

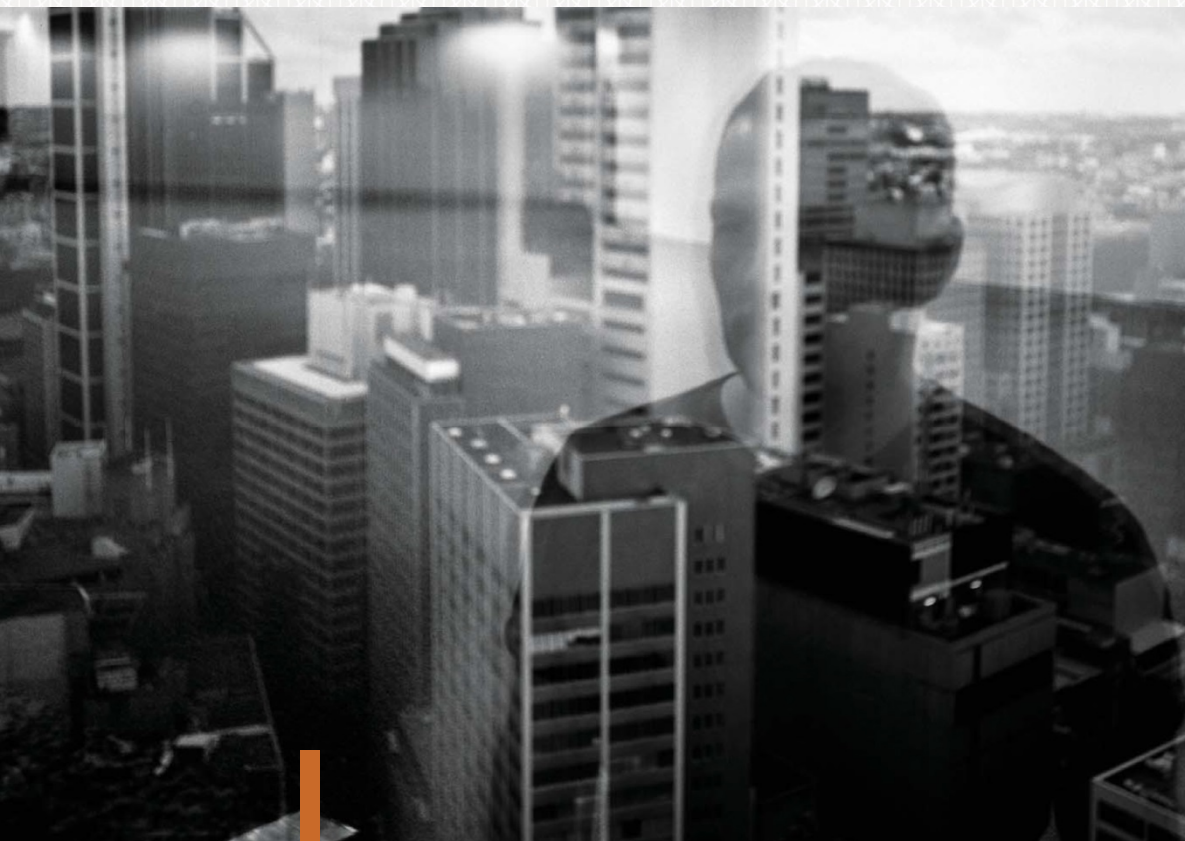
PLANNING & NATURAL SYSTEMS

ATTACHMENT A

**MODIFICATION OF DEVELOPMENT
CONSENT DA-521/2017 (MODIFICATION B)**

ORDINARY MEETING

18 APRIL 2018




Independent Assessment to MidCoast Council

Assessment of Proposed Modification B to consent conditions DA521/2017

Nos. 34-36 West Street, Forster

Submitted to MidCoast Council

Report Revision History

| Revision | Date Issued | Prepared by | Reviewed by | Verified by |
|------------|-------------|--|--|---|
| 01- DRAFT | 27/02/18 | R. Read <i>Snr Project Planner</i> | C. Speek <i>Associate Director</i> |  |
| 02 - Final | 26/03/18 | C. Speek <i>Associate Director</i> | | J. Grant <i>Executive Director</i> |

This document is preliminary unless approved by a Director of City Plan Strategy & Development.

CERTIFICATION

This report has been authorised by City Plan Strategy & Development, with input from a number of other expert consultants, on behalf of the Client. The accuracy of the information contained herein is to the best of our knowledge not false or misleading. The comments have been based upon information and facts that were correct at the time of writing this report.

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1. Executive Summary

| | |
|-----------------------|--|
| Application No. | 521/2017/B |
| Proposed modification | Modify Condition 62 of Development Consent reference DA 521/2017 |
| Subject Site | 34-36 West Street, Forster (Lots 11-13 in DP 47987) |
| Applicant | Enyoc Pty Ltd |
| Owner | MidCoast Council |
| Report By | City Plan Strategy & Development P/L (CPSD) |

Note: Reference to Sections of the Environmental Planning and Assessment Act 1979 (As Amended)

On the 1st March 2018, changes were made to the EP&A Act which affect the section references in this report. For the purposes of this assessment report previous section references have been updated. For clarification the following section references are considered applicable:

- Section 96 Modifications – Section 4.55
- Section 79C Assessment – Section 4.15

Background

On the 15 May 2017, Enyoc Pty Ltd, lodged a development application with MidCoast Council proposing a mixed-use development comprising civic/community, commercial, residential and tourist uses at 34-36 West Street, Forster.

The development proposed to construct four multi-storey buildings over a podium base to accommodate 139 self-contained seniors housing units, 4 penthouse residential apartments, an 84-suite hotel, 18 serviced apartments, a supermarket, an 800-seat cinema, restaurants and retail space, a childcare centre, a nightclub, and community facilities comprising of a new library, visitor information centre, flexible community spaces and a public car park.

Proposed over four development stages, the development was reported to have a Capital Investment Value of \$80 million. Pursuant to Part 4 'regional development' of State Environmental Planning Policy (State and Regional Development) 2011, the application was determined by the Hunter and Central Coast Joint Regional Planning Panel (JRPP).

MidCoast Council were the land owners and City Plan Strategy and Development P/L (CPSD) were engaged to provide an independent assessment of the application to the JRPP for determination.

The JRPP resolved to grant development consent (JRPP 2017HCC012; MidCoast DA521/2017) on 20 September 2017 subject to the removal of the uses of the proposed cinema, nightclub and childcare centre. The consent was issued with 103 conditions of consent.

The applicant lodged an application seeking to modify four (4) conditions of the consent. The modifications seek a reduction in S4.55 (Previously S94) contributions levied on the project; proposes to enable the stratum subdivision of stage 1A to be registered prior to physically

connecting water, sewer and electricity infrastructure; and reduce the maintenance period of bioretention stormwater devices to be installed in the public road. These modifications are being considered as part of a separate modification application DA 521/2017/A.

Proposed modification

A separate modification has been lodged seeking to amend Condition No. 62 which limits construction hours to allow limited construction activities to occur on Saturdays and Sundays from 9am to 4pm.

The application is made pursuant to a S4.55 (Previously S96(1A)) of the EP&A Act and MidCoast Council will remain the consent authority for this application. CPSD has been engaged by the Council to independently review and assess the current modification application.

Consultation

Given the potential impact of the modification on the amenity of nearby neighbouring properties, the application was placed on notification for a period of 16 days from 8 November 2017 to 24 November 2017. A total of five (5) submissions were received raising objections to the proposed additional construction hours on the grounds of loss of amenity to tourists and visitors resulting in loss of business.

Comments on the application were also sought from Council's Environmental Health Section, who could not support the modification on the grounds of inadequate information provided from the applicant to justify the likely impacts upon the amenity of the area.

Assessment

The matters prescribed under Section 4.55 are addressed in Section 5 of this report having regard to the submitted documentation as well as comments provided by submissions.

A detailed assessment of the proposed modifications has been undertaken taking into consideration the Interim Construction Noise Guideline and examines the following key issues:

- Whether the proposed modifications, when considered in their entirety against the original approval, would not materially alter the approval and are justified as having minimal environmental impact pursuant to Section 4.55(1A) of the Act; and
- Whether an extension to construction hours of operation would impact on the surrounding amenity.

Conclusions

The condition imposed upon the consent for this development was based on the 'recommended standard hours' for construction activities, provided in the document titled Interim Construction Noise Guideline (2009).

The purpose for imposing such conditions enable for the adequate protection of amenity of the surrounding area. Equally, it provides a balance whereby construction activities may be undertaken in areas for protected amenity.

Accordingly, the Interim Construction Noise Guideline (2009) provides reasons whereby works may be reasonable to occur outside of these hours and the applicant's reasoning being '*due to potential loss of working days as a result of weather etc*' is not considered an adequate justification in consideration of potential amenity impacts to the surrounding area for a prolonged an undefined period of time.

For this project in particular, the size of the project and its planned development staging provides for an unknown affectation period. In addition, it was found that the limited

information provided by the applicant would not adequately justify the proposal when considered against the likely amenity impacts the proposal will create.

For these reasons, the application does not represent a modification with minimal impact and it is recommended that the application be refused on the grounds of impacts to the surrounding amenity relating to noise, air quality, traffic, visual and parking.

Recommendation

It is recommended that proposed modification to amend Condition 62 be refused and the Condition be retained in its current form.

2. Introduction

City Plan Strategy & Development (CPSD) has been engaged to undertake an independent assessment of the proposed modification to DA521/2017 approved by the Joint Regional Planning Panel (JRRP) on 20 September 2017.

The approved development is for a mixed-use commercial and residential development integrated with a civic precinct, to be known as 'Forster Solaris'. It involves the erection of four towers over a podium base to accommodate 139 self-contained seniors housing units, 4 penthouse residential apartments, an 84-suite hotel, 18 serviced apartments, a supermarket, restaurants and retail space, and community facilities comprising of a new library, visitor information centre, flexible community spaces and a public car park at 34-36 West Street, Forster (the subject site).

MidCoast Council (the Council) is the current owner of the subject site and has entered into a partnership with Enyoc to deliver the approved project. The original application was made by Enyoc, a local development and investment group, with an intention to develop the project.

An application to modify the development consent under Section 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (the Act) has been lodged with MidCoast Council seeking to modify Condition No. 62 to the approved development relating to permitted construction hours.

A detailed assessment of the proposed modification, including with respect to the matters prescribed under Section 4.55 of the Act, is included in Section 5 of this report having regard to the submitted documentation as well as comments received by the local community and Council officers.

Overall, CPSD considers that:

- The application has been correctly made;
- The application has been appropriately advertised;
- The application as proposed to be modified will result in a development that would be substantially the same development as that approved;
- Despite the above, the proposed modification to extend the hours of construction activity into the weekend period for the length of construction would likely result in an unacceptable impact to the amenity of the area;
- The application, in its current should not be supported.

3. The Approved Development

Development Consent (reference DA521/2017) was granted by the Joint Regional Planning Panel (JRPP) on 20 September 2017 for a mixed use development containing a range of uses including civic/community, commercial, residential, tourist and strata subdivision.

The consent applies to land located at 34-36 West Street, Forster, legally described as Lots 11-13 in DP 47987 (the subject site).

The development involves the construction of four multi-storey buildings over a podium base and associated works over four stages (as detailed in the approved 'Staging Plan').

The approved staged stratum subdivision plan will divide the site into three large stratum lots in Stage 1, ensuring that the community facilities component, constructed in Stage 1, can be subdivided from the remainder of the development. Further subdivision of the individual units will be considered post-construction.

It is noted that the consent was issued subject to the removal of the proposed cinema, nightclub and childcare centre components.

The consent was issued subject to 103 conditions. The existing approved condition which is proposed to be modified is outlined below:

CONDITIONS TO BE SATISFIED PRIOR TO ISSUE OF A CONSTRUCTION CERTIFICATE

62. Construction times

Construction and/or demolition works, including deliveries on or to the site must not unreasonably interfere with the amenity of the neighbourhood and must occur only in accordance with the following:

- a) Monday to Friday, from 7 am to 6 pm.*
- b) Saturday, from 8 am to 1 pm.*

No construction and/or demolition work, including deliveries are to take place on Sundays or Public Holidays.

Reason: *To maintain amenity during construction of the development.*

4. Proposed Modifications

The proposed modification seeks consent to amend Condition No. 62 to permit limited construction activities on Saturdays and Sundays from 9am to 4pm.

Limited activities proposed are those that do not rely on heavy plant or machinery and involve manual work using hand tools, such as:

- Formwork
- Steel fixing
- Block and brick laying
- Installing services
- Partition walls
- Glazing
- External wall finishes
- Floor coverings
- Internal fixtures and fittings, finishing trades
- External landscape works.

In addition to the limited activities the builder will also undertake consultation with neighbours at commencement of construction and provide contact details should any concerns arise and take appropriate action to minimise any impacts. The builder will also keep a log of any complaints received and action taken to address concerns. This log will be available for Council to inspect as requested.

5. Matters for Consideration under Section 4.55

5.1 Overview

Section 4.55 of the Environmental Planning and Assessment Act, 1979 (the Act) confers on a consent authority the power and discretion to modify a consent granted under the Act.

Applications can be made under:

- 4.55(1) Modifications involving minor error, misdescription or miscalculation;
- 4.55 (1A) Modifications involving minimal environmental impact; or
- 4.55 (2) Other modifications.

The application was lodged under Section 4.55(1A). The relevant provisions of the Act state:

“Modification of consents

(1A) Modifications involving minimal environmental impact. A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

- a) it is satisfied that the proposed modification is of minimal environmental impact, and
- b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all) under this section, and
- c) it has notified the application in accordance with:
 - i. the regulations, if the regulations so require, or
 - ii. a development control plan, if the consent authority is a council that has made a development control plan under section 72 that requires the notification or advertising of applications for modification of a development consent, and
- d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

The matters prescribed under Section 4.55 are addressed below.

5.2 Minimal Environmental Impact (Section 4.55(1A)(a))

The proposed modification to the condition for construction hours appears minor relative the wording of the condition. However, when considered against the nature of the approved scheme, the modification could have substantial ongoing impacts in both the operational and construction phases that would be detrimental to the amenity of the area and to the future earlier implemented stages of the development.

Specifically, the size of the development has resulted in the current approval being structured in a way that would enable the development to be implemented as a series of stages. The

impact of extending the construction hours over the whole development implementation would therefore extend to each phase, resulting in construction activity occurring on new stages whilst earlier stages are occupied.

Relating solely to the construction period, the modification would not affect the end use, but would, however, be likely to affect the occupation and amenity of occupiers to the earlier stages.

The modifications are also to be considered to result in adverse impacts on the surrounding locality during the construction phase, which given the size of the development is likely to be several years.

CPSD therefore consider that the modifications are likely to result in adverse impacts on the site or the surrounding locality that may not be minor and therefore should not be considered under S4.55(1A) of the EP&A Act but Section 4.55(2).

In accordance with the Regulations, it is noted and accepted that the application has been accepted by Council and advertised in the first instance as a S4.55(1A) and therefore, assessed accordingly.

5.3 Substantially the Same Development (Section 4.55(1A)(b))

In our view, “substantially the same development” means “essentially or materially or having the same essence” as defined by Pearlman C.J. in *Schroders Australian Property Management Ltd v Shoalhaven City Council and Anor (1999) NSWLEC 251*. Accordingly, it is the substance of the proposal relative to the substance of the development as originally approved.

The proposed development is essentially, and materially, the same as the approved development and will not involve any physical change to the approved development.

CPSD therefore considers that the development (as modified) will remain substantially the same as the development that was originally approved, under DA521/2017.

5.4 Public Notification (Section 4.55(1A)(c))

The original DA was determined by the Joint Regional Planning Panel. Being a S4.55(1A) application, MidCoast Council remains the consent authority for this application.

Section 4.55(1A)(c) of the Act provides that a consent authority may modify a consent if it has publicly notified the Modification Application in accordance with the relevant Council's Development Control Plan (DCP).

The notification requirements provide that notification should occur in accordance with the Council's DCP, namely the Great Lakes DCP 2014 (GLDCP). Referring to a public notification policy, the policy stipulates ‘modifications, which in the opinion of Council will not detrimentally affect the amenity of persons on adjoining or neighbouring land, do not have to be notified’.

Given the potential public amenity impact the proposed modification was notified for 16 days from 8 November 2017. A total of five (5) submissions were received.

5.5 Public Submissions (Section 4.55(1A)(d))

The proposed modification was notified for 16 days from 8 November 2017. A total of five (5) submissions were received all of which opposed the modification. Issues raised are considered in **section 5.6(d)** of this report.

5.6 Section 79C(1) Considerations (Section 4.55(3))

Environmental assessment matters relevant to the proposed modified development under Section 79C (1) (a), (b), (c), (d) and (e) of the Act are addressed below.

(a) Environmental Planning Instrument Provisions

Table 1: Section 79C(1)(a) Matters for Consideration

| Section | Matters for consideration - general | Comment |
|---------|---|--|
| 1(a)(i) | Any Environmental Planning Instrument | The original application as approved in September 2017 was assessed against all relevant EPI's. The proposed modifications to the conditions are considered to represent substantially the same development. No EPIs is considered applicable to this modification. |
| (ii) | Any Draft Environmental Planning Instrument | No draft EPIs is considered applicable to this modification. |
| (iii) | Any Development Control Plan | No relevant controls are included within the GLDCP. |
| (iiia) | Any planning agreement | No planning agreement was entered into under Section 93F. |
| (iv) | The regulations | The proposed modification as proposed and recommended for modification will not impact any matter prescribed under the Regulations. |
| (v) | Any coastal zone management plan | None Applicable |

(b) the likely impacts of that development

The proposed modification seeks consent to amend Condition No. 62 to permit limited construction activities on Saturdays and Sundays from 9am to 4pm. Limited activities proposed are those that do not rely on heavy plant or machinery and involve manual work using hand held tools.

In addition to these suggested restricted activities, the builder will also undertake consultation with neighbours at commencement of construction and provide contact details should any concerns arise and take appropriate action to minimise any impacts. The builder will also keep a log of any complaints received and action taken to address concerns. This log will be available for Council to inspect as requested.

The impacts of the construction phase compared to the ongoing operational phase of the development is varied. Unlike the operational phase, construction activity is generally carried out outside, the number and types of vehicles, plant and equipment used can vary greatly during different phases of work and in different locations on the site. These variations make mitigation measures more difficult to apply.

'Offensive noise' has been considered by the Land and Environment Court in *Meriden v Pedavoli* (2009), NSW Land and Environment Court judgement 183 (22 October 2009). It considered the following:

- Is the noise loud in an absolute sense? Is it loud relative to other noise in the area?
- Does the noise include characteristics that make it particularly irritating?
- Does the noise occur at times when people expect to enjoy peace and quiet?
- Is the noise atypical for the area?
- Does the noise occur often?
- Are a number of people affected by the noise?

The subject site is located at the southern edge of the Forster town centre, the site is surrounded by various types of development and uses including commercial buildings, motel accommodation, residential flat buildings, low density holiday units and holiday parks.

The applicant has not given any certainty to the length of the construction period, equally, very limited information has been provided to adequately consider the likely impact and a worst case scenario is to be assumed. Of particular note:

Given the size of the development and the approved staging, it is likely that construction is to be undertaken for several years, no indication as to how the activities will be conducted throughout the period will be undertaken;

- No details as to the amount of construction workers to be on site at any time;
- No information on tool types and activities;
- No construction plan indicating any amelioration options have been provided;
- No proposed mitigation or impact measurement is provided or proposed.

The above list is not exhaustive, but representative of the aspects of the impacts of construction that have not been considered by the applicant. The proposed modification will result in construction being carried out 7 days a week resulting in limited respite for the surrounding area.

While the modifications to the conditions do not impact the design or layout of the development, it is likely to have amenity impacts to surrounding area.

(c) the suitability of the site for the development

The proposed condition modifications do not affect the design and layout of the development as approved.

The subject site is located at the southern edge of the Forster town centre, the site is surrounded by various types of development and uses including commercial buildings, motel accommodation, residential flat buildings, low density holiday units and holiday park.

Given the range of residents and tourists located in close proximity to the site, the site is not considered suitable to enable the implementation of extended hours.

(d) any submissions

A total of five (5) submissions were received all of which objected to the modification on the grounds of:

1. Noise impacts to surrounding amenity from power tools and vehicles.
 - The proposed limited uses such as generators and power drills have high decibel counts.

- Application states that '*generally the activities will be limited to....' generally is not specific enough and even small scale construction processes are intrusive*'.
 - The site will be busy enough without extending hours.
 - There are two churches in the vicinity approximately 80 to 100 metres from the site. As Sunday is the sabbath this should be honoured for everyone who attends church.
2. Loss of income
- Both the FVC and MRSL advise in the dramatic loss of income due to reduction in customers due to the noise.
 - Sundays are a time for sleep in and relaxation.
3. Parking
- Parking of the workers vehicles and deliveries being made on Sundays would severely impact on parking in Lake Street which is already well used because of the churches located there.
 - FHV generates significant revenue through group bookings. Due to their nature they require travel in and out of park. The presence of construction workers and related vehicles is likely to impact on their ability to freely enter and exit the FHV.
4. Impact on tourism
- Tourism industry critical to the success of the Forster community and the proposed hours could affect a number of tourism operators.
 - The area is close to the centre of the shopping and restaurant area where a lot of people/tourist come for peace and quiet and relaxation on the weekends.

Council's Environmental Health Section

Comments was also received from Councils Environmental Health branch. The comments outlined that constructions times and was included in accordance with the 'recommended standard hours' for construction activities, provided in the document titled Interim Construction Noise Guideline (2009), prepared by the Department of Environment & Climate Change NSW.

In relation to construction works proposed outside of the recommended standard hours, the Interim Construction Noise Guideline (2009) states:

The five categories of works that might be undertaken outside the recommended standard hours are:

- (a) the delivery of oversized plant or structures that police or other authorities determine require special arrangements to transport along public roads*
- (b) emergency work to avoid the loss of life or damage to property, or to prevent environmental harm*
- (c) maintenance and repair of public infrastructure where disruption to essential services and/or considerations of worker safety do not allow work within standard hours*

(d) *public infrastructure works that shorten the length of the project and are supported by the affected community*

works where a proponent demonstrates and justifies a need to operate outside the recommended standard hours.

In the last two categories, the proponent should provide the relevant authority with clear justification for reasons other than convenience, such as to sustain operational integrity of road, rail and utility networks.

The letter submitted in conjunction with application to modify a Development Consent, prepared by Coastplan Group Pty Ltd does not provide justification for the requested modification of recommended hours other than stating 'due to potential loss of working days as a result of weather etc, it is sought that construction also be permitted on Saturday afternoons and Sundays'.

The application therefore cannot be supported based upon the information provided and the justification for the variation of standard hours.

(e) the public interest

The current approved constructions times are in accordance with the 'recommended standard hours' for construction activities, provided in the document titled Interim Construction Noise Guideline (2009), prepared by the Department of Environment & Climate Change NSW.

In relation to construction works proposed outside of the recommended standard hours, the Interim Construction Noise Guideline (2009) states '*works where a proponent demonstrates and justifies a need to operate outside the recommended standard hours*'.

The request to seek an increase '*due to potential loss of working days as a result of weather etc*' is not considered an adequate justification in consideration of potential amenity impacts to the surrounding area or to stage 1A of the development which includes public related amenities and services. Being an activity likely to continue for a prolonged period of time and with limited information and management / mitigations plans in place, the modification as proposed is not in the public interest.

6. Conclusion

The application proposes to modify Condition 62. Specifically, it seeks to permit limited construction activities on Saturdays and Sundays from 9am to 4pm. Limited activities proposed are those that do not rely on heavy plant or machinery and involve manual work using hand held tools.

In addition to restriction of activities the builder will also undertake consultation with neighbours at commencement of construction and provide contact details should any concerns arise and take appropriate action to minimise any impacts. The builder will also keep a log of any complaints received and action taken to address concerns. This log will be available for Council to inspect as requested.

The current approved constructions times are in accordance with the 'recommended standard hours' for construction activities, provided in the document titled Interim Construction Noise Guideline (2009), prepared by the Department of Environment & Climate Change NSW.

In relation to construction works proposed outside of the recommended standard hours, the Interim Construction Noise Guideline (2009) states *'works where a proponent demonstrates and justifies a need to operate outside the recommended standard hours'*.

The request to seek an increase *'due to potential loss of working days as a result of weather etc'* is not considered an adequate justification in consideration of potential amenity impacts to the surrounding area for a prolonged period of time.

CPSD is not satisfied that adequate information or justification has been provided to support this proposal. The approval of this modification is likely to result in a number of significant ongoing amenity impacts to the surrounding area and to future occupiers of the development, including, but not limited to the public services infrastructure delivered in stage 1. The application is likely to result in significant environmental impacts in its current proposed form and it is recommended that the modification be refused.

7. Recommendation

It is recommended that the proposed modification to amend Condition 62 be refused and Condition 62 be retained in its current form.