds to Council. This would deprive the

Museum of scarce funding relied upon, and specifically granted to the Museum, in order for it to provide an important State service. This would also act as a disincentive for the continual upkeep and improvement of one of NSW's oldest public buildings.

Therefore, in accordance with the direction provided by Circular D6, Condition B15 of the consent does not represent a justifiable development contribution and should be removed.

3.2 Central Sydney Development Contributions Plan 2013

Section 2.2(c) of the Section 61 Development Contributions Plan 2013 identifies a range of circumstances in which exemptions from a levy under the plan may be considered by the consent authority. This includes the following:

- Not-for-profit development – development undertaken on a cooperative or not-for-profit basis that provides a distinct community benefit, including but not limited to childcare services and emergency services such as fire stations, police stations and ambulance stations; and
- Heritage – development for the sole purpose of the adaptive reuse of an item of environmental heritage. The terms 'item' and 'environmental heritage' have the same meaning as in the *Heritage Act 1977*.

The development is considered to warrant an exemption from development contributions under both of these categories, as outlined below. Furthermore, it is noted that major development at the site has consistently been exempt from Section 61 contributions in the past by both the Department and the City of Sydney Council, including:

- Australian Museum Revitalisation Project Stage 1 (Major Project 06_0044);
- Refurbishment works to the Long Gallery (D/2016/1209);
- Crystal Hall development (D/2014/1217); and
- A signage strategy for the Australian Museum (D/2015/468).

3.2.1 Not-for-profit development

The Section 61 Contributions Plan provides an exemption from contributions for 'not-for-profit development'. The plan defines 'not-for-profit development' as:

*'development undertaken on a cooperative **or not-for-profit basis that provides a distinct community benefit** including but not limited to childcare services and emergency services such as fire stations, police stations and ambulance stations;'*

The Museum Trust is a registered charity with the Australian Charities and Not-for-profits Commission, which is the national regulator of charities (refer to **Attachment B**). Under the Charities Act 2013 (Cth), in order to be a registered charity, an organisation must be not-for-profit and have only charitable purposes that are for the public benefit. The Australian Museum is a public institution which relies on government grants, donations, and community funding to provide new facilities and exhibitions for the public at large.

The current use of the site and the approved alterations to the Museum are undertaken on a not-for-profit basis and clearly provide a distinct community benefit. The works represent a \$57,551,764 investment in a significant piece of the State's social infrastructure that will improve the Museum's ability to carry out its important educational and cultural role. Specifically, the development provides the following community benefits:

- a new flexible exhibition space to allow the Museum to host the world's most sought after displays, including the upcoming Tutankhamun exhibition;
- a new 'search and discover' educational space for students;
- equitable access improvements to the Museum and circulation between exhibits;
- enhanced visitor experience and wayfinding through improvements to the day to day operations of the Museum;

- repairs and maintenance of a State significant heritage item;
- improvements to the ESD performance of a major public building; and
- strengthening of the financial independence of a public asset with significant ongoing operational and maintenance cost.

The development is therefore considered to meet the not-for profit development criteria for an exemption under the Section 61 Contributions Plan.

3.2.2 Heritage

The Section 61 Contributions Plan provides an exemption for ‘development for the sole purpose of the adaptive reuse of an item of environmental heritage’. The plan states that the terms ‘item’ and ‘environmental heritage’ have the same meaning as in the *Heritage Act 1977*.

The Australian Museum is listed on the State Heritage Register (SHR No 000805) and as a Local Heritage Item (I246) under the *Sydney Local Environmental Plan* (LEP) 2012. It is therefore clearly an item of environmental heritage in accordance with the Section 61 Contributions Plan.

The sole purpose of undertaking the development is for the adaptive reuse of areas of the Museum to refurbish and repurpose the Museum to cater to its evolving needs. Accordingly, the entirety of the Schedule of Costs submitted with the original EIS (refer to **Attachment C**) can be attributed to works relating to an item of environmental heritage and therefore the entire project should be exempt from the contribution.

To support this position, Orwell & Peter Phillips has been engaged to provide an expert opinion on whether the works constitute the ‘adaptive reuse’ of a heritage item. In the absence of a definition of ‘adaptive reuse’ in the Section 61 Contributions Plan, *Heritage Act 1977* or any other relevant legislation, the Burra Charter (2013) was referred to as a guide. The Burra Charter includes the following definitions:

- *Adaption means **changing a place to suite the existing use or a proposed use.***
- *Use means the function of a place, including the activities and traditional and customary practices that may occur at the place or are dependent on the place.*
- *Compatible use means a use which respects the cultural significance of a place. Such a use involves no, or minimal, impact on cultural significance.*

In context of these definitions, Orwell & Peter Phillips consider that the term ‘adaptive reuse’ is equivalent to ‘the adaption of a place for a compatible use’ irrespective of whether the proposed use of the place as a museum is the same as the existing use. Accordingly, the approved works to the Australian Museum would fall within the scope of adaptive reuse of an item of environmental heritage and is therefore eligible for an exemption under the Section 61 Contributions Plan.

4.0 Substantially the same development

Section 4.55(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)*”.

The development, as proposed to be modified, is substantially the same development as that originally approved in that it only relates to Section 61 contributions. There are no physical changes proposed to the approved development and the proposed amendment will not impact the operation or any other function of the Museum.

5.0 Environmental assessment

Section 4.55(1A) of the EP&A Act states that a consent authority may modify a development consent if “*it is satisfied that the proposed modification is of minimal environmental impact*”. Under section 4.55(3) the consent Authority must also take into consideration the relevant matters to the application referred to in section 4.15(1) of the EP&A Act.

The proposed modification will have nil environmental impact and will not alter the assessment of relevant matters under section 4.15(1) undertaken as part of the original application. The matter of Section 61 Contributions has been addressed at Section 3.2 above.

6.0 Reasons for approval of the original application

Section 4.55(3) of the EP&A Act requires a consent authority to take into consideration the reasons for approval of the original application when assessing a modification application. The original SSDA was approved by the Executive Director, Key Sites and Industry Assessments, of the Department of Planning, Industry and Environment as delegate of the Minister for Planning. The key reasons for the decision outlined in the Department’s notice of decision letter includes:

- *The project will provide a range of benefits for the region and the State as a whole, including a total capital investment of \$57,551,764 and 84 jobs;*
- *The project is permissible with development consent, and is consistent with NSW Government policies;*
- *The impacts on the community and the environment can be appropriately minimised, managed or offset to an acceptable level, in accordance with applicable NSW Government policies and standards;*
- *The issues raised by the community during consultation and in submissions have been considered and adequately addressed through changes to the project and the recommended conditions of consent; and*
- *Weighing all relevant considerations, the project is in the public interest.*

Approval of the proposed modification does not undermine the justification provided for the granting of consent for the original application. The project will continue to deliver substantial benefits for the Region and the State, and it continues to be consistent with the applicable NSW Government policies and standards. With the exception of the issue of contributions, as raised by the City of Sydney Council, the project continues to address all issues raised by the community and agencies during consultation. There is strong justification for exempting the project from development contributions as detailed throughout this section 4.55(1A) and the proposed modification is considered to contribute to the public benefit of the project as it will prevent the diversion of public funds away from the Australian Museum.

7.0 Conclusion

The proposed modification seeks to remove Condition B15 relating to the payment of development contributions for the project. In accordance with section 4.55(1A) of the EP&A Act, the Department of Planning, Industry and Environment may modify the consent as:

- The proposed modification will not result in any additional environmental impacts;
- The development remains substantially the same as the development for which the consent was granted;
- Condition B15 does not represent a justifiable development contribution in accordance with the direction provided by the Department’s Circular D6; and

- An exemption from Council's Contribution Plan is warranted on the basis that the works are being undertaken by a not-for-profit organisation, they relate to the adaptive reuse of a State heritage item and will deliver a material public benefit.

We trust that the information contained within this application, and as attached, is sufficient to enable a prompt assessment of the proposed modification request. Should you have any further queries about this matter, please do not hesitate to contact me on 9409 4953 or cforrester@ethosurban.com.

Yours sincerely,



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