

Report on 64 – 66 Victoria Avenue, and 22A Conway Avenue, Concord West

JRPP No	2012SYE119
DA Number	505/2012
Local Government Area	City of Canada Bay
Proposed Development	Development Application for demolition of existing structures, remediation of the land, and construction of a new primary school, childcare centre, early childhood and health centre, carparking, associated facilities and landscaping and upgrade works to change rooms and sports field in Powells Creek Reserve
Street Address	Lot 2 DP 218758, 64 Victoria Avenue, Concord West and Part Lot 5 DP 778667, 66 Victoria Avenue, Concord West (both owned by Council) and Part Lot 118 DP 752023, 22A Conway Avenue, Concord West (Crown Land)
Applicant	Department of Education and Communities
Owner	City of Canada Bay Council and Department of Lands
Number of Submissions	On Public Notification from 7 January 2013 until 4 February 2013. 11 submissions received.
Supplementary Report by	Mr Gary Shiels, of GSA Planning (independent planning consultant due to Council ownership and partnership in community facilities to be provided)

1.0 PANEL RESOLUTION OF 24 JULY 2013:

On 24 July 2013, the Joint Regional Planning Panel Sydney East (JRPP) considered the attached report on Development Application No. 505/2013 for demolition of existing structures, remediation of the land, and construction of a new primary school, childcare centre, early childhood and health centre, carparking, associated facilities and landscaping and upgrade works to change rooms and sports field in Powells Creek Reserve.

The Applicant is a Crown Authority and under Section 89 of the Environmental Planning and Assessment Act 1979, a consent authority must not refuse its consent or impose conditions on a Crown development application without the approval of the applicant or the Minister. The Panel was advised that the draft conditions attached to the assessment report have been agreed upon by the Minister.

The Panel resolved on 24 July 2013 as follows:-

- The Panel has considered the planning assessment report as well as the concerns of the submitters both in writing and orally at the public meeting. The Panel is in favour of accepting the recommendation of the planning assessment report to approve the application; however, the Panel believes that it cannot do so because the land is now zoned Open Space and particularly because it was zoned Open Space at the time when the application was lodged.*

2. *For this reason, the Panel requests the applicant to withdraw the application and re-lodge it after the rezoning of the land allowing a school becomes effective. The new application will then have to be re-notified and the Panel will consider, at the next public meeting at which it will consider the application, any additional issues that arise.*

During the meeting to consider the assessment report, the issue of compliance with the pre-approval status of Clause 6.2 of the Canada Bay Local Environmental Plan 2008 relating to Acid Sulfate Soil was also raised – this matter is discussed in further detail below and compliance is considered to be achieved.

In response to the Panel's resolution, Council officers and the planning consultant who prepared the original assessment report have reviewed the process that was undertaken to rezone the land from RE1 Public Recreation to SP2 Infrastructure – School and the public exhibition and notification procedure that was undertaken for both the rezoning and the development application. This supplementary report has been prepared to address the zoning issue accordingly.

2.0 BACKGROUND TO RESOLUTION OF 24 JULY 2013:

As outlined in the resolution of the JRPP of 24 July 2013, when DA 505/2012 was lodged with Council and subsequently considered, the subject site was zoned RE1 Public Recreation and classified as Community Land under the Canada Bay Local Environmental Plan 2008. The majority of the proposed development was prohibited under this zoning.

Council Officers have undertaken a detailed investigation of the chronology of events leading up to the resolution by the JRPP. These investigations are summarised within this section.

The Canada Bay Local Environmental Plan 2013 commenced on 2 August 2013 and rezoned Lot 2 DP 218758, 64 Victoria Avenue, Concord West and Part Lot 5 DP 778667, 66 Victoria Avenue, Concord West to SP2 Infrastructure – School and reclassified this land from Community to Operational.

However, Development Application No. 505/2012 was lodged on 18 December 2012 prior to the land being rezoned to SP2 Infrastructure – School. Clause 1.8A of the Canada Bay Local Environmental Plan 2013 that became effective on 2 August 2013 states the following, inter alia:-

1.8A Savings provision relating to development applications

If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

Note. *However, under Division 4B of Part 3 of the Act, a development application may be made for consent to carry out development that may only be carried out if the environmental planning instrument applying to the relevant development is appropriately amended or if a new instrument, including an appropriate principal environmental planning instrument, is made, and the consent authority may consider the application. The Division requires public notice of the development application and the draft environmental planning instrument allowing the development at the same time, or as closely together as is practicable.*

Division 4B of Part 3 of the Environmental Planning and Assessment Act 1979 contains the following provisions under Clauses 72I – 72K inclusive:-

72I Application of Division

- (1) *This Division applies if a development application is made to a consent authority for consent to carry out development that may only be carried out if an environmental planning instrument applying to the land on which the development is proposed to be carried out is appropriately amended.*
- (2) *This Division also applies in respect of applications and approvals under Part 3A, and references to a development application, a consent authority or a consent are to be construed accordingly.*
- (3) *A reference in this Division to the appropriate amendment of an environmental planning instrument includes a reference to the making of an appropriate principal environmental planning instrument.*

72J Making and consideration of certain development applications

Nothing in this Act prevents:

- (a) *the making of a development application to a consent authority for consent to carry out development that may only be carried out if an environmental planning instrument applying to the land on which the development is proposed to be carried out is appropriately amended, or*
- (b) *the consideration by a consent authority of such a development application, subject to this Division.*

72K Joint exhibition of instrument and advertising of application

- (1) *Public notice that is required to be given under this Act in connection with the making of a proposed environmental planning instrument and notice that is required to be given under this Act of a development application in circumstances where this Division applies are to be given by the same notice if that is practicable or, if that is not practicable, as closely together as is practicable.*
- (2) *The period during which the public may inspect the documents relating to the proposed environmental planning instrument and the development application the subject of the same notice, if those periods are different, is to be the longer of them.*
- (3) *If the proposed environmental planning instrument makes the development the subject of the development application State significant development or designated development, the period for public inspection of the development application that is to be relevant in determining the period for public inspection under subsection (2) is the period relevant to the inspection of a development application for State significant development or designated development.*

3.0 PUBLIC EXHIBITION AND NOTIFICATION OF DRAFT CANADA BAY LOCAL ENVIRONMENTAL PLAN AND DEVELOPMENT APPLICATION NO. 505/2012:

Council Officers considered the requirements of Clause 72K(1) of the Environmental Planning and Assessment Act 1979 and have determined that they have been satisfied with regard to the joint exhibition of the environmental planning instrument – in this case, the draft Canada Bay Local Environmental Plan 2013 and the advertising of Development Application No. 505/2012.

The draft Canada Bay Local Environmental Plan 2013 was exhibited from 20 August 2012 to 17 September 2012. Development Application No. 505/2012 was lodged on 18 December 2012 and was publicly notified from 7 January 2013 to 4 February 2013.

The rezoning of the site to SP2 Infrastructure formed part of the draft Canada Bay Local Environmental Plan 2013 which is a Comprehensive LEP and not a site specific amendment to the former Canada Bay LEP 2008. As a result of the timing of the lodgement of the Development Application by the Department of Education and Communities, the opportunity to identically match the exhibition of the draft LEP 2013 and the Development Application did not exist. Regardless, it is considered that due to these circumstances, it can be reliably stated that the two processes occurred *as closely together as was practicable*.

The material exhibited with the draft Canada Bay Local Environmental Plan 2013 involved a variety of documents and maps including two (2) discussion papers – one for the rezoning to SP2 Infrastructure and one for the Reclassification of the land. Both of these documents clearly explained that the land was being rezoned and reclassified to allow the site to be redeveloped for a school. Secondly, the maps that were exhibited with the draft LEP clearly showed that the land was to be rezoned to SP2 Infrastructure - School. It is a requirement of the Act/Standard Instrument that when the Infrastructure zone is to be used you must identify what type of Infrastructure is proposed for the land.

It should also be noted that during the public hearing process for the reclassification of the land which also preceded the lodgement of the development application, it was also clearly identified that the land was being reclassified from Community to Operational Land to facilitate the use of part of Powells Creek Reserve for a school.

A further complicating factor to the above chronology, and the process of implementing the draft Canada Bay Local Environmental Plan 2013, is that up until the 19 October 2012, the proposed school was permissible on the subject site under the provisions of Sydney Regional Environmental Plan No. 24 – Homebush Bay Area. Council was not informed that the site had been rezoned to RE1 Public Recreation under this SREP. However, once Council had become aware of this situation, a Planning Proposal was lodged with the Department of Planning and Infrastructure on 26 November 2012 to rezone part of the site to SP2 Infrastructure – School and to reclassify No. 66 Victoria Avenue from Community Land to Operational Land (No. 64 Victoria Ave is already Operational Land) to allow the site to be developed for a new school. The Planning Proposal was forwarded to the Department on the assumption that it would progress faster than the draft Canada Bay Local Environmental Plan 2013 being a rezoning for one site compared to a comprehensive LEP for the entire Local Government Area. The Planning Proposal was not exhibited on advice from the Department of Planning's Gateway Determination because the draft Comprehensive LEP had been exhibited only one month earlier.

The provisions of sub-clause (2) of Clause 72K above have also been satisfied because, although the public exhibition/notice of each was undertaken during periods that were different, they were both exhibited/notified for 29 days.

Sub-clause (3) of Clause 72K is irrelevant for the purposes of this assessment as the development application is not State significant or Designated development.

In summary, although the draft Canada Bay LEP that rezoned the site to SP2 Infrastructure – School and the subsequent Development Application for the school were exhibited/notified 3 months apart, the requirements of Division 4B Part 3 of the Environmental Planning and Assessment Act 1979 have been satisfied as the draft LEP exhibition correctly preceded the lodgement of the development application and due to the circumstances of this matter as detailed above, it was not possible or practicable for the rezoning and the development application to be exhibited/notified any closer together in time. Therefore, it could be considered that the rezoning and the development application exhibition/notification occurred as closely together as was practicable.

4.0 CLAUSE 6.2 OF CANADA BAY LEP 2008 - ACID SULFATE SOILS

Clause 6.1 of the Canada Bay Local Environmental Plan 2008 relates to Acid Sulfate Soils and states as follows:-

- (1) *The objective of this clause is to ensure that development does not disturb, expose or drain acid sulfate soils and cause environmental damage.*
- (2) *Development consent is required for the carrying out of works described in the Table to this subclause on land shown on the Acid Sulfate Soils Map as being of the class specified for those works.*

Class of land	Works
1	Any works.
2	Works below the natural ground surface. Works by which the watertable is likely to be lowered.
3	Works more than 1 metre below the natural ground surface. Works by which the watertable is likely to be lowered more than 1 metre below the natural ground surface.
4	Works more than 2 metres below the natural ground surface. Works by which the watertable is likely to be lowered more than 2 metres below the natural ground surface.
5	Works within 500 metres of adjacent Class 1, 2, 3 or 4 land that is below 5 metres Australian Height Datum and by which the watertable is likely to be lowered below 1 metre Australian Height Datum on adjacent Class 1, 2, 3 or 4 land.

- (3) *Development consent must not be granted under this clause for the carrying out of works unless an acid sulfate soils management plan has been prepared for the proposed works in accordance with the Acid Sulfate Soils Manual and has been provided to the consent authority.*
- (4) *Despite subclause (2), development consent is not required under this clause for the carrying out of works if:*
 - (a) *a preliminary assessment of the proposed works prepared in accordance with the Acid Sulfate Soils Manual indicates that an acid sulfate soils management plan is not required for the works, and*
 - (b) *the preliminary assessment has been provided to the consent authority and the consent authority has confirmed the assessment by notice in writing to the person proposing to carry out the works.*
- (5) *Despite subclause (2), development consent is not required under this clause for the carrying out of any of the following works by a public authority (including ancillary work such as excavation, construction of access ways or the supply of power):*
 - (a) *emergency work, being the repair or replacement of the works of the public authority, required to be carried out urgently because the works have been damaged, have ceased to function or pose a risk to the environment or to public health and safety,*
 - (b) *routine maintenance work, being the periodic inspection, cleaning, repair or replacement of the works of the public authority (other than work that involves the disturbance of more than 1 tonne of soil),*
 - (c) *minor work, being work that costs less than \$20,000 (other than drainage work).*
- (6) *Despite subclause (2), development consent is not required under this clause to carry out any works where both of the following criteria are met:*
 - (a) *the works involve the disturbance of less than 1 tonne of soil,*
 - (b) *the works are not likely to lower the watertable.*

This Clause is a pre-approval provision of the Canada Bay Local Environmental Plan 2008 and is also contained in the 2013 Comprehensive LEP. Compliance with this Clause is a statutory requirement before a consent authority can issue development consent for the proposal. This requirement was raised with the applicants and they have since submitted information to Council (dated 11 February 2013) outlining that Dr Michael Dunbavan of Coffey Environments Australia (Coffey) (NSW EPA accredited Site Auditor No. 0804) has been engaged to provide environmental auditing services during the planning and construction of the proposed school. The information submitted to Council states the following, inter alia:

Remediation Options and Footing Construction for the Site

The site has been used historically for landfilling of waste materials. WSP's draft Remedial Action Plan states that the depth of fill materials on the site varies between 1.3 metres and 3.6 metres. One remediation option is to remove fill material from the site for disposal to an appropriately licensed landfill. This extent of excavation is unlikely to result in substantial disturbance of acid sulfate soil. The likely method of foundation support for the buildings is driven piles founded on shale which will result in minimal movement of soil.

Given the above, the Auditor concludes that the likely extent of remediation works and subsequent footing construction is unlikely to cause substantial disturbance of acid sulfate soils on the site.

Acid Sulfate Soil Management

Because acid sulfate soils are confirmed to be present on the site, an Acid Sulfate Soil Management Plan is required. This Plan must be consistent with requirements in the NSW Acid Sulfate Soil Manual, published by the Acid Sulfate Soil Management Advisory Committee, August 1998.

This Manual includes Industry Guideline for Urban Development in Acid Sulfate Soil (copy attached). The Auditor acknowledges that NSW EPA has issued a more recent publication "Acid Sulfate Soil Remediation Guidelines for Coastal Floodplains in New South Wales (publication DECC 2007/321). The Auditor considers that these Remediation Guidelines are specific to coastal floodplains, typical of those in the Northern Rivers region of NSW, and do not apply to management of acid sulfate soils at the site.

While an Acid Sulfate Soils Management Plan has not been submitted with respect of the proposal, the information submitted above indicates that remediation work is not likely to cause substantial disturbance of acid sulfate soils. A condition has also been recommended, and agreed to by the applicant, relating to the management of Acid Sulfate Soils if they are encountered. If the JRPP is of the opinion that the above information satisfies the requirements for acid sulfate soils, the development application can be determined.

5.0 CONCLUSION:

On the 2nd of August, the subject site was rezoned to permit schools. The second concern of the JRPP related to the savings clause. The savings clause in the Canada Bay LEP 2013 is accompanied by a supplementary note that makes reference to the provisions of the EP&A Act. This note has been the subject of a chronological review by Council officers.

On the basis of the above chronology of events related to the public exhibition of the draft Canada Bay Local Environmental Plan 2013 and the public notification of Development Application No. 505/2012, if the JRPP is satisfied that Div 4B of Part 3 of the Environmental Planning and Assessment Act 1979 resolves the issues raised by Clause 1.8A of the Canada Bay LEP 2013, then the JRPP can determine Development Application No.505/2012.

6.0 RECOMMENDATION:

1. THAT the Joint Regional Planning Panel Sydney East Region accepts that the provisions of Division 4B of Part 3 of the Environmental Planning and Assessment Act 1979 has been satisfied for the purposes of the assessment of Development Application No. 505/2012 for a new school on Lot 2 DP 218758, 64 Victoria Avenue, Concord West and Part Lot 5 DP 778667, 66 Victoria Avenue, Concord West and Part Lot 118 DP 752023, 22A Conway Avenue, Concord West.
2. THAT pursuant to Section 80 of the Environmental Planning and Assessment Act 1979 (as amended), that the Joint Regional Planning Panel Sydney East Region, as the determining authority, grant development consent to Development Application No. 505/2012 for the demolition of existing structures, remediation of the land, and construction of a new primary school with a maximum of 600 students, childcare centre for 47 children, early childhood and health centre, 68 car parking spaces, associated facilities and landscaping and upgrade works to change rooms and sports field in Powells Creek Reserve on Lot 2 DP 218758, 64 Victoria Avenue, Concord West and Part Lot 5 DP 778667, 66 Victoria Avenue, Concord West and Part Lot 118 DP 752023, 22A Conway Avenue, Concord West, subject to the attached conditions.



Gary A Shiels
MANAGING DIRECTOR
GSA PLANNING
6 August 2013