

3.2**4 - 6 Niangala Close, Belrose – Modification of Consent No. DA2001/1615 to modify Condition No. 39 and delete Condition Nos. 41A and 41B****S96 (2) MODIFICATION APPLICATION ASSESSMENT REPORT**

Assessment Officer: Lashta Haidari
Address / Property Description: Lot 1, DP 880191, No. 4-6 Niangala Close, Belrose

Proposal: Section 96(2) modification of Development Consent No.2001/1615 to modify Condition No. 39 and delete Condition Nos. 41A & 41B.

Modification Application No. MOD2010/0178

Plans Reference: No plans were submitted as part of this application

Applicant: Homemakers Supa Centa Belrose P/L

Owner: Homemakers Supa Centa Belrose P/L

Application Lodged: 29 July 2010

Amended Plans: No

Locality: C9 - Austlink Business Park
Category: Category 2 - 'Shops' (with GFA not exceeding 2500m²)
Draft WLEP 2009 Permissible
Clause 20 Variations: No variation sought as part of this modification
Land and Environment Court No
Action:
Referred to WDAP: No
Referred to ADP: Yes "The modification relates to conditions that were endorsed by ADP"

SUMMARY

Submissions: No submissions were received as a result of the notification process

Submission Issues: None

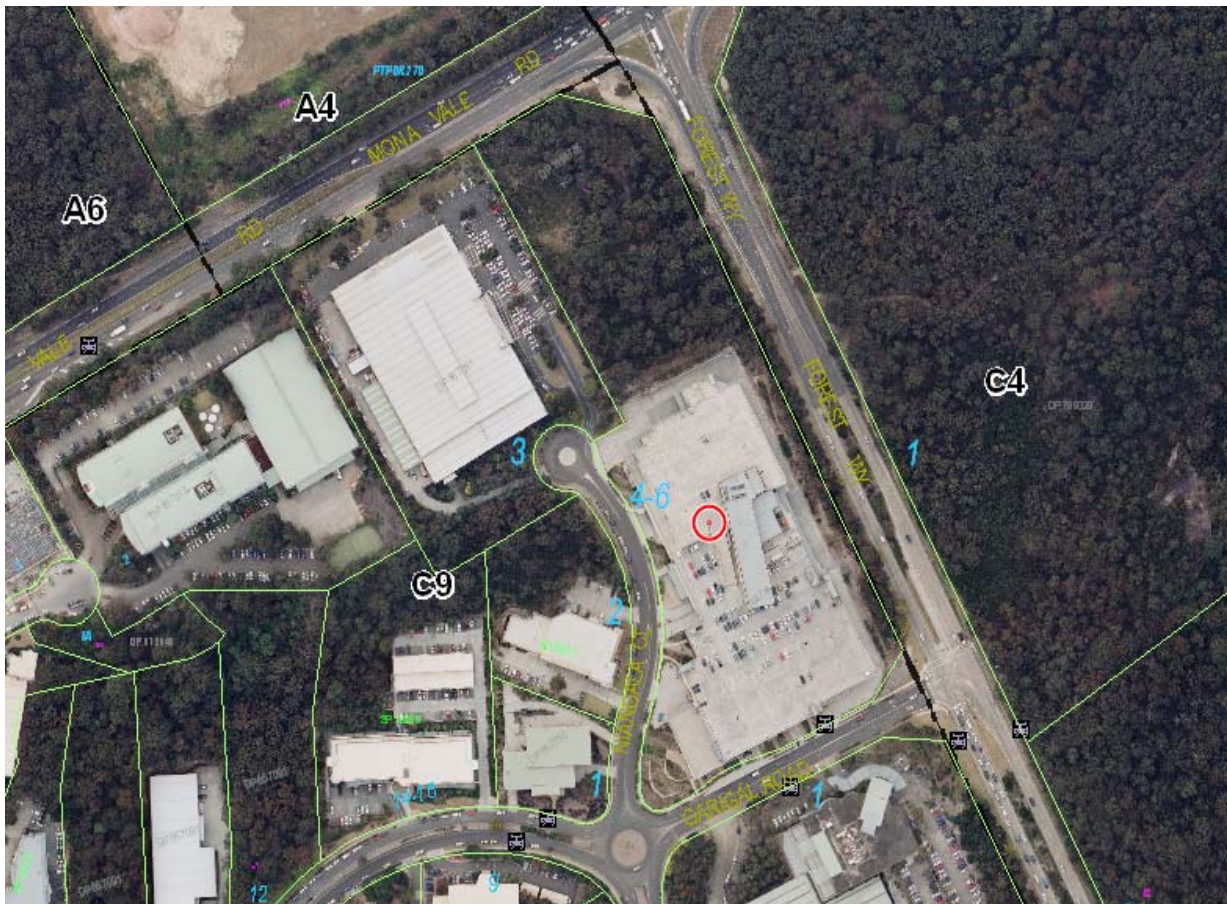
Assessment Issues: Economic impact; the requirement of Section 92 (2) of the EP and A Act 1979.

Recommendation: Section 96 (2) Approval

Attachments: Hill PDA report (Dated: 30/09/2010)



LOCALITY PLAN (not to scale)



Subject Site: Lot 1, DP 880191, No. 4-6 Niangala Close, Belrose

Notification: The subject application (as amended) was publicly notified and advertised in accordance with the Environmental Planning and Assessment Regulation 2000 and Warringah Development Control Plan. Notification letters were sent to 97 adjoining owners and occupiers. The application was advertised in the Manly Daily on 16 August 2010.

SITE DESCRIPTION

The site is legally described as Lot 1 in DP 220191 known as 4-6 Niangala Close, Belrose. The site is located on the corner of Monavale Road, Forest Way, Garigal Road and Niangala Close. The total area of the site is 4.13 hectares.

The site is currently occupied by the Homemakers Supacentra building and is located within the Austlink Business Park, Belrose.

Land surrounding the site has been developed by a variety of uses including a "Bunnings" hardware outlet to the north-west, "Carpet Right" warehouse on the opposite side of Niangala Close to the west and the "Panasonic" building on the opposite side of Garigal Road to the south.

APPROVED DEVELOPMENT

Development Consent 2001/1615 for the construction of a bulky goods retail outlet, shops, restaurants, conservation of bushland and associated parking was granted consent by Council on 11 May 2004.

PREVIOUSLY APPROVED MODIFICATIONS

Council's records indicate that Development Consent No. DA2001/1615 was modified on the following occasions:

- 27 February 2006, Council granted modified consent (2001/1615Mod 1) to provide an additional 124 car parking spaces on the rooftop of the building and to provide access ramps; and
- 26 September 2006, Council granted modified consent (2001/1615Mod 2) for the provision of a stairway linking the lower and upper level rooftop carparking areas.
- 18 February 2010, Council granted modified consent (MOD2009/0030) to modify condition No. 39 of consent 2001/1615 to increase the gross floor area of the shops component of the Development from 1000m² to 2500m².

Condition Nos. 41A and 41B were added to the Consent by MOD2009/0030 as a result of an *Economic Impact Assessment* provided by Hill PDA dated 7 January 2010.

Other Relevant Consents

A separate Development Application (DA2005/1128) was approved on 24 March 2006 for the occupation and use of the approved development for shops, restaurants and bulky goods retailing.

HISTORY AND BACKGROUND

The original consent relating to the construction of a bulky goods retail outlet for this site was initially issued by Council on 7 May 2002. The consent was challenged by a third party in the Land and Environment Court and on 2 July 2003 the Land and Environment Court declared the consent void. The key issue relating to the appeal was the failure by the Council to properly consider the economic impacts of the development.

As part of the Court proceedings the applicant provided Council with two independent economic impact assessments. Hill PDA was engaged by Council to review the economic impact assessments.

Hill PDA raised significant concerns in relation to both of the economic assessment reports prepared by the applicant in that the reports did not adequately address all of the relevant issues in relation to economic impact. In particular, there was concern expressed that the proposed floor space for the retail component could potentially create a small shopping centre.

In light of the above, Hill PDA recommended that the shops component be restricted to a total maximum area of 1,000m². The reasons for this restriction were:

- *To not undermine the establishment of other retail shops (such as food outlets) in the Business Park and thereby allow all workers in the business park to have easy access to minor retail uses. Further, it is not equitable for the proposal to provide all of the retail shops in the Austlink Business Park.*
- *To prevent the establishment of a neighbourhood retail centre within the Business Park and to ensure the proposal does not significantly impact on nearby neighbourhood retail centres.*

The above recommendation made by Hill PDA was supported in the assessment of the application and endorsed by the Independent Hearing and Assessment Panel (IHAP). The proposal was then granted consent by Council on 11 May 2004, with Condition No. 39 which stated:

"The gross floor space for shops and restaurants in the development shall not exceed 1000 square meters for shops and 302 square metres for restaurants".

A section 96 Application (Mod2009/0030) was received by Council on the 13 February 2002, which sought to amend the condition 39 to increase the floor space for shops from 1000m² to 2500m².

The above modification was approved by Council on 18 February 2010 with additional conditions 41A and 41B which stated:

41A Retailing of clothing or apparel

This consent does not authorise the use of any shop whose primary purpose is for the retailing of clothing or apparel.

41B Size of individual shops

This consent does not authorise any individual shop to exceed 400 square metres of gross floor space.

PROPOSAL IN DETAIL

The applicant seeks to modify Development Consent DA2001/1615 by amending Condition No. 39 and deleting Condition Nos. 41A and 41B of the conditions of consent.

Condition No. 39 states:

39 *The gross floor space for shops and restaurants in the development shall not exceed 2500 square metres for shops and 302 square metres for restaurants.*

The applicant proposes to amend the above condition by adding the following condition:

39A *The following restrictions apply to the gross floor space of shops:*

- a) *1000 square metres of shops may be utilised for general retailing.*
- b) *The additional 1500 square metres of shops permitted by Mod2009/0030 is subject to the following restrictions:*
 - i. *This consent does not authorise the use of the additional 1500 square metres for shops whose primary purpose is for the retailing of clothing or apparel.*
 - ii. *This consent does not authorise any individual shop to exceed 400 square metres of gross floor space.*

It is proposed to delete Conditions 41A and 41B as they would be replaced by new condition 39A.

STATUTORY CONTROLS

- a) Environmental Planning and Assessment Act 1979
- b) Environmental Planning and Assessment Regulations 2000
- c) Warringah Local Environment Plan 2000
- d) Draft Warringah Local Environmental Plan 2009
- e) Warringah Development Control Plan
- f) Warringah Section 94A Contributions Plan

REFERRALS

No referrals were required for the proposed modification

NOTIFICATION & SUBMISSIONS RECEIVED

The subject application (as amended) was publicly notified and advertised in accordance with the Environmental Planning and Assessment Regulation 2000 and Warringah Development Control Plan. Notification letters were sent to 97 adjoining owners and occupiers. The application was advertised in the Manly Daily on 16 August 2010.

No submissions were received as a result of the notification.

SECTION 96 OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

The subject application to modify Development Consent No. 2001/1615 has been lodged pursuant to Section 96(2) of the Environmental Planning and Assessment Act 1979. Section 96(2) of the Environmental Planning and Assessment Act 1979 (the Act) stipulates:

'Other modifications

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

- (a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and*
- (b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and*
- (c) It has notified the application in accordance with:*
 - (i) The regulations, if the regulations so require, or*
 - (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*
- (d) It has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.*

The development as modified is considered to be substantially the same development as the development for which consent was originally granted for the following reasons:

- No change is proposed to the approved land use;
- The proposed modification does not alter the form or function of the approved building;
- The proposed modification will not result in any change to the facade of the building and there will be no increase in the gross floor area of the approved building; and
- The proposed modification does not raise any additional environmental impacts beyond those considered in the original application.

The original Development Application DA2001/1615 required concurrence from the National Parks and Wildlife Service (now incorporated within the Department of Environment and Climate Change and water– DECCW). The subject modification proposes no change to the building and therefore will have no impact on Duffy's Forrest Vegetation Community. The conditions as recommended by the Department as part of the original application will remain and will not be altered as part of the

proposed modification. As such, the modification application is not required to be referred to the DECCW for comment.

As discussed in the 'Notification and Submissions' section of this report, the application has been advertised and notified in accordance with the Environmental Planning and Assessment Regulation 2000 and Warringah Development Control Plan. No submissions were received as a result of the notification for the proposed development.

Accordingly, the proposed modifications may be assessed pursuant to Section 96(2) of the Act.

Section 79C Assessment

In accordance with Section 96(3) of the Environmental Planning and Assessment Act 1979, in determining an modification application made under Section 96 the consent authority must 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 following table assesses the proposed modifications against the relevant matters under Section 79C of the Environmental Planning and Assessment Act 1979.

Section 79C 'Matters for Consideration'	Comments
Section 79C (1) (a)(i) – Provisions of any environmental planning instrument	The proposed modifications do not alter the proposal's compliance with any environmental planning instrument. See discussion under "State Environmental Planning Policies" and "Warringah Local Environmental Plan 2000" in this report.
Section 79C (1) (a)(ii) – Provisions of any draft environmental planning instrument	Draft Warringah LEP 2009 applies and is discussed in this report.
Section 79C (1) (a)(iii) – Provisions of any development control plan	The application was notified in accordance with Warringah Development Control Plan.
Section 79C (1) (a)(iia) – Planning Agreement or any Draft Planning Agreement under Section 93F	None applicable to the proposal
Section 79C (1) (a)(iv) – Provisions of the regulations	All relevant provisions of the EP&A Regulation 2000 have been taken into consideration during the assessment of the development application and this modification application.
Section 79C (1) (b) – The likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality	<p>(i) The proposed modifications will not result in any adverse impacts on the natural or built environment as the proposed modifications will be consistent with the desired future character statement and the relevant general principles of development control in WLEP 2000.</p> <p>(ii) The proposed modifications will not have a detrimental social impact on the locality considering the nature of the modifications, which maintain substantially the same development.</p> <p>(iii) The modified development will not have a detrimental economic impact on the locality considering that the gross retail floor space has already been approved. Suitable restrictions have been retained within the proposed new Condition No. 39A to limit the use of the retail space.</p> <p>Notwithstanding above, the economic impact of the proposed development is discussed in detail later in this report.</p>
Section 79C (1)(c) – The suitability of the site for the development	The proposed modifications do not alter the site's suitability for the proposed use.
Section 79C (1)(d) – Any submissions made in accordance with the EPA Act or EPA Regs	Refer to Public and notification section of this report.
Section 79C (1)(e) – The public interest	The proposed modification is considered to be in public interest as the increase in shop gross floor space will provide employment opportunities to the general public.

Section 79C 'Matters for Consideration'	Comments
	Further to the above, the proposed modifications are generally consistent with the planning controls applying to the site under WLEP 2000 and do not result in any unreasonable impacts. As such, the proposed modification is considered to be in the public interest.

Economic Impact Assessment

Section 79C (1) (b) of the Environmental Planning and Assessment Act 1979 requires Council to consider the economic impact of the proposed development in the locality. In addition, given the history of the approved development and reasons behind restricting the shop component of the development not to be utilised for certain uses, Hill PDA was re-engaged by Council to review the economic impact of the proposed modification. The Hill PDA report is appended to this report.

The Hill PDA report concludes:

“Conditions 41A and 41B were imposed to increase control in the protection of the economic viability of existing centres. Nevertheless the changes sought by the applicant are minor and would have no measurable impacts on the viability of existing centres. It relates to no more than 1,000sqm of retail space and largely validates an existing retailer more than it achieves any other purpose. It gives the owner a little more flexibility with tenancies but the limitation of floor area to 1000m² is insignificant in comparison to the sizes of potentially competing centres”.

In light of the above, the assessment made by Hill PDA is concurred with. Further, the applicant seeks to modify the application so Conditions 41A and 41B only apply to the additional 1500m² (approved as part of S96 application) of general retail and not the total 2,500m² of general retail, given that the original approval which restricted the shop component to 1,000sqm did not have these additional restrictions relating to the types of shops.

DRAFT ENVIRONMENTAL PLANNING INSTRUMENTS:

Draft Warringah Local Environmental Plan 2009 (Draft WLEP 2009)

Definition: Retail Premises

Land Use Zone: B7 Business Park

Permissible or Prohibited: Permissible (as the use is not specified in items 2 or 4)

Additional Permitted used for particular land – Refer to Schedule 1: N/A

Principal Development Standards:

Development Standard	Required	Proposed	Complies	Clause 4.6 Exception to Development Standard
Minimum Subdivision Lot Size:	The application does not seek any subdivision of the land	NA	NA	N/A
Rural Subdivision:	Not applicable to the proposed modification	NA	NA	NA
No Strata Plan or Community Title Subdivisions in certain rural and environmental zones:	Not applicable to the proposed modification	NA	NA	NA
Height of Buildings:	11m	The proposed modification does not alter the approved	NA	NA

		building height		
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The proposed development is consistent with the aims and objectives of the Draft WLEP 2009.

State Environmental Planning Policies

SEPP (Infrastructure) 2007

Clause 45 of SEPP Infrastructure requires the Consent Authority to consider any development application (or an application for modification of consent) for any development carried out:

- Within or immediately adjacent to an easement for electricity purposes (whether or not the electricity infrastructure exists);
- Immediately adjacent to an electricity substation; or
- Within 5m of an exposed overhead electricity power line.

The proposal is not within or immediately adjacent to any of the above electricity infrastructure and as such the development application is not required to be referred to the electricity supply authority. In this regard, the subject application is considered to satisfy the provision of Clause 45 SEPP Infrastructure.

Draft SEPP (Competition) 2010

On 27 July 2010 the NSW Government has released the draft *State Environmental Planning (Competition) Policy 2010 (draft SEPP)* which aims to promote economic growth and competition, and remove anti-competitive barriers in environmental planning and assessment.

The draft SEPP applies to commercial development for the purposes of retail, business or office premises.

Under the draft SEPP,

- A consent authority must not take into consideration the commercial viability of a proposed commercial development when determining development applications made under Part 4 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*,
- A consent authority must not take into consideration the likely impact of a proposed commercial development on the commercial viability of other individual businesses when determining development applications under Part 4 of the EP&A Act.

Clause 13 of the Draft SEPP refers to the Savings and transitional provision, which states:

"This Policy does not apply to or with respect to an application for an approval under Part 3A of the Act or for development consent under Part 4 of the Act that had been made but not finally determined before the commencement of this Policy".

The original Development consent relating to this site was approved by Council on 11 May 2004 and subsequently modified to increase the GFA area for the shop component from 100m² to 2500m² on the 7 January 2010. The draft SEPP was released on the 27 July 2010 and accordingly, the saving provision renders the draft SEPP not applicable to the proposed modification.

Regional Environment Plans (REP's)

There are no REP's applicable to the assessment of this application.

Local Environment Plans (LEP's)

Warringah Local Environmental Plan 2000

Desired Future Character

The subject site is located in the C9 Locality – Austlink Business Park under the LEP. The Desired Future Character statement for this locality is as follows:

The Austlink Business Park will integrate modern forms of industry, manufacturing, research, warehouses, offices and related services with the natural qualities of the locality and the adjacent National Park.

Articulated building forms, generous landscaped spaces around buildings and building materials that blend in with the colours and textures of the natural landscape will be used to minimise the visual impact of development on long distance views of the locality.

Areas within the locality shown cross-hatched on the map may only be developed if it is clearly demonstrated that the topography of the land is suitable for development and any Aboriginal relics found on the site may be preserved in their natural state.

There will be no vehicle access to properties directly from Mona Vale Road or Forest Way.

The proposed modification seeks to amend Condition 39 by adding Condition No. 39A to allow for up to 1000m² of shops to be used for unrestricted general retailing. Further, Condition No. 39A seeks to prohibit the additional 1500m² of retail area, as generally approved under MOD2009/0030, from the retailing of clothing or apparel and from individually exceeding 400m² of gross floor space.

Therefore, the proposed modification will not increase the approved floor space area of the shops.

Clause 12(3)(b) of the LEP requires the consent authority to be satisfied that proposed Category 2 development is consistent with the Desired Future Character described in the relevant Locality Statement.

The proposed modification will not alter the proposal's consistency with the DFC statement of the locality as the proposed land uses are consistent with the land uses defined in the locality statement, namely, bulky goods retailing and shops with a gross floor area not exceeding 2,500m² and restaurants with a gross floor area not exceeding 302m².

The shops and restaurant are provided as an integral component of the bulky goods retail use of the site intended to meet the convenience needs of visitors to the bulky goods shops. It is considered that the use of the shops would be consistent with the desired future character of the locality, and the proposed modification will not result in any significant impact on the viability of other centres in the LGA.

BUILT FORM CONTROLS

The proposed modification does not alter the approved built form controls.

GENERAL PRINCIPLES OF DEVELOPMENT CONTROL

The following General Principles of Development Control as contained in Part 4 of Warringah Local Environmental Plan 2000 are applicable to the proposed modifications:

Clause 74 - Provision of Car Parking

This clause refers to Schedule 17 of the WLEP that requires comparisons with developments for similar purposes. Assessment of the proposed parking provisions was made in the original application. A traffic report titled 'Traffic implications of the proposed Belrose Warehouse' prepared by Colston Budd Hunt and Kafes 2001 was submitted with the original application that

provided a comparison with parking provisions for Supacentas in Sydney. The report concluded that the proposal has a similar parking rate. It should be noted that the traffic report was based on the shop component having a gross floor area of 2,500m².

The development was approved with a total of 1,030 spaces (773 spaces within the basement levels and 257 spaces on the rooftop), a subsequent Section 96 application (2001/1615Mod1) approved an additional of 124 spaces for the development. The total number of car parking spaces for the entire development is 1154 spaces and therefore considered reasonable having regard to the rate of car parking provided at similar developments throughout Sydney.

The proposed modification is therefore satisfactory in relation to Clause 74.

SCHEDULES

Schedule 17 - Carparking Provision

Carparking Provision	Refer to Clause 74 under the General Principles section of this report. In summary, the development has satisfactory number of carparking for the development.
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MEDIATION

Mediation was not requested for this development application.

Warringah Section 94A Development Contributions Plan

The proposed modification seeks to modify conditions relating to Development consent No. 2001/1615 issued for the construction of a bulky goods retail outlet. Accordingly Section 94A contribution plan does not apply to this application.

CONCLUSION

The site has been inspected and the application assessed having regard to the provisions of Section 96(2) of the Environmental Planning and Assessment Act 1979, Warringah Local Environmental Plan 2000, Draft Warringah Local Environmental Plan 2009, Warringah Development Control Plan and the relevant codes and policies of Council.

The modification proposed under this application seeks to modify Condition No. 39 by adding Condition No. 39A to allow for up to 1000m² of shops to be unrestricted general retailing. Further, Condition No. 39A will prohibit the additional 1500m² of retail area, as generally approved under MOD2009/0030, from the retailing of clothing or apparel and from individually exceeding 400m² of gross floor space.

The proposal is found to be consistent with the DFC and the general principles as contained within WLEP 2000. The proposed modification does not seek to modify the approved built form controls for the C9 locality.

It is considered that the proposed modification satisfies the relevant controls and that all processes have been followed. Accordingly, the proposal is recommended for approval.

RECOMMENDATION (SECTION 96 APPROVAL)

That the Section 96 (2) Application No. 2010/0178 to modify Development Consent No. 2001/1615 granted for the construction of a bulky goods retail outlet, shops, restaurants, conservation of bushland and associated parking at Lot 1, DP 880191, No. 4-6 Niangala Close, Belrose be approved and the consent be modified in the following manner;

A. Additional Condition No. 39A

39A Notwithstanding Condition 41 the following restrictions also apply to the gross floor space of shops:

- a) 1000 square metres of shops may be utilised for general retailing.
- b) 1500 square metres of shops is subject to the following restrictions:
 - i. This consent does not authorise the use of the additional 1500 square metres for shops whose primary purpose is for the retailing of clothing or apparel.
 - ii. This consent does not authorise any individual shop to exceed 400 square metres of gross floor space.

B. Delete Conditions:

41A. Retailing of clothing or apparel

This consent does not authorise the use of any shop whose primary purpose is for the retailing of clothing or apparel.

Reason: *To maintain the use of the centre for retailing of bulky goods.*

41B. Size of the individual shops

This consent does not authorise any individual shop to exceed 400 square metres of gross floor space.

Reason: *To prevent the creation of mini major retailers.*



Hill PDA Report dated 30 September 2010

Hill PDA

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30 September, 2010

Lashta Haidari
Warringah Council
725 Pittwater Road
Dee Why

Dear Lashta,

Re: Section 96 Application to Modify Consent No. 2001/1615 in relation to the Belrose Supacenta

I refer to your letter dated 14 September regarding the above matter. This letter is a review of our assessment of the Section 96 application seeking an amendment to the conditions of consent in relation to DA 2001/1615 – the Belrose Supacenta.

I have examined the application in relation to likely economic impacts that may result. As part of the assessment I discussed the relevant issues with JBA Planning.

I understand that the applicant seeks a modification to the conditions of consent recommended by Hill PDA and imposed by Council in relation to the previous Section 96 approval enabling an increase in non-bulky goods (or general) retail from the previous 1,000sqm to 2,500sqm.

- Condition 41A prohibits the selling of clothing or apparel; and
- Condition 41B prohibits any individual shop to exceed 400sqm.

The reason for the conditions was to ensure that mini-majors such as Reject, Priceline, Best and Less, etc that normally help anchor the traditional retail centres do not locate in the Supacenta and to ensure that clothing stores locate in the traditional centres rather than in the supacenta.

The applicant now seeks those conditions to be modified so that Conditions 41A and 41B only apply to the additional 1,500sqm of general retail and not the total 2,500sqm of general retail.

If development (change of use) is not carried out, then our understanding is that the conditions do not apply to the current 1,000sqm of general retail. If development (change of retail use) is carried out in accordance with the current consent then the conditions do apply to the full 2,500sqm of general retail. There is an existing clothing store in the building and it would operate non-conformingly to the conditions.

Hill PDA Report dated 30 September 2010

The applicant seeks the change of conditions largely for two reasons. Firstly it validates the existing clothing store rather than changes it to a non-conforming use. Secondly the applicant argues that it is inequitable that additional conditions are imposed on the existing use (general retailers).

Conditions 41A and 41B were imposed to increase control in the protection of the economic viability of existing centres. Nevertheless the changes sought by the applicant are minor and would have no measurable impacts on the viability of existing centres. It relates to no more than 1,000sqm of retail space and largely validates an existing retailer more than it achieves any other purpose. It gives the owner a little more flexibility with tenancies but the limitation of floor area to 1,000sqm is insignificant in comparison to the sizes of potentially competing centres.

For these reasons we have no objection to the proposed changes to the conditions sought by the applicant.

Should you have any questions, please do not hesitate to contact us in our Sydney office on 02 9252 8777.

Yours sincerely,



Adrian Hack
BTP (Hons), MLE, MPIA.
Principal, Hill PDA

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