



PACIFIC PLANNING

Pacific Planning

Property | Planning | Project Management

T 0437 521 110

E info@pacificplanning.com.au

ABN 88 610 562

STATEMENT OF ENVIRONMENTAL EFFECTS

Proposed Modification to Consent

Section 4.55(2)

DA 64/2007

Middleton Grange Town Centre

Prepared for Manta Group Pty Ltd

Submitted to Liverpool City Council
September 2018

Contact

This report has been prepared by:

Tim Stewart on behalf of

Pacific Planning Pty Ltd

PO Box 8
Caringbah
NSW 1495

M 0437 521 110
E info@pacificplanning.com.au
ABN: 88 610 562

All Rights Reserved. No material may be reproduced without prior permission of Pacific Planning Pty Ltd. Pacific Planning Pty Ltd while working on this project has tried to ensure the accuracy of the information in this publication, it accepts no responsibility or liability for any errors, omissions or resultant consequences including any loss or damages arising from reliance in the information in this publication.

Table of Contents

Contents

1.	Introduction	1
1.1	Preamble and Background	1
1.2	Context	2
1.3	Site Description	2
1.4	Description of the proposed modifications	3
2.	Planning Issues	5
2.1	Provisions of the Act and Regulations	5
2.2	Provisions of Relevant Environmental Planning Instruments – 4.15(1)(a)(i)	8
2.2.1	Legislative Provisions	8
2.2.2	Development on land intended to be acquired for a public purpose (Clause 5.1A)	9
2.2.3	Flood planning (Clause 7.8)	10
2.3	Provisions of Development Control Plans – s4.15 (1)(a)(iii):	10
2.4	Provisions of the Regulations – s4.15 (1)(a)(iv):	12
3.	Impact Assessment	13
3.1	Assessment of Likely Impact – s4.15 (1)(b):	13
3.2	Suitability of the Site – s4.15 (1)(c):	14
3.3	Variations to Conditions of Approval or Consent.	14
4.	Final Remarks	15
4.1	Required Statements	15
4.2	Concluding comments.....	15

LIST OF TABLES

TABLES	NAME	PAGE No.
Table 1	Court case examples	6

LIST OF FIGURES

FIGURE	NAME	PAGE No.
Figure 1:	Aerial photo of the site	2
Figure 2:	The approved road and services layout (as modified by DA 64/2007/A	3
Figure 3	The proposed road and services layout	4
Figure 4	Land Use Zoning Map	8
Figure 5	Land Reservation Acquisition Map	9

APPENDICES

APPENDICES	TITLE
Appendix 1	Modification Plans, prepared by J. Wyndham Price
Appendix 2	Site Survey, prepared by Vince Morgan Surveyors
Appendix 3	Existing consent, modification & Plans
Appendix 4	Flooding Report and Stormwater Letter, prepared by J. Wyndham Price
Appendix 5	Traffic Report, prepared by Traffix

1. Introduction

1.1 Preamble and Background

Consent was granted for development application DA 64/2007 on 5 October 2006 for the “*subdivision of existing lots into: eight (8) torrens title lots, four (4) public reserve lots, three (3) residue lots and associated roads and drainage works*”. Preliminary drainage works were carried out, activating this consent.

On 1 February 2008 a modification to DA 64/2007 was approved for the “*subdivision of existing lots into: seven (7) torrens title lots, four (4) public reserve lots, two (2) residue lots and associated roads and drainage works, intersection and pedestrian treatment and drainage works*”. Conditions 1.1 and 2 were modified to reflect the minor changes. Consents and plans are attached (Appendix 1).

Development Application DA 64/2007 and the modification DA 64/2007/A for Road and Drainage Construction are active. On 11 July 2008, a Construction Certificate (CC) for road and drainage works was issued by Council. The trunk drainage system design within the town centre included culverts appropriate to the 1% AEP event flood scenario. A portion of these works were completed in 2009.

Furthermore, on 16 August 2011 the NSW Office of Water gave approval for an enclosed drainage channel directing the flow of Southern Creek through the site for the subdivision and construction of roads on previous Lot 100, 101 and 102 Seventeenth Avenue, Middleton Grange. This enclosed drain over the site was noted by the NSW Office of Water as an acceptable solution in the context.

Development Application (DA 74/2015) was approved by Council on 1 April 2015 for the super lot subdivision of the site into eight (8) lots. The proposal involved the subdivision only. No physical works were proposed as part of this application. A subdivision certificate has been issued by the Land & Property Information Service. This subdivision establishes a lot width of 36m for Lots 2 and 3 (on the eastern part of the site), a width of 88m for Lots 4 and 5 (in the middle of the site), a width of 35.47m for Lots 7 and 8 (lots adjoining Middleton Grange public school to the west) and 50.02m for Lot 6. These dimensions allow sufficient room to achieve a transitional building form within the site as well as to adjoining land.

The 2015 consent was activated when the subdivision was registered. This subdivision remains the active plan for the site and no change is proposed to this layout.

This proposed modification seeks to modify DA 64/2007 by realigning the road layout and drainage works. Any further required adjustments to the subdivision layout that may be required will be done in the future.

Pursuant to Section 4.55(3), this report also considers relevant matters listed in Section 4.15(1) that are relevant to this application. In reviewing the approved plans and sub consultant’s reports, the proposed modification will result in substantially the same development as that which was approved.

The proposed changes can be assessed pursuant to Section 4.55(2) of the *Environmental Planning & Assessment (EP&A) Act 1979* on the basis of the justification outlined in Section 2.1 which provides that the proposal remains substantially the same as that which is approved.

1.2 Context

The context underpinning this application relates to the usual design resolution that takes place in a development of this nature given the site works, shape and masterplan resolution.

1.3 Site Description

The site currently comprises eight (8) lots and is legally described as:

- Lots 2, 3, 4, 5, and 6 in DP 1207518;
- Lot 1 in DP 1078564;
- Lot 12 in DP 1108343; and
- Lot 102 in DP 1128111

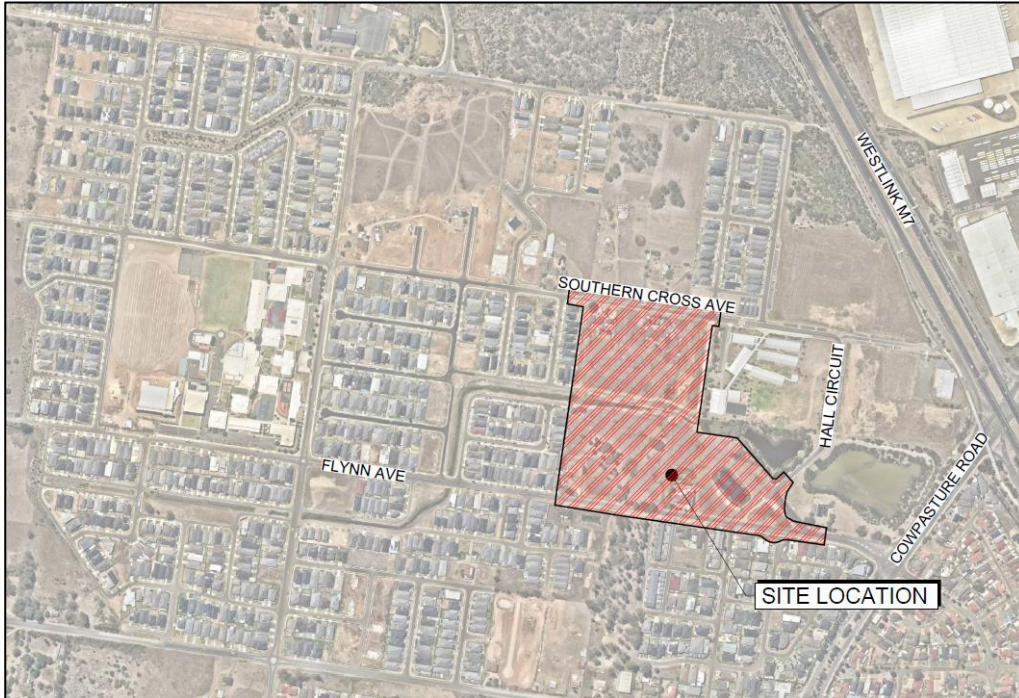


Figure 1: Aerial photo of the site

A site survey is attached at Appendix 2.

1.4 Description of the proposed modifications

The approved layout is shown below and the proposed layout follows:

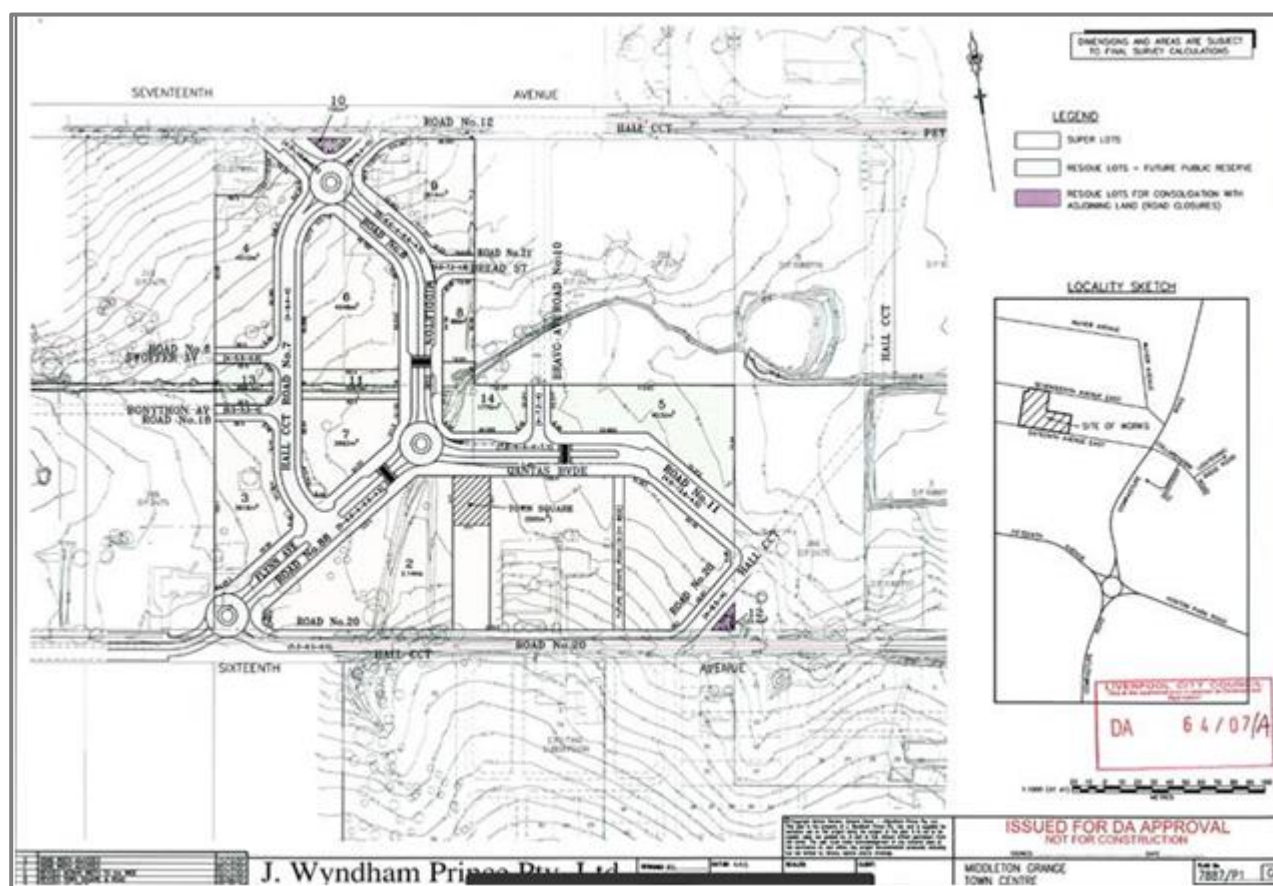


Figure 2: The approved road and services layout (as modified by DA 64/2007/A).

The attached plans provide details of the road designs and earthworks. The intersections illustrate a swept path analysis to demonstrate the appropriateness of the widths and profiles. Road sections are also provided as well as detailed drainage plans.

The changes are summarised as follows:

- The addition of one additional intersection at the southern end of the site onto Flynn Avenue.
- A widening of the two intersections at the northern boundary with Southern Cross Avenue.
- A realignment of the internal roads to straighten them out in order to remove the cross-over points and internal roundabouts.
- A minor reconfiguration to the intersection of Hall Circuit and Flynn Avenue and its connection with Qantas Blvd.
- The redesign of Rene Avenue to create a one-way east-west vehicular link.
- The creation of Bravo Ave along the eastern boundary of the site adjacent to Middleton Grange Public School.

- Reconfiguration of open space and pedestrian linkages to align with the road design.
- Change the truck drainage element from a channel to a box culvert. Specifically, it includes three (3) 3600mm x 1200mm reinforced concrete box culverts with a grade of 0.5-1%. (Separate correspondence dated 16 May 2018 has been submitted to Council about this in support of compliance with Council's preferred design criteria.)

Figure 3 below illustrates the proposed new road layout (from plans at Appendix 1).



Figure 3: The proposed road and services layout.

It is requested that Condition 1.1 and 2 be amended to reference the updated plans.

2. Planning Issues

2.1 Provisions of the Act and Regulations

Section 4.55(2) of the Environmental Planning & Assessment Act 1979 states:

- (2) *Other modifications. A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:*
- (a) *it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all),*
 - (d) *it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be*

Clause 115 of the Environmental Planning and Assessment Regulation 2000 establishes several requirements relevant to this application (not all clauses included below):

- (1) *An application for modification of a development consent under section 4.55 (1), (1A) or (2) or 4.56 (1) of the Act must contain the following information:*
- (d) *a description of the proposed modification to the development consent,*
 - (e) *a statement that indicates either:*
 - (i) *that the modification is merely intended to correct a minor error, misdescription or miscalculation, or*
 - (ii) *that the modification is intended to have some other effect, as specified in the statement,*
 - (f) *a description of the expected impacts of the modification,*
 - (g) *an undertaking to the effect that the development (as to be modified) will remain substantially the same as the development that was originally approved,*

Section 4.55(2) is the appropriate vehicle to be used in this instance. This application is substantially the same development as that which was approved. The justification for this assessment is set out below.

The Court consistently describes the section 96 (now 4.55) modification provision as “*beneficial and facultative*”. It is designed to assist the modification process rather than to act as an impediment to it. “*It is to be construed and applied in a way that is favourable to those who seek to benefit from the provision*” (see *North Sydney Council v Michael Standley & Associates Pty Limited* [1998]). Councils must, therefore, be very cautious in demanding that a full DA be lodged, as the modification power is there for a reason, namely, to avoid the full DA process that is always otherwise available. This is supported by the findings of Vacik (endorsed in *Michael Standley* at 440 and *Moto Projects (No. 2) Pty Ltd. V North Sydney Council* [1999] NSWLEC 280; (1999) 106 LGERA 298 at [30]) where “*substantially*” means “*essentially or materially having the same essence*”.

Further, the proposal does not “*radically transform*” the site as set out in *Sydney City Council v Ilene Pty Ltd [1984]*. This Court finding supports the broad use of Section 4.55 with the use of such wording, leaving much scope for it to be used.

There are several Court cases where quite significant modifications were able to be dealt with using a DA modification because the Court ruled that they passed the “substantially the same” test. These cases are summarised below:

Case	Summary of changes to the buildings
<i>Bassett and Jones Architects Pty Limited v Waverley Council (No 2) [2005]</i>	One additional level from 3 storeys to 4 storeys, representing a 28% increase in total height and a 20% increase in floor area, where both exceeded the applicable council controls. This application was ultimately refused on the basis of privacy impacts, but it did pass the “substantially the same” test.
<i>Davi Developments Pty Ltd v Leichhardt Council [2007]</i>	Removal of one level, a total revision of unit mix from 42 dwellings to 30 dwellings and an “entirely different” basement design.
<i>Bathla Investments Pty Limited v Blacktown City Council [2008]</i>	Eight townhouses presenting as four, single-storey buildings, where some were attached. Application sought to change some of the townhouses to two storeys, separate the dwellings and made changes to the garage designs and parking layout. The Court noted that there were “ <i>numerous differences</i> ” between the schemes, however, the townhouse development presented as materially and essentially the same development.
<i>Marana Developments Pty Limited v Botany City Council [2011]</i>	The original approval was for the construction of five residential flat buildings (with basement car parking) comprising a total of 76 units. The modification application sought ‘significant changes to the external appearance and layout of the buildings’ including an increase in unit numbers from 76 up to 102, and an additional level of basement car parking. This also involved changing the unit mix. Despite significant internal changes, the minimal change to the external floorplates and layout was of great significance and the “substantially the same” test was satisfied.

Table 1: Court case examples

In the decision of *Gann v Sutherland Shire Council [2008]* Justice Lloyd dealt with a Section 96 modification to increase the building’s bulk that would also breach the applicable development standards. In confirming that a SEPP 1 variation was not required, the Court noted:

“This does not mean that development standards count for nothing. Section 96(3) still requires the consent authority to take into consideration the matters referred to in s 79C, which in turn include the provision of any environmental planning instrument. That is, any development standard in an environmental planning instrument must be taken into consideration by the consent authority, but the absolute prohibition against the carrying out of development otherwise than in accordance with the instrument in s 76A(1) does not apply.”

All relevant Court judgments say that Section 4.55 is a 'free-standing provision'. It is Section 4.55 itself which authorises the development to be approved notwithstanding any breach of development standards. Section 4.55 is a broad power to approve, subject to its own stand-alone tests (such as the "substantially the same" test, and a requirement to consider all relevant s.4.15 matters). This means that strict numerical compliance with any standard must not be enforced simply for the sake of compliance. It does however, require proper consideration of the standard's objectives and all ensuing impacts to ensure they are acceptable in the context. An application can only be refused on the basis that the impact is unacceptable or it compromises the objectives of the standard.

Modifications can be determined under Section 4.55(1A) or (2). A modification pursuant Section 4.55(1A) is to be of "minor" impact. Minor is a subjective judgment however can be construed as meaning negligible or insignificant. The Court has determined that it has nothing to do with the extent of changes but relates to extent of impact. In comparison, Section 4.55(2) is reserved for "Other Modifications" which, by inference, can have a level of impact beyond what is deemed to be "minimal".

Comment:

An examination of both plans indicate that some change will result to the street intersections and the location of through-site linkages. This will have the effect of redirecting some traffic flows and creating one additional intersection on Flynn Avenue. In this regard, this modification is appropriately lodged pursuant to Section 96(2).

An assessment of the proposed modification against the approval illuminates the following:

- There are no breaches in any planning control for the site.
- The site design of major north-south linkages remains the same however the roads have effectively been straightened to remove internal cross-overs and create more logical blocks.
- The general structure plan and east-west connections remain essentially the same.
- This modification represents a logical transition of internal roads.

Given the weight of legal examination around satisfying the "substantially the same" test, I confirm that this application "essentially or materially has the same essence" as the layout that is approved. On this basis it is "substantially the same" development as was approved and is able to be considered by Council pursuant to Section 4.55(2). In general terms, the site is being activated with new roads in a similar way to what is approved. The modification process still requires the impacts of this to be assessed. There is no reason that Council needs to receive a DA in order to process this amended design.

2.2 Provisions of Relevant Environmental Planning Instruments – 4.15(1)(a)(i)

The relevant provisions are within Liverpool Local Environmental Plan 2008.

2.2.1 Legislative Provisions

The site is zoned part B2 Local Centre, part R1 General Residential and part RE1 Public Recreation under Liverpool Local Environmental Plan 2008 (LEP 2008) as shown in the Figure below:



Figure 4: Land Use Zoning Map

The proposed uses and modifications are permissible within the site. The B2 zone objectives are supported by the modified plans:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To allow for residential and other accommodation while maintaining active retail, business or other non-residential uses at street level.
- To facilitate a high standard of urban design and a unique character that contributes to achieving a sense of place for the local community.

The R1 zone objectives are also supported by the modified plans which create a more efficient layout and traffic flow throughout the overall site:

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To ensure that housing densities are broadly concentrated in locations accessible to public transport, employment, services and facilities.
- To facilitate development of social and community infrastructure to meet the needs of future residents.

2.2.2 Development on land intended to be acquired for a public purpose (Clause 5.1A)

The site does have a portion of Recreation land as shown in the map below:

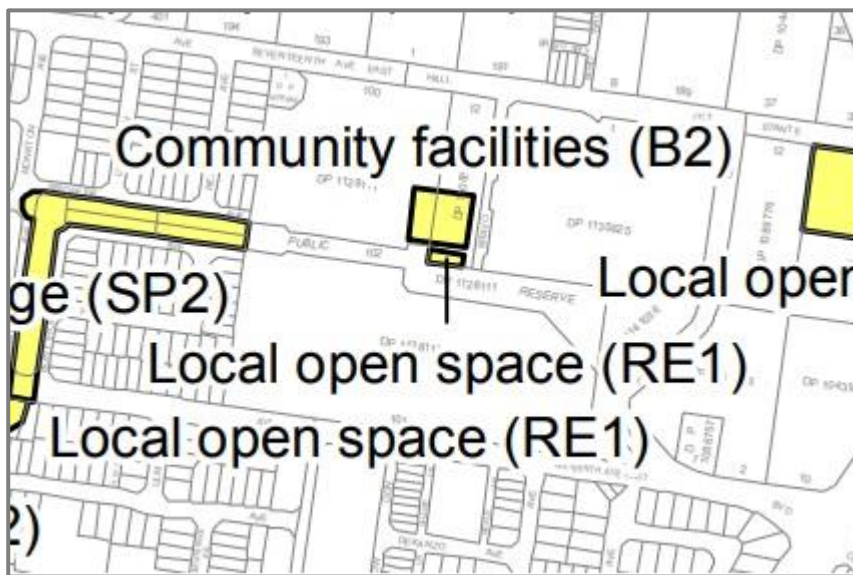


Figure 5: Land Reservation Acquisition Map

Clause 5.1B provides for:

- (2) *This clause applies to land shown on the Land Reservation Acquisition Map and specified in Column 1 of the Table to this clause and that has not been acquired by the authority of the State specified opposite that land in Column 2 of the Table.*
- (3) *Development consent must not be granted to any development on land to which this clause applies other than development for a purpose specified opposite that land in Column 3 of the Table to this clause.*

Within the site are two parcels of land which are:

- Zone RE1 Public Recreation and marked “Local open space”
- Zone B2 Local Centre and marked “Community facilities”

The proposed road and infrastructure runs around the edge of the nominated areas. Earthworks are permissible in both areas having regard to the requirements in the Table to Clause 5.1B (3). No roads are proposed within these areas, but rather they adjoin them as appropriate to the overall structure plan.

2.2.3 Flood planning (Clause 7.8)

The site is affected by flooding. The proposed works will generally have no new impact on flooding, however earthworks are required as part of the development and these modified works have been assessed in the appropriate reports (attached).

The proposed modification represents no new danger and does not add to the flood hazard of the land. It will not affect flood behaviour. The amended drainage system has been designed in order to deal with flood water in the most effective way.

2.3 Provisions of Development Control Plans – s4.15 (1)(a)(iii):

Liverpool Development Control Plan 2008 Part 2.5 Middleton Grange, applies to the site.

Section 2.1 Street Network

1. The subdivision of land, design and layout of streets shall be in accordance with Figures 2 – 3
2. All streets shall be designed and constructed in accordance with Figures 2, 3 and 4.
3. All intersections shall be designed in accordance with the RTA Austroads Road Design Guide and the specifications set out in the Transport and Traffic Assessment (see Background Reports to the Master Plan).

This has been well discussed with Council. The proposed roads do not exactly align with the masterplan (DCP Figure 2) however they do promote appropriate through-site links.

Section 2.3 Streetscape and Street Trees

Street trees are shown on the plans and dimensions on the verge widths and landscape widths are all clearly shown on the sections. No street furniture is proposed at this stage.

Section 2.5 Stormwater Management

Controls:

1. Where any construction within the floodplain, adjacent to a watercourse, drainage depression or an enclosed drainage system is proposed, the DA shall be accompanied by a full hydrologic and hydraulic assessment to allow a determination of the risk and impact by, and on, the development proposal by flooding. The assessment shall include:
 - Analysis of the impact of the development on flood storage capacity, flood conveyance, flood levels, and flow velocities.
 - Identification of the flood risk to both people and property as a result of the development.
 - External and internal catchment hydrology for rainfall events up to the probable maximum flood (PMF), including the 1% Annual Exceedence Probability (AEP) design storm.
 - Predicted extents of flood inundation.
 - Depths and velocities of predicted flood flows to allow effective hazard categorisation.
2. The development shall have no adverse impact on the existing flood regime in the surrounding areas and shall demonstrate the operation of any proposed flood mitigation measures.

Other controls not listed here.

The flood reports and infrastructure designs have been designed in compliance with these controls. They are attached with the plans. Culverts have been designed in accordance with the appropriate Stormwater Strategy.

The supplementary flood assessment letter concludes that the adjustments to the previous design will ensure:

- The culvert will have a lower probability of blockages over the long term.
- Better access and maintenance opportunities for the Council by providing a larger dimension for the culvert.

Furthermore, the amended design provides an overland flow path through Rene Avenue to ensure that during large storm events where the culvert is 100% blocked, overland flows are directed down a public road safely in order to reduce the potential flood impact in the adjoining development.

Supporting flooding reports and documentation is included at Appendix 4.

Section 4.2 Site Planning

No buildings are proposed as part of this work, however it is important to ensure that the roads and drainage infrastructure allow for this objective to be achieved.

- a) *To ensure that the development is compatible with amenity to nearby residential areas and open space.*

- b) To ensure that the development is compatible with the adjoining business development.*
- c) To ensure that the development reflects the character of the locality and environment.*
- d) To ensure that the development contributes to the public domain and attractiveness of the centre for its users;*

The proposed modification to the road design allows for this objective to be achieved in terms of compatibility with adjoining residential lands and proposed open space lands. It will enable appropriate blocks that allow for business uses in the appropriately zoned area. This is in line with the desired future character of the locality.

2.4 Provisions of the Regulations – s4.15 (1)(a)(iv):

There are no provisions in the Regulations which are impacted by this proposed modification.

3. Impact Assessment

3.1 Assessment of Likely Impact – s4.15 (1)(b):

Guidelines for assessing s4.55 modifications state that council must:

- consider the impacts of the original development as if they were occurring at the time the modification application is determined.
- compare the likely impacts of the proposed modified development, including the environmental, social and economic impacts, with the impacts of the original development.

Since the original approval, there have been no major changes to the natural or built environment around the site that warrant consideration as part of this proposed modification. Much of the assessment has already taken place with the original approval. This modification is resolving the location of the roads and infrastructure.

When examining any modification, it is demonstrated that:

- the proposed modification will have no significant visual impact,
- the modification will result in a more logical layout while still ensuring through site connections and open space.

Access and traffic:

The modification will widen the two existing approved intersections at the north of the site and add one new intersection to the south on Flynn Avenue. The resulting change to internal traffic flows will reduce loads on the one approved intersection and create more direct traffic flows.

A plan for traffic management within the site has been provided which shows signage, directional flows and carriageway dimensions. An associated report (Appendix 5) assessed traffic generation and carriageway cross-section compliance. The report concluded:

“The internal road cross sections are compliant with the Middleton Grange DCP and provide three different road typologies based on their role in the hierarchy”. “It is therefore concluded that the proposed internal road network is supportable on traffic planning grounds and will operate satisfactorily.”

Public domain and overshadowing:

The public domain is essentially unaffected by the modification. Indeed, the modification promotes a more logical lot pattern which will allow for an improved urban form in the future.

No buildings or elevated structures are proposed as part of this modification.

Economic impact, social impact, privacy:

There are no external impact on these matters.

Utilities; Other land resources; Water; Soils, Natural Environment etc.:

Utility services are to be relocated within the realigned road reserves. This can have a minor impact however the net impact of hard surface area is negligible.

The proposed changes have no negative impacts on soil or water. A plan is provided showing where the site is stabilised for access and where disturbance is proposed. This impact is negligible on adjoining lands provided the appropriate measures are implemented. A Soil and Water Management Plan is included in the set of Plans.

New stormwater channels are proposed as per the attached plans and these respond to Council's preferred solutions for the site. The culverts run in an east-west direction within the Rene Ave reserve (proposed). An accompanying letter addressing Flooding and Stormwater is at Appendix 4.

SEPP 55 applies to consent for development and this application seeks to modify a consent. This matter has been assessed already.

The realignment of roads may slightly change which trees on site need to be removed, as approved by the existing consent and stamped plans.

3.2 Suitability of the Site – s4.15 (1)(c):

The suitability of the site has already been assessed.

3.3 Variations to Conditions of Approval or Consent.

Condition 1.1 and 2 must be reworded to reflect the updated plans and reports.

4. Final Remarks

4.1 Required Statements

In accordance with Clause 115(1)(g) of the Regulation, the following statements are provided:

1. This Section 4.55(2) modification aims to modify the internal road layout and external intersections for the site and relocate associated infrastructure.
2. This modification will result in substantially the same development that was originally approved, as demonstrated by the legal precedent and clarity provided in the noted cases.
3. This modification will have no unacceptable environmental impact on the site and its surrounds.

4.2 Concluding comments

The resolution of an agreed masterplan has been undertaken with Council. This has aimed to find a balance between the broader masterplan for the site and the most efficient internal layout for orderly development.

The through site linkages are generally the same although road alignments aim to remove angled and curved roads within the site. Significant work has been done to refine stormwater and traffic within the site while supporting the overall masterplan for the area. This has been achieved.

Significant legal opinion has been presented to justify the assertion that the proposal remains substantially the same as what is approved. Council is still able to determine the merits of the proposal and any impacts under this process.

There are no reasons to not approve this modification as requested.

Tim Stewart

Town Planner

