

## 10.8. Section 34 Conciliation Conference Process

<b>AUTHOR</b>	Stephen Beattie, Manager Development Services
<b>ENDORSED BY</b>	Marcelo Occhiuzzi, Director Community, Planning and Environment
<b>ATTACHMENTS</b>	1. Report to Council 28112022 re s 34 Conciliation Conference Process [ <b>10.8.1</b> - 80 pages]
<b>CSP LINK</b>	5. Our Civic Leadership 5.2 Strong civic leadership and customer focussed services 5.3 Community is engaged in what Council does

---

### PURPOSE:

The purpose of this report is to provide advice regarding Council's preference to finalise Land and Environment Court appeals by consent orders after a section 34 conciliation conference agreement is reached, to provide the community an opportunity to make submissions to the Court on the agreement.

### EXECUTIVE SUMMARY:

- On 27 March 2023, Council resolved to clarify its position in relation to Land and Environment Court (LEC) appeals so that if agreement is reached in a section 34 conference, Council finalise the matter by way of consent orders to provide the community with an opportunity of making submissions to the Court. Council also resolved to have staff prepare a report in response to this resolution. This report is in response to that resolution.
- The LEC increasingly requires parties to settle appeals by way of section 34 conciliation conferences. These are designed to minimise costs and delays and are conducted on a "without prejudice" basis until endorsed by the Court. At the time of writing, Council had 18 ongoing LEC appeals relating to development applications.
- On 11 April 2023, Council received advice from its internal legal advisor. Whilst noting the benefits of increased transparency and objector involvement in the process, the advice articulates potentially unanticipated and/or unacceptable risks associated with the finalisation of matters by consent orders as resolved on 27 March 2023.
- The mechanisms to increase the involvement of parties in finalising matters escalated to the LEC are provided for and constrained by the relevant State legislation and Court practice directions and procedures.
- This report recommends that in the context of risks outlined, that the approach preferred by Council be monitored for the next 6 months and a report be prepared outlining impacts and issues arising from this approach.

### RECOMMENDATION:

**1. THAT** in response to this report and advice provided, that staff monitor Council's preferred approach to the section 34 conciliation conferences process as resolved by Council at its meeting on 27 March 2023, with a view to reporting the matter back to Council in 6 months with an inventory of impacts and issues arising from the approach.

**2. THAT** Council lobbies the New South Wales State Government to change the Section 34 process to allow more community participation and transparency in the Land and Environment Court process.

## Background

The Land and Environment Court (LEC) increasingly requires parties to settle appeals by way of “section 34 conciliation conferences”. These are conferences between parties conducted before matters are heard at a full hearing of the LEC and are designed to minimise costs and delays and if possible, avoid the expense and time commitments of full hearings. They are conducted on a “without prejudice” basis until an agreement between parties is endorsed by the Court. At the time of writing, Council had 18 ongoing LEC appeals relating to development applications. Whilst this is a significant number, it is not particularly unusual in recent times given Covid based processing delays and uncertain economic times.

At its meeting on 27 March 2023, Council resolved:

1. THAT Council clarify its preference in relation to the Land & Environment Court appeals so that if agreement is reached in an s34 conciliation conference, Council finalise the matter by consent orders to ensure that the community can see the agreed conditions and have an opportunity to make submissions to the Court on the agreement.
2. THAT a report on this matter be provided to Council at the next available meeting.

This report is provided in response to part 2 of the resolution.

A report to Council’s meeting of 28 November 2022 is also provided (Attachment 1) as it sets out further information regarding the s34 conciliation conference process.

## Report

Following Council’s decision on 27 March 2023, a Councillor briefing was conducted on 11 April 2023 to discuss the implications of this decision.

The process of defending an appeal as it leads into the s34 conciliation conference process, on a development matter, is normally characterised as follows:

1. First directions hearing is conducted.
2. Briefing of external experts (if) appointed by Council to assist with the case.
3. Preparation of “Statement of Facts & Contentions” filed by Council, and a reply to the applicant’s Statement if required.
4. The s34 conciliation conference commences onsite, objectors make submissions and notes of their submissions are taken.
5. The s34 conciliation procedure is ‘without prejudice’ and both parties seek to reach a compromised agreement. This remains confidential and proceedings cannot be shared until a matter is settled (step 7).
6. The parties must act in good faith during the s34 conciliation process and remain under the jurisdiction of the LEC.
7. If a matter can be settled at this stage of proceedings, the parties enter a s34 Agreement which must be approved by the Court before it is able to be publicly shared.

The procedures for consent orders are characterised by the following steps:

1. Consent orders are dealt with by way of a consent orders hearing.
2. The reason Council would give for an application to proceed by consent orders rather than conclusion by s34 agreement would be that the objectors should be allowed to make further submissions on any amended plans or conditions.
3. Once the s34 conciliation conference process is terminated, neither party is bound by any agreement reached. As indicated above, Council staff and their consultants, are obliged to act in good faith during a s34 conciliation conference to genuinely seek to reach an agreement with the applicant.
4. Council would make an application for a consent orders hearing.
5. The applicant may or may not agree with such an application.
6. The Court may or may not decide to allow a consent orders hearing. If the Court rejects the request to allow a consent orders hearing, it will make orders in the usual course for the preparation of the matter for a contested hearing.

The preparation required for a consent orders hearing is as follows:

1. A second directions hearing.
2. A Notice of Motion to be filed by the Applicant to rely on any amended plans.
3. Joint conferencing to occur between experts.
4. Joint reports prepared by experts.
5. Attendance at the consent orders hearing.

## **Opportunities and Risks**

### Opportunities

Council is seeking to find a pathway within established LEC processes to provide increased communication and consultation with objectors on revised plans and conditions prior to entering into a binding agreement with the applicant. The preferred approach as determined by Council presents the following opportunities and potential benefits:

1. Greater involvement by objectors which may involve residents being able to give further evidence at any consent orders hearing, particularly relating to amended plans and conditions which they may not have had the opportunity to comment upon via the s34 conciliation process.
2. The parties and the Court being given the opportunity to consider any further submissions by objectors in addition to submissions made onsite during the s34 conference process.
3. An increase in the overall community feeling that Council is including and involving members of the community who are directly impacted by development, including a greater degree of transparency in the decision-making process.

### Risks

The process preference indicated by Council may also pose risks that should be considered.

It is to be noted that the response of the Court to this resolved preference is untested. It is not possible to provide definitive advice as to how the LEC will respond. It is worth noting, however, that the notion of conciliation conferencing through the s34 process is a deliberate and concerted push to achieve efficient and cost-effective negotiated resolutions to LEC appeals in an increasingly congested Court system.

The following are potential risks with Council's preferred way to deal with s34 conference matters:

1. The LEC may not choose to grant a consent orders hearing based on the public interest contentions having not been resolved.
2. The applicant may choose to withdraw an agreement that was previously generated in good faith including amended plans and may prefer the matter to run to a full hearing. This scenario may risk negotiated outcomes that may be "taken off the table" if the process continues to a hearing.
3. If a consent orders hearing is allowed, the usual course is that notes of the objectors' evidence are tendered to the Court.
4. Section 3.6 of Council's Community Engagement Protocol provides for notification if amendments are 'likely to have a greater adverse effect on or a different adverse effect on adjoining or neighbouring land' – so the applicant may argue that the Court does not need to hear further from the objectors.
5. The applicant may apply for costs as a result of Council not acting in good faith if the matter could have been resolved by s34 Agreement.
6. The relevant planning panel may consider Council staff to be acting unreasonably pursuant to delegation given to staff by them to deal with the s34 conciliation conference process.
7. The additional legal processing of applications post a s34 conciliation conference may add significant costs to Council.
8. The procedures will likely attract adverse comment from the Court, given the Civil Procedure Act 2005 obligations on the parties.
9. In a consent orders hearing, the Court is required to decide on the merits which will mean evidence will need to be prepared, a hearing held, and further costs incurred by both parties.
10. There is a risk of mixed messaging – where Council will be advising residents that it intends to seek orders by consent, but also offering a further opportunity to address the Court against the proposal or in respect of conditions.

It is noted that the resolution of 27 March 2023, being expressed as a preference, is considered a lawful resolution.

Council's approach to s34 conciliation conferences must always accord with the Court's usual or mandated practices and procedures. It is noted that once matters enter the LEC jurisdiction, Council staff are effectively serving the Court. The relevant delegations to Council staff are explored in the attached report of 28 November 2022.

Council must participate in the s34 conciliation conference process as a "model litigant", acting in "good faith" and in pursuit of the "just, quick and cheap" resolution of proceedings:

Model Litigant Policy for Civil Litigation (NSW); s34(1A) Land and Environment Court Act 1979; and s56 Civil Procedure Act 2005.

The common law sets out the duty of 'good faith' which encompasses the notions of:

1. Fairness
2. Reasonableness
3. Standards of decency
4. Fair dealing

The duty to act in good faith applies to all parties in the proceedings, and it includes the presiding Commissioner. The Council has a duty to the Court and to the Applicant to act in good faith. The Applicant has the same obligation.

The Commissioner must also act in good faith and not withhold its agreement to a conciliated outcome if it is satisfied that the Court has the power to make.

### **Engagement of the community within the s34 process.**

Council staff and its legal advisors have been aware of the community's concern over the latter closed stages of the s34 process. It should be noted that every effort has previously been made to advertise amendments gained through the s34 process with the leave of the Court and the applicant and to use any submission made to refine conditions as they relate to the agreed plans. This has been a standing procedure following earlier concerns made by the community and while submitters may still not be happy or agree with the outcome, some continued engagement occurs outside of what could normally be expected in the s34 process. While written submissions might be made, the submitter is not allowed to re-address the Court on the matter, and this is a clear shortcoming.

### **Implementation**

The Panel Solicitors have been advised of Council's resolution. Information regarding implementation of this resolution is being recorded with the data to include:

- the number of affected matters;
- the number resolved at s34;
- the number resolved through consent orders;
- the number where applicant agreed to consent orders process;
- the number where applicant did not agree to Consent orders process; and
- the additional cost of pursuing Consent orders.

To date the implementation of this approach have resulted in the following outcomes:

#### Case study 1

This application for alterations and additions to an existing mixed-use building and heritage based on Existing Use Rights relied on a cl4.6 objection. Amended plans were received and notified during the s34 process which resolved Council's issues. The applicant was asked if they would agree to finalising the matter by way of consent orders. The applicant was not supportive of this approach but as a compromise, indicated that they would agree to the

notification of the draft conditions to submitters. Both parties approached the court with this proposition and the Court, while not usual practice, granted the parties' wish. An additional submission was received which sought detailed refinements to the conditions and picked up one clear typographical error. Most of these suggestions were incorporated into the final orders so it was beneficial to the process. A letter has since been received from the submitter acknowledging Council's efforts.

Case study 2:

This application for demolition of an apartment building, its replacement with a new apartment building of similar height, together with new residential buildings on adjoining sites resulting in the effective redevelopment of the entire block, has been subject to a lengthy s34 process which resulted in the submission of a considerably amended scheme. This amended scheme was notified to submitters and the additional submissions received were again used to refine the conditions of consent. The applicant was approached with a view to concluding the matter by consent orders but did not agree, indicating that they had entered into the process in good faith. They did agree as a compromise to notify the proposed conditions of consent so submitters could be kept informed. This matter is yet to be concluded.

**Options**

Council has the following options in relation to this matter:

1. Maintain the adopted stance of 27 March 2023 that it is Council's preference in relation to the Land & Environment Court appeals so that if agreement is reached in an s34 conciliation conference, Council seek to finalise the matter by consent orders.
2. Continue as per 1 above and monitor the risks and impacts with a view to reporting the impacts of the process to Council in 6 months' time.
3. Amend this position in response to the advice provided to Council but continue the current practice of notification if amendments are like to have a greater adverse effect on or a different adverse effect on adjoining or neighbouring land.

These options are assessed in the table below.

<b>Option</b>	<b>Finance/Resourcing</b>	<b>Risk/Opportunity</b>	<b>Consultation</b>
1.	<ul style="list-style-type: none"> <li>- Applicant may apply for costs, claiming Council has failed to act in good faith.</li> <li>- Applicant may withdraw any agreement reached and take the matter to</li> </ul>	<ul style="list-style-type: none"> <li>- Risk that Court does not grant consent orders hearing as public interest contentions not resolved.</li> <li>- Risk that relevant planning panel may consider Council staff to be acting unreasonably pursuant to the staffs'</li> </ul>	<ul style="list-style-type: none"> <li>- s3.6 of Council's Community Engagement Protocol provides notification required if amendments 'likely to have a greater adverse effect on or a different adverse effect on</li> </ul>

Option	Finance/Resourcing	Risk/Opportunity	Consultation
	<p>hearing, resulting in additional legal costs.</p> <ul style="list-style-type: none"> <li>- However, Council currently seeks to consult with objectors re proposed orders so there may not be any significant impact.</li> </ul>	<p>delegations in relation to the s34 conciliation conference process.</p> <ul style="list-style-type: none"> <li>- Opportunity for objectors to make submissions prior to the finalisation of any orders.</li> <li>- Seeking renotification for matters that do not create greater or different adverse effect on adjoining land is inconsistent with s3.6 of Council's Community Engagement Protocol.</li> </ul>	<p>adjoining or neighbouring land.</p> <ul style="list-style-type: none"> <li>- However, the proposed change results in greater opportunity for objectors to participate in the process.</li> </ul>
	<ul style="list-style-type: none"> <li>- Similar to Option 1 above but with a timeline to monitor such risks and report back to Council.</li> </ul>	<ul style="list-style-type: none"> <li>- Similar to Option 1 above but with a timeline to monitor such risks and report back to Council.</li> </ul>	<ul style="list-style-type: none"> <li>- Similar to Option 1 above but with a timeline to monitor such risks and report back to Council.</li> </ul>
3.	<ul style="list-style-type: none"> <li>- Council's former position has been to seek to have proposed orders consulted with objectors where changes are being considered. Returning to this would have no impact on resourcing.</li> </ul>	<ul style="list-style-type: none"> <li>- Risk that objectors are not adequately engaged in the planning process.</li> <li>- Opportunity to demonstrate Council's commitment more clearly to good faith participation in the s34 process.</li> </ul>	<ul style="list-style-type: none"> <li>- s3.6 of Council's Community Engagement Protocol provides notification required if amendments 'likely to have a greater adverse effect on or a different adverse effect on adjoining or neighbouring land. An amendment would be necessary to make clear that Councils preference is for all s34 matters to be renotified regardless of impact, for the purposes of transparency.</li> </ul>

It is recommended that Council maintain the adopted stance of 27 March 2023 but that the impact of the changed process be monitored and managed to mitigate any adverse impacts



for Council with a further report examining the outcome of the process to be submitted with six months.

### **Representations to the NSW State Government**

Council submitted the following Motion to the 2022 Local Government NSW Annual Conference, which was carried:

*Reference 90: That Local Government NSW lobbies the NSW State Government to change the Section 34 process to allow more community participation and transparency.*

Council's desire to increase community participation and transparency in the section 34 process is noted and supported. However, it is considered that this is more appropriately achieved through reform at the State Government level. This would not only benefit this Council but provide additional openness and transparency that would potentially benefit all in the State of New South Wales.

### **Consultation requirements**

Community engagement is not required.

### **Financial/Resource Implications**

There are no financial implication arising directly from this report, however, the six-month monitoring process recommended, may result in financial implications being reported at the end of this process.

### **Legislation**

Attached is a report provided previously to Council regarding the section 34 process.

### 10.13.Section 34 Conciliation Conference Process

**AUTHOR:** Craig Winn, Solicitor

**ENDORSED BY:** Shane Sullivan, Executive Manager Governance

**ATTACHMENTS:**

1. Legal Advice dated 20 October 2022 [**10.13.1** - 10 pages]
2. Report to Council Section 34 Conciliation Conference Process 22 August [**10.13.2** - 64 pages]

**PURPOSE:**

The purpose of this Report is to provide Council with advice concerning the ability of Council to adopt a policy for Section 34 Conciliations, to include the notification of plans to be agreed to before entering into a Section 34 agreement.

**EXECUTIVE SUMMARY:**

On 30 August 2022, Council sought advice from its external legal advisor, to include, among other things, a request that the said advice consider:

1. *The potential creation and adoption of a Policy, generally, that might apply to the section 34 Conciliation Conference process, noting the Court's usual practices, the Act and the Court's own Conciliation Conference Policy; and*
2. *Any issues that might arise with the creation or adoption of such a Policy, including cost implications, delay in proceedings or any other matter that might arise if Council were to adopt a blanket approach that prevented the entering into of a s34 agreement until residents had otherwise been notified.*

On 20 October 2022 Council received advice from its external legal advisor This advice is attached and is provided without any claim of legal professional privilege.

The advice, in summary, concludes as follows:

*Whilst Council could adopt a Conciliation Conference Policy that requires amended plans to be renotified before entering into a section 34 Agreement relating to those plans, it seems to us that it is likely that such a policy would be unworkable and impractical (and would leave the Council open to costs orders being made against it) unless it applies only in the following circumstances:*

1. *The plans that are to be the subject of the section 34 Agreement are amended plans that have not previously been notified by the Council; and*
2. *The Applicant agrees to the proposed amended plans being notified during the adjourned conciliation conference; and*

*3. The amendments to the plans fall within the scope of amendments that would usually be notified*

*4. The Council staff with delegation in relation to the conciliation conference are of the view that requiring the amended plans to be notified is of utility and would not be considered to be unreasonable conduct on Council's part in the circumstances of the case.*

*If the Policy was limited in its application to the above circumstances, it would generally reflect the Council's current CE Protocol and the practice of the Court in conciliation conferences. It would therefore seem that the Policy would not be necessary.*

The mechanisms to increase the involvement of parties in finalising matters escalated to the Land and Environment Court are provided for within the relevant State legislation. The current provisions under the legislation will likely hamper efforts by Council to communicate changes to plans through the section 34 Conciliation Conference process in the way suggested.

As such, it is respectfully submitted that the Court's usual practices and procedures, to include the relevant statutes that apply, will at all times prevail over Council policy.

In this regard, the implementation of, or adoption of, a Policy that may be at odds with the requirements of the Court, will likely expose Council to scrutiny and adverse cost orders, in circumstances where Council were to repeatedly or consistently seek to adjourn or delay the determination of proceedings, for want of a re-notification process that accords with a Council policy.

**FINANCIAL IMPLICATIONS:**

There are no financial implication arising directly from this report.

**RECOMMENDATION:**

1. **THAT** the Report be received
2. **THAT** Council continue to make representations as appropriate to lobby the State Government to change the Section 34 process to allow greater community participation and transparency.

## **LINK TO COMMUNITY STRATEGIC PLAN**

The relationship with the Community Strategic Plan is as follows:

- 5. Our Civic Leadership
- 5.2 Strong civic leadership and customer focussed services

## **BACKGROUND**

At its Ordinary Meeting of Council held on Monday 27 June 2022, it was resolved as follows:

*That Council receive a report regarding Council's approach to section 34 Conciliation Conferences and agreements including the particular example raised by the Committee at 20-24 Bray Street, North Sydney.*

Council received a report in accordance with the above Resolution on 22 August 2022.

At its Ordinary Meeting of Council held on 22 August 2022, it was resolved as follows:

- 1. THAT the report be received.*
- 2. THAT a further report on a without prejudice basis be provided considering the ability for Council to adopt a policy for Section 34 conciliations that ensures Council notifies the plans to be agreed to before entering into any Section 34 agreement.*
- 3. THAT Council put a Motion to the next Local Government NSW Conference that Local Government NSW lobby the State Government to change the Section 34 process to allow more community participation and transparency.*

## **CONSULTATION REQUIREMENTS**

Community engagement is not required.

## **DETAIL**

On 22 August 2022 Council received and considered a Report that detailed the Section 34 Conciliation Conference Process of the Land and Environment Court (the Report).

At page 6 of the Report, it was stated that

*Council will usually notify resident objectors when and if a development application is amended during the course of a section 34 Conciliation Conference – subject to the Court adjourning the proceedings...The Court has, however, held that it is not bound by the notification requirements of a Council Development Control Plan and in this*

*regard, it is open to the Court to deny adjourning proceedings to allow or permit the re-notification of amended drawings: V'Landy's v Land and Environment Court of NSW [2012] NSWLEC 218. It is common practice, however, for the Court to adjourn proceedings to allow or permit Council's to re-notify resident objectors where, when and if a development application is proposed to be amended during the course of a Conciliation Conference. Council's approach, generally, to the submission of amended drawings, is to request an adjournment to the relevant proceedings, so as to allow or permit resident objectors to be notified of the amended proposal. Such requests are informed and reinforced by reference to Council's Community Consultation Protocol.*

Having considered the Report, Council resolved as follows:

- 1. THAT the report be received.*
- 2. THAT a further report on a without prejudice basis be provided considering the ability for Council to adopt a policy for Section 34 conciliations that ensures Council notifies the plans to be agreed to before entering into any Section 34 agreement.*
- 3. THAT Council put a Motion to the next Local Government NSW Conference that Local Government NSW lobby the State Government to change the Section 34 process to allow more community participation and transparency.*

This Report responds only to point 2 of this Resolution of Council.

On 30 August 2022, Council sought advice from its external legal advisor, to include a request that the advice consider:

- 1. The potential creation and adoption of a Policy, generally, that might apply to the section 34 Conciliation Conference process, noting the Court's usual practices, the Act and the Court's own Conciliation Conference Policy; and*
- 2. Any issues that might arise with the creation or adoption of such a Policy, including cost implications, delay in proceedings or any other matter that might arise if Council were to adopt a blanket approach that prevented the entering into of a s34 agreement until residents had otherwise been notified.*

On 20 October 2022, Council received advice from its external legal advisor.

Relevantly, the advice concluded as follows:

#### *Conclusion*

*There are various practical matters that are likely to affect the ability of the Council to implement a 'blanket' policy that requires notification of any amended plans before a section 34 Agreement is entered into, including:*

- 1. The conciliation process is "without prejudice" and confidential between the parties. Amended plans provided by an Applicant during a conciliation conference are required to be kept confidential unless or until leave is sought and granted to substitute those plans in the proceedings. Council therefore does not have the ability or power to notify*

*amended plans during the conciliation conference (i.e. before orders are made) unless the Applicant agrees to that course.*

*2. If Council is presented with amended plans that only make minor changes which fall outside the scope of the notification requirements of the CE Protocol, and the Council's experts and delegate are satisfied that the amended plans resolve the issues raised in respect of the application insistence by the Council for the amended plans to be publicly notified before it enters into a section 34 Agreement could, in our view, constitute unreasonable conduct on the part of the Council and lead to a successful application for costs being made on the basis of the Council not participating in the conciliation in good faith.*

*3. The Council's delegate and representatives will have had an opportunity to consider public submissions in relation to a development application prior to a conciliation conference and also hear from members of the public as part of the conciliation process. If the parties' experts' and delegates consider that amended plans put forward by the Applicant at the conciliation resolve the issues raised in respect of the application **and** the development as shown in those plans is not considered likely to have a greater adverse effect on or a different adverse effect on adjoining or neighbouring land to the development shown in the plans that were notified it seems to us that to require the amended plans to be notified before entering into the agreement would be contrary to section 3.6 of Council's CE Protocol.*

*Whilst the Council could adopt a Conciliation Conference Policy that requires amended plans to be publicly notified before entering into a section 34 Agreement relating to those plans, it seems to us that it is likely that such a policy would be unworkable and impractical (and would leave the Council open to costs orders being made against it) unless it applies only in the following circumstances:*

*1. The plans that are to be the subject of the section 34 Agreement are amended plans that have not previously been notified by the Council; and*

*2. The Applicant agrees to the proposed amended plans being notified during the adjourned conciliation conference; and*

*3. The amendments to the plans fall within the scope of amendments that would usually be notified by Council in accordance with section 3.6 of the CE Protocol; and*

*4. The Council staff with delegation in relation to the conciliation conference are of the view that requiring the amended plans to be notified is of utility and would not be considered to be unreasonable conduct on Council's part in the circumstances of the case.*

*If the Policy was limited in its application to the above circumstances, it would generally reflect the Council's current CE Protocol and the practice of the Court in conciliation conferences. It would therefore seem that the Policy would not be necessary.*

### **Concluding Remarks**

It is understood that Council is seeking a pathway to provide increased communication and consultation on revised plans prior to entering into a binding agreement. However, it is respectfully submitted that the adoption of a blanket policy has the potential to put Council at odds with the requirements of the Court.

Council's approach to Conciliation Conferences must always accord with the Court's usual or mandated practices and procedures.

Council must participate in and throughout the Conciliation Conference process as a "model litigant", acting in "good faith" and in pursuit of the "just, quick and cheap" resolution of proceedings: Model Litigant Policy for Civil Litigation (NSW); s34(1A) *Land and Environment Court Act 1979*; and s56 *Civil Procedure Act 2005*.

Given the advice of Council's external legal advisors, and acknowledging the usual practices of the Court and Council (as articulated at page 6 of the Report to Council on 22 August 2022), to include Council's current CE Protocol, it would seem the creation and adoption of a Policy that applies to the section 34 Conciliation Conference process, is unnecessary and may, if Council were to create and adopt any such Policy, expose Council to issues of unworkability, impracticality and potential adverse cost orders.



**Our Ref:** AJS:PDH:444454  
**Contact:** Adam Seton  
**Contact Tel:** 4640 3621  
**Contact Email:** aseton@marsdens.net.au

**Your Ref:** Craig Winn

The General Manager  
North Sydney Council  
PO Box 12  
NORTH SYDNEY NSW 2059

20 October 2022

Dear Sir,

**Re: Advice - Council resolution for Policy regarding notification of agreed plans before entering into any Section 34 Agreement**

---

We refer to the email received from Council's Solicitor dated 30 August 2022 concerning the following Council resolution:

*"That a further report on a without prejudice basis be provided considering the ability for Council to adopt a policy for Section 34 Conciliations that ensures Council notifies the plans to be agreed to before entering into any Section 34 Agreement.*

*That Council put a Motion to the next Local Government NSW Conference that Local Government NSW lobby the State Government to change the Section 34 process to allow more community participation and transparency."*

Council seeks our advice in relation to the first paragraph of the abovementioned Council resolution, including a consideration of the following matters:

1. *The potential creation and adoption of a Policy, generally, that might apply to the section 34 Conciliation Conference process, noting the Court's usual practices, the Act and the Court's own Conciliation Conference Policy;*
2. *Any issues that might arise with the creation or adoption of such a Policy, including cost implications, delay in proceedings or any other matter that might arise if Council were to adopt a blanket approach that prevented the entering into of a s34 agreement until residents had otherwise been notified;*

ABN 59 874 202 316

All correspondence to PO Box 291 Campbelltown NSW 2560

[www.marsdens.net.au](http://www.marsdens.net.au) | [email@marsdens.net.au](mailto:email@marsdens.net.au)

CAMPBELLTOWN | CAMDEN | SYDNEY | LIVERPOOL | ORAN PARK | LEPPINGTON

Liability limited by a scheme approved under Professional Standards Legislation  
14454558.1





**Re: Advice - Council resolution for Policy regarding notification of agreed plans before entering into any Section 34 Agreement** **20 October 2022**

---

3. *The workability and enforceability of any such Policy, in circumstances where the Court is consent authority and the Court has a discretion to either consider or disregard any Council adopted section 34 Conciliation Conference Policy that requires residents to be notified prior to entering into an agreement.*

Our advice is set out below.

**ADVICE**

A review of the relevant legislation and controls that apply to Land and Environment Court section 34 conciliation conferences, public notification of amended development applications and the obligations and powers of the Court and the Council in Class 1 Court Appeals is provided below. We thereafter provide advice in relation to Council's proposal to adopt a policy to notify "*the plans to be agreed to before entering into any Section 34 Agreement*".

**Relevant Legislation**

**Conciliation Conferences**

Section 34 of the Land and Environment Court Act 1979 (**L&E Court Act**) relevantly states as follows:

**"34 Conciliation conferences**

(1) *If proceedings are pending in Class 1, 2 or 3 of the Court's jurisdiction, the Court—*

*(a) may arrange a conciliation conference between the parties or their representatives, with or without their consent, and*

*(b) if it does so, must notify the parties or their representatives of the time and place fixed for the conference.*

**(1A) *It is the duty of each party to proceedings where a conciliation conference has been arranged under subsection (1) to participate, in good faith, in the conciliation conference.***

(2) *A conciliation conference is to be presided over by a single Commissioner.*

(3) *If, either at or after a conciliation conference, agreement is reached between the parties or their representatives as to the terms of a decision in the proceedings that would be acceptable to the parties (being a decision that the Court could have made in the proper exercise of its functions), the Commissioner—*

**Re: Advice - Council resolution for Policy regarding notification of agreed plans before entering into any Section 34 Agreement** **20 October 2022**

---

(a) *must dispose of the proceedings in accordance with the decision, and*

(b) *must set out in writing the terms of the decision.*

(4) *If no such agreement is reached, the Commissioner must terminate the conciliation conference and—*

(a) *unless the parties consent under paragraph (b), must make a written report to the Court—*

(i) *stating that no such agreement has been reached and that the conciliation conference has been terminated, and*

(ii) *setting out what in the Commissioner's view are the issues in dispute between the parties, or*

(b) *if the parties consent to the Commissioner disposing of the proceedings, must dispose of the proceedings—*

(i) *following a hearing, whether held forthwith or later, or*

(ii) *with the consent of the parties, on the basis of what has occurred at the conciliation conference.*

(5) *The Commissioner, when giving his or her decision under subsection (4)(b), is to give reasons for the decision—*

...

**(6) *If satisfied that there is a good reason to do so, the Commissioner may adjourn the conciliation conference to a time and place fixed in consultation with the Registrar.***

(7) *Subject to this Act and the rules, the Commissioner disposing of, or hearing and disposing of, proceedings pursuant to subsection (3) or (4)(b) has and may exercise the functions of the Court.*

...

**Re: Advice - Council resolution for Policy regarding notification of agreed plans before entering into any Section 34 Agreement** **20 October 2022**

---

(10) *If an agreement is reached between the parties and proceedings are being dealt with under subsection (3), any document signed by the parties is admissible as to the fact that such an agreement has been reached and as to the substance of the agreement.*

(10A) *The same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to—*

(a) *a conciliation conference, and*

(b) *a document or other material sent to or produced to a Commissioner, or sent to or produced at the Court or the registry of the Court, for the purpose of enabling a conciliation conference to be arranged.*

(10B) *The privilege conferred by subsection (10A) extends only to a publication made—*

(a) *at a conciliation conference, or*

(b) *in a document or other material sent to or produced to a Commissioner, or sent to or produced at the Court or the registry of the Court, for the purpose of enabling a conciliation conference to be arranged.*

(11) *Subject to subsections (10) and (12)—*

(a) *evidence of anything said or of any admission made in a conciliation conference is not admissible in any proceedings before any court, tribunal or body, and*

(b) *a document prepared for the purposes of, or in the course of, or as a result of, a conciliation conference, or any copy of such a document, is not admissible in evidence in any proceedings before any court, tribunal or body.*

(12) *Subsection (11) does not apply with respect to any evidence or document if the parties consent to the admission of the evidence or document.”*

The Court’s Conciliation Conference Policy, which commenced on 27 March 2017, includes the following guidance in relation to the conciliation conference process:

**“Giving effect to a conciliation agreement**

**Re: Advice - Council resolution for Policy regarding notification of agreed plans before entering into any Section 34 Agreement 20 October 2022**

---

31. *If the parties reach agreement during the conciliation phase as to the terms of a decision in the proceedings that would be acceptable to the parties, the Commissioner is to dispose of the proceedings in accordance with the decision (provided only that the Commissioner is satisfied that the decision is one that the Court could have made in the proper exercise of its functions).*

**32. *If the agreement requires preparation of documents such as amended plans and revised conditions of consent to reflect the terms of the decision agreed, the Commissioner will set a timetable for the preparation of the documents.***

*The conciliation conference will be adjourned to a date and time to accommodate the timetable and orders would ordinarily be made in chambers to give effect to the agreement if the timetable was observed (and the resumed conference cancelled as a result).*

***Adjournment of conciliation conferences***

33. *A conciliation conference is to be adjourned to a time and date fixed in consultation with the Registrar only if the Commissioner is satisfied that there is a good reason to do so (s 34(6)). **Adjournments will usually only be granted in circumstances where the parties have reached an agreement in principle and where a short adjournment is required for documents (including plans and conditions) to be prepared to finalise the agreement.***

**34. *Adjournments are not usually appropriate where either of the parties request time to consider their position or obtain advice.***

***The powers and duties of the Court and the duties of the parties***

Section 39(2) of the L&E Court Act gives the Court, for the purposes of hearing and disposing of a Class 1 appeal, all of the functions and discretions which the person or body whose decision the subject of the appeal had, in respect of the matter the subject of the appeal. The Land and Environment Court therefore has the functions and discretions of the **Council** during a conciliation conference in relation to a Class 1 development appeal.

Further to the above, section 56 of the Civil Procedure Act 2005 states that the Court in civil proceedings (which include Class 1 of the Land and Environment Court's jurisdiction) must seek to give effect to the overriding **purpose** of the rules of the court, which is to *facilitate the just, quick and cheap resolution of the real issues in the proceedings* [emphasis added]. Parties to proceedings, including councils, are

**Re: Advice - Council resolution for Policy regarding notification of agreed plans before entering into any Section 34 Agreement** **20 October 2022**

---

also under a duty to “assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.”

**Amendments to development applications and duties to notify**

Section 37 of the Environmental Planning and Assessment Regulation 2021 (**EPA Regulation 2021**) identifies that an applicant may, at any time before a development application is determined, apply to the consent authority for an amendment to the development application. Ordinarily, the amendment is to be made via the NSW Planning Portal, however the requirement to use the NSW planning portal does not apply if the development application is subject to proceedings in the Court.

Division 2.6 and Schedule 1 of the Environmental Planning and Assessment Act 1979 (**EPA Act**) sets out the mandatory community participation requirements of planning authorities in relation to development applications. We understand that Council has adopted the “North Sydney Council Community Engagement Protocol” (**CE Protocol**) pursuant to the requirements of Division 2.6 and Schedule 1. The CE Protocol states as follows in relation to advertisement and notification requirements for amended plans:

**“3.6 Advertisement and Notification requirements for Amended Plans**

*An applicant may amend an application at any time before the consent authority has made its final determination.*

*If, in Council’s opinion, the amendments are considered likely to have a greater adverse effect on or a different adverse effect on adjoining or neighbouring land, then Council will renotify any owner/occupier of adjoining or neighbouring land that in the Council’s opinion may be adversely affected by the amended application.*

*Where the amendments, in the Council’s opinion, do not increase or lessen the adverse effect on adjoining or neighbouring land, Council may choose not to renotify or readvertise the application.*

*Where the amendments arise from a Council-sponsored mediation, and it is considered that those amendments reflect the outcome of the mediation and do not otherwise increase the application’s environmental impact, the amendments will not be notified or advertised.*

*Where the amendments involve the removal, lopping, topping or pruning a tree, the application will not be renotified or readvertised, but only where that application is required by a tree preservation order and no other development is involved.”*

**Re: Advice - Council resolution for Policy regarding notification of agreed plans before entering into any Section 34 Agreement** **20 October 2022**

---

**The Proposed Policy: Notification of plans prior to entering into a section 34 Agreement**

Council is considering adopting a policy that applies to conciliation conferences held under section 34 of the L&E Court Act that includes a provision requiring 'plans to be notified' before entering into any agreement for resolution of the proceedings under that section.

As outlined above, the conciliation conference process is one that is undertaken on a confidential and without prejudice basis. The parties are required to participate in a conciliation conference in good faith and conciliation conferences will only be 'adjourned' (and not terminated) in circumstances where parties' have reached an 'in principle' agreement.

At first instance, the application of Council's proposed policy will only be relevant in circumstances where a conciliation conference has commenced, the Applicant proposes to amend the development application during the course of the conciliation by way of amending the plans the subject of the application and those amended plans would result in a development that the Council's delegate 'in principle' agrees should be determined by way of approval.

In the present circumstances, there are a number of practical matters that are likely to affect the ability of the Council to implement a 'blanket' policy that requires notification of any amended plans before a section 34 Agreement is entered into, including the following:

1. The conciliation process is "without prejudice" and confidential between the parties. Amended plans provided by an Applicant during a conciliation conference are required to be kept confidential unless or until leave is sought and granted to substitute those plans in the proceedings. Where a conciliated agreement has been negotiated that is based on amended plans the section 34 Agreement itself will usually contain proposed orders seeking leave to be granted to substitute the amended plans.

Accordingly, the amended plans remain confidential until the orders proposed in a section 34 Agreement are made by the Court. Council therefore does not have the ability or power to notify amended plans during the conciliation conference (i.e. before orders are made) unless the Applicant agrees to that course. Council could therefore not implement its proposed policy to notify amended plans during a conciliation conference unless an Applicant agrees to the amended plans being made public for the purposes of notification.

2. In the case of *V'landys v Land and Environment Court of NSW* [2012] NSWLEC 218 (V'Landys) the Court said "*parties are under a duty to assist the Court in its duty and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court: s 56(3). Importantly, a party is under a duty to take reasonable steps to resolve or narrow the issues in dispute in a way that is consistent with that overriding purpose: s 56(3A).*"

**Re: Advice - Council resolution for Policy regarding notification of agreed plans before entering into any Section 34 Agreement** **20 October 2022**

---

If, as part of a conciliation conference, the Council is presented with an amended set of plans that Council would, in the usual course, publically notify in accordance with the CE Protocol (because the amendments are not insignificant and fall within the scope of the Protocol), it would not be unreasonable for the Council to inform the Court that it would seek to notify the amended proposal (with the Applicant's agreement) and consider public submissions before it enters into a section 34 Agreement. In our experience, this often occurs in practice and it is not an unreasonable position for a Council to take.

However, if Council is presented with amended plans that only make minor changes which fall outside the scope of the notification requirements of the CE Protocol, and the Council's experts and delegate are satisfied that the amended plans resolve the issues raised in respect of the application insistence by the Council for the amended plans to be publically notified before it enters into a section 34 Agreement could, in our view, constitute unreasonable conduct on the part of the Council and lead to a successful application for costs being made on the basis of the Council not participating in the conciliation in good faith.

3. The Council's delegate and representatives will have had an opportunity to consider public submissions in relation to a development application prior to a conciliation conference and also hear from members of the public as part of the conciliation process. If the parties' experts' and delegates consider that amended plans put forward by the Applicant at the conciliation would resolve the issues raised in respect of the application **and** the development as shown in those plans **is not** considered likely to have a greater adverse effect on or a different adverse effect on adjoining or neighbouring land to the development shown in the plans that were notified it seems to us that to require the amended plans to be notified before entering into the agreement would be contrary to section 3.6 of Council's CE Protocol.

Having regard to the above, if the implementation of Council's proposed policy required an adjournment (and delay) of proceedings which was solely for the purpose of 'informing' the public of plans that are agreed between the parties (where the development as shown in the amended plans is not considered likely to have a greater adverse effect on or a different adverse effect on adjoining or neighbouring land to the development shown in the plans that were notified), such conduct could be seen by the Court in a costs application relating to the proceedings as being unreasonable and contrary to the duty of the Council as a party to the proceedings to assist the Court to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

### **Conclusion**

There are various practical matters that are likely to affect the ability of the Council to implement a 'blanket' policy that requires notification of any amended plans before a section 34 Agreement is entered into, including:

**Re: Advice - Council resolution for Policy regarding notification of agreed plans before entering into any Section 34 Agreement** **20 October 2022**

---

1. The conciliation process is “without prejudice” and confidential between the parties. Amended plans provided by an Applicant during a conciliation conference are required to be kept confidential unless or until leave is sought and granted to substitute those plans in the proceedings. Council therefore does not have the ability or power to notify amended plans during the conciliation conference (i.e. before orders are made) unless the Applicant agrees to that course.
2. If Council is presented with amended plans that only make minor changes which fall outside the scope of the notification requirements of the CE Protocol, and the Council's experts and delegate are satisfied that the amended plans resolve the issues raised in respect of the application insistence by the Council for the amended plans to be publically notified before it enters into a section 34 Agreement could, in our view, constitute unreasonable conduct on the part of the Council and lead to a successful application for costs being made on the basis of the Council not participating in the conciliation in good faith.
3. The Council's delegate and representatives will have had an opportunity to consider public submissions in relation to a development application prior to a conciliation conference and also hear from members of the public as part of the conciliation process. If the parties' experts' and delegates consider that amended plans put forward by the Applicant at the conciliation resolve the issues raised in respect of the application **and** the development as shown in those plans is not considered likely to have a greater adverse effect on or a different adverse effect on adjoining or neighbouring land to the development shown in the plans that were notified it seems to us that to require the amended plans to be notified before entering into the agreement would be contrary to section 3.6 of Council's CE Protocol.

Whilst the Council could adopt a Conciliation Conference Policy that requires amended plans to be publically notified before entering into a section 34 Agreement relating to those plans, it seems to us that it is likely that such a policy would be unworkable and impractical (and would leave the Council open to costs orders being made against it) unless it applies only in the following circumstances:

1. The plans that are to be the subject of the section 34 Agreement are amended plans that have not previously been notified by the Council; **and**
2. The Applicant agrees to the proposed amended plans being notified during the adjourned conciliation conference; **and**
3. The amendments to the plans fall within the scope of amendments that would usually be notified by Council in accordance with section 3.6 of the CE Protocol; **and**



10

**Re: Advice - Council resolution for Policy regarding notification of agreed plans before  
entering into any Section 34 Agreement 20 October 2022**

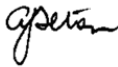
---

4. The Council staff with delegation in relation to the conciliation conference are of the view that requiring the amended plans to be notified is of utility and would not be considered to be unreasonable conduct on Council's part in the circumstances of the case.

If the Policy was limited in its application to the above circumstances it would generally reflect the Council's current CE Protocol and the practice of the Court in conciliation conferences. It would therefore seem that the Policy would not be necessary.

We trust that the above advice is of assistance. Should you have any queries in relation to the advice or require further advice, please do not hesitate to contact Adam Seton or Peta Hudson at our Campbelltown office.

Yours faithfully  
**MARSDENS LAW GROUP**



**A.J. SETON**  
**Partner**  
**Accredited Specialist Local Govt. & Planning**

**8.7. Section 34 Conciliation Conference Process Land and Environment Court Proceedings No. 2021/141523 20-24 Bray Street, North Sydney, and 35 Kurraba Road, Neutral Bay, NSW 2089**

**AUTHOR:** Craig Winn, Solicitor

**ENDORSED BY:** Shane Sullivan, Executive Manager Governance

**ATTACHMENTS:**

1. DA 337/20 - 35 Kurraba Road & 20-24 Bray Street - Land and Environment Court NSW - [8.7.1 - 53 pages]

**PURPOSE:**

At its Ordinary Meeting of Council held on Monday 27 June 2022, it was resolved:

*That Council receive a report regarding Council's approach to section 34 Conciliation Conferences and agreements including the particular example raised by the Committee at 20-24 Bray Street, North Sydney.*

The purpose of this report is to provide Council with some general information that may assist Councillors in understanding the section 34 Conciliation Conference process, to include how Council approaches, generally, the section 34 Conciliation Conference process, having particular regard to the example at 20-24 Bray Street, North Sydney.

**EXECUTIVE SUMMARY:**

Council's approach to section 34 Conciliation Conferences is subject to the *Land and Environment Court Act 1979* and the Land and Environment Courts Practice Notes and Policies. The Act and the relevant Practice Notes and Policies require parties to approach and participate in the Conciliation Conference process from a position of "good faith" with a view to achieving the "just, quick and cheap" resolution of proceedings.

Any agreement reached during the section 34 Conciliation Conference process, is usually reached predicated upon impartial expert opinion; the elimination of material contentions; the narrowing of contentions to the extent that any remaining contentions can or will be addressed by condition of consent; or that any remaining contentions do not warrant outright refusal of the relevant development application.

Council or its legal advisors will usually communicate with resident objectors, in writing, prior to the commencement of a Conciliation Conference and subsequent to a Conciliation Conference, regardless of an agreement being reached or otherwise.

In the matter of 20-24 Bray Street, North Sydney, the parties' respective experts formed the view that the development was appropriate in its modified form and that the Cl4.6

submission (building height development standard variation) could be accepted. The Court in the proper exercise of its functions agreed with this conclusion, upholding the appeal, granting conditional development consent.

**FINANCIAL IMPLICATIONS:**

There are no financial implication arising directly from this report.

**RECOMMENDATION:**

**1. THAT** the report be received.

## **LINK TO COMMUNITY STRATEGIC PLAN**

The relationship with the Community Strategic Plan is as follows:

- 5. Our Civic Leadership
- 5.2 Strong civic leadership and customer focussed services

## **BACKGROUND**

This report seeks to provide Councillors with a general understanding of the section 34 Conciliation Conference process and the approach that is generally taken by Council when reaching an agreement, allowing the Court to dispose of the relevant proceedings in accordance with any such agreement. The report includes specific reference to Land and Environment Court Proceedings No. 21/141523, 20-24 Bray Street, North Sydney

## **CONSULTATION REQUIREMENTS**

Community engagement is not required.

## **DETAIL**

### **The DA Appeal process and the Conciliation Conference process**

A development application appeal ('DA Appeal') is the general term used to describe when an applicant for development consent is dissatisfied with the determination of their development application and the applicant lodges or files an appeal to the Land and Environment Court of NSW ('Court'). An appeal may be against the actual refusal of a DA; the deemed refusal of a DA (the DA was not determined within a specific period of time); or a condition of consent imposed by the relevant consent authority.

Generally, there are two (2) parties to any DA appeal proceedings – the Applicant for the DA and the Council.

Neighbours or resident objectors are not considered parties in an appeal and therefore neighbours or resident objectors have no legal entitlement to participate in DA appeal proceedings. Council, however, almost always calls on neighbours and resident objectors, as 'lay' witnesses, to assist their case, and the Court has the power, under s38 of the *Land and Environment Court Act 1979* to inform itself on matters it thinks fit and appropriate which includes hearing from neighbours or resident objectors on matters that relate to "the impacts of the proposed development" on their land, property and premises.

Neighbours and resident objectors can seek to be joined as a party to DA Appeal proceedings (s39A of the *Land and Environment Court Act 1979*) or seek to have an order made by the Court that allows them to participate as though they were a party to the proceedings.

Generally, the Court will only allow or permit a resident objector to join proceedings when and if the resident objector can establish that an issue should be raised and considered by the Court and that any such issue will not be sufficiently or satisfactorily addressed by the Court, absent the resident objector joining the proceedings.

When a DA appeal is lodged or filed, Council staff or Council's external legal advisors will usually notify all persons who objected to the DA and, in so far as is reasonably possible, keep any person who objected to the DA informed of relevant dates that relate to the conduct of the DA appeal proceedings.

There are several stages or processes in the DA Appeal process, each of which is set out in the relevant Practice Note(s) of the Court.

The primary purpose of each relevant Practice Note is to set out the case management procedures of DA appeals for the 'just, quick and cheap resolution' of proceedings.

Section 34 of the *Land and Environment Court Act 1979* ('the Act') allows or permits the Court to arrange, with or without the consent of the parties, a Conciliation Conference between the parties and their respective representatives.

Section 34AA of the Act mandates that the Court "must arrange a conciliation conference between the parties and their representatives, with or without their consent". Relevantly, section 34AA of the Act applies only to DA appeals involving development for the purposes of detached dwellings, dual occupancies and/or alterations and additions to single dwellings and dual occupancies.

Section 34(1A) of the Act provides it is the duty of each party to proceedings, where a conciliation conference has been arranged, to participate in "good faith". Similarly, the Courts Practice Note provides, as a Usual direction of the Court, that:

*The parties are to participate, in good faith, in the conciliation conference, to include preparing to be able to fully and meaningfully participate, having authority or the ready means of obtaining authority to reach agreement and genuinely endeavouring to reach agreement at the conciliation conference.*

The primary purpose of the section 34 Conciliation Conference process is to resolve, where possible, or at the very least narrow, where the former is not possible, the issues/contentions between the parties. It is anticipated by the Court that the parties will reach a point where an agreed consent can be issued.

The Conciliation Conference, being a conference between the parties, is not one in which neighbours or resident objectors are entitled to participate. Resident objectors, however, are generally permitted to give oral evidence to the Court at the commencement of a section 34 Conciliation Conference site inspection (in accordance with the Land and Environment Court's "Conciliation Conference Policy"). Relevantly, in the matter of *Fairfield CC v Gray* [2018] NSWLEC 81, Moore J refused an application by a community group to participate in a section

34 Conciliation Conference, noting that participants in the section 34 Conciliation Conference 'had to be parties to the appeal'. However, this has not been the general practice of the court.

It is therefore imperative that Council Officers and Council's legal advisors ensure that neighbours and resident objectors understand the duty imposed upon Council and Council Officers to participate in good faith, in pursuit of the just, quick and cheap resolution of the proceedings. This means Council staff must properly consider the way proceedings can be resolved.

Council Officers and/or expert witnesses who participate in the Conciliation Conference process owe their primary duty to the Court, and not to the residents or indeed the Council itself as provided in *Uniform Civil Procedure Rules 2005, Schedule 7 Expert Witness Code of Conduct*.

An expert witness, to include in-house experts (Town Planners, Engineers etc) have a paramount duty to the Court. Expert witnesses must not advocate for any party in the proceedings but must assist the court impartially on matters relevant to the area of their expertise. Therefore, in many instances, a DA appeal will be resolved at a conciliation conference. This is, primarily due to the evidence or impartial opinions of the relevant expert witnesses.

Prior to the commencement of a Conciliation Conference, Council's usual practice, via its legal advisor or its internal experts, is to notify resident objectors, in writing, of the DA Appeal and the date on which the Conciliation Conference is listed. The Council is also required, in accordance with the Courts Conciliation Conference Policy, to prepare a list of resident objectors and other non-expert objectors, who wish to make submissions on-site, at the conciliation Conference. The list must include a reference to the relevant written submissions of each resident objector made to Council prior to the commencement of the DA Appeal and/or made to Council prior to the Conciliation Conference. When notifying resident objectors and other lay submitters of the relevant Conciliation Conference date, and inviting resident objectors to make submissions on-site at the Conciliation Conference, the Courts Conciliation Conference policy requires Council to:

- Advise resident objectors, being those people who have made submissions to the council, of the time of the site inspection so they have the opportunity to ask the council if they can make a submission on-site for consideration by the parties during the conciliation phase.
- Advise resident objectors that, at the conclusion of any submissions made on site, the parties will be undertaking confidential conciliation discussions facilitated by the Commissioner and that participation in those discussions is limited to the parties (including their legal representatives and experts).
- Advise resident objectors who propose to make submissions to the Court, that while their submission is to be given on-site, if their submission becomes evidence, it will have the same effect as if it was given in a courtroom.

- The full text of the submissions can be made available during the conciliation phase and subsequently tendered by the council as part of any determination phase of the proceedings.
- Where a written submission has been prepared and submitted to the council by a person on behalf of the owner of a property, such as an architect or town planner, that person may address the Court on the contents of the written submission. Such submissions are not expert evidence in the proceedings.
- Where one specific issue has been addressed in detail by one submitter, it is not necessary for each subsequent submitter to address in full the same issue. It is sufficient if the subsequent submitters acknowledge that they hold similar views to any previous submitter who has spoken on that issue.
- The council has the contact details of any submitter who has expressed interest in attending any hearing that may be held if the conciliation conference is terminated, so that the council can contact those persons advising them of the time and venue of the hearing.
- Where submitters speak on-site (or at an alternative location if required), notes are to be taken by each party or their legal representatives or agents and an agreed summary can be tendered to the Court in the event the matter proceeds to hearing and the parties consent to the Court determining the matter on the basis of the submissions made on site at the conciliation conference.

Noting the above, the manner in which Council communicates with resident objectors is generally in accordance with the Courts' usual practice and the Courts' Conciliation Conference Policy. That is, Council will communicate with resident objectors, in writing, prior to the commencement of a Conciliation Conference and subsequent to a Conciliation Conference, regardless of an agreement being reached or otherwise. As a general proposition, Council will only communicate with residents who are or may be affected by the proposed development. This accords with the Courts Conciliation Conference Policy, to the extent that the Court gives preference to residents directly affected by a proposed development, such as those living adjoining or directly opposite the site of the proposed development. If there are contentions or issues that extend beyond the immediate vicinity, such as impacts on the character of the locality or wider traffic implications, a representative person may be nominated as a primary contact and that nominated person may be permitted to make submissions, orally, at the site inspection component of the Conciliation Conference process.

It is not uncommon in DA appeal proceedings for an Applicant to propose amendments to their development application at or shortly after a Conciliation Conference. Such action occurs in an attempt to address the issues raised in a Statement of Facts and Contentions (SOFC) or those issues discussed at the conciliation conference.

Council will usually notify resident objectors when and if a development application is amended during the course of a section 34 Conciliation Conference – subject to the Court adjourning the proceedings. The Court has, however, held that it is not bound by the notification requirements of a Council Development Control Plan and in this regard, it is open to the Court to deny adjourning proceedings to allow or permit the re-notification of

amended drawings: *V'landy's v Land and Environment Court of NSW* [2012] NSWLEC 218. It is common practice, however, for the Court to adjourn proceedings to allow or permit Council's to renotify resident objectors where, when and if a development application is proposed to be amended during the course of a Conciliation Conference. Council's approach, generally, to the submission of amended drawings, is to request an adjournment of the relevant proceedings, so as to allow or permit resident objectors to be notified of the amended proposal. Such requests are informed and reinforced by reference to Councils Community Consultation Protocol.

The Conciliation Conference itself involves a Commissioner of the Court who will generally have expertise on issues relevant to the DA appeal. The Commissioner acts as a Conciliator and facilitates negotiations between the parties with a view to reaching or achieving an agreement between the parties.

If, during the Conciliation Conference, the parties are able to reach agreement, the Conciliator, being a Commissioner of the Court, is able to dispose of the proceedings in accordance with the parties agreement. If the parties are unable to reach agreement, the Conciliation Conference is terminated and the proceedings are referred back to the Court for the purpose of fixing the proceedings for a hearing. Alternatively, if the parties do not reach agreement, and the parties consent, the Commissioner may terminate the Conciliation Conference and determine the proceedings with or without a further hearing based on the evidence adduced during the Conciliation Conference.

The possible outcomes of a Conciliation Conference may be summarised as follows:

1. The parties reach an agreement and the Court disposes of the proceedings and determines the development application in accordance with the agreement; or
2. The parties do not reach an agreement, however, the parties consent to the Court disposing of the proceedings and determining the development application on the basis of evidence adduced during the course of the Conciliation Conference; or
3. The parties reach an agreement on some but not all of the issues in contention and the Conciliation Conference is terminated and the matter is fixed for future contested hearing; or
4. The parties do not reach an agreement on any of the issues in contention and the Conciliation Conference is terminated and the matter is fixed for future contested hearing.

If the parties reach an agreement and the Court determines the proceedings in accordance with that agreement resident objectors will usually be notified of the Courts determination.

Council does not seek to "justify" to residents, resident objectors or lay witnesses, the basis upon which any agreement or non-agreement is or was reached. Agreements are reached predicated upon the evidence, being the impartial evidence of expert witnesses and the lay evidence of resident objectors.

If an agreement is reached between the parties, the Court, as consent authority, will dispose of the proceedings in accordance with the agreement and set out in writing the terms of the



Court's decision: s34(3) of the *Land and Environment Court Act 1979*. In this regard, the Court will set out the reasoning or basis upon which it determines or determined to dispose of the proceedings, granting development consent to the relevant development application. That is, an agreement reached between the parties, is a decision of the Court, that the Court could have made in the proper exercise of its functions as consent authority: s34(8) of the *Land and Environment Court Act 1979*. Upon the terms of the Court's decision being made and published, Council will notify, in writing, resident objectors, and provide resident objectors with a link to or a copy of the Court's determination.

If the parties do not reach an agreement and the proceedings are set down for future contested hearing, resident objectors will be notified and invited to attend and make submissions to the Court at the future contested hearing.

It is important to note the obvious difference between mediation in its accepted form and the Court conciliation process. In a mediation process the mediator is independent of the dispute and while they may provide the parties with some direction, they do not determine the dispute. In the case of the Courts conciliation process, the conciliator, being the Commissioner, has the power to determine the dispute, or elements there of if the conciliation fails.

#### **Council's role in DA Planning Appeals.**

Development applications can be subject of an appeal to the Land and Environment Court by an applicant. Appeals can be commenced based on a decision made by the Panel or by a Council officer under delegation or following the expiry of the deemed refusal period: typically, 40 days from the date of lodgement for a local development application.

Under the provisions of the EPA Act the North Sydney Local Planning Panel (NSLPP) is responsible for the control and direction of Planning appeals arising from its activities.

However, at its meeting of 4 July 2019 NSLPP delegated their functions with regard to the control and direction of all development appeals against determinations (or deemed determinations) of the Local Planning Panel (as well as those determinations not captured by the Local Planning Direction) to the following Council Officers in the context of Council's current delegations concerning authority to deal with appeals and procedural matters concerning such appeals in the Land and Environment Court:

1. The General Manager;
2. The Chief Operating Officer (now a redundant title);
3. The General Counsel (Council Solicitor);
4. The Director City Strategy;
5. The Manager Development Services;
6. The Manager Strategic Planning; and
7. The Manager Environment & Building Compliance.

As outlined in detail earlier the Court's practice directions dictate that residential appeals are to be resolved by way of the Section 34 Conference process. Generally this delegation is

exercised by either Councils General Counsel (Council Solicitor) or the Manager of Development Services.

The General Manager has given similar delegations to Council staff to deal with the minority of appeals commenced in regard to applications that do not warrant panel determination. The enactment of legislation that created compulsory planning panels has effectively eliminated Councillors involvement in the appeal process.

**Specific Example**

**Land and Environment Court Proceedings No. 21/141523  
20-24 Bray Street, North Sydney**

Loyito Pty Ltd v North Sydney Council NSWLEC 1074 was subject to conciliation over three days being 6 September 2021, 20 September 2021 and 9 February 2022. The matter was heard by Commissioner Walsh who handed down Orders on 15 February 2022.

The Court orders were as follows;

- 1) The Applicant is to pay the respondents costs thrown away in accordance with s 8.15(3) of the Environmental Planning and Assessment Act 1979, in the agreed amount of \$1.00.
- 2) The appeal is upheld.
- 3) The request pursuant to clause 4.6 of the North Sydney Local Environmental Plan to vary the development standard for Height of Buildings contained in clause 4.3 thereof, as prepared by Andrew Darroch, Planner, dated October 2021 is upheld.
- 4) Development consent is granted to Development Application No. 337/20, as amended, for the demolition of the existing residential flat building and construction of a new residential flat building with basement parking at 20-24 Bray Street, North Sydney, with associated earthworks and landscaping, and alterations and additions to the single dwelling at 35 Kurraba Road Neutral Bay, NSW 2089 subject to the conditions set out in Annexure 'A' to this agreement. The subject site straddles the R2 and R3 zones which both feature a maximum building height of 8.5 meters.

This application was lodged on 21 December 2020 and the appeal started as a deemed refusal appeal which was lodged with the Court on 19 May 2021.

The DA, as amended, sought consent for demolition of an existing residential flat building and construction of a new residential flat building with basement parking at 20-24 Bray Street North Sydney (legally described as SP 13397), and alterations and additions to the adjoining single dwelling at 35 Kurraba Road Neutral Bay (legally described as Lot 101 DP 627484 and Lot 3 DP565786).

The site is characterised by an existing apartment building which would not comply with relevant development standards including building height which apply today.

The application when lodged relied on existing use rights. During the application process amendments occurred to the North Sydney LEP which allowed residential flat buildings to be constructed in the R3 residential zone. In either case the applicant was required to lodge and

have accepted by the consent authority a valid CL 4,6 submissions seeking variation to the building height standard.

The Court is required to consider whether it would grant consent to an application even if the parties come to an agreement as to what could be approved. The orders of Walsh C (attached) details how he has approached the issue of building height and other matters related to the determination.

The issue of building height was core to many of the submissions received by Council. Building height was initially assessed as being unacceptable due to an unwarranted increase proposed by the originally submitted plans. As amended during the conciliation process the eastern end of the development was lowered to be more reflective of the existing building envelope with the western end of the development being only marginally outside the applicable 8.5-meter height limit.

The acceptance of a Cl 4.6 objection requires the demonstration of the compliance of a development proposal with the objectives of the applicable development standard. While identification of the nature of the variation being sought is important it is the assessment of the subsequent impacts which are determinative.

While the approved development is taller than the already noncomplying existing development the Commissioner has noted that the proposal addressed its neighbours appropriately. Council's expert had formed the view that the development was appropriate in its modified form and that the Cl4.6 submission could be accepted.

A brief comment is made in regard to the amount awarded to Council for "costs thrown away". This value is not reflective of the cost to Council in reviewing the amended plans submitted by the applicant during the conciliation process. However, these amended plans addressed many of the points of concern raised in direct fashion and were easily assessed and accepted. Seeking greater costs may have extended time frames for the final determination and thus increased overall costs to Council.

### **Conclusion**

Council's approach to Conciliation Conferences must always accord with the Court's usual or mandated practices and procedures.

Council must participate in the Conciliation Conference process as a "model litigant", acting in "good faith" and in pursuit of the "just, quick and cheap" resolution of proceedings.

Decisions made to either agree or disagree to enter into any agreement, will always be predicated primarily upon the impartial views and opinions of expert witnesses, who are bound to assist the Court in reaching a determination on the issues or contentions raised between the parties. In forming their respective "views or opinions" expert witnesses must consider the lay submissions and evidence of resident objectors, whose submissions, in written and verbal form, becomes evidence in which the Court makes its decision, in addition to the expert evidence of the parties respective expert witnesses.

Council or its legal advisors will usually communicate with resident objectors, in writing, prior to the commencement of a Conciliation Conference and subsequent to a Conciliation Conference, regardless of an agreement being reached or otherwise.

The role of the Experts in the Court process is clear. They are to serve the Court in their professional capacity independently of their primary employer. This applies equally to experts employed by the Council and by the applicant.

In the matter of 20-24 Bray Street, North Sydney, the parties respective experts formed the view that the development was appropriate in its modified form and that the CI4.6 submission (building height development standard variation) could be accepted. The Court formed the same view and accordingly determined the development application in accordance with the agreement reached between the parties.

Form 43  
UCPR 36.11



Issued: 16 February 2022 9:09 AM

**JUDGMENT/ORDER**

**COURT DETAILS**

Court	Land and Environment Court of NSW
Division	Class 1
Registry	Land and Environment Court Sydney
Case number	2021/00141523

**TITLE OF PROCEEDINGS**

First Applicant	Loyito Pty Ltd ACN 001908845
First Respondent	North Sydney Council ABN 32353260317

**DATE OF JUDGMENT/ORDER**

Date made or given	15 February 2022
Date entered	15 February 2022

**TERMS OF JUDGMENT/ORDER**

The Orders of the Court are:

- 1) The Applicant is to pay the respondents costs thrown away in accordance with s 8.15(3) of the Environmental Planning and Assessment Act 1979, in the agreed amount of \$1.00.
- 2) The appeal is upheld.
- 3) The request pursuant to clause 4.6 of the North Sydney Local Environmental Plan to vary the development standard for Height of Buildings contained in clause 4.3 thereof, as prepared by Andrew Darroch, Planner, dated October 2021 is upheld.
- 4) Development consent is granted to Development Application No. 337/20, as amended, for the demolition of the existing residential flat building and construction of a new residential flat building with basement parking at 20-24 Bray Street, North Sydney, with associated earthworks and landscaping, and alterations and additions to the single dwelling at 35 Kurraba Road Neutral Bay, NSW 2089 subject to the conditions set out in Annexure 'A' to this agreement.

**SEAL AND SIGNATURE**



Signature	S. Froh
Capacity	Registrar
Date	16 February 2022

cwalsh1

If this document was issued by means of the Electronic Case Management System (ECM), pursuant to Part 3 of the Uniform Civil Procedure Rules (UCPR), this document is taken to have been signed if the person's name is printed where his or her signature would otherwise appear.

**FURTHER DETAILS ABOUT Applicant(s)**

**First Applicant**

Name Loyito Pty Ltd  
ACN 001908845  
Address Suite 2 Level 3  
7 - 5 Macquarie Place  
SYDNEY NSW 2000

Telephone  
Fax  
E-mail  
Client reference

**Legal representative**

Name ANTHONY JAMES WHEALY  
Practicing certificate number 33614  
Address Barrack Place Level 7  
151 Clarence Street  
SYDNEY NSW 2000  
DX address DX 13025 Syd-Market St NSW  
Telephone 02 8289 5872  
Fax 02 9247 1315  
Email PES\_Anthony\_Subteam@millsOakley.com.au  
Electronic service address PES\_Anthony\_Subteam@millsOakley.com.au

**FURTHER DETAILS ABOUT Respondent(s)**

**First Respondent**

Name North Sydney Council  
ABN 32353260317  
Address 200 Miller Street  
NORTH SYDNEY NSW 2060  
Frequent User Identifier NSYDC

**ATTACHMENTS TO ORDERS**

(141523.21 Walsh C (Annexure A).pdf)

[attach.]

## Annexure A

### DETERMINATION OF DEVELOPMENT APPLICATION BY GRANT OF CONSENT

<b>Development Application No:</b>	DA337/20
<b>Development:</b>	demolition of the existing residential flat building and construction of a new residential flat building with basement parking at 20-24 Bray Street, North Sydney, with associated earthworks and landscaping, and alterations and additions to the single dwelling at 35 Kurraba Road Neutral Bay, NSW 2089
<b>Site:</b>	20-24 Bray Street, North Sydney, and 35 Kurraba Road, Neutral Bay, NSW 2089

The above development application has been determined by the granting of consent subject to the conditions specified in this consent.

**Date of determination:** 15 February 2022

**Date from which consent takes effect:** Date the consent is registered on the NSW Planning Portal.

#### TERMINOLOGY

In this consent:

- (a) Any reference to a Construction, Compliance, Occupation or Subdivision Certificate is a reference to such a certificate as defined in the *Environmental Planning and Assessment Act 1979*.
- (b) Any reference to the "applicant" means a reference to the applicant for development consent or any person who may be carrying out development from time to time pursuant to this consent.
- (c) Any reference to the "site", means the land known as 20-24 Bray Street North Sydney (SP 13397) and 35 Kurraba Road (Lot 101 DP 627484 and Lot 3 DP565786), Neutral Bay.

The conditions of consent are as follows:

**A. Conditions that Identify Approved Plans****Development in Accordance with Plans/Documentation**

A1. The development must be carried out in accordance with the following drawings and documentation and endorsed with Council's approval stamp, except where amended by the following conditions of this consent.

Plan No.	Rev	Date	Title	Prepared by
DA-A-011	C	03-11-2021	Site Plan	Smith & Tzannes
DA-A-101	C	03-11-2021	Level C1 – Carpark	Smith & Tzannes
DA-A-102	C	03-11-2021	Level 0	Smith & Tzannes
DA-A-103	C	03-11-2021	Level 1	Smith & Tzannes
DA-A-104	C	03-11-2021	Level 2 (Residences)	Smith & Tzannes
DA-A-105	C	03-11-2021	Level 3 (Residences)	Smith & Tzannes
DA-A-106	C	03-11-2021	Level 4 (Residences)	Smith & Tzannes
DA-A-107	C	03-11-2021	Level 5	Smith & Tzannes
DA-A-108	C	03-11-2021	Roof	Smith & Tzannes
DA-A-200	C	03-11-2021	North Elevation	Smith & Tzannes
DA-A-201	C	03-11-2021	South Elevation (Bray Street)	Smith & Tzannes
DA-A-202	C	03-11-2021	East Elevation	Smith & Tzannes
DA-A-203	C	03-11-2021	West Elevation	Smith & Tzannes
DA-A-204	C	03-11-2021	Section A	Smith & Tzannes
DA-A-205	C	03-11-2021	Section 1	Smith & Tzannes
DA-A-206	C	03-11-2021	Section 2	Smith & Tzannes
DA-A-207	C	03-11-2021	Section 3	Smith & Tzannes
DA-A-300	C	03-11-2021	Site and Roof Plan – 35 Kurraba Rd	Smith & Tzannes
DA-A-301	C	03-11-2021	Ground Plan – 35 Kurraba Rd	Smith & Tzannes
DA-A-302	C	03-11-2021	Elevations – 35 Kurraba Rd	Smith & Tzannes
DA-A-900	C	03-11-2021	External Forms & Finishes	Smith & Tzannes
DA-A-901	C	03-11-2021	External Forms & Finishes	Smith & Tzannes
DA-A-902	C	03-11-2021	External Forms & Finishes	Smith & Tzannes
DA-A-903	C	03-11-2021	External; Finishes Schedule	Smith & Tzannes
LPDA21-141 Sheet 1	B	03-11-2021	Landscape Site Plan	Conzept Landscape Architects
LPDA21-141 Sheet 2	B	03-11-2021	Landscape Plan (Upper)	Conzept Landscape Architects
LPDA21-141 Sheet 2	B	03-11-2021	Landscape Plan (Lower)	Conzept Landscape Architects
LPDA21-141 Sheet 2	B	03-11-2021	Landscape Plan (Roof Planters)	Conzept Landscape Architects
LPDA21-141 Sheet 2	B	03-11-2021	South Elevation	Conzept Landscape Architects
LPDA21-141 Sheet 2	B	03-11-2021	North Elevation	Conzept Landscape Architects
LPDA21-141 Sheet 2	B	03-11-2021	Details & Specification	Conzept Landscape Architects
Cover	D	07-10-2021	General Notes	Alpha Engineering
SW01	D	07-10-2021	Sediment and Erosion Control Plan	Alpha Engineering
SW02	D	07-10-2021	Level C1 Drainage Plan	Alpha Engineering
SW03	D	07-10-2021	Level 0 Drainage Plan	Alpha Engineering
SW04	D	07-10-2021	Level 1 Drainage	Alpha Engineering

Page 2 of 51



SW05	D	07-10-2021	Level 2 Drainage Plan	Alpha Engineering
SW06	D	07-10-2021	Level 3 Drainage Plan	Alpha Engineering
SW07	D	07-10-2021	Level 4 Drainage Plan	Alpha Engineering
SW08	D	07-10-2021	Level 5 Drainage Plan	Alpha Engineering
SW09	D	07-10-2021	Level 6 Roof Drainage Plan	Alpha Engineering
SW10	D	07-10-2021	Stormwater Details and Sections	Alpha Engineering
SW11	D	07-10-2021	Drains Model and Results	Alpha Engineering
SW12	D	07-10-2021	Music Model and Results	Alpha Engineering

<u>BASIX Certificate 1149654M_03</u>
<u>Overland Flood Study and Flood Impact Report, prepared by Alpha Engineering dated 8 October 2021</u>
<u>Geotechnical Investigation Report (Rev 2), prepared by Geo- Environmental Engineering dated 12 October 2021</u>
<u>Construction and Traffic Management Plan, prepared by TTPPA dated October 2021</u>
<u>Traffic Impact Assessment, prepared by PDC Consultants dated 13 October 2021</u>
<u>Traffic Noise Assessment, prepared by Rodney Stevens Acoustic dated 13 October 2021</u>
<u>Operational Waste Management Plan prepared by Elephants Foot dated 11 October 2021</u>

(Reason: To ensure that the form of the development undertaken is in accordance with the determination of Council, Public Information)

#### Plans on Site

A2. A copy of all stamped approved plans, specifications and documents (including the plans, specifications and documents submitted and approved with the Construction Certificate) must be kept on site at all times so as to be readily available for perusal by any officer of Council or the Principal Certifying Authority.

All documents kept on site in accordance with this condition must be provided to any officer of the Council or the certifying authority upon their request.

(Reason: To ensure that the form of the development undertaken is in accordance with the determination of Council, Public Information and to ensure ongoing compliance)

**No Demolition of Extra Fabric**

A3. Alterations to, and demolition of the existing building/structures shall be limited to that documented on the approved plans.

(Reason: To ensure compliance with the approved development)

**External Finishes & Materials**

A4. External finishes and materials must be in accordance with the submitted schedules on Drawings DA-A-900 Rev C, DA-A-901 Rev C, DA-A-902 Rev C and DA-A-903 Rev C, all dated 3 November 2011, prepared by Smith & Tzannes unless otherwise modified by Council in writing.

(Reason: To ensure that the form of the development undertaken is in accordance with the determination of Council, Public Information)

**B. Matters to be Completed before the lodgement of an Application for a Construction Certificate**

**Construction Management Program – Local Traffic Committee Approval**

B1. A Construction Management Program prepared by a suitably qualified and experienced traffic consultant must be submitted and approved in writing by North Sydney Traffic Committee PRIOR TO THE ISSUE OF ANY Construction Certificate. Any use of Council property will require appropriate approvals prior to any work commencing. At a minimum, the Construction Management Program must specifically address the following matters:

- a) A plan view (min 1:100 scale) of the entire site and frontage roadways indicating:
  - i. Dedicated temporary construction site driveway entrances and exits, controlled by a certified traffic controller, to safely manage pedestrians and construction related vehicles in the frontage roadways and footways;
  - ii. The proposed signage for pedestrian management to comply with the relevant Australian Standards, including pram ramps;
  - iii. Turning areas within the site for construction and spoil removal vehicles, allowing a forward egress for all construction vehicles on the site;
  - iv. The locations of any proposed Work Zones in the frontage roadways (to be approved by Council's Traffic Committee);
  - v. Locations of hoardings proposed;
  - vi. Location of any proposed crane standing areas;
  - vii. A dedicated unloading and loading point within the site for all construction vehicles, plant and deliveries;
  - viii. Material, plant and spoil bin storage areas within the site, where all materials are to be dropped off and collected; and
  - ix. The provision of an on-site parking area for employees, tradesperson and construction vehicles as far as possible.
- b) A detailed heavy vehicle access route map through the Council area to Arterial Roads. Provision is to be made to ensure through traffic is maintained at all times.
- c) The proposed phases of works on the site, and the expected duration of each phase.

- d) How access to neighboring properties will be maintained at all times and the proposed manner in which adjoining property owners will be kept advised of the timeframes for completion of each phase of process.
- e) The road is not to be used as a waiting area for trucks delivering to or awaiting pick up of materials.
- f) The proposed method of support to any excavation adjacent to adjoining properties, or the road reserve. The proposed method of support is to be designed and certified by an appropriately qualified and practicing structural engineer and must not involve any permanent or temporary encroachment onto Council's property.
- g) Proposed protection for Council and adjoining properties. Details are to include site fencing and the provision of "B" class hoardings over footpaths and laneways.
- h) A Waste Management Plan. The Waste Management Plan must include, but not be limited to, the estimated volume of waste and method of disposal for the construction and operation phases of the development, design of on-site waste storage and recycling area and administrative arrangements for waste and recycling management during the construction process.

All traffic control work and excavation, demolition and construction activities must be undertaken in accordance with the approved Construction Management Program and any conditions attached to the approved Program. The approved Construction Management Program must be submitted as part of the documentation lodged with the application for approval of a construction certificate. A copy of the approved Construction Management Program and any conditions imposed on that Program, must be kept on the site at all times and made available to any officer of Council upon request.

Notes:

- 1) North Sydney Council's adopted fee for certification of compliance with this condition shall be payable on lodgment, or in any event, prior to the issue of the relevant approval.
- 2) Any use of Council property will require appropriate approvals and demonstration of liability insurances prior to such work commencing.
- 3) Failure to provide complete and detailed information may result in delays. It is recommended that your Construction Management Plan be lodged with Council as early as possible, as a minimum six (6) weeks notice is required to refer items to the Traffic Committee.
- 4) Dependent on the circumstances of the site, Council may request additional information to that detailed above.

(Reason: To ensure appropriate measures have been considered for site access, storage and the operation of the site during all phases of the demolition process in a manner that respects adjoining owner's property rights and residential amenity in the locality, without unreasonable inconvenience to the community)

**C. Prior to the Issue of a Construction Certificate (and ongoing, where indicated).**

**Dilapidation Report Damage to Public Infrastructure**

- C1. A dilapidation survey and report (including photographic record) must be prepared by a suitably qualified consultant who details the pre-developed condition of the existing public infrastructure in the vicinity of the development site. Particular attention must be paid to accurately recording any pre-developed damaged areas so that Council is fully informed when assessing any damage to public infrastructure caused as a result of the development. A copy of the dilapidation survey and report is to be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate.

The developer may be held liable for all damage to public infrastructure in the vicinity of the site, where such damage is not accurately recorded and demonstrated as pre-existing under the requirements of this condition.

The developer shall bear the cost of carrying out works to restore all public infrastructure damaged as a result of the carrying out of the development, and no occupation of the development shall occur until damage caused as a result of the carrying out of the development is rectified.

A copy of the dilapidation survey and report must be lodged with North Sydney Council by the Certifying Authority with submission of the Construction Certificate documentation.

(Reason: To record the condition of public infrastructure prior to the commencement of construction)

**Dilapidation Report Private Property (Excavation)**

- C2. A full dilapidation survey and report on the visible and structural condition of all neighbouring structures within the 'zone of influence' of the required excavations must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate. The zone of influence is to be defined as the horizontal distance from the edge of the excavation face to twice the excavation depth.

The dilapidation report and survey is to be prepared by a consulting structural/geotechnical engineer.

All costs incurred in achieving compliance with this condition shall be borne by the person entitled to act on this Consent.

In the event that access for undertaking the dilapidation survey is denied by an adjoining owner, the applicant MUST INFORM Council, in writing that steps have been taken to obtain access and advise the affected property owner of the reason for the survey and that these steps have failed, with evidence of those steps having been taken and any responses.. Confirmation of a copy of this correspondence being sent to Council must be submitted to the Certifying Authority prior to the issue of any Construction Certificate.

Note: This documentation is for record keeping purposes only, and may be used by the developer or affected property owner to assist in any action required to resolve any dispute over damage to adjoining properties arising from the works. It is in the applicant's and adjoining owner's interest for it to be as full and detailed as possible.

(Reason: To record the condition of property/ies prior to the commencement of construction)

**Dilapidation Survey Private Property (Neighbouring Buildings)**

C3. A photographic survey and dilapidation report of the detached dwelling at No. 35 Kurraba Road and the adjoining properties, including Nos. 23 – 33 Kurraba Road, Nos 16, 18 and 22 Doris Street, Nos 55 – 59 Neutral Street and Nos. 62, 64, 64A and 66 Clark Road, North Sydney, detailing the physical condition of those properties, both internally and externally, including, but not limited to, such items as walls, ceilings, roof, structural members and other similar items, SHALL BE submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate. The survey and report is to be prepared by an appropriately qualified person. A copy of the report is to be provided to Council, if Council is not the Certifying Authority, prior to the issue of any Construction Certificate.

All costs incurred in achieving compliance with this condition shall be borne by the person entitled to act on this Consent.

In the event that access for undertaking the photographic survey and dilapidation report is denied by an adjoining owner, the applicant MUST INFORM Council, in writing, that steps have been taken to obtain access and advise the affected property owner of the reason for the survey and that these steps have failed, , with evidence of those steps having been taken and any responses. Confirmation of a copy of this correspondence being sent to Council must be submitted to the Certifying Authority prior to the issue of any Construction Certificate.

Note: This documentation is for record keeping purposes only, and may be used by an applicant or affected property owner to assist in any action required to resolve any dispute over damage to adjoining properties arising from the works. It is in the applicant's and adjoining owner's interest for it to be as full and detailed as possible.

(Reason: Proper management of records)

**Structural Adequacy of Adjoining Properties – Excavation Works**

C4. A report prepared by an appropriately qualified and practising structural engineer detailing the structural adequacy of No.35 Kurraba Road and the adjoining properties Nos. 23 – 33 Kurraba Road, Nos 16, 18 and 22 Doris Street, Nos 55 – 59 Neutral Street and Nos. 62, 64, 64A and 66 Clark Road, North Sydney, which certifies their ability to withstand the proposed excavation and outlines any measures required to be implemented to ensure that no damage will occur to adjoining properties during the course of the works, must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate. The measures outlined in the certified report must be complied with at all times.

(Reason: To ensure the protection and structural integrity of adjoining properties in close proximity during excavation works)

**Shoring for Adjoining Property**

C4. Where any shoring for excavation is to be located on or is supporting Council's property, or any adjoining private property, engineering drawings certified as being adequate for their intended purpose by an appropriately qualified and practising structural engineer, showing all details, including the extent of excavation, encroachment and the method of removal and de-stressing of shoring elements, backfilling and compacting of over-excavated cavities on Council's and/or private property with fill suitable for its purpose, must be submitted to the Certifying Authority for approval with the Construction Certificate. A copy of this documentation must be provided to the Council for record purposes. Backfilling and compacting of over-excavated cavities must be addressed as the build-up is progressing through the basements to ensure that compaction is reliable. To obtain the permit for tieback anchors, an 'Application to satisfy development consent' form with payment of the adopted assessment fees, must be made to Council.

*Note: Approval of engineering drawings for shoring works to be located on adjoining property by the Certifying Authority does not authorize a trespass on private or public land. All relevant permissions/ legal rights must be obtained to undertake any works on adjoining land.*

(Reason: To ensure the protection of existing public infrastructure and adjoining properties)

**Geotechnical Report**

C5. Prior to issue of any Construction Certificate a Geotechnical/Civil Engineering report must be prepared which addresses at a minimum (but is not limited to) the following:-

- a) The type and extent of substrata formations by the provision of a minimum of four (4) representative bore hole logs which are to provide a full description of all material from ground surface to 1.0m below the finished basement floor level and include the location and description of any anomalies encountered in the profile. The surface and depth of the bore hole logs must be related to Australian Height Datum;
- b) The appropriate means of excavation/shoring in light of point (a) above and proximity to adjacent property and structures. Potential vibration caused by method of excavation and potential settlements affecting nearby footings/foundations must be discussed and mechanisms to ameliorate any such impacts recommended;
- c) The proposed method to temporarily and permanently support the excavation for the basement adjacent to adjoining property, structures and road reserve if nearby (full support must be provided within the subject site);
- d) The existing groundwater levels in relation to the basement structure, where influenced;
- e) The drawdown effects on adjacent properties (including road reserve), if any, the basement excavation will have on groundwater together with the appropriate construction methods to be utilized in controlling groundwater. Where it is considered there is the potential for the development to create a "dam" for natural groundwater flows, a groundwater drainage system must be designed to transfer groundwater through or under the proposed development without a change in the

range of the natural groundwater level fluctuations. Where an impediment to the natural flow path is constructed, artificial drains such as perimeter drains and through drainage may be utilized; and

- f) Recommendations to allow the satisfactory implementation of the works. An implementation program is to be prepared along with a suitable monitoring program including control levels for vibration, shoring support, ground level and groundwater level movements during construction. The implementation program is to nominate suitable hold points at the various stages of the works for verification of the design intent before sign-off and before proceeding with subsequent stages.

The geotechnical report must be prepared by an appropriately qualified consulting geotechnical/ hydro geological engineer or suitable qualified expert with previous experience in such investigations and reporting.

It is the responsibility of the consulting geotechnical/ hydrological specialist to undertake the appropriate investigations, reporting and specialist recommendations to ensure a reasonable level of protection to adjacent property and structures both during and after construction. The report must contain site-specific geotechnical recommendations and shall specify the necessary hold/inspection points by relevant professionals as appropriate.

The design principles for the geotechnical report are as follows:

- a) no ground settlement or movement is to be induced which is sufficient enough to cause an adverse impact to adjoining property and/or infrastructure;
- b) no changes to the ground water level are to occur as a result of the development that are sufficient enough to cause an adverse impact to the surrounding property and infrastructure;
- c) no changes to the ground water level are to occur during the construction of the development that are sufficient enough to cause an adverse impact to the surrounding property and infrastructure;
- d) vibration is to be minimized or eliminated to ensure no adverse impact on the surrounding property and infrastructure occurs, as a result of the construction of the development;
- e) appropriate support and retention systems are to be recommended and suitable designs prepared to allow the proposed development to comply with these Design Principles; and
- f) An adverse impact can be assumed to be crack damage as identified within the relevant Australian Standard for determining such damage.

The report, satisfying the requirements of this condition, must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate.

The professional recommendations, implementation program, monitoring program, mitigation measures and the like contained in the report must be implemented in full during

the relevant stages of excavation and construction.

(Reason: To ensure the structural integrity of the subject site and adjoining sites during the excavation process)

**Sediment Control**

C6. Where construction or excavation activity requires the disturbance of the soil surface or existing vegetation, erosion and sediment control techniques, as a minimum, are to be in accordance with the publication Managing Urban Stormwater: Soils & Construction (4th edition, Landcom, 2004) commonly referred to as the "Blue Book" or a suitable and effective alternative method.

A Sediment Control Plan must be prepared and submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate and prior to any works commencing. The Sediment Control Plan must be consistent with the Blue Book and disclose:

- a) All details of drainage to protect and drain the site during the construction processes;
- b) All sediment control devices, barriers and the like;
- c) Sedimentation tanks, ponds or the like;
- d) Covering materials and methods; and
- e) A schedule and programme of the sequence of the sediment and erosion control works or devices to be installed and maintained.
- f) Methods for the temporary and controlled disposal of stormwater during construction.

All works must be undertaken in accordance with the approved Sediment Control plan.

The Certifying Authority must ensure that the building plans and specifications submitted, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

(Reason: To protect the environment from the effects of sedimentation and erosion from development sites)

**Waste Management Plan**

C7. A Waste Management Plan is to be submitted for approval by the Certifying Authority prior to the issue of any Construction Certificate. The plan must include, but not be limited to:

- a) The estimated volume of waste and method of disposal for the construction and operation phases of the development;
- b) The design of the on-site waste storage and recycling area; and
- c) Administrative arrangements for waste and recycling management during the construction process.



The approved Waste Management Plan must be complied with at all times in the carrying out of the development.

(Reason: To encourage the minimisation of waste and recycling of building waste)

**Solar Panels**

- C8. Solar panel flashings and frames to be coloured to match the roof material. Solar panels are to sit flat on the roof plane and are not to be tilted. Plans and specifications which comply with this condition must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate.

The Certifying Authority must ensure that the building plans and specifications submitted fully satisfy the requirements of this condition.

(Reason: To minimise the visual impact of the solar panel(s) on the roof plane)

**Rooftop Air Conditioners**

- C9. Roof top air conditioners/condensers must be accommodated within an acoustic enclosure to minimise noise impacts for the outdoor roof terrace.

The Certifying Authority must ensure that the building plans and specifications submitted fully satisfy the requirements of this condition.

(Reason: To minimise noise impact for the outdoor roof terrace)

**Roofing Materials - Reflectivity**

- C10. Roofing materials must be factory pre-finished with low glare and reflectivity properties to be compatible with the colours of neighbouring buildings. The selected roofing material must not cause a glare nuisance or excessive reflectivity to adjoining or nearby properties. Plans and specifications which comply with this condition must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate. The Certifying Authority must ensure that the building plans and specifications submitted, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

(Reason: To ensure that excessive glare or reflectivity nuisance from roofing materials does not occur as a result of the development)

**Work Zone**

- C11. If a Work Zone is proposed, an application must be made to the North Sydney Local Traffic Committee to install the 'Work Zone'. A Work Zone permit is required to be issued by the Council prior to the issue of any Construction Certificate.

Work Zones are provided specifically for the set down and pick up of materials and not for the parking of private vehicles associated with the site. Work Zones will generally not be approved where there is sufficient space on-site for the setting down and picking up of goods being taken to or from a construction site. If the Work Zone is approved by the

Committee, the Applicant must obtain a written copy of the related resolution from the North Sydney Local Traffic Committee and submit a copy of this to the Certifying Authority to enable issue of the Construction Certificate.

Where approval of the 'Work Zone' is given by the Committee, the requirements of the Committee, including installation of the necessary 'Work Zone' signage and payment of any fees, must occur prior to commencement of any works on the site. Further, at the expiration of the Work Zone approval, the developer is required to remove the Work Zone signs and reinstate any previous signs, all at the developer's cost. The requirements imposed by the Committee on the Work Zone permit (or permits) must be complied with at all times.

(Reason: Amenity and convenience during construction)

#### **Carparking and Vehicular Access**

The following applies to the parking areas under the proposed building and the vehicular access to the carpark :

- a) All aspects of the carpark design must comply with Australian Standard AS2890.1 Off-Street Parking;
- b) All aspects of parking spaces for disabilities must comply with Australian Standard AS2890.6;
- c) All aspects of bicycle parking spaces and storage facilities must comply with Australian Standard AS 2890.3;
- d) Three (3) additional bicycle parking space must be provided within the carpark to ensure compliance with the requirements of North Sydney Development Control Plan 2013;
- e) Turning paths for all parking spaces within the car park prior must be verified prior to the issue of the construction certificate.
- f) The proposed waste collection within the carpark via a 6.4m Small Rigid Vehicle (SRV) must be verified with Council's Waste Services prior to the issue of Construction Certificate;
- g) An internal traffic signal system must be provided to accommodate entering and exiting traffic via the car lift. The internal traffic signal system shall be designed by a suitably qualified consultant, with the design to be provided to Council prior to the issue of the Construction Certificate. The design should include the waiting bay line marking and signposting arrangements.
- h) The driveway to the site must be designed such that there are minimum sight lines for pedestrian safety as per Figure 3.3 of AS 2890.1;
- i) Installation of "No Pedestrian Access via Bray Lane" signs at the building exit to Bray Lane and at the entrance to Bray Lane from Clark Road to ensure pedestrian safety. The cost for the installation of signs is to be borne by the applicant/developer;

The Certifying Authority must ensure that the building plans, documentation and specifications submitted fully satisfy the requirements of this condition.

(Reason: To ensure carparking and associated vehicular access complies with relevant standards/requirements and to ensure traffic safety)

#### **Required Infrastructure Works –Roads Act 1993**

C12. Prior to issue of any Construction Certificate engineering design plans and specifications must be prepared by a qualified civil design engineer. The plans and specifications must be to a detail suitable for construction issue purposes and must provide detail and specification for the following infrastructure works to be completed as part of the development. To

obtain the permit, an application must be made to Council on a 'Application to satisfy development consent' form with payment of the adopted assessment/inspection fees. The responsibility for accuracy of the design fully rests with the designing engineer. All responsibility on implementation and supervision of works specified on design plans fully rests on designing engineer or whoever is chosen to be applicant's engineering representative:

Road Works

- a) Construction of a fully new replacement concrete footpath is required across the entire site frontage in Bray Street. A longitudinal section is required along the footpath property boundary at a scale of 1:50 extending 5m past the property boundary line. The footpath shall be designed (at a single straight grade of 3% falling to top of kerb) so that it is uniform without showing signs of dipping or rising particularly at entrances. Concrete finish must be wood-float finish.
- b) Cross sections at a scale of 1:50 along the centre-line of each access point to the building at Bray Street must be provided and are to show the calculated clearance to the underside of any overhead structure. All the entry points are to comply with the Building Code of Australia (BCA), including disability requirements. The Council approved footpath levels must be accommodated at the building entry points.
- c) The redundant layback crossing on Bray Street must be reinstated as upright kerb gutter and concrete footpath.
- d) Full width Road carriageway surface Reconstruction for entire property frontage in Bray Street.
- e) Full width and length Road carriageway surface Reconstruction in Bray Lane.
- f) Construction of a fully new kerb and gutter is required across the entire site frontage in Bray Street. A longitudinal section is required along the gutter line (existing and proposed levels), at a scale of 1:50 extending 5m past the property boundary line.
- g) Construction of a fully new kerb and gutter is required on both sides for entire length in Bray Lane. A longitudinal section is required along the gutter line (existing and proposed levels), at a scale of 1:50 extending 5m past the property boundary line.
- h) The entire heavy duty concrete vehicular entrance from Clark Road into Bray Lane must be reconstructed at the present levels. Concrete finish must be wood-float finish.
- i) 600 mm road shoulder wide- strip, adjacent to all new layback and gutter works, on Clark Road must be reconstructed, to ensure uniformity in the road reserve.
- j) The proposed vehicular access from Bray Lane into the building car park must comply with AS 2890.1 and Council's current Vehicular Access Application Guidelines and Specification (gutter bridges not permitted) to ensure that a B85 vehicle will not scrape/strike the surface of the carriageway, layback, vehicular crossing or parking floor.

- k) The design detail has to be provided and must include sections along centre-line and extremities of the crossing at a scale of 1:25. Sections are to be taken from the centre of the roadway through to the parking area itself and shall include all changes of grade and levels, **both** existing and proposed.
- l) A longitudinal section along the gutter line of Bray Lane at a scale of 1:50 showing how it is intended to transition the layback with the existing gutter levels and shall include all changes of grade and levels, **both** existing and proposed.
- m) A longitudinal section along the property boundary in Bray Lane at a scale of 1:50 is required and shall include all changes of grade and levels, **both** existing and proposed.

Drainage Works

Connection of the site stormwater system must be made directly to a newly constructed grated gully pit, to front the site in Bray Lane. To accommodate this requirement, the following drainage infrastructure works must be carried out on Council property at the Applicants expense:-

- a) Construction of a standard grated gully pit fronting the subject site in Bray Lane. The pit must be constructed in accordance with Councils "Infrastructure Specification for Roadworks, Drainage and Miscellaneous Works".
- b) Construction of a new in-ground drainage line under the kerb and gutter at standard depth. The line must connect the new gully pit to the existing Council pit located downstream of the site (near Clark Road). The pipes within the road reserve are to be reinforced concrete class 2 with a minimum 375mm diameter and have bedding in accordance with Australian Standard AS 3725 – (Loads on buried concrete pipes). The developer shall be responsible for carrying out any service investigations to allow a gravity connection.
- c) Two existing stormwater kerb inlet pits in Bray Street must be maintained or replaced with new pits (if damaged).

Plans and specifications which comply with this condition must be submitted to the Certifying Authority for approval prior to the issue of the relevant Construction Certificate.

Certifying Authorities must not issue a Construction Certificate without the formal written approval of Council (as Roads Authority) under the Roads Act 1993.

The required plans and specifications are to be designed in accordance with North Sydney Council's current documents Infrastructure Specification for Road Works, Drainage and Miscellaneous Works and Performance Guide for Engineering Design and Construction. The drawings must detail existing utility services and trees affected by the works, erosion control requirements and traffic management requirements during the course of works. A detailed survey must be undertaken as required. Traffic management is to be certified on the drawings as being in accordance with the documents SAA HB81.1 – 1996 – Field Guide for Traffic Control at Works on Roads – Part 1 and RMS Traffic Control at Work Sites (1998). **Construction of the works must proceed only in accordance with any conditions attached to the Council Roads Act 1993 approval.**

**Note:** A minimum of 21 days will be required for Council to assess Roads Act submissions. Early submission is recommended to avoid any delays in obtaining a Construction Certificate. A fee to cover cost of assessment (set out in Council's adopted fees and charges) is payable and Council will withhold any consent and approved plans until full payment of the correct fees. Plans and specifications must be marked to the attention of Council's Development Engineers. In addition, a copy of this condition must be provided, together with a covering letter stating the full address of the property and the accompanying DA number.

(Reason: To ensure infrastructure works are designed and constructed to appropriate standards and requirements of the Roads Act 1993)

**Stormwater Management and Disposal Design Plan – Construction Issue**

C13. Prior to issue of the Construction Certificate, the applicant shall have a site drainage management plan prepared by a qualified drainage design engineer. The site drainage management plan must detail the following requirements of North Sydney Council:

- a) Compliance with BCA drainage requirements, Councils Engineering Performance guide and current Australian Standards and guidelines, such as AS/NZ3500.3.2 1998, National Plumbing and Drainage Code.
- b) Stormwater runoff and subsoil drainage generated by the approved dwellings must be conveyed in a controlled manner by gravity via a direct connection to Council's stormwater gully pit, which must be constructed in Bray Lane. When a direct connection to the pit option is implemented then the pipeline within the road reserve, must have a minimum cover of 450mm.
- c) All civil and drainage works within the road reserve must be designed and built in accordance with Council's current "Infrastructure Specification". Prior to issue of the Construction Certificate the applicant must have engineering plans and specifications, prepared by a qualified civil drainage design engineer. Council must approve the plans and specifications, in writing, prior to issue of any Construction Certificate by the Certifying Authority. The documentation must provide engineering construction detail for the following public infrastructure works that must be completed as part of the approved development. Council reserve the right of keeping all bonds on infrastructure works for 12-month defects liability period.
- d) Video inspection must be carried out of completed drainage works that are to revert to council and a video tape forwarded to council's development engineer to support the certification. Bonds held by Council will be returned after receipt of satisfactory information.
- e) The stormwater drainage system shall be designed for an average recurrence interval (A.R.I.) of 1 in 20 years.
- f) All redundant stormwater pipelines within the footpath area shall be removed and the footpath and kerb reinstated.
- g) All sub-soil seepage drainage shall be discharged via a suitable silt arrester pit. Details of all plans certified as being adequate for their intended purpose and complaint with the provisions of AS3500.3.2 by an appropriately qualified and practising civil engineer, shall be submitted with the application for a Construction Certificate.

- h) The design and installation of the Rainwater Tanks shall comply with BASIX and **Sydney Water** requirements. Overflow from tank shall be connected by gravity to the stormwater disposal system.
- i) Retaining walls and path levels along Bray Street must be provided at required levels to stop entry of flood waters into the property.
- j) Garage floor level must be set 150 mm above the 100-year flood level.
- k) Storage areas within the garage must be set 300 mm above the 100-year flood level.
- l) Prevent any stormwater egress into adjacent properties by creating physical barriers and surface drainage interception.
- m) Provide subsoil drainage to all necessary areas with pump out facilities as required.

Details demonstrating compliance are to be submitted with all other drainage details to Council prior to issue of any Construction Certificate.

The Certifying Authority issuing the Construction Certificate must ensure that the approved drainage plan and specifications, satisfying the requirements of this condition, is referenced on and accompanies the Construction Certificate.

(Reason: To ensure controlled stormwater management and disposal without nuisance)

**On-Site Stormwater Detention**

C14. On site detention must be provided to ensure that the maximum discharge from the site does not exceed discharge which would occur during a 1 in 5 year storm for the time of concentration determined for the particular site, for the existing site conditions. All other stormwater run-off from the site for all storms up to the 1 in 100 year storm is to be retained on the site for gradual release to the kerb and gutter or drainage system. Provision is to be made for satisfactory overland flow should a storm in excess of the above parameters occur.

Determination of the required cumulative storage must be based on the mass curve technique as detailed in Technical Note 1, Chapter 14 of the Australian Rainfall and Runoff Volume 1, 1987 Edition.

Engineering calculations, design and certification complying with this condition must be provided by an appropriately qualified and practicing Civil Engineer and submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate.

(Reason: To ensure appropriate provision is made for the disposal and management of stormwater generated by the development, and to ensure that public infrastructure in Council's care and control is not overloaded)

**Bond for Damage and Completion of Infrastructure Works – Stormwater, Kerb and Gutter, Footpaths, Vehicular Crossing and Road Pavement**

C15. Prior to the issue of any Construction Certificate, security deposit or bank guarantee must be provided to Council to the sum of \$149,100.00 to be held by Council for the payment of cost

for any/all of the following:

- a) making good any damage caused to any property of the Council as a consequence of the doing of anything to which this consent relates,
- b) completing any public work (such as road work, kerbing and guttering, footway construction, stormwater drainage and [environmental controls](#)) required in connection with this consent
- c) remedying any defects in any such public work that arise within 6 months after the work is completed.

The security required by this condition and in the schedule contained later in these conditions must be provided by way of a deposit with the Council; or other such guarantee that is satisfactory to Council (such as a bank guarantee). Any guarantee provided as security must name North Sydney Council as the nominated beneficiary and must not be subject to an expiry date.

The security will be refundable following the expiration of 6 months from the issue of any final Occupation Certificate or completion of public work required to be completed (whichever is the latest) but only upon inspection and release by Council's Engineers.

Council shall have full authority to make use of the bond for such restoration works as deemed necessary by Council in circumstances including the following: -

- where the damage constitutes a hazard in which case Council may make use of the security immediately;
- the applicant has not repaired or commenced repairing damage within 48 hours of the issue by Council in writing of instructions to undertake such repairs or works;
- works in the public road associated with the development are to an unacceptable quality; and
- the Certifying Authority must ensure that security is provided to North Sydney Council prior to issue of any Construction Certificate.

(Reason: To ensure appropriate security for works on public land and an appropriate quality for new public infrastructure)

#### Tree Protection

C16. To ensure the protection of all trees to be retained, the following measures are to be undertaken:

- a) All documentation for the Construction Certificate application must show the site trees to be retained, and retention of the adjoining trees, with their positions and diameters of trunks and crowns (canopies) to be clearly and accurately shown in relation to all levels of the proposed development.
- b) All plans and correspondences must refer to the required compliance with the approved Tree Protection and Management Plan, and clearly show the assigned number of each tree on site, adjoining and Council land.

- c) A Consulting Arboriculturist (“the project arboriculturist”), who holds a minimum Australian Qualification Framework Level 5 in Arboriculture, is a registered consulting member of a nationally recognised arboricultural organisation or association, and who does not remove or prune trees in the North Sydney local government area, shall be engaged before work commences for the duration of site preparation, demolition, construction and landscaping.
- d) The project arboriculturist shall inspect, monitor, supervise, provide recommendations and written reports and certification relating to protection of the trees and compliance with the conditions of consent.
- e) The contact details of the project arboriculturist shall be advised to council before work commences and maintained up to date for the duration of works. If a new project arborist is appointed details of the new project arborist shall be notified to council within 7 days.
- f) The project arboriculturist is to submit a list of critical stages where joint site inspections with Council’s Tree Management Officer will be required, with the adopted schedule to be complied with during the course of works, and include at minimum, the following hold points:
- i. Prior to demolition of existing structures;
  - ii. At commencement of any excavation works within 7 metres of any tree to be retained;
  - iii. Prior to any tree crown or root pruning;
  - iv. At commencement of construction works within 7 metres of any tree to be retained.

(Reason: Tree protection measures)

#### Tree Protection Measures to be shown on Construction Drawings

C17. The tree protection measures contained in the arborist report prepared by Canopy Consulting dated 28 October 2020, and as subsequently amended, shall be shown clearly on the Construction Certificate drawings. Plans and specifications showing the said tree protection measures must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate. The Certifying Authority must ensure the construction plans and specifications submitted, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

(Reason: To ensure that appropriate tree protection measures are shown on construction drawings)

#### Protection of Trees

C18. The following tree(s) are required to be protected and retained as part of the development consent in accordance with AS 4970–2009 – Protection of trees on development sites:

Tree	Location	Height
T2 <i>Grevillea robusta</i>	Between driveways – northern boundary – 29 Bray St	18m
T7 <i>Angophora costata</i>	Southern boundary of 31 Kurraba Rd	15m
T8 <i>Corymbia citriodora</i>	Southern boundary 20–24 Bray St	23m



T9 <i>Populus deltoides</i>	Northern boundary 29 Bray St	21m
T10 <i>Corymbia citriodora</i>	South-eastern corner 20-24 Bray St	15m
T11 <i>Toona ciliata</i>	South-eastern corner 64 Clark Rd	7m
T16 x <i>Cupressocyparis leylandii</i>	North-western corner of 20-24 Bray St	9m

Plans and specifications complying with this condition must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate. The Certifying Authority must ensure that the building plans and specifications submitted, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

Any tree(s) shown as being retained on the approved plans (regardless of whether they are listed in the above schedule or not) must be protected and retained in accordance with this condition.

(Reason: Protection of existing environmental and community assets)

#### Approval for removal of Trees

- C19. The following tree(s) are approved for removal in accordance with the development consent:

Trees	Location	Height
T1 <i>Callistemon citrinus</i>	Adjacent southern boundary, existing carpark-Bray St	3m
T3 <i>Jacaranda mimosifolia</i>	Centre of 20-24 Bray St	7m
T4 <i>Jacaranda mimosifolia</i>	Centre of 20-24 Bray St	8m
T5 <i>Ailanthus altissima</i>	Centre of 20-24 Bray St – southern boundary	4m
T6 <i>Jacaranda mimosifolia</i>	Centre of 20-24 Bray St	12m
T13 <i>Dypsis lutescens</i>	Adjacent existing carpark-Bray St	5m
T14 <i>Ailanthus altissima</i>	Northern boundary of 20-24 Bray St	4m
T15 <i>Callistemon citrinus</i>	Northern boundary of 20-24 Bray St	3.5m
T12 <i>Murraya paniculata</i>	Eastern boundary of 35 Kurraba Road	6m

Removal or pruning of any other tree on the site is not approved, excluding species exempt under Council's Tree Preservation Order.

Any tree(s) shown as being retained on the approved plans (regardless of whether they are listed in the above schedule or not) must be protected and retained in accordance with this condition.

(Reason: Protection of existing environmental and community assets)

#### Amendments to the Landscape Plan

- C20. The landscape plan must be amended as follows to provide an appropriate landscaped setting:

- No excavation, construction, or level changes shall be permitted further south than the existing building line without the approval of the consultant arborist within the TPZ of T8 *Corymbia citriodora* 23m, and no excavation, construction, or level changes shall be permitted within the TPZ of T10 *Corymbia citriodora* 15m, or T7 *Angophora costata* 15m without the approval of the consultant arborist. Amended

drawings including levels shall be required to clearly indicate compliance with these conditions

- A green wall shall be installed along the length of the reconstructed wall on the SE boundary of 35 Kurraba Road, as replacement for T12 *Murraya paniculata* 6m to be removed. A fully automatic watering system and maintenance schedule shall be included.
- Additional replacement planting of 3 x *Corymbia maculata* (100l) and 1 x *Cupaniopsis anacardioides* (200l) shall be planted within the subject site
- The proposed 3 x *Jacaranda mimosifolia* (100l) shall be increased in size to 3 x *Jacaranda mimosifolia* (200l)
- The *Syzigium* 'Resilience' (200m), and *Syzigium* 'Tiny Trev' (200mm) to be planted along the western boundary of 20–24 Bray Street shall be increased to 300mm pot size
- No crown lifting of T2 *Grevillea robusta* canopy shall be permitted, nor pruning to the canopy of T8 *Corymbia citriodora* 23m or T10 *Corymbia citriodora*. T2 *Grevillea robusta* shall have 1.8m high steel mesh tree protection fencing, and branch protection installed. Confirmation of these conditions shall be required in an amended arborist report.
- New trees in north western corner garden in front of terraces to have minimum 1.2m soil depth.
- New front fence to 35 Kurraba Road to be a 900 mm painted timber picket fence. The side boundary fence between Kurraba Road and the front building line shall be a timber picket fence with a maximum height 1200 mm.
- Removable or collapsible bollards to be provided to the car parking space at rear 35 Kurraba Rd and car parking surface to be permeable.
- New soft landscape proposal to 35 Kurraba Road for the front and side setbacks is to be provided that includes one small tree (minimum) and hedge plantings using plant species consistent in character with the conservation area. No synthetic turf is to be used and paving in the front setback is to be minimised to pedestrian access only.
- Yoga lawn on roof terrace to be natural turf, not artificial grass, to minimise radiant heat.
- No steel pole structures for the shade structures to 27 Kurraba Road to be installed on the subject property.
- Access path to north western corner garden to be provided formaintenance.

An amended landscape plan complying with this condition must be submitted for the written approval of Council's Team Leader Assessment in consultation with Council's Landscape Officer prior to the issue of any Construction Certificate. The Certifying Authority must ensure that the amended landscape plan and other plans and specifications submitted fully satisfy the requirements of this condition.

(Reason: To ensure residential amenity)

#### Root Mapping

C21. Non-invasive/non-destructive root mapping is to be undertaken within the tree protection zone (TPZ) (identified as per AS4970–2009) of the T8 *Corymbia citriodora* located on the Southern boundary of 20–24 Bray St, and T10 *Corymbia citriodora* located in the SE corner 20–24 Bray Street to determine the size and depth of the tree roots prior to the design of the required footings.

Root mapping is to be undertaken under the direct supervision of an AQF level 5 arborist. The said consulting/ project arborist is to prepare a written report, with images, addressing the following:

- a. describing the results of the root mapping;
- b. providing an assessment of potential tree impacts of the excavation; and
- c. making recommendations of protection measures to be implemented for the duration of excavation and construction activity to ensure the ongoing health and viability of the tree.

The report is to be provided to the Certifying Authority for approval (with a copy provided to Council) prior to the issue of any Construction Certificate. Plans and Specifications submitted to the Certifier for approval must comply with the recommendations of the arborist report referred to in this condition, and the development must be carried out in accordance with the said report.

(Reason: To ensure the protection of significant trees)

#### **Garbage and Recycling Facilities**

C22. An appropriate area must be provided within the premises for the storage of garbage bins and recycling containers and all waste and recyclable material generated by this premises. The following requirements must be met:

- a) all internal walls of the storage area must be rendered to a smooth surface, covered at the floor/wall intersection, graded and appropriately drained with a tap in close proximity to facilitate cleaning;
- b) provision for the separation and storage in appropriate categories of material suitable for recycling;
- c) the storage area must be adequately screened from the street, with the entrance to the enclosures no more than 2m from the street boundary of the property;
- d) if a storage facility is to be provided at another suitable location within the building, a complementary garbage bin holding bay must be provided no more than 2m from the street boundary of the property;
- e) garbage enclosures serving residential units are not to be located within areas designated for non-residential uses; and
- f) garbage enclosures serving non-residential uses are not to be located within areas designated for dining purposes.

Plans and specifications which comply with this condition must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate.

The Certifying Authority must ensure that the building plans and specifications submitted, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

Note: The applicant may wish to discuss bin storage requirements and location with

Council's Environmental Services prior to finalisation of the required detail, and a copy of Council's Waste Handling Guide should be obtained for reference purposes before the design is finalised.

(Reason: To ensure the provision of appropriate waste facilities for residents and protect community health, and to ensure efficient collection of waste by collection contractors)

**Asbestos Material Survey**

C23. A report must be prepared by a suitably qualified person in relation to the existing building fabric to be demolished and/or disturbed identifying the presence or otherwise of asbestos contamination and, if asbestos contamination is present, making recommendations as to the work required to safely address the contamination.

Any demolition works or other works identified in the report as having to be carried out must be carried out in accordance with the recommendations of the report and the following:

- a) the removal of asbestos must be undertaken by a WorkCover licensed contractor;
- b) all removal must be in strict accordance with the requirements of the WorkCover Authority in relation to the removal, handling and disposal of material containing asbestos and any Work Safe Australia requirements.
- c) during the removal of any asbestos a sign stating "DANGER ASBESTOS REMOVAL IN PROGRESS" must be erected in a visible position at the boundary of the site; and
- d) Waste disposal receipts must be provided to the Certifying Authority as proof of correct disposal of asbestos laden waste.

The report must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate. The Certifying Authority must ensure that the report, and other plans, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

(Reason: To ensure the long term health of workers on site and occupants of the building is not put at risk unnecessarily)

**Location of Plant**

C24. All plant and equipment (including but not limited to air conditioning equipment), with the exception of the plant/equipment as shown on the approved plans on the roof level, is to be located within the basement of the building and is not to be located on balconies or therooof.

Plans and specifications complying with this condition must be submitted to the Certifying Authority for Approval prior to the issue of any Construction Certificate. The Certifying Authority must ensure that the building plans and specifications submitted, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

(Reason: Minimise impact on surrounding properties, improved visual appearance and amenity for locality)

**Noise from Plant and Equipment**

C25. The use of all plant and equipment installed on the premises must not:

(a) Contribute an LAeq(15min) which will cause the total LAeq(15min) from all plant and equipment operating contemporaneously on the site or in the strata scheme or in the mixed strata schemes to exceed the RBL by more than 5dB when measured at the boundary of any affected receiver . The modifying factor adjustments in Section 4 of the EPA Industrial Noise Policy shall be applied.

(b) Cause "offensive noise" as defined in the Protection of the Environment Operations Act 1997.

"affected receiver" includes residential premises (including any lot in the strata scheme or another strata scheme), premises for short-term accommodation, schools, hospitals, places of worship, commercial premises and parks and such other affected receiver as may be notified by the Council in writing.

"boundary" includes any window or elevated window of an affected receiver.

Terms in this condition have the same meaning as in the Noise Guide for Local Government and the Industrial Noise Policy published by the NSW Environment Protection Authority.

(Reason: To maintain an appropriate level of amenity for adjoining landuses)

**Air Conditioners in Residential Premises**

C26. The use of any air conditioner installed on the premises must comply with the requirements of the Protection of the Environment Operations (Noise Control) Regulations 2008 and State Environmental Planning Policy (Infrastructure) 2007 and must not:

(a) emit a noise that is audible within a habitable room in any affected residence (regardless of whether any door or window to that room is open);

(i) before 8.00am and after 10.00pm on any Saturday, Sunday or Public Holiday; or

(ii) before 7.00am or after 10.00pm on any other day

(b) cause an LAeq(15min) which exceeds the RBL background noise level by more than 5dB when measured at the boundary of any affected residence. The modifying factor adjustments in Section 4 of the EPA Industrial Noise Policy will be applied.

"affected residence" includes residential premises (including any lot in the strata scheme or another strata scheme), premises for short-term accommodation and hospitals.

"boundary" includes any window or elevated window of an affected residence.

Terms in this condition have the same meaning as in the Noise Guide for Local Government and the Industrial Noise Policy published by the NSW Environment Protection Authority.

(Reason: To maintain residential amenity)

**Acoustic Privacy (Residential Apartments)**

C27. Noise levels in sole occupancy units of residential apartments must not exceed the following:

Location	Maximum
----------	---------

Habitable Rooms other than Sleeping Areas	40 LAeq (1hr)
Sleeping Areas	35 LAeq (1hr)

The "Maximum" limits are to apply in any hour of a 24 hour period with the windows of the sole occupancy unit closed.

"habitable room" has the same meaning as in the Building Code of Australia.

A floor separating sole occupancy units shall have a weighted standardised impact sound pressure level  $L'_{nT,w}$  not more than 55dB when measured in-situ in accordance with AS ISO 140.7-2006 "Field measurements of impact sound insulation of floors" and rated to AS ISO 717.2-2004 "Rating of sound insulation in buildings and of building elements. Part 2: Impact sound insulation". This clause shall not apply to the floor of a kitchen, bathroom, toilet or laundry in a residential sole occupancy unit.

Mechanical equipment such as lift plant, air conditioning plant servicing the building and pumps shall not be located immediately adjacent bedrooms.

A statement from an appropriately qualified acoustical consultant eligible for membership of the Association of Australian Acoustic Consultants, certifying that the acoustic mitigation measures outlined above have been satisfied, must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate.

(Reason: To comply with best practice standards for residential acoustic amenity)

**Provision of Accessible Paths of Travel**

C28. The building must be designed and constructed to provide access and facilities in accordance with the Building Code of Australia and Disability (Access to Premises – Buildings) Standards 2010. Plans and specifications complying with this condition must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate. The Certifying Authority must ensure that the building plans and specifications submitted, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

Notes:

1. If, in complying with this condition, amendments to the development are required, the design changes must be submitted for the approval of Council prior to a Construction Certificate being issued. Approval of a modification application may be required.
2. It is not within Council's power to set aside National legislation which requires the upgrade of buildings to meet modern access standards. Such decisions remain the jurisdiction of the Building Professionals Board Access Advisory Committee who may grant an exemption in certain exceptional circumstances.
3. Information on making an application for an "unjustifiable hardship exemption" under the accessibility standards can be found in the website of the NSW Building Professional Boards at <http://www.bpb.nsw.gov.au/page/premises-standards>

(Reason: To ensure the provision of equitable and dignified access for all people in accordance with disability discrimination legislation and relevant Australian Standards)

**Adaptable Housing**

C29. The adaptable apartments identified in the application are to be designed with accessible features for disabled persons, and must incorporate level entries and wider doorways and corridors, slip resistant surfaces, reachable power points, disabled toilet, and lever door handles and taps. These features are to be designed generally in accordance with the relevant Australian Standard 4299 – 1995. Plans and specifications complying with this condition must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate. The Certifying Authority must ensure that the building plans and specifications submitted, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

(Reason: To ensure equity of access and availability of accommodation in the future for an ageing population)

**Noise Management Plan – Construction Sites**

C30. A noise management plan prepared by an appropriately qualified acoustical consultant eligible for membership of the Association of Australian Acoustic Consultants must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate.

The plan must include, but not be limited to, the following:

- a) identify sensitive locations near the site;
- b) identify potential impacts (ie. exceedence of the goals at the identified locations);
- c) identify mitigation measures to control noise and vibration from the site, the reduction in noise and vibration likely and the feasibility and reasonableness of these measures;
- d) selection criteria for plant and equipment;
- e) community consultation;
- f) details of work schedules for all construction phases;
- g) selection of traffic routes to minimise residential noise intrusion;
- h) schedule of plant and equipment use and maintenance programs;
- i) noise monitoring techniques and method of reporting results;

- j) the methodology to be employed for handling and investigating any complaints should they arise;
- k) site induction details for employees and contractors; and
- l) a declaration of available technologies and the reason for the selection of the preferred technology from a noise generating perspective should be included.

The approved plan must be complied with at all times.

(Reason: To maintain appropriate amenity to nearby occupants)

#### Compliance with Acoustic Report

C31. The recommendations contained in the acoustic report prepared by Rodney Stevens Acoustics dated 13 October 2021, with the exception of any acoustic treatments specified in this consent, must be implemented during construction and use of the development.

A statement from an appropriately qualified acoustical consultant eligible for membership of the Association of Australian Acoustic Consultants, certifying that the acoustic mitigation measures outlined in the above stated report have been suitably incorporated into the development and that relevant noise criteria have been satisfied, must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate.

The Principal Certifying Authority must ensure that the building plans and specifications submitted, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

(Reason: To maintain an appropriate level of amenity for adjoining landuses)

#### Section 7.11 Contributions

C32. A monetary contribution pursuant to the provisions of Section 7.11 of the Environmental Planning and Assessment Act 1979, in accordance with the North Sydney Local Infrastructure Contribution Plan for the public amenities / services of **\$100,000.00**, must be paid to Council.

The contribution MUST BE paid prior issue of any Occupation Certificate, unless no Construction Certificate to which this consent relates has been issued on or before 25 September 2022. If no Construction Certificate to which this consent relates has been issued on or before 25 September 2022, the contribution MUST BE paid prior to the issue of the any Construction Certificate.

The above amount will be adjusted for inflation by reference to the Consumer Price (All Ordinaries) Index applicable at the time of the payment of the contribution.

A copy of the North Sydney Local Infrastructure Contribution Plan can be viewed at North Sydney Council's Customer Service Centre, 200 Miller Street, North Sydney or downloaded via Council's website at [www.northsydney.nsw.gov.au](http://www.northsydney.nsw.gov.au)

(Reason: To retain a level of service for the existing population and to provide the same level of service to the population resulting from new development)



**Security Deposit/ Guarantee Schedule**

C33. All fees and security deposits/ guarantees in accordance with the schedule below must be provided to Council prior to the issue of any Construction Certificate:

Security deposit/ guarantee	Amount (\$)
Infrastructure Damage Bond	\$28,500.00
Drainage Construction Bond	\$17,200.00
Engineering Construction Bond	\$103,400.00
<b>TOTAL BONDS</b>	<b>\$149,100.00</b>

Note: The following fees applicable

Fees	
Section 7.11 Contribution	\$100,000.00
<b>TOTAL FEES</b>	<b>\$100,000.00</b>

The security required by the above schedule must be provided by way of a deposit with the Council; or other such guarantee that is satisfactory to Council (such as a bank guarantee). Any guarantee provided as security must name North Sydney Council as the nominated beneficiary and must not be subject to an expiry date.

(Reason: Compliance with the development consent)

**BASIX Certificate**

C34. Under clause 97A(3) of the Environmental Planning & Assessment Regulation 2000, it is a condition of this development consent that all the commitments listed in BASIX Certificate No. 1149654M\_03 for the development are fulfilled. Plans and specifications complying with this condition must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate. The Certifying Authority must ensure that the building plans and specifications submitted, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

(Reason: To ensure the proposed development will meet the Government's requirements for sustainability and statutory requirements)

**Underground Electricity and Other Services**

C35. All overhead electricity and other lines (existing and proposed) must be undergrounded from the proposed building on the site to the appropriate power pole(s) or other connection point, in accordance with the requirements of Energy Australia. Plans and specifications complying with this condition must be submitted to the Certifying Authority for approval prior to the issue of any Construction Certificate. The Certifying Authority must ensure that the building plans and specifications submitted fully satisfy the requirements of this condition.

(Reason: To provide infrastructure that facilitates the future improvement of the streetscape by relocation of overhead lines below ground)

**D. Prior to the Commencement of any Works (and continuing where indicated)**

**Protection of Trees**

- D1. All trees that are specifically nominated to be retained by notation on plans or by condition as a requirement of this consent must be maintained and protected during demolition, excavation and construction on the site in accordance with AS4970-2009 (Protection of trees on development sites). A report containing recommendations, and methods of tree protection prepared by an appropriately qualified person must be provided to the Certifying Authority for approval by an appropriately qualified person prior to commencement of any works on the site. Any recommendations must be undertaken for the duration of works on the site.

Sensitive construction techniques including hand excavation, pier and beam construction, flexible location of piers and footings shall be used within the TPZ of any tree nominated for protection under this consent, except where the TPZ is protected by existing structures. No over excavation and no soil level changes shall be permitted within the TPZ of any tree nominated for protection under this consent.

The roots of any protected tree shall not be cut if they are greater than 50mm in diameter.

(Reason: Tree protection measures)

**Project Arborist to be Engaged**

- D2. The project arboriculturist shall inspect tree protection measures and certify in writing to the Principal Certifying Authority the measures comply with the approved Tree Protection Plan and as directed by the project arboriculturist before work commences.

The project arboriculturist shall provide guidance and oversight of tree protection and management to ensure that the stability and ongoing viability of trees being retained is not compromised.

The project arboriculturist must contact the tree pruning contractor and Council's Landscape Development Officer (giving at least 2 working days' notice) to arrange a joint site meeting, prior to commencing any pruning, to determine the exact location and extent of pruning that is permissible, with the tree pruning contractor to comply with any instructions issued by Council, acting reasonably.

Any pruning must be undertaken by a practicing arborist with a minimum Australian Qualification Framework Level 3 in arboriculture, in accordance with the principles of the Australian Standard AS 4373-2007 'Pruning of Amenity Trees,' and the NSW Work Cover Code of Practice for the Amenity Tree Industry (1998), as well as any instructions issued on site by Council, acting reasonably.

The practicing arborist must keep a log of dates and times of when they attended the site, the type of works that were performed, and must form part of the certification required prior to Occupation.

(Reason: Tree Protection)

**Tree Protection Measures**

D3. The tree protection measures detailed in the approved Tree Protection and Management Plan, as subsequently amended, and as directed by the project arboriculturist shall be established before work commences.

- No excavation, construction, or level changes shall be permitted further south than the existing building line within the TPZ of T8 *Corymbia citriodora* 23m, no excavation, construction, or level changes shall be permitted within the TPZ T10 *Corymbia citriodora* 15m, or T7 *Angophora costata* 15m. Sensitive construction techniques shall be used within the TPZ of these trees, and no roots greater than 40mm shall be cut without prior notification to an in consultation with council. Any such root pruning shall be carried out by a min AQ3 qualified arborist, under the supervision of the project arborist.
- No canopy pruning shall be permitted to any tree protected under this consent

(Reason: To ensure that the stability and ongoing viability of trees being retained are not compromised Tree protection measures)

**Temporary Fences and Tree Protection**

D4. All protected trees on-site that are specifically nominated to be retained by notation on plans or as per condition C19 to be retained by notation on plans or by condition as a requirement of this consent must be tagged with luminous tape or the like for purposes of identification prior to demolition, excavation or construction works and must remain so for the duration of works on the site. No materials or builder's waste are to be stored in the vicinity of the nominated tree/trees at any time.

Appropriate fencing or barricades in accordance with AS4970-2009 (Protection of trees on development sites), not less than the distance shown in the schedule hereunder, (except where existing structures provide adequate protection within these noted distances, and subject to ratification by the project arborist), must be installed to the satisfaction of the Certifying Authority prior to demolition or commencement of any works and must be maintained for the duration of the works.

(Reason: To protect the trees to be retained on the site during construction works)

**Public Liability Insurance – Works on Public Land**

D5. Any person or contractor undertaking works on public land must take out Public Risk Insurance with a minimum cover of \$20 million in relation to the occupation of public land and the undertaking of approved works within Council's road reserve or public land, as approved by this consent. The Policy is to note, and provide protection/full indemnification for North Sydney Council, as an interested party. A copy of the Policy must be submitted to Council prior to commencement of any works. The Policy must be valid for the entire period that the works are being undertaken.

(Note: Applications for hoarding permits, vehicular crossings etc will require evidence of insurance upon lodgement of the application.)

(Reason: To ensure the community is protected from the cost of any claim for damages arising from works on public land)

**Commencement of Works Notice**

D6. Building work, demolition or excavation in accordance with this development consent must not be commenced until the developer has given at least 2 days notice to North Sydney Council of the person's intention to commence building work, demolition or excavation in accordance with this development consent.

(Reason: To ensure appropriate safeguarding measures are in place prior to the commencement of any building work, demolition or excavation)

**Notification of New Addresses**

D7. Prior to the commencement of any building works, an application must be made and written confirmation received from North Sydney Council of the allocated street address (house number) and/ or unit numbers of the completed project.

To assist Council, a plan for unit numbering should be submitted for concurrence. These details will be recorded in Council records and must be displayed at the property in accordance with the provisions of the applicable Australian Standard relating to rural and urban addressing. A copy of the allocation confirmation must be submitted to the Certifying Authority with the application for a Construction Certificate.

(Reason: To ensure that Council records are accurate, and that house numbering complies with the requirements of Council's House Numbering Policy. Proper house numbering also assists emergency services in readily locating properties)

**E. During Demolition and Building Work**

**Parking Restrictions**

E1. Existing public parking provisions in the vicinity of the site must be maintained at all times during works. The placement of any barriers, traffic cones, obstructions or other device in the road shoulder or kerbside lane is prohibited without the prior written consent of Council. Changes to existing public parking facilities/restrictions must be approved by the North Sydney Local Traffic Committee. The Developer will be held responsible for any breaches of this condition, and will incur any fines associated with enforcement by Council regulatory officers.

(Reason: To ensure that existing kerbside parking provisions are not compromised during works)

**Road Reserve Safety**

E2. All public footways and roadways fronting and adjacent to the site must be maintained in a safe condition at all times during the course of the development works, with no obstructions caused to the said footways and roadways. Construction materials and plant must not be stored in the road reserve without approval of Council. A safe pedestrian circulation route and a pavement/route free of trip hazards must be maintained at all times on or adjacent to any public access ways fronting the construction site.

Where public infrastructure is damaged, repair works must be carried out in when and as directed by Council officers (at full Developer cost). Where pedestrian circulation is diverted on to the roadway or verge areas, clear directional signage and protective barricades must be installed in accordance with AS1742-3 (1996) "Traffic Control Devices for Work on Roads". **If pedestrian circulation is not satisfactorily maintained across the site frontage, and action is not taken promptly to rectify the defects, Council may undertake proceedings to stop work.**

(Reason: Public Safety)

**Temporary Disposal of Stormwater Runoff**

E3. During construction, stormwater runoff must be disposed in a controlled manner that is compatible with the erosion and sediment controls on the site. Immediately upon completion of any impervious areas on the site (including roofs, driveways, paving) and where the final drainage system is incomplete, the necessary temporary drainage systems must be installed to reasonably manage and control runoff as far as the approved point of stormwater discharge. Such ongoing measures must be to the satisfaction of the Certifying Authority.

(Reason: Stormwater control during construction)

**Cigarette Butt Receptacle**

E4. A cigarette butt receptacle is to be provided on the site for the duration of excavation/demolition/construction process, for convenient use of site workers.

(Reason: To ensure adequate provision is made for builders' waste)

**Service Adjustments**

E5. Where required, the adjustment or inclusion of any new utility service facilities must be carried out by the person acting on the consent and in accordance with the requirements of the relevant utility authority. These works shall be at no cost to Council. It is the Applicants full responsibility to make contact with the relevant utility authorities to ascertain the impacts of the proposal upon utility services at the appropriate stage of the development (including water, phone, gas and the like). Council accepts no responsibility whatsoever for any matter arising from its approval of this application involving any influence upon utility services provided by another authority.

(Reason: To ensure the service requirements are met)

**Geotechnical Stability during Works**

E6. A contractor with specialist excavation experience must undertake the excavations for the development and a suitably qualified and consulting geotechnical engineer must oversee the excavation procedure.

Geotechnical aspects of the development work, namely appropriate excavation method and vibration control, support and retention of excavated faces, and hydro geological considerations must be undertaken in accordance with the recommendations of the

Geotechnical Engineer and all subsequent geotechnical inspections carried out during the excavation and construction phase.

Approval must be obtained from all affected property owners, including North Sydney Council where rock anchors (both temporary and permanent) are proposed below adjacent private or public property.

(Reason: Ensure appropriate professional are engaged at appropriate stages during construction)

#### Council Inspection of Public Infrastructure Works

E7. During the works on public infrastructure reverting to Council's care and control, Council's development engineer must undertake inspections of the works at the following hold points:

- a) Vehicular access; and associated road civil works.
- b) Stormwater.

All works must proceed in accordance with Roads Act 1993 approvals or other permits relating to roads issued by Council. A minimum of 48 hours notice must be given to Council to book an inspection. Work must not proceed until the works or activity covered by the inspection is approved.

(Reason: To ensure quality of construction joints and connections in the drainage system)

#### Progress Survey

E8. In order to ensure compliance with approved plans, a Survey Certificate, prepared to Australian Height Datum, must be prepared by a Registered Surveyor showing the following:

- a) at the completion of excavation, prior to the placement of any footings, showing the completed level of the excavation and its relationship to the boundaries;
- b) prior to placement of concrete at the ground floor level, showing the level of the form work and its relationship to boundaries including relevant footpath and roadway levels;
- c) prior to placement of concrete at each fifth floor level showing the principal level of the formwork and the intended relationship of the completed works to the boundary;
- d) prior to roofing, or completion of the highest point of the building showing the anticipated level of the completed work and its relationship to the boundary; and
- e) at completion, works showing the relationship of the building to the boundary and showing the maximum height of the overall works and the height of the principal roof elements.

Progress certifications in response to points (a) through to (e) must be provided to the Certifying Authority for approval at the time of carrying out relevant progress inspections. In the event that such survey information is not provided or reveals discrepancies between the approved plans and the proposed works, all works, save for works necessary to bring the development into compliance with the approved plans, must cease. Works may only continue upon notification by the Certifying Authority to the Applicant that survey information (included updated survey information following the carrying out of works to comply with the approved plans) complies with this condition.

(Reason: To ensure compliance with approved plans)

**Removal of Extra Fabric**

E9. Should any portion of the existing building, trees, or curtilage of the site which is indicated on the approved plans to be retained be damaged for whatever reason, all the works in the area of the damaged portion are to cease and written notification of the damage is to be given to Council forthwith. No work is to resume until the written approval of Council to do so is obtained. Failure to comply with the provisions of this condition may result in the Council taking further action including legal proceedings if necessary.

(Reason: To ensure compliance with the terms of this development consent)

**Dust Emission and Air Quality**

E10. The following must be complied with at all times:

- (a) Materials must not be burnt on the site.
- (b) Vehicles entering and leaving the site with soil or fill material must be covered.
- (c) Dust suppression measures must be carried out to minimise wind-borne emissions in accordance with the NSW Department of Housing's 1998 guidelines – Managing Urban Stormwater: Soils and Construction.
- (d) Odour suppression measures must also be carried out where appropriate so as to prevent nuisance occurring at adjoining properties.

(Reason: To ensure residential amenity is maintained in the immediate vicinity)

**Noise and Vibration**

E11. The works must be undertaken in accordance with the "Interim Construction Noise Guideline" published by the NSW Environment Protection Authority, to ensure excessive levels of noise and vibration do not occur so as to minimise adverse effects experienced on any adjoining land.

(Reason: To ensure residential amenity is maintained in the immediate vicinity)

**No Work on Public Open Space**

E12. No work can be undertaken within adjoining public lands (ie. Parks, Reserves, Roads etc) without the prior written consent of Council. In this regard the developer is to liaise with Council prior to the commencement of any design works or preparation of a Construction

and Traffic Management Plan.

(Reason: Protection of existing public infrastructure and land and to ensure public safety and proper management of public land)

#### Developer's Cost of Work on Council Property

E13. The developer must bear the cost of all works associated with the development that occurs on Council's property, including the restoration of damaged areas.

(Reason: To ensure the proper management of public land and funds)

#### No Removal of Trees on Public Property

E14. No trees on public property (footpaths, roads, reserves, etc.) unless specifically approved by this consent shall be removed or damaged during construction including for the erection of any fences, hoardings or other temporary works.

(Reason: Protection of existing environmental infrastructure and community assets)

#### Protection of Trees

E15. All trees required to be retained, as part of this consent must be protected from any damage during construction works in accordance with AS4970–2009. All recommendations contained within the Arborist Report prepared by Canopy Consulting dated 28 October 2020 and as subsequently amended, must be implemented for the duration of the works.

In the event that any tree required to be retained is damaged during works on the site, notice of the damage must be given to Council forthwith.

Notes:

- 1) If the nominated tree is damaged to a significant degree or removed from the site without prior written approval being obtained from Council, the issuing of fines or legal proceedings may be commenced for failure to comply with the conditions of this consent.
- 2) An application to modify this consent pursuant to Section 4.55 of the Environmental Planning and Assessment Act 1979 will be required to address the non-compliance with any of the conditions of consent relating to the retention of nominated trees, and Council may require tree replenishment.

(Reason: Protection of existing environmental infrastructure and community assets)

#### Trees to be Removed

E16. All trees on the site must be protected and retained save for those expressly identified below as being approved for removal: –

Trees	Location	Height
T1 <i>Callistemon citrinus</i>	Adjacent southern boundary, existing carpark–Bray	3m
T3 <i>Jacaranda mimosifolia</i>	Centre of 20–24 Bray St	7m
T4 <i>Jacaranda mimosifolia</i>	Centre of 20–24 Bray St	8m
T5 <i>Ailanthus altissima</i>	Centre of 20–24 Bray St – sthrn bdry	4m
T6 <i>Jacaranda mimosifolia</i>	Centre of 20–24 Bray St	12m
T12 <i>Murraya paniculata</i>	Eastern boundary of 35 Kurraba Road	6m



T13 <i>Dypsis lutescens</i>	Adjacent existing carpark-Bray St	5m
T14 <i>Ailanthus altissima</i>	Northern boundary of 20-24 Bray St	4m
T15 <i>Callistemon citrinus</i>	Northern boundary of 20-24 Bray St	3.5m

(Reason: To ensure compliance with the terms of this development consent)

#### Special Permits

E17. Unless otherwise specifically approved in writing by Council, all works, processes, storage of materials, loading and unloading associated with the development must occur entirely on the property.

The developer, owner or builder may apply for specific permits available from Council's Customer Service Centre for the undermentioned activities on Council's property. In the event that a permit is granted by Council for the carrying out of works, processes, storage of materials, loading and unloading associated with the development on Council's property, the development must be carried out in accordance with the requirements of the permit. A minimum of forty-eight (48) hours notice is required for any permit: –

1) **On-street mobile plant**

Eg. cranes, concrete pumps, cherry-pickers, etc. – restrictions apply to the hours of operation, the area of operation, etc. Separate permits are required for each occasion and each piece of equipment. It is the developer's, owner's and builder's responsibilities to take whatever steps are necessary to ensure that the use of any equipment does not violate adjoining property owner's rights.

(Reason: Proper management of public land)

2) **Hoardings**

Permits are required to erect Class A and Class B hoardings. If an 'A' Class hoarding is to alienate a section of Council's property, that section will require a permit for the occupation of Council's property.

(Reason: Proper management of public land)

3) **Storage of building materials and building waste containers (skips) on Council's property**

Permits to utilise Council property for the storage of building materials and building waste containers (skips) are required for each location. Failure to obtain the relevant permits will result in the building materials or building waste containers (skips) being impounded by Council with no additional notice being given. Storage of building materials and waste containers on open space reserves and parks is prohibited.

(Reason: Proper management of public land)

4) **Kerbside restrictions, construction zones**

Attention is drawn to the existing kerbside restrictions adjacent to the development. Should alteration of existing kerbside restrictions be required, or the provision of a

construction zone, the appropriate application must be made and the fee paid to Council. Alternatives to such restrictions may require referral to Council’s Traffic Committee and may take considerable time to be resolved. An earlier application is suggested to avoid delays in construction programs.

(Reason: Proper management of public land)

**Noxious Plants**

E18. All lantana, privet, rubber trees, asthma weed, and other declared noxious plants on the site, must be eradicated before the commencement of landscape works.

(Reason: To ensure that plants identified as weed species are not allowed to proliferate or interfere with a quality landscaping outcome)

**Construction Hours**

E19. Construction activities and works approved under this consent must be carried out only within the hours stipulated in the following table:

Standard Construction Hours		
Location	Day	Hours
All other zones	Monday – Friday	7.00am – 5.00pm
	Saturday	8.00am – 1.00pm
	Sunday	No work permitted
	Public holiday	

Construction activities for development approved under this consent must be carried out in accordance with the standard construction hours above and any Construction Noise Management Plan required under this consent.

In the event of breach to the approved hours of construction Council take may take enforcement action under Part 9 of the EP & A Act 1979 and in accordance with Council’s adopted Compliance & Enforcement Policy.

(Reason: To ensure that works do not interfere with reasonable amenity expectations of residents and the community)

**Installation and Maintenance of Sediment Control**

E20. Erosion and sediment controls must be installed and maintained at all times in accordance with the Sediment and erosion control plan submitted and approved with the Construction Certificate.

Erosion and sediment measures must be maintained in accordance with the publication Managing Urban Stormwater: Soils & Construction (4th edition, Landcom, 2004), commonly referred to as the “Blue Book” and can only be removed when development activities have been completed and the site fully stabilised.

(Reason: To protect the environment from the effects of sedimentation and erosion from development sites)

**Sediment and Erosion Control Signage**

E21. A durable sign must be erected during building works in a prominent location on site, warning of penalties should appropriate erosion and sedimentation control devices not be maintained. A sign of the type referred to in this condition is available from Council.

(Reason: To protect the environment from the effects of sedimentation and erosion from development sites)

**Site Amenities and Facilities**

E22. Where work involved in the erection and demolition of a building is being carried out, amenities which satisfy applicable occupational health and safety and construction safety regulations, including any WorkCover Authority requirements, must be provided and maintained at all times. The type of work place determines the type of amenities required.

Further information and details can be obtained from the Internet at [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)

(Reason: To ensure the health and safety of the community and workers on the site)

**Health and Safety**

E23. All work undertaken must satisfy applicable occupational health and safety and construction safety regulations, including any WorkCover Authority requirements to prepare a health and safety plan. Site fencing must be installed sufficient to exclude the public from the site. Safety signs must be erected that warn the public to keep out of the site, and provide a contact telephone number for enquiries.

Further information and details regarding occupational health and safety requirements for construction sites can be obtained from the internet at [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)

(Reason: To ensure the health and safety of the community and workers on the site)

**Prohibition on Use of Pavements**

E24. Building materials must not be placed on Council's footpaths, roadways, parks or grass verges, (unless a permit is obtained from Council beforehand). A suitable sign to this effect must be erected adjacent to the street alignment.

(Reason: To ensure public safety and amenity on public land)

**Plant & Equipment Kept Within Site**

E25. All plant and equipment used in the undertaking of the development/ works, including concrete pumps, wagons, lifts, mobile cranes, hoardings etc, must be situated within the boundaries of the site (unless a permit is obtained from Council beforehand) and so placed that all concrete slurry, water, debris and the like must be discharged onto the building site, and is to be contained within the site boundaries.

Details of Council requirements for permits on public land for standing plant, hoardings, storage of materials and construction zones and the like are available on Council's website at [www.northsydney.nsw.gov.au](http://www.northsydney.nsw.gov.au).

(Reason: To ensure public safety and amenity on public land)

**Imported Fill Material**

E26. The only waste derived fill material that may be received at the development site is: –

- a) Virgin excavated natural material (within the meaning of the Protection of the Environment Operations Act 1997); and
- b) Any other waste-derived material the subject of a resource recovery exemption under cl. 51A of the Protection of the Environment Operations (Waste) Regulation 2005 that is permitted to be used as fill material.

Any waste-derived material the subject of a resource recovery exemption received at the development site, must be accompanied by documentation as the material's compliance with the exemption conditions and must be provided to the Certifying Authority on request.

(Reason: To ensure that imported fill is of an acceptable standard for environmental protection purposes)

**Waste Disposal**

E27. All records demonstrating the lawful disposal of waste must be retained and kept readily accessible for inspection by regulatory authorities such as North Sydney Council and the Environmental Protection Authority.

(Reason: To ensure the lawful disposal of construction and demolition waste)

**Asbestos Removal**

E28. All demolition works involving the removal and disposal of asbestos cement must only be undertaken by contractors who hold a current WorkCover Asbestos or "Demolition Licence" and a current WorkCover "Class 2 (Restricted) Asbestos Licence and removal must be carried out in accordance with National Occupational Health and Safety Commission.

(Reason: To ensure works are carried out in accordance with relevant WorkCover requirements)

**Compliance with Construction Noise Management Plan**

E29. All works conducted on site which form part of this development must be carried out in accordance with the submitted Construction Noise Management Plan submitted with the Construction Certificate and all conditions of consent.

(Reason: To ensure noise generating activities are appropriately managed and nearby sensitive receivers protected)

**F. Prescribed Conditions imposed under EP&A Act and Regulations and other relevant Legislation**

**National Construction Code**

F1. All building work must be carried out in accordance with the provisions of the National Construction Code.

(Reason: Prescribed– Statutory)

**Home Building Act**

F2. 1) Building work that involves residential building work (within the meaning and exemptions provided in the Home Building Act 1989) for which the *Home Building Act 1989* requires there to be a contract of insurance under Part 6 of that Act must not be carried out unless the Principal Certifying Authority for the development to which the work relates has given North Sydney Council written notice of the contract of insurance being issued and of the following:

- a) in the case of work for which a principal contractor is required to be appointed:
  - i) the name and licence number of the principal contractor, and
  - ii) the name of the insurer by which the work is insured under Part 6 of that Act, or
- (b) in the case of work to be done by an owner–builder:
  - (i) the name of the owner–builder, and
  - (ii) if the owner–builder is required to hold an owner–builder permit under that Act, the number of the owner–builder permit.

2) If arrangements for doing residential building work are changed while the work is in progress such that the information submitted to Council in accordance with this conditions is out of date, work must cease and no further work may be carried out unless the Principal Certifying Authority for the development to which the work relates (not being the Council), has given the Council written notice of the updated information.

Note: A certificate purporting to be issued by an approved insurer under Part 6 of the Home Building Act 1989 that states that a person is the holder of an insurance policy issued for the purposes of that Part is, for the purposes of this clause, sufficient evidence that the person has complied with the requirements of that Part.

(Reason: Prescribed– Statutory)

**Appointment of a Principal Certifying Authority (PCA)**

F3. Building work, demolition or excavation in accordance with the development consent must not be commenced until the developer has appointed a Principal Certifying Authority for the building work in accordance with the provisions of the EP&A Act and its Regulations.

(Reason: Statutory; To ensure appropriate safeguarding measures are in place prior to the commencement of any building work, demolition or excavation)

**Construction Certificate**

F4. Building work, demolition or excavation in accordance with the development consent must not be commenced until a Construction Certificate for the relevant part of the building work has been issued in accordance with the provisions of the EP&A Act and its Regulations.

(Reason: Statutory; To ensure appropriate safeguarding measures are in place prior to the commencement of any building work, demolition or excavation)

**Occupation Certificate**

F5. A person must not commence occupation or use of the whole or any part of a new building (*new building* includes an altered portion of, or an extension to, an existing building) unless an Occupation Certificate has been issued in relation to the building or part. Only the Principal Certifying Authority appointed for the building work can issue an Occupation Certificate.

(Reason: Statutory)

**Excavation/Demolition**

- F6.
- 1) All excavations and backfilling associated with the erection or demolition of a building must be executed safely and in accordance with appropriate professional standards.
  - 2) All excavations associated with the erection or demolition of a building must be properly guarded and protected to prevent them from being dangerous to life or property.
  - 3) Demolition work must be undertaken in accordance with the provisions of AS2601–Demolition of Structures.

(Reason: To ensure that work is undertaken in a professional and responsible manner and protect adjoining property and persons from potential damage)

**Protection of Public Places**

- F7.
- 1) A hoarding and site fencing must be erected between the work site and adjoining public place.
  - 2) If necessary, an awning is to be erected, sufficient to prevent any substance from, or in connection with, the work falling into the public place.
  - 3) The work site must be kept lit between sunset and sunrise if it is likely to be hazardous to persons in the public place.
  - 4) Any such hoarding, fence or awning is to be removed when the work has been completed.
  - 5) No access across public reserves or parks is permitted.

Note: Prior to the erection of any temporary fence or hoarding over property owned or

managed by Council, written approval must be obtained. Any application needs to be accompanied by plans indicating the type of hoarding and its layout. Fees are assessed and will form part of any approval given. These fees must be paid prior to the approval being given. Approval for hoardings will generally only be given in association with approved building works, maintenance or to ensure protection of the public. An application form for a Hoarding Permit can be downloaded from Council's website.

(Reason: To ensure public safety and the proper management of public land)

**Site Sign**

- F8. 1) A sign must be erected in a prominent position on the site
- a) stating that unauthorised entry to the work site is prohibited;
  - b) showing the name of the principal contractor (or person in charge of the work site), and a telephone number at which that person may be contacted at any time for business purposes and outside working hours; and
  - c) showing the name, address and telephone number of the Principal Certifying Authority for the work.
- 2) Any such sign must be maintained while to building work or demolition work is being carried out, but must be removed when the work has been completed.

(Reason: Prescribed- Statutory)

**G. Prior to the Issue of an Occupation Certificate**

**Infrastructure Repair and Completion of Works**

G1. Prior to the issue of any Occupation Certificate any and all works relating to the development:

- a) in the road reserve must be fully completed; and
- b) to repair and make good any damaged public infrastructure caused as a result of any works relating to the development (including damage caused by, but not limited to, delivery vehicles, waste collection, contractors, sub contractors, concrete vehicles) must be fully repaired;

to the satisfaction of Council Engineers at no cost to Council.

(Reason: Maintain quality of Public assets)

**Noise Certification**

G2. Prior to issue of the any Occupation Certificate a certificate from an appropriately qualified acoustical consultant eligible for membership of the Association of Australian Acoustic Consultants is to be submitted to, and approved by, the Certifying Authority certifying that the noise and vibration from use of the development complies with the conditions of consent here-in.

(Reason: To ensure acoustic amenity)

**Certification- Civil Works**

- G3. a) An appropriately qualified and practising Civil Engineer must certify to the Certifying Authority that the stormwater drainage system is constructed in accordance with this consent and the provisions of the applicable Australian Standard. A copy of the certificate must be submitted to Council (if it is not the Certifying Authority) upon completion of the development works and prior to the issue of an Occupation Certificate.
- b) An appropriately qualified and practicing Civil Engineer must certify to the Certifying Authority that the vehicular crossing and associated works and road works were constructed in accordance with this consent and any approval for works in the road reserve issued by the Council. A copy of the certificate must be submitted to Council (if it is not the Certifying Authority), upon completion of the development works and prior to the issue of an Occupation Certificate.

(Reason: Compliance with the Consent)

**Works as Executed Drawings and Video**

- G4. A works-as-executed survey drawing (W.A.E.) of the completed stormwater drainage system must be obtained. The W.A.E. survey drawing must show the alignment, depth and grade of the stormwater drainage pipelines, pits and ancillary plumbing. The W.A.E survey drawing must be reviewed by a qualified and practising civil engineer and certification provided to the Certifying Authority that the as-built system achieves the design intent of the plans approved with the Construction Certificate. Certification must be provided with the W.A.E survey drawing to the Certifying Authority prior to the issue of an Occupation Certificate.

A copy of the WAE survey drawing, CCTV – video inspection and certification must be submitted to the Council.

CCTV inspection of conduits shall be conducted in accordance with the Conduit

Inspection Reporting Code of Australia WSA 05–2013.

(Reason: Compliance with the Consent)

**Access to Premises**

- G5. Prior to the issue of any Occupation Certificate, a certificate must be prepared an appropriately qualified and practising Civil Engineer certifying that access and facilities for persons with a disability in accordance with the Building Code of Australia and AS Disability (Access to Premises – buildings) Standards 2010 (Premises Standards) has been provided. This certificate must be submitted to, and approved by, the Certifying Authority prior to issue of the Occupation Certificate.

(Reason: Equitable access and facilities for people with adisability)



**Damage to Adjoining Properties**

G6. On completion of the development the subject of this consent and prior to the issue of the Occupation Certificate, a report is to be prepared by an appropriately qualified consultant and is to be provided to the Certifying Authority (and a copy to Council if it is not the Certifying Authority) certifying:

- a) whether any damage to adjoining properties has occurred as a result of the development;
- b) the nature and extent of any damage caused to the adjoining property as a result of the development;
- c) the nature and extent of works required to rectify any damage caused to the adjoining property as a result of the proposed development;
- d) the nature and extent of works carried out to rectify any damage caused to the adjoining property as a result of the development; and
- e) the nature and extent of any agreements entered into for rectification of any damage caused to the adjoining property as a result of the development.

The report and certification must reference the dilapidation survey and reports required to be provided to the Certifying Authority in accordance with this consent.

All costs incurred in achieving compliance with this condition shall be borne by the developer.

(Reason: To ensure adjoining owner's property rights are protected in so far as possible)

**Utility Services**

G7. All utility services shall be adjusted, to the correct levels and/or location/s required by this consent, prior to issue of an occupation certificate. This shall be at no cost to Council.

(Reason: To ensure compliance with the terms of this consent)

**Covenant & Restriction (Stormwater Control Systems)**

G8. An Instrument pursuant to Sections 88B and 88E of the *Conveyancing Act* 1919 and one copy must be submitted to Council in registrable form, providing for:

- a) a restriction as to user and positive covenant as to user as appropriate in favour of North Sydney Council burdening 20–24 Bray Street, North Sydney requiring the ongoing retention, maintenance and operation of the stormwater facility (on-site detention and pump-out system);
- b) North Sydney Council being nominated in the Instrument as the only party authorised to release, vary or modify the Instrument;
- c) the wording on the Instrument making reference to the Council file/s whichhold:
  - (a) the Construction plans; and
  - (b) the "Work-as-Executed" (as built) plans;

Upon Council being satisfied as to the terms of the Instrument, North Sydney Council's

official seal will be affixed to these documents, prior to submission to the NSW Land Registry Services Office for registration

The Instrument creating the restriction and/or covenant under ss 88B and 88E required by this condition of consent must be registered on the Title of the development site prior to the issue of an Occupation Certificate or commencement of use of the site, whichever is the earlier.

Evidence of the registration of the instrument referred to in this condition is to be provided to Council prior to the issue of an Occupation Certificate.

All costs associated with the preparation, approval and registration of the Instrument required by this condition of consent must be borne by the person acting on this consent including the reasonable costs of Council in obtaining advice, negotiating the terms or otherwise facilitating the execution and registration of the required Instrument.

(Reason: Compliance and adequate maintenance of drainage system)

**Basement Pump-Out Maintenance**

G9. Prior to issue of an Occupation Certificate a Maintenance Regime must be prepared for the basement stormwater pump-out system and submitted to the Principal Certifying Authority for approval with the Occupation Certificate documentation. The regime must specify that the system is to be regularly inspected and checked by qualified practitioners.

The basement stormwater pump-out system must be maintained in accordance with the approved Maintenance Regime at all times.

(Reason: To ensure future provision for maintenance of the drainage system)

**Covenant & Restriction (Use of Communal Areas)**

G10. An Instrument pursuant to Sections 88B and 88E of the *Conveyancing Act 1919* and one copy must be submitted to Council in registrable form, providing for:

- 1) a restriction as to user and positive covenant in favour of North Sydney Council burdening Nos. 20–24 Bray Street, North Sydney, restricting the use of the communal areas on the roof level are maintained as such and shall only be varied with approval of Council; and
- 2) North Sydney Council being nominated in the Instrument as the only party authorised to release, vary or modify the Instrument.

Upon Council being satisfied as to the terms of the Instrument, North Sydney Council's official seal will be affixed to these documents, prior to submission to the Land & Property Information Office for registration

The Instrument creating the restriction and/or covenant under ss 88B and 88E required by this condition of consent must be registered on the Title of the development site prior to the issue of an Occupation Certificate or commencement of use of the site, whichever is the earlier. Typical wording for the Instrument can be sourced from Council's "Specification for the Management of Stormwater".

Evidence of the registration of the instrument referred to in this condition is to be provided to Council prior to the issue of an Occupation Certificate.

All costs associated with the preparation, approval and registration of the Instrument required by this condition of consent must be borne by the person acting on this consent including the reasonable costs of Council in obtaining advice, negotiating the terms or otherwise facilitating the execution and registration of the required Instrument.

(Reason: Compliance and maintain communal use of the communal area on te roof level)

#### Notification of New Address Developments

G11. Prior to any Occupation Certificate being issued, the person acting upon this consent must comply with the following: –

(a) Notify Australia Post of the address(es) as issued by Council and the location in plan form of any secondary, internal addresses, in relation to built public roads. Check Australia Post Website ([www.auspost.com.au](http://www.auspost.com.au)) to find your nearest Australia Post Delivery Facility.

(Reason: To ensure that Council records are accurate, and that house numbering complies with the requirements of Council's House Numbering Policy. Proper house numbering also assists emergency services in readily locating properties)

#### Vehicle Egress Signs

G12. Prior to the issue of an Occupation Certificate, appropriate sign(s) must be provided and maintained within the site at the point(s) of vehicular egress to ensure all vehicles stop before proceeding onto the public way.

(Reason: To ensure pedestrian safety)

#### Intercom

G13. An intercom system must be provided in a convenient location adjacent to the carpark entrance to enable easier and safe access for visitors to the building's visitors parking prior to issue of any occupation Certificate.

(Reason: To ensure convenient access is available for visitors to the building)

#### Sydney Water

G14. A Section 73 Compliance Certificate under the Sydney Water Act 1994 must be obtained.

The final Section 73 Certificate must be submitted to the Certifying Authority prior to release of any linen plan for subdivision or prior to occupation of the development, whichever is the earlier.

#### Notes:

Application must be made through an authorised Water Servicing Co-ordinator, for details see the Sydney Water web site [www.sydneywater.com.au/customer/urban/index](http://www.sydneywater.com.au/customer/urban/index), or

telephone 13 20 92.

Following application, a 'Notice of Requirements' will be forwarded detailing water and sewer extensions to be built and charges to be paid. Please make early contact with the Coordinator since building of water/sewer extensions can be time consuming and may impact on other services and building, driveway or landscape design.

(Reason: To ensure compliance with the statutory requirements of Sydney Water)

**House Numbering**

G15. Prior to any Occupation Certificate being issued an application must be made to North Sydney Council for written confirmation, or allocation, of the street address(es) or apartment number(s) for the completed project in accordance with Council's Property Addressing Policy. These are the numbers that will be recorded in Council records and must be displayed at the property in accordance with the provisions of AS/NZS 4819:2011.

Note: If apartments are to be sold off the plan, the applicant must have written confirmation from Council of the address and apartment numbering if the apartment number is to be identified on the contract.

(Reason: To ensure that Council records are accurate, and that house numbering complies with the requirements of Council's House Numbering Policy. Proper house numbering also assists emergency services in readily locating properties.)

**Allocation of Spaces**

G16. Car parking spaces must be provided and maintained at all times on the subject site. The spaces shall be allocated to uses within the building in accordance the following table:

28	Residential (Total)
2	Visitors
4	Accessible

The car parking spaces are to be identified on-site by line-marking and numbering upon the completion of the works and prior to issue of Occupation Certificate. Car parking spaces provided must only be used in conjunction with the approved uses contained within the development.

In the case of Strata subdivision any car parking for strata lots for residential purposes must be individually allocated to its corresponding residential strata lot as part of each lots' unit entitlement.

Visitor parking facilities must be designated as common property on the strata plan. Visitor parking facilities must not at any time be allocated, sold, licensed or leased for the exclusive use of any occupier or owner and must be retained as common property by the Owners Corporation for use by building visitors.

(Reason: To ensure that adequate parking facilities to service the development are provided on site)

**Asbestos Clearance Certificate**

G17. For building works where asbestos based products have been removed or altered, an asbestos clearance certificate signed by an appropriately qualified person (being an Occupational Hygienist or Environmental Consultant) must be submitted to and approved by the Certifying Authority (and a copy forwarded to Council if it is not the Certifying Authority) for the building work prior to the issue of any Occupation Certificate, the asbestos clearance certificate must certify the following: –

- a) the building/ land is free of asbestos; or
- b) the building/ land has asbestos that is presently deemed safe.

The certificate must also be accompanied by tipping receipts, which detail that all asbestos waste has been disposed of at an approved asbestos waste disposal depot. If asbestos is retained on site the certificate must identify the type, location, use, condition and amount of such material.

Note: Further details of licensed asbestos waste disposal facilities can be obtained from [www.epa.nsw.gov.au](http://www.epa.nsw.gov.au)

(Reason: To ensure that building works involving asbestos based products are safe for occupation and will pose no health risks to occupants)

**Certification of Tree Condition**

G18. Prior to the issue of an Occupation Certificate, a report prepared by an appropriately qualified person (being an arborist or the like) must be submitted to the Certifying Authority, describing the health of the tree(s) specifically nominated below:

Tree	Location	Height
T2 <i>Grevillea robusta</i>	Between driveways – northern bdy –29 Bray St	18m
T7 <i>Angophora costata</i>	Southern boundary of 31 Kurraba Road	15m
T8 <i>Corymbia citriodora</i>	Southern boundary 20–24 Bray St	23m
T9 <i>Populus deltoides</i>	Northern boundary 29 Bray St	21m
T10 <i>Corymbia citriodora</i>	South–eastern corner 20–24 Bray St	15m
T11 <i>Toona ciliata</i>	South–eastern corner 64 Clark Rd	7m
T16 x <i>Cupressocyparis leylandii</i>	North–western corner 20–24 Bray St	9m
3 x <i>Corymbia maculata</i>	within the subject site	100l
1 x <i>Cupaniopsis anacardioides</i>	within the subject site	200l

The report must detail the condition and health of the nominated tree(s) upon completion of the works, and shall certify that the tree(s) has/have not been significantly damaged during the works on the site, and has/have reasonable prospects for survival.

(Reason: To ensure compliance with the terms of this consent)

**Disposal Information**

G19. Upon completion of works and prior to occupation, a report including the following information must be provided to Council's Open Space and Environmental Services Department:

- (a) the total tonnage of all waste and excavated material disposed of from the site (including any tipping docket); and
- (b) the disposal points and methods used.

(Reason: To ensure appropriate disposal methods are undertaken for auditing and inspection purposes)

**Verification Statement (External Finishes and Materials)**

G20. Prior to the issue of any Occupation Certificate, a verification statement from a qualified designer or architect (preferably the original designer), must be submitted to Council and the Certifying Authority certifying that the external finishes and materials are in accordance with the approved schedule of finishes and materials identified in this consent.

“qualified designer” means a person registered as an architect in accordance with the Architects Act 2003 cf 50(1A) EP & A Regs 2000.

(Reason: To ensure the design quality and finishes for residential flat development)

**Consolidation of Lots and Creation of Easement**

G21. Prior to the issue of the Occupation Certificate, Lot 3 DP 565786 and Lot 101 DP627484 shall be consolidated into one lot. An easement is to be created over SP13397 to allow vehicles associated with No. 35 Kurraba Road to reverse into SP13397 and to allow vehicles to travel along Bray Lane in a forward direction.

Documentary evidence of consolidation and the creation of the easement shall be provided to the Principal Certifier.

(Reason: To promote orderly development of land)

**BASIX Completion Certificate**

G22. In accordance with Clause 154C of the Environmental Planning and Assessment Regulation 2000, prior to issuing a final occupation certificate the Certifying Authority must apply to the Director-General for a BASIX completion receipt.

(Reason: To ensure compliance with the specified BASIX Certificate)

**Landscaping**

G23. The landscaping shown in the approved landscape plan with amendments as required by Condition C20 must be completed prior to the issue of any Occupation Certificate.

(Reason: To ensure compliance)

**Landscape Maintenance Plan**

G24. Prior to the issue of any Occupation Certificate, a revised Landscape Maintenance Plan, based on the submitted Landscape Maintenance Strategy, prepared by Concept Landscape Architect dated 3 November 2021 must be submitted for the written approval of Council’s Team Leader Assessments in consultation with Council’s Landscape Development Officer to

ensures the ongoing viability and vigour of plant species, the practicalities of undertaking landscape maintenance are met as well as the retention of the intended aesthetic values of the Landscape Plan, including but not limited to:

- a) Maintenance and usage of irrigation
- b) Mowing schedule
- c) Fertilising schedule
- d) Pruning and trimming schedule
- e) Re-mulching
- f) Replanting schedule
- g) Cleaning of exterior pavements, furniture and lighting
- h) Storage of materials
- i) Disposal of landscape waste
- j) Access of maintenance staff
- k) Use and noise control of power tools

(Reason: To maintain landscape quality for the development)

**Compliance with Certain conditions**

- G25. Prior to the issue of any Occupation Certificate Condition C12 (Carparking) must be certified as having been implemented on site and complied with.

(Reason: To ensure the development is completed in accordance with the requirements of this consent)

**I. On-Going / Operational Conditions**

**Rooftop Communal Area**

11. The rooftop communal area, the communal room and associated facilities must only be used by the residents and their guests of the approved development.

The operating hours of the rooftop communal facilities shall be as follows:

Sunday to Thursday: 7.00am to 10.00pm

Friday to Saturday: 7.00am to 11.00pm

A sign showing the above operating hours must be installed at a highly visible location within the communal area.

The above operating hours must be incorporated in the by-law of any strata plan for the approved development.

(Reason: To restrict the use of the facilities and amenity protection.)

**Roof Terrace Equipment**

12. All equipment, furniture and other ancillary equipment are to be weighted and/or secured so that they are contained at all times within the perimeter of the roof terrace.

(Reason: To minimise visual clutter and in the interests of safety)

**Use of Car parking Spaces**

13. Car parking spaces provided must only be used in conjunction with the approved uses contained within the development. Visitor parking facilities must be designated as common property on any strata plan. Visitor parking facilities must not at any time be allocated, sold, licensed or leased for the exclusive use of any owner or occupier or third party and must be retained as Common Property by the owners corporation for use by building visitors.

(Reason: To ensure that visitor parking is not allocated to building occupants and remains available on an ongoing basis)

**Roof Top Lighting**

14. Lighting on rooftop or podium level areas must not be illuminated between 11:00 pm and 7:00 am. The design and placement of the lighting must:

- a) be directed away from any residential dwellings;
- b) not create a nuisance or negatively affect the amenity of the surrounding neighbourhood; and
- c) comply with AS4282–1997 control of obtrusive effects of outdoor lighting.

(Reason: To ensure residential premises are not affected by inappropriate or excessive illumination)

**Noise and Vibration Impact**

15. The on-going use of the development approved under this consent must comply with all conditions pertaining to noise and vibration specified in this consent including the noise mitigating measures as identified in the acoustic report for the proposed development, dated 28 September 2020, and prepared by Renzo Tonin.

(Reason: To ensure compliance with the specified levels of noise and vibration and to maintain the amenity of surrounding land uses)

**Allocation of Spaces**

16. The allocation of Carparking spaces within the development must be maintained at all times in accordance with the terms of this consent. The allocation of spaces must be maintained in accordance with the following table:

28	Residential (Total)
2	Visitors
4	Accessible

Car parking spaces provided must only be used in conjunction with the approved uses contained within the development.



*Loyito Pty Ltd v North Sydney Council*  
2021/141523

LEC No.

In the case of Strata subdivision any car parking for strata lots for residential purposes must be individually allocated to its corresponding residential strata lot as part of each lot's unit entitlement.

Visitor parking facilities must be designated as common property on the strata plan. Visitor parking facilities must not at any time be allocated, sold, licensed or leased for the exclusive use of any occupier or owner and must be retained as common property by the Owners Corporation for use by building visitors.

(Reason: To ensure that adequate parking facilities to service the development are provided on site)

**Maintenance of Approved Landscaping**

17. The owners of the premises at No. 35 Kurraba Road and Nos 20–24 Bray Street, North Sydney is to maintain the landscaping approved by this consent generally in accordance with Concept Landscape Plan prepared by Conzept Landscape Architects dated 11/20 as modified by Condition C20 and the Revised Landscape Maintenance Plan as modified by Condition G24 in this consent.

Any replacement plants required shall be advanced in growth and be selected to maintain the anticipated mature height, canopy density and nature of those plant species as originally approved.

Should it be desired to substitute plants which are not of the same mature height, canopy density and nature (particularly flowering for non flowering, native for exotic, deciduous for non deciduous or the reverse of any these) a modification to this consent will be required.

(Reason: To ensure maintenance of the amenity, solar access and views of adjoining properties)