

INNER WEST COUNCIL – WESTCONNEX M4 EAST

EXTENT OF SALVAGE OBLIGATION

FIRST MEMORANDUM OF ADVICE

1. On 11 February 2016, the Minister for Planning approved the State Significant Infrastructure (**SSI**) application for the WestConnex M4 East Project from Homebush Drive to Parramatta Road and Wattle Street at Haberfield. The Project includes the construction of tunnels and aboveground road works, together with ventilation systems, noise abatement facilities and traffic interchanges. The Proponent of the Project is the RMS which is responsible for implementing the approval, and is bound by its conditions.
2. A swathe of houses, streets and landscaping is being demolished to make way for the Wattle Street works, which comprise an interchange, tunnel entrances, on and off ramps and a ventilation facility. The ventilation stack will tower over western Haberfield, which is the first garden suburb of Sydney, a status that has been recognised for many years in heritage instruments and is reflected in the Haberfield Heritage Conservation Area (**HCA**), which is both listed under cl.5.10 and Schedule 5 of the Ashfield LEP 2013 and specially protected in the LEP to maintain its single-storey appearance: cl.6.5. Fifty-three dwellings within the HCA will be demolished, of which 29 are identified as contributory, and two intact tree-lined streets would be partially affected by the construction works (EIS, Table 19.26, Figure 116). However, most contributory buildings within the HCA are not individually listed heritage items under the LEP or in the Register maintained by the RMS under s.170 of the *Heritage Act 1977* (**the H Act**).
3. I am asked to advise whether Condition B24 of the Minister's approval, which imposes an obligation to salvage heritage items, includes contributory

buildings which are not individually listed heritage items. I am firmly of the opinion that it does so, and even if it does not, then Conditions A2(iii) and D57(c)(ii)(E) impose that obligation, which was an express commitment by the RMS in its Preferred Infrastructure Report (**PIR**).

4. First it is necessary to explain what the term “contributory” means in a heritage context. It is not defined in the H Act, nor in the Standard Instrument, upon which all comprehensive LEPs are now based. In the jurisprudence of the Land and Environment Court, an accepted meaning has emerged, founded on heritage practice:

“44. A contributory item in a conservation area is a building that is not individually listed as a heritage item, but by virtue of age, scale, materials, details, design style or intactness is consistent with the conservation area, and therefore reinforces its heritage significance”: Helou v Strathfield Municipal Council (2006) 144 LGERA 322.

In *Diamond Killara Pty Ltd v Ku-ring-gai Council* [2015] NSWLEC 1079, the Court adopted this definition from the Report of a leading heritage specialist, Jennifer Hill:

“The word contributory when used in relation to potential conservation areas refers to the contribution that the property makes to the overall heritage values of the area. The contribution mostly relates to the historic and aesthetic values, but may in some circumstances also relate to technical and or social values ... Properties identified as contributory are from the key period and have a reasonable degree of integrity.”

and concluded that:

“Each individual building in isolation is not necessarily significant but it is the group as a whole, together with the heritage items, that has significance.”

The heritage significance of a contributory building is undeniable, and it is difficult to see any rational basis for distinguishing between an individually listed heritage item and a contributory building, so far as the obligation to salvage is concerned.

5. The Minister's approval was issued under Part 5.1 of the *Environmental Planning and Assessment Act 1979 (the EPA Act)*. Part 5.1 is the successor to former Part 3A, and it confers upon the Minister a wide power to impose conditions and to modify the SSI. Under s.115ZB(3), the Minister may approve SSI "with such modifications of the infrastructure or on such conditions as the Minister may determine". It is a power which is not constrained by the Project application, unlike Part 4 of the EPA Act: *Weston Aluminium Pty Ltd v Environment Protection Authority* (2007) 82 ALJR 74 at [14]. Nor is the Minister confined by the list of purposes for which conditions may be imposed, unlike s.80A of the Act. Conditions may be flexible, and are not invalid because they apply adaptive management measures, rather than resolve issues to finality: *Community Action for Windsor Bridge Inc v RMS* [2015] NSWLEC 167 at [64], [65], [74], [75].
6. There are numerous conditions of the approval that relate to non-Aboriginal heritage, and it is necessary to unravel their tangled skein to work out what heritage obligations are imposed on the RMS. Some conditions could alter aspects of the Project, but others are designed to implement the obligations imposed by other approval conditions, and commitments made by the RMS in the EIS and PIR.
7. Condition B44 establishes an Urban Design Review Panel to provide advice on the detailed design of the infrastructure including "sympathetic heritage design", and to review the Urban Design and Landscape Plan required by Condition B45. That Plan must mitigate the visual impact of the facilities, and its impact on the visual amenity and setting of the Haberfield HAC: B45(b). Sitting under the Plan is, *inter alia*, a Wattle Street interchange Urban Design and Landscape Sub-plan which must detail final landscaping taking into account heritage impacts to the HCA.
8. As part of the Construction and Environmental Management Plan (**CEM Plan**) required by Condition D56, a Construction Heritage

Management Plan (**CHM Plan**) must be prepared (Condition D57(c)) to include:

“processes and mechanisms for the reuse and recycling of building and landscape components from contributory, potential and locally listed heritage items within other built or landscaped components of the SSI”: Condition D57(c)(ii)(E).

Under this Plan, at the very least, salvage of contributory items is envisaged. The CHM Plan (Revision 3, 24 June 2016) has now been made, and it contains a preliminary list of houses that have been recommended for selected salvage in Annexure F. Of the buildings within the HCA which were not individually listed heritage items, each were considered for salvage but only a few were recommended for it. The RMS asked its consultant to consider salvage from potential heritage items and contributory items within the HCA: p.30.5. The salvage process was summarised:

- “• *the urban design and landscape architects will confirm types and amounts of materials to be salvaged for reuse within the fabric of the project ...*
- *the heritage consultant will identify elements and materials to be salvaged from heritage items, and also from contributory and potential heritage items.*
- *the elements and materials identified by the urban design and landscape architects and the heritage consultant will be salvaged from the nominated houses, if feasible ... There have been some instances where the conditions of elements has proven too poor to successfully salvage ... These elements are collectively identified as ‘salvaged elements’. ...*
- *Where practicable, salvaged materials such as sandstone blocks and brickwork will be used in the fabric of the permanent works ...*
- *Local Councils will be consulted regarding a process to allow residual elements and materials (salvaged elements and materials not incorporated into the project) to be available to end users with a priority on property owners within the locality or HCA from where the items were salvaged.*

- *Residual salvaged elements will be distributed either directly from a secure storage site, or via a site agreed upon with the relevant local Council” (CHM Plan, p.31).*

A Heritage Interpretation Plan is also to be prepared, which will record the salvaged items as well as the heritage values of heritage items and the HCA.

9. The premise of my instructions is that the RMS recognises no obligation under the approval to salvage materials from contributory items in the HCA which are not themselves individually listed as heritage items. This premise may be correct, because a Heritage Salvage Report has been published under the CHM Plan in which it is said:

“A preliminary heritage survey (which included a desktop review and a series of inspections) has been undertaken by the projects heritage consultant. The inspections involved a review of houses for their suitability for salvageable materials. The inspections were informed by the WestConnex M4 East EIS, and in particular Appendix S, the WestConnex M4 East Non-Aboriginal Heritage Impact Assessment prepared by GML Heritage.

The primary target of the inspections has been houses identified as ‘heritage items’ on the heritage schedule of relevant council’s Local Environmental Plan (LEP) and the Roads and Maritime s170 register. Though not required for the purpose of the salvage conditions, additional inspections were undertaken of:

- *the potential heritage items identified by GML Heritage*
- *the potential heritage items identified by the contractor’s heritage consultant; and*
- *the contributory items within the Haberfield and Powells Estate heritage conservation areas” (underlining added).*

Three matters should be noted. First, while referring to the EIS and its heritage assessment, the recommendations for salvage were later revised in the PIR, and the PIR prevails over the EIS in the case of inconsistency: see Condition A3(b). There is no reference to the PIR in this passage, and it appears that everyone involved in the Project is unaware of it. Second, the fact that the primary target for salvage was the individually listed heritage

items suggested that the heritage consultant gave priority to recommending salvage of those items, over contributory items not so listed. Some evidence of that preference is provided later in the Report, where it is stated that twelve of the 16 individual items would be salvaged, but only nine contributory items, out of 29. That is a ratio of three from four, compared with one from every three contributory items. Third, the statement that salvage of contributory items was “not required for the purpose of the salvage conditions” is completely incorrect.

10. Although each contributory item was examined with a view to determining whether it was likely to yield salvageable materials, and some items were recommended for salvage, it appears that the recommendation was infected by bias, and therefore unreliable, and in any event the primacy given to heritage items as understood by the RMS is clearly contrary to the CHM Plan, which the RMS must implement: Condition D57.
11. The question then is whether the RMS is correct in thinking that the conditions of approval limit the salvage obligation to individually listed heritage items. The conditions take the Project documents, and impose a general obligation to implement them, the most recent of them (the PIR) prevailing over the earlier ones, in the case of an inconsistency. Then specific conditions are imposed which prevail where inconsistent with the Project documents. However, simply because a later condition enters the field of an earlier condition does not produce an inconsistency. That is especially so where the later condition increases the strength of an obligation imposed by an earlier condition, but does not contradict it, or selects as its subject matter a subset of the subject matter of the earlier condition. Both conditions can be read together. The approval is a statutory instrument, and is therefore governed by the rule of construction that different provisions of the one instrument should be read together: *Saraswasti v The Queen* (1991) 172 CLR 1.

12. The proponent made a commitment to consider contributory items for salvage in the PIR, and Condition A2(c) requires the proponent to implement it. This may not be consistent with the EIS, but under Condition A3(b), the PIR postdates the EIS and therefore prevails to the extent of any inconsistency. Although Condition A2(c) refers to the Submissions Report, that report contained the PIR. These reports were prepared because of a requirement by the Secretary of the Department of Planning under s.115Z(6) to submit a response to the issues raised in submissions and to prepare a PIR outlining any proposed changes to the infrastructure to minimise its environmental impact or to deal with the issues raised during the assessment period. The commitment is then applied by the CHM Plan, as required by Condition D57.
13. It is necessary to explain how this commitment emerged. During the submissions period, the Heritage Council criticised the design and location of the infrastructure at Wattle Street, primarily because of its impact on the HCA. It recommended that the Minister not approve the Project until changes had been made in the design plans to demonstrate that the impacts on the conservation area and the heritage items had been adequately taken into account. In effect, the Heritage Council was calling for the relocation of the tunnel entry, or at the very least significantly more detail of the proposed structures and mitigation measures. It was to avoid the inevitable delay and expense involved in meeting these requirements that several conditions were imposed to expand the proponent's obligations in relation to heritage items and to require an urban design treatment of the Wattle Street interchange which would be driven by independent experts, in consultation with the Heritage Council. In response, the RMS amended its proposed environmental management measures in the Submissions Report, and recommended:

- “• *During demolition, where practical and as advised by a qualified heritage consultant, recycle elements of heritage fabric from listed heritage items and affected sections of*

the Heritage Conservation Areas where a major adverse impact would be caused by the project” (Report, p.4-79)

It also accepted that an independent urban design review panel should be constituted to advise on heritage related aspects of the design during the detailed design phase. Chapter 8 of the PIR comprises a table of environmental management measures. Measures NAH8 and NAH9 relate to the salvage obligation (Report, p.8-48). Parts of the paragraphs in bold have been added as a consequence of the criticism to which I referred. Measure NAH8 contains the following the additional information:

“During demolition, where practical and as advised by a qualified heritage consultant, recycle elements of heritage fabric from listed heritage items and affected sections of the Heritage Conservation Areas – contributory streetscapes and houses where a major adverse impact will be caused by the project, as identified in the construction heritage management plan in the Powell’s Estate Conservation Area, Thornleigh House gates and driveway, and the Haberfield Conservation Area”.

Measure NAH9 provides:

“During demolition, where practical and as advised by a qualified heritage consultant, recycle elements of heritage fabric from listed heritage items and affected sections of the Heritage Conservation Areas – contributory streetscapes and houses where a major adverse impact will be caused by the project, as identified in the construction heritage management plan in ... the Haberfield Conservation Area”.

Measure NAH8 is addressed to preconstruction and construction whereas Measure NAH9 is addressed to construction. Both quoted provisions replace or supplement the commitments in the EIS.

14. The application of these provisions depends upon whether a major adverse impact will be caused by the Project as identified in the CHM Plan. Clearly, demolition is such an impact, and was ranked as a major adverse impact in Annexure F to the CHM Plan for all houses to be demolished within the HCA. That then triggered the obligation to consider salvage and recommendations to that effect were made and are recorded in the CHM Plan.

15. In my opinion, it is clear beyond argument that Condition A2 of the approval imposes an obligation on the RMS and its construction team to salvage materials from demolished houses within the HCA, according to the same criteria as applied to listed individual heritage items. No discrimination between contributory and other heritage items was authorised by that condition. Nothing in the later heritage conditions of the approval reduces this obligation. On the contrary, those conditions either impose a more stringent obligation for certain heritage items (on a narrow construction) or simply replicate the obligation already imposed by the earlier condition (on a wider construction). The effect is the same, because there is no inconsistency between the later conditions and Condition A2. Both may operate together.
16. Condition B24 provides:

“The Proponent must salvage items and materials from heritage items (excluding potential heritage items) as advised by an independent heritage consultant. How the items are reused in the project is to be detailed in the Urban Design and Landscape Plan required by Condition B45.

Any residual items and materials must be made available, through a process to be developed by the Proponent in consultant with the relevant Council(s), to property owners within the locality or heritage conservation area from where the item or material originated.”

“Heritage item” is defined in the approval as:

“A place, building, work, relic, archaeological site, tree, moveable object or precinct of heritage significance, that is listed under one or more of the following registers: the State Heritage Register under the Heritage Act 1977, a State agency heritage and conservation register under s.170 of the Heritage Act 1977, a Local Environmental Plan under the EPA Act, the world, national or Commonwealth heritage lists under the EPBC Act and/or an Aboriginal object or Aboriginal place as defined in s.5 of the National Parks and Wildlife Act 1974.”

Heritage Conservation Area was also defined as:

“An area in which the historical origins and relationships between the various elements create a sense of place. The

area is typically aesthetic, historic, scientific or socially significant and has been listed under one or more of the following registers: the State Heritage Register under the Heritage Act 1977 ... The LEP ..."

It is argued that "heritage item" did not include a listed Heritage Conservation Area, and that the reference to heritage items in Condition B24 therefore excluded contributory items. I disagree. I accept that the listing of items in the planning instruments distinguished between conservation areas and individually listed items such as trees, houses, walls or places of heritage significance. That bifurcation appears clearly in the Ashfield LEP. However, that is not the correct perspective from which to construe the conditions of approval. This is a State significant project where the sole approval authority is the Minister for Planning and he would be expected to take into account matters of State significance, and in particular the system for heritage protection under the H Act. That Act does not distinguish between heritage conservation areas and heritage items. On the contrary, its definition of an item includes a precinct and environmental heritage is defined to include those precincts of State or local heritage significance. "Precinct" is defined to mean an area or a part of an area or any other part of the State (s.4(1), H Act) and is analogous to an HCA, or at least includes an HCA. The objects of the H Act include the identification, registration and protection of "items of State heritage significance", which include precincts that are separately treated in planning instruments as heritage conservation areas, in contradistinction to individual heritage items. That distinction does not operate at a State level, and all that the Minister has done in Condition B24 and the relevant definitions is adopt the language of the H Act when defining heritage items (that is, by including "precinct"). Although local planning instruments observe a distinction between heritage items and heritage conservation areas, for the purposes of the approval, heritage item is defined to include precincts, that definition has been transferred from the H Act, and that Act protects HCAs as precincts. The definition of heritage item in the Standard Instrument has not been adopted in the Minister's approval, and the artificial distinction in the Dictionary to the Standard Instrument between a heritage conservation area and a heritage item was rejected when

specially defining heritage item, for the purposes of the approval. As the HCA is also a listed precinct it falls within the definition of a heritage item in the approval.

17. Even if "heritage item" in the condition bore its more restricted meaning, it merely imposed a specific obligation in the case of individually listed heritage items for salvage, without contradicting the more general obligation imposed by Condition A2(c). No inconsistency between them arises, and there is therefore no occasion to determine whether the later condition prevails: Condition A3. It would not displace the obligation to salvage contributory items, because on the narrow meaning of heritage item, Condition B24 does not address contributory items within the HCA at all, and is incapable of contradicting the earlier condition because of the difference in subject matter. Moreover, it reveals no intention to displace the earlier condition by exhausting the field of heritage protection: *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, at 586-92. On the contrary, as I have demonstrated above, Condition D57(c)(iii)(E) requires that the CHM Plan make provision for salvaging contributory items, and it does. That completely answers any suggestion that Condition B24 confines the generality of Condition A2.
18. The RMS is under an obligation to salvage dwellings which are partially or wholly demolished within the Haberfield HCA, whether or not they are individually listed as heritage items under the LEP.



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