

Report to Sydney Central City Planning Panel

SCCPP reference	PPSSCC-481
DA No.	DA/875/2017/B PAN-248718
Date of receipt	20 October 2022
Proposal	Section 4.55(2) modification to amend DA/875/2017/A for the proposed infrastructure works on the site and concept GFA allocation
Street address	7-9 Burroway Road – Wentworth Point
Property Description	Lot 1 and Lot 2 in DP1276305
Applicant	Anna Johnston – File Planning & Development Services Pty Ltd
Owner	Minister For Education And Early Learning Transport For NSW
Submissions	Two (2) submissions
Recommendation	Refusal
Regional Development Criteria	N/A The application is being referred to the regional panel under Section 4.33 of the EP&A Act (Determination of Crown development applications) as the recommendation of the consent authority is for refusal of the application.
List of All Relevant s4.15(1)(a) Matters	The application fails to pass the jurisdictional threshold as to whether it is substantially the same development. Assessment under Section 4.15 of the EPA Act is not required.
List all documents submitted with this report for the Panel's consideration	Refer to submitted documents by the applicant on the planning portal. No other additional documentation submitted with this report.
Report prepared By	Kate Lafferty (Executive Planner – City Significant Development)
Report Date	1 August 2023

Summary of Sec 4.15 matters

Have all recommendations in relation to relevant s4.15 matters been summarised in the Executive Summary of the assessment report? **N/A**

Legislative clauses requiring consent authority satisfaction

Have relevant clauses in all applicable environmental planning instruments where the consent authority must be satisfied about a particular matter been listed, and relevant recommendations summarized, in the Executive Summary of the assessment report?
e.g. Clause 7 of SEPP 55 - Remediation of Land, Clause 4.6(4) of the relevant LEP **Yes**

Clause 4.6 Exceptions to development standards

If a written request for a contravention to a development standard (clause 4.6 of the LEP) has been received, has it been attached to the assessment report? **Not Applicable**

Special Infrastructure Contributions

Does the DA require Special Infrastructure Contributions conditions (Sec 7.24)?
Note: Certain DAs in the Western Sydney Growth Areas Special Contributions Area may require specific Special Infrastructure Contributions (SIC) conditions **Not Applicable**

Conditions

Have draft conditions been provided to the applicant for comment?
Note: in order to reduce delays in determinations, the Panel prefer that draft conditions, notwithstanding Council's recommendation, be provided to the applicant to enable any comments to be considered as part of the assessment report **No - Recommended for Refusal**

ASSESSMENT REPORT – SECTION 4.55 MODIFICATION

Environmental Planning & Assessment Act 1979

SUMMARY

Application details

DA No:	DA/875/2017/B
Assessment officer:	Kate Lafferty
Property:	7-9 Burroway Road – Wentworth Point Lot 1 and Lot 2 in DP1276305
Proposal:	Section 4.55(2) modification to amend DA/40/2015 as modified by DA/875/2017/A for the proposed infrastructure works on the site and concept GFA allocation. The proposed modifications include the changes to the location and design of Ridge Road and the modified design of the proposed park (including the provision of active open space).
Date of receipt:	20 October 2022
Applicant:	Anna Johnston File Planning & Development Services Pty Ltd
Owner:	Minister For Education And Early Learning Transport For NSW
Submissions received:	2 submissions
Is the property owned by a Council employee or Councillor:	No
Political donations disclosed:	No
Council application:	No
Crown application:	Yes
Issues:	<p>The application seeks modification of the consent granted as DA-40/2015 as modified by DA DA/875/2017/A</p> <ul style="list-style-type: none">• The application is not substantially the same development and therefore cannot be approved as a Section 4.55 application.• The application seeks surrender of part of DA-40/2015 (being the surrender of the GFA distribution). If that consent is surrendered then it cannot be modified. Although the

applicant has referred to the “surrender” of the GFA distribution, Council officers have interpreted this to refer to the removal of that component from the consent.

- The application is inconsistent with the lot layout, title arrangements and covenants put in place under DA 273/2014 and so seeks to frustrate the delivery of the public infrastructure required as part of that consent notwithstanding that the development the subject of that consent was carried out.
- The application is inconsistent with the applicable Wentworth Point DCP.

Recommendation:

Refusal

Legislative requirements

Zoning:

RE1 Public Recreation
E1 Local Centre
R4 High Density Residential

Permissible under:

Parramatta Local Environmental Plan 2023

Relevant legislation/policies:

Wentworth Point Precinct DCP 2014

Variations:

Numerous variations to the Wentworth Point Precinct DCP 2014 – see report details

Integrated development:

No
The integrated development provisions of the EPA Act do not apply to development applications made by, or on behalf of the Crown, in accordance with Section 4.44(2) of the EPA Act.

Crown development:

Yes – Transport for NSW & Minister For Education And Early Learning

Designated development:

No

The site

Site Area:

76,281m² (entire site)

Easements/rights of way:

Various easements and restrictions on the land – see details in report

Heritage item:

No

In the vicinity of a heritage item:

No

Site History:

See Background section below

SITE & SURROUNDS

The subject site relevant to this application relates to an area located on the peninsula at Wentworth Point. The site has an area of 76,281m². The subject site is part of the identified Maritime Precinct within the Wentworth Point Urban Activation Precinct (rezoned by DPI on 4 July 2014).

The subject site adjoins Parramatta River to the north, Homebush Bay to the east, Wentworth Point Primary School to the west and vacant industrial (future mixed use development) opposite to the south along Burroway Road. The site was previously used for industrial purposes however has been vacant for a number of years. The site is largely disturbed, however, contains a saltmarsh community on the tip of the peninsula.

The following aerial photo indicates the location of the subject site and its relationship to adjoining properties.



Locality Map - subject site outlined in red
(Source: Nearmaps dated 16.03.2023)

The site was formerly part of a larger development site that pursuant to DA – 273/2014 was previously subdivided into 4 lots, being the following:


Lot 201	Wentworth Point Public School
Lot 202	Site of future peninsula park to be dedicated to Council
Lot 203	Site of future mixed use development
Lot 204	Site for the future dry boat store and maritime car parking.

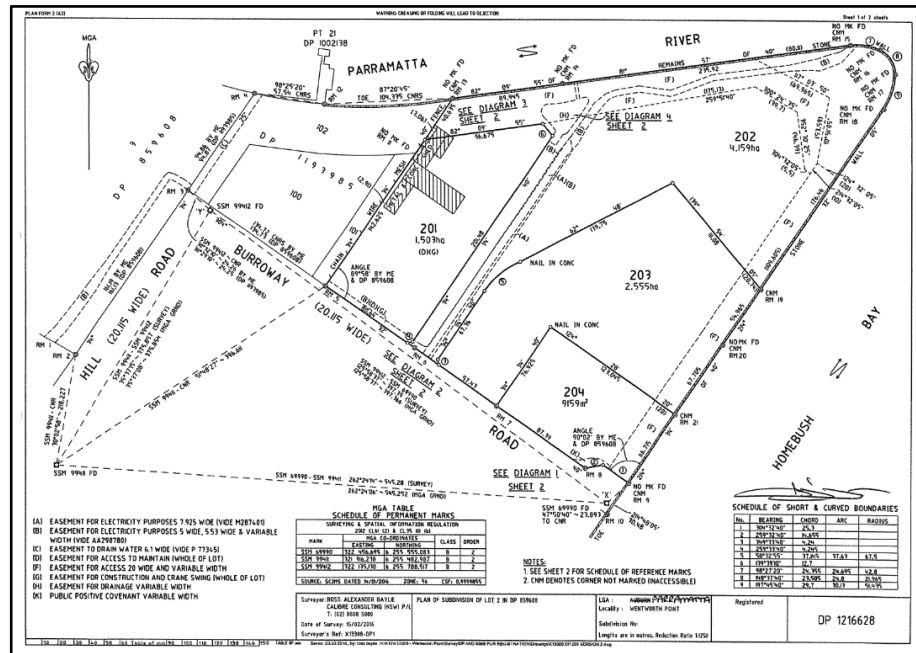
The following plan shows the subdivision pursuant to DA-273/2014.

Work has commenced on site under the existing infrastructure works approval DA/875/2017/A (the subject of this application) and part of the site is under construction for the recently approved high school (SOPHS, approved as a State Significant Development). There are also numerous demountable construction buildings located on the site.

BACKGROUND

The table below indicates the relevant development background for this application.

DA Number	Details										
DA-273/2014 (Auburn Reference) “subdivision approval”	<p>Approval for the subdivision of 1 lot into 4 Torrens Title allotments was granted under the former Auburn Council and notice of determination issued on 27 November 2015. The approved subdivision plan is indicated below.</p>  <p style="text-align: center;">Stamped Approved Subdivision Plan</p> <p>The lots created reflected the intended use of the site as follows:</p> <table border="1"> <thead> <tr> <th>Lot</th><th>Development Purpose</th></tr> </thead> <tbody> <tr> <td>Lot 201</td><td>Wentworth Point Public School</td></tr> <tr> <td>Lot 202</td><td>Peninsula Park</td></tr> <tr> <td>Lot 203</td><td>TfNSW owned redevelopment lot (vacant)</td></tr> <tr> <td>Lot 204</td><td>TfNSW owned lot – approved for a dry dock (DA/644/2017 approved by the regional planning panel on 6 June 2018)</td></tr> </tbody> </table> <p>The application was amended on 3 March 2016 via DA-273/2014/A including changes to Conditions 7, 8 and 9.</p> <p>The subdivision approval contains requirements for the delivery of a park, community facility and cul-de-sac in Burroway Road. These conditions are discussed further within the report.</p> <p>The subdivision plan was registered on 19 July 2016 (SC/100/2016).</p>	Lot	Development Purpose	Lot 201	Wentworth Point Public School	Lot 202	Peninsula Park	Lot 203	TfNSW owned redevelopment lot (vacant)	Lot 204	TfNSW owned lot – approved for a dry dock (DA/644/2017 approved by the regional planning panel on 6 June 2018)
Lot	Development Purpose										
Lot 201	Wentworth Point Public School										
Lot 202	Peninsula Park										
Lot 203	TfNSW owned redevelopment lot (vacant)										
Lot 204	TfNSW owned lot – approved for a dry dock (DA/644/2017 approved by the regional planning panel on 6 June 2018)										



Registered subdivision plan

Amongst other matters, restrictions/covenants were placed on the title with respect to the delivery of the park, Burroway Road cul-de-sac and community facility.

DA-40/2015
(Auburn
Reference)

“infrastructure
approval”

An application for a staged development proposal for distribution of gross floor area across lots 203 to 204 including demolition of existing buildings, tree removal, earthworks, site remediation, construction of roads, sea wall and public domain works and further subdivisions to create roads.

Approved by the Sydney West Joint Regional Planning Panel on 17 February 2016.



Extract from Approved Landscape Plans

The design details of this application corresponded to the boundaries of the aforementioned subdivision approval.

Council Amalgamation on 12 May 2016. The subject site (formerly under Auburn LGA) now falls under the City of Parramatta Council LGA.	
DA/875/2017 (City of Parramatta Reference)	Section 4.55(1A) modification of DA-40/2015 (Auburn Reference) to amend the approved sea wall design. Approved by the Sydney Central Planning Panel on 30 April 2018.
DA/875/2017/A (City of Parramatta Reference)	Section 4.55(1A) modification to the approved infrastructure works on the site (DA-40/2015 – Auburn Reference). The proposed modifications include changes to the park and road design and the staging of the remediation works. Approved under delegation on 19 November 2020.

Following the above approvals, a number of key planning processes have been undertaken on the site and are discussed below.

Obligation to deliver the Park and Community Facility

DA-273/2014 was granted in November 2015 for the subdivision of land including the site. That subdivision being the development permitted by that consent was carried out as described above.

DA-273/2014 as amended by DA-273/2014/A included conditions requiring dedication of Peninsula Park and the registration of covenants over the land to comprise Peninsula Park.

Condition 7 provides for the construction and dedication of Peninsula Park:

The developer of Lot 203 is responsible for the construction, completion and subsequent dedication to Council of the Peninsula Park identified as Lot 202 on the approved plan of subdivision. In this regard,

- a) The Peninsula Park shall be constructed and completed in accordance with any relevant civil and infrastructure works development consent,
- b) The Peninsula Park shall be constructed to Practical Completion Stage prior to the issue of any residential Occupation Certificate that would authorise the occupancy of more than three hundred and fifty (350) residential units within Lot 203. That is, no more than a cumulative total of 350 residential units are permitted to be occupied throughout Lot 203 prior to the construction and Practical Completion of the Peninsula Park.
- c) The Peninsula Park land area (Lot 202) will be dedicated to Council upon the developer successfully fulfilling its obligations under the twelve (12) month Defect Liability period following Practical Completion, or at any other time as agreed with Council or at any time as agreed with Council.

A restriction under the Conveyancing Act shall be registered on the title of Lot 203 reflecting the (sic) all of the above requirements including the restriction on the issue of residential Occupation Certificates. The proposed wording of the restriction shall be to the satisfaction

of Council and shall be submitted to Council for approval with the subdivision certificate application.

For the purpose of this condition Practical Completion is defined as the works for the Peninsula Park being complete except for minor defects and omissions that do not prevent the park from being reasonably capable of being used for its intended purpose.

Note: Auburn City Council acknowledges that the requirement to register a restriction/covenant as prescribed by this condition, may be varied or extinguished, subject to Council's written consent, should Council enter into a section 93F Planning Agreement with the developer of Lot 203 for the delivery of a Peninsula Park within Lot 202.

Reason:- to ensure that the Peninsula Park is provided to meet the needs of the future communities of the Wentworth Point locality and to ensure the development occurs in accordance with the Wentworth Point Development Control Plan.

Condition 9 provides for the construction and dedication of a community facility:

With respect to the Community Facility referred to in Section 2.0 of the Wentworth Point Precinct Development Control Plan 2014:

- a) *The developer of Lot 203 is required to construct a Community Facility together with ten (10) associated car parking spaces, within Lot 203, in conjunction with the development of Lot 203.*
- b) *The design of the Community Facility and associated car parking shall be to the satisfaction of Council and shall be incorporated in any future development application submitted for Lot 203,*
- c) *The Community Facility building shall have a floor space of not less than one thousand square metres (1,000sqm) (exclusive of the associated car parking), being a cold shell with capped services, capable of being fitted out by Council as a multi-purpose community centre,*
- d) *The Practical Completion of the Community Facility and associated car parking shall occur prior to the issue of the Occupation Certificate for the 400th dwelling unit for any development within Lot 203, or at any time as agreed with Council.*
- e) *Upon Practical Completion of the Community Facility, the developer shall dedicate the 1,000 sqm cold shell space and 10 car spaces to Council in stratum,*

A restriction under the Conveyancing Act shall be registered on the title of Lot 203 reflecting the all of the above requirements including the restriction on the issue of residential Occupation Certificates. The proposed wording of the restriction shall be to the satisfaction of Council and shall be submitted to Council for approval with the subdivision certificate application.

For the purpose of this condition, Practical Completion is defined as the works for the Community Facility being complete except for minor defects and omissions that do not prevent the Community Facility from being reasonably capable of being used for its intended purpose.

Note: Auburn City Council acknowledges that the requirement to register a restriction/covenant as prescribed by this condition, may be varied or extinguished, subject to Council's written consent, should Council enter into a section 93F Planning Agreement with the developer of Lot 203 for the delivery of a Community Facility within Lot 203.

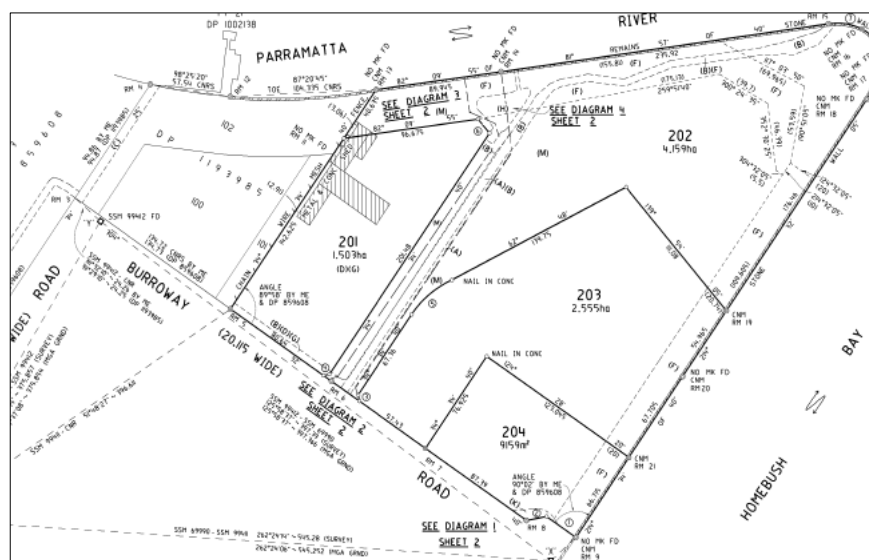
Reason:- to ensure the provision of a Community Facility as part of the redevelopment of Wentworth Point as required by the Wentworth Point Precinct Development Control Plan 2014.

These conditions were complied with in carrying out the approved development being the subdivision of the land.

Registered Covenants

The following paragraphs set out important information about covenants registered over lots 202 and 203 that benefit Council and require the embellishment and dedication of a park and community facility.

DP 1216628 was registered on 19 July 2016 and shows the lots created as follows:



Upon registration of the plan of subdivision approved under the 2015 Subdivision Consent, instruments setting out easements, covenants and restrictions were registered. The covenants and restrictions included:

Number of Item shown in the intention panel on the plan	Identity of easement, profit a prendre, restriction or positive covenant to be created and referred to in the plan	Burdened lot(s) or parcel(s)	Benefitted lot(s) road(s), bodies or Prescribed Authority
7	Restriction on the Use of Land (whole of Lot)	203	City of Parramatta Council
8	Public Positive Covenant (whole of Lot)	202	City of Parramatta Council
9	Public Positive Covenant (Whole of Lot)	203	City of Parramatta Council
10	Public Positive Variable Width(K) Covenant	Part 204 Designated K	City of Parramatta Council.

Restriction 7 provides:

- (a) No more than a cumulative total of 350 residential units are permitted to be Occupied upon the Burdened Lot prior to Practical Completion. The Owner cannot apply for more than 350 residential Occupational Certificates prior to Practical Completion.

Covenant 8 provides:

- (a) The Grantor must use reasonable endeavours to construct the Peninsula Park on the Burdened Lot.
 - (b) The Grantor must construct the Peninsula Park in accordance with the Development Consent.
 - (c) The Grantor must notify the Prescribed Authority when Practical Completion has been reached.
 - (d) The Grantor will dedicate the Burdened Lot to the Prescribed Authority upon the expiry of the Defect Liability Period, or at any other time as agreed between the Grantor and the Prescribed Authority and obtain acknowledgement of the Council.
 - (e) This public positive covenant expires on the date at the Burdened Lot is dedicated to the Prescribed Authority as contemplated under clause 9(d) and the Grantor and the Grantee must upon expiry take all reasonable steps to remove this public positive covenant from the title to the Burdened Lot as soon as practicable, including but not limited to preparing and executing all necessary documents and producing the relevant certificates of titles at Land & Property Information NSW.
 - (f) For the purposes of this clause 9:
 - (i) **Practical Completion** means the works for the Peninsula Park have been completed except for minor defects and omissions that do not prevent the park from being reasonably capable of being used for its intended purposes (as an open space park area).
 - (ii) **Defect Liability Period** means the period commencing on the date of Practical Completion and expiring 12 months after that date.
- Name of authority empowered to release, vary or modify the Public Positive Covenant numbered 8 in the plan**
- Subject to clause 9(e) the Grantor must obtain the prior written consent of the Prescribed Authority to any release, variation or modification of the public positive covenants (**Consent**), which Consent:
- (a) must not be unreasonably withheld; and
 - (b) must not be subject to or include as a condition of Consent, the payment of money.

Covenant 9 provides:

- (a) Prior to the issue of the Occupation Certificate for the 400th residential unit within the Burdened Lot, the Grantor will use reasonable endeavours to:
 - (i) construct a Community Facility including ten (10) associated car spaces, within the Burdened Lot, in a location to be determined by the Grantor in its absolute discretion.
- (b) The Grantor and the Prescribed Authority must in good faith, consult with each other in relation to the design of the Community Facility including the ten (10) associated car spaces which include disabled parking.
- (c) The Grantor must construct the Community Facility in accordance with the Development Consent.
- (d) The Grantor will dedicate the Community Facility including the ten (10) associated car spaces to the Prescribed Authority (in stratum or such other form as determined by the Owner in its absolute discretion) following Practical Completion.
- (e) The Grantor must notify the Prescribed Authority when Practical Completion has been reached.
- (f) This public positive covenant expires on the date being the earlier of:
 - (i) the date that the Community Facility is dedicated to the Prescribed Authority as contemplated under clause 10(d); or
 - (ii) the date that the Prescribed Authority and the Grantor enter into a Planning Agreement, Any the Grantor and the Prescribed Authority must upon such expiry take all reasonable steps to remove this positive covenant from the title to the Burdened Lot as soon as practicable, including but not limited to preparing and executing all necessary documents and producing the relevant certificates of title at Land & Property Information NSW
- (g) For the purposes of this clause 10:
 - (i) **Planning Agreement** means a planning agreement entered into by the Prescribed Authority and the Grantor in accordance with s 93F of the *Environmental Planning and Assessment Act 1979* which contemplates the delivery of the Community Facility.
 - (ii) **Practical Completion** means the works for the Community Facility being complete except for minor defects and omissions that do not prevent the Community Facility from being reasonably capable of being used for its intended purpose.

Covenant 10 provides:

- (a) The Grantor must incorporate the Burroway Road cul-de-sac in any Development Application submitted to Council, noting, however that the obligation to include the Burroway Road cul-de-sac in a Development Application will only apply once.
 - (b) The Grantor acknowledges that the Prescribed Authority will not issue any Occupational Certificates for the Burdened Lot until the Burroway Road cul-de-sac has reached Practical Completion or any other time as agreed between the Grantor and the Prescribed Authority.
 - (c) The Grantor must notify the Prescribed Authority when Practical Completion has been reached and obtain acknowledgement of the Council.
 - (d) The Grantor and the Prescribed Authority agree that for the purposes of calculating the site area, gross floor and floor space ratio that apply to the Burdened Lot under the *Auburn Local Environmental Plan 2010*, the area of land that is dedicated to the Prescribed Authority as contemplated in clause 11(e) can be included in those calculations.
 - (e) The Grantor will dedicate the Burroway Road cul-de-sac to form part of the public road to the Prescribed Authority upon the expiry of the Defect Liability Period, or at any other time as agreed between the Grantor and the Prescribed Authority.
 - (f) This public positive covenant expires on the date that that part of the Burdened Lot shown as (K) in the Plan is dedicated to Council as contemplated under clause 11(e) and the Grantor and the Prescribed Authority must upon expiry take all reasonable steps to remove this public positive covenant from the title to the Burdened Lot as soon as practicable, including but not limited to preparing and executing all necessary documents and producing the relevant certificates of title at Land & Property Information NSW> .
 - (g) For the purposes of this clause 11:
 - (i) **Practical Completion** means the works for the turning circle being complete except for minor defects and omissions that do not prevent the turning circle being reasonably capable of being used for its intended purpose as determined by the Grantor in its absolute discretion.
 - (ii) **Defect Liability Period** means the period commencing on the date of Practical Completion and expiring 12 months after that date.
- Name of authority empowered to release, vary or modify the Public Positive Covenant numbered 10 in the plan:**
- Subject to clause 11(f), the Grantor must obtain the prior written consent of the Prescribed Authority to any release, variation or modification of this public positive covenant (**Consent**) which Consent:
- (i) must not be unreasonably withheld; and
 - (ii) must not be subject to or include as a condition of Consent, the payment of money.

Re-subdivision of the Site

A subdivision certificate application was lodged with Council on 13 October 2021 by Land Title Solutions seeking to create a new lot for the proposed new high school on the site, including the consolidation of the remaining lots (Torrens title subdivision to convert 3 lots into 2 lots). No development consent had been granted for this subdivision. The subdivision was sought as exempt development under the provisions of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP).

As at 13 October 2021 the subdivision of land was permitted as exempt development under section 2.75(f) of the Codes SEPP. Subdivision was defined in s6.2 of the EP&A Act as the division of land into 2 or more parts that, after the division, would be obviously adapted for separate occupation, use or disposition. However, the subdivision of land excluded the registration of a plan of consolidation s6.2(3)(e)(i). The purpose of these provisions is that division of land is subdivision, consolidation is not. The consolidation of lots 202 and 203 and 204 and their re-subdivision ought not to have been approved as exempt development.

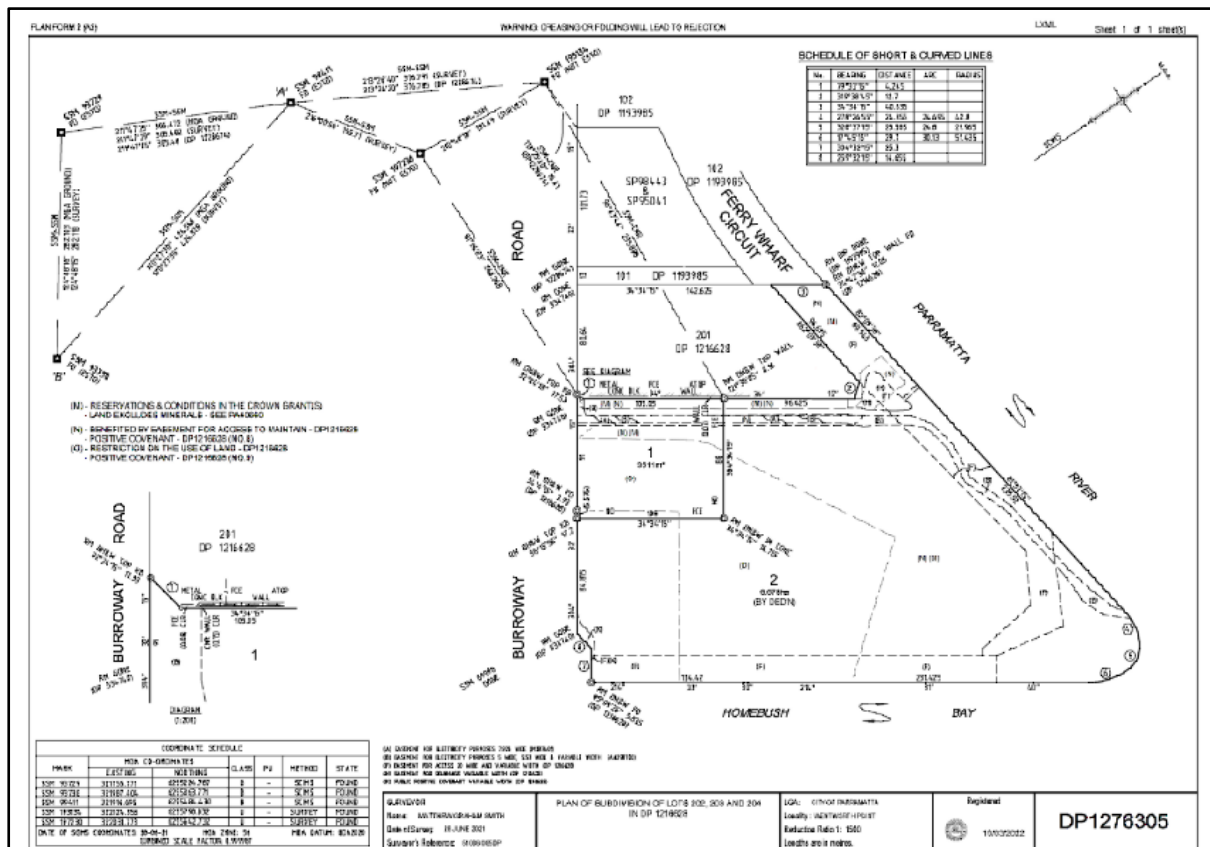
Council officers did not support the release of this subdivision certificate as it was not agreed that the subdivision fell under the provisions of exempt development. Council officers were of

the opinion that development consent would be required to carry out the subdivision. The applicant was advised of Council's position.

Council was notified on 14 March 2021 that the site had been subdivided for the high school and the remaining lots consolidated. The plan of subdivision was registered on 10 March 2022. The process by which the plan of subdivision was registered is not known.

The previous restrictions on the land (including the covenants for the park, community facility and cul-de-sac) were transferred to this new subdivision, although they no longer coincide with relevant boundaries.

The registered subdivision is shown below.



Lot 1 and Lot 2 in this plan is burdened by the covenants and restrictions discussed above for the delivery of the park and community centre.

Sydney Olympic Park High School (SOPHS) Approval

The Department of Education submitted a State Significant Development Application (reference SSD-11802230) with DPIE which was publicly exhibited between October to November 2021. This application sought a 2 stage approval for a high school to accommodate 1530 students on the newly created lot (Lot 1 in DP 1276305) at 7 Burroway Road.

Council officers lodged a number of submissions with respect to this proposed development. The following outlines the key areas of concern that were raised during that process. These issues are important to note as they also relate to the current modification the subject of this report. It indicates Council officers' ongoing concerns regarding the necessity for appropriate strategic master planning for the site and consideration of existing planning controls, site constraints, approvals to date, and vision for the maritime precinct.

Key areas of concern included the following:

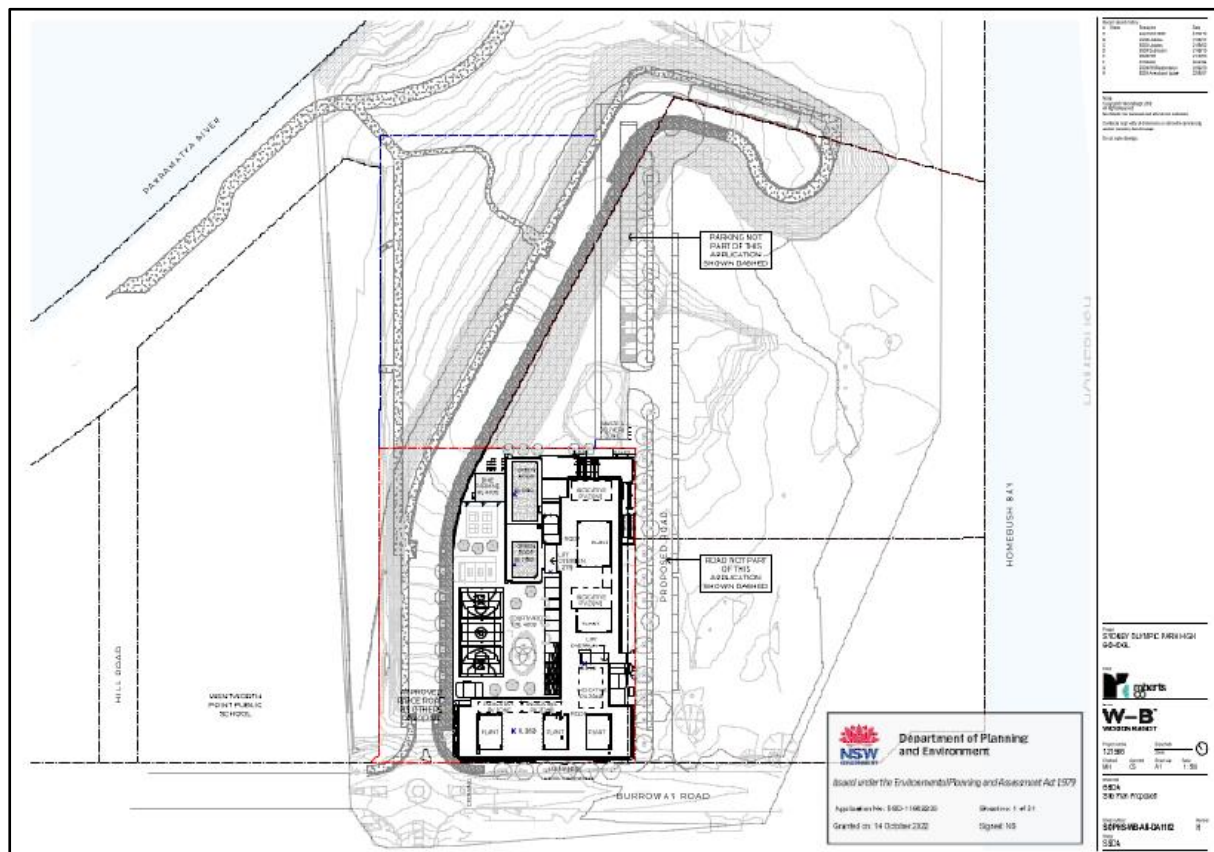
- **Site Planning Impacts** - The application provides plans for the proposed school effectively in isolation, and in doing so provides no indication of how the surrounding areas will be redeveloped and will function in the future given the contextual change resulting from this application. The application will override previous plans for the precinct without providing alternative solutions and does not adequately address the impacts upon current plans for the road network, Maritime Precinct and the proposed Peninsula Park.
- **Existing Subdivision Pattern** - There are significant impacts on the existing subdivision of the precinct which has been specifically set out for the overall development of the area.
- **Wentworth Point Precinct DCP** - The proposal is inconsistent with the Wentworth Point Precinct DCP (including the over-arching indicative structure plan) which impacts the entire eastern precinct layout and development controls. The proposal does not comply with key elements of the DCP regarding structure plan, street networks, pedestrian/cycle networks, distribution of land use and vehicular access/parking.
- **Existing Approvals** - Currently there are consents for key components of the precinct including the Peninsula Park, dry dock, rowing club and marina. Approval of this SSD would nullify those consents and raises questions about the delivery and timing of these components.
- **Contravention of LEP and Development Standards** - The SSD application contravenes LEP controls including permissibility, Height of Building and FSR. It is noted the proponent may seek to utilise provisions within the *EP&A Act* and the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* to override the *Auburn LEP 2010* provisions. Council Officers view is that the issues could be better addressed through a broader scheme that takes a wholistic approach to development of the precinct.
- **Proposed Planning Proposal** - The proponent states that a Planning Proposal is currently being prepared for the subject school site, the TfNSW land to the east and the future Peninsula Park to the north. A master plan of the Precinct (including the Peninsula Park) should be resolved before any determination for the school be granted. This will provide greater certainty regarding the orderly development of land, delivery of assets (including the new road and park) and provide for appropriate controls for future development within the precinct.
- **Inadequacy of school facilities/infrastructure** - The EIS states that the proposed playing fields and the new road with car park do not form part of the application. The application however depends upon these facilities being provided for the construction and operation of the high school. This is critically important to planning for a functional high school and needs to be resolved before the application is determined. The proposed school will have insufficient open space for students and fails to meet the minimum standards set out by the Department of Education's Educational Facilities Standards and Guidelines (EFSG) for stages 1 and 2.
- **Shared Open Space and Recreation Facilities** - The proposed school and playing field will significantly encroach into the proposed Peninsula Park and reduce the area of recreational space available to the surrounding residential community during school hours. City of Parramatta Council has previously resolved that any playing field associated with the new school should not be provided at the expense of land already proposed for the Peninsula Park. It is noted that the existing park equates to approximately 3.6ha, and

the addition of the playing field increases the overall size of the open space to 4.1ha. However, the playing field encroaches into the Peninsula Park area by approximately 0.5ha, thereby reducing the area that is unencumbered by the school to 3.1ha. Any such playing field should be wholly located on land outside of the existing park and not compromise the unrestricted access to the park.

Notwithstanding, the proposed playing field, amenities, indoor and outdoor multi-use courts should be located to ensure adequate public access and be designed to allow the public to utilise the facilities outside of school hours.

The proposal sought to build over the covenants for the park (primarily the area for the future Ridge Road) and relied on separate agencies to provide for approval and/or delivery of the new eastern service road, car park and playing field required for the operation of the high school. Given these issues, the application was amended to seek approval for only Stage 1 works that would not impact on the park covenants, or rely on these facilities for the operation of the high school.

On 14 October 2022, the Minister approved the Stage 1 construction of the new high school for 850 students.



SOPHS Approved Site Plan – Indicating Stage 1

Planning Proposal

A planning proposal was lodged with Council on 15 November 2022 seeking to reconfigure the land use and built form across the site as follows: amend the zoning, amend the maximum building height and apply an FSR of 2.6:1 on the mixed use residential development lot.

The Applicant has indicated that they intend to enter into a Planning Agreement with Council to make arrangements for the delivery and dedication of the Peninsula Park, including the

proposed playing field, Ridge Road, and the Homebush Bay Promenade. Council understands that Landcom is suggesting that the delivery of these items would be in lieu of any development contributions for the future development of the mixed use site. A Letter of Offer to enter into a Planning Agreement with Council for the site was not provided.

The planning proposal was withdrawn by the applicant on 6 June 2023.



Planning Proposal - Illustrative Master Plan (Group GSA)

PROPOSED MODIFICATIONS

The application seeks approval to modify the development approved by DA-40/2015 as modified by DA/875/2017/A. This is purportedly as a result of the introduction of the new high school on the site.

The application proposes the following modifications:

- Relocate Ridge Road from the western boundary adjoining the primary school further east towards Homebush Bay
- Reconfigure Peninsula Park to accommodate the relocated Ridge Road and include the provision of a playing field (noting that the embellishment of the playing field would be subject of a future modification)
- Amend the proposed stormwater management and erosion control works to reflect the updated park layout and road alignment.
- Surrender (in part) DA 40-2015 being the concept approval of distribution of GFA
- Surrender DA-273/2014 being the consent for subdivision.



Approved Application (Mod A)

Proposed Modification (Mod B)

It is noted that the information submitted during assessment of the modification application:

- Has changed the nature of the proposed modifications from original submission to the latest response submission in the following manner:
 - The application has changed from proposing a new subdivision retaining the intent of the current key covenants to an 'indicative' subdivision removing existing key covenants (however, clearly contemplates subdivision in a different lot layout than approved under DA-273/2014)
 - The application originally transferred all previous GFA on Lot 203 and Lot 204 to the new proposed residual site and now seeks to remove all GFA allocation on the lots.
- Contains misinformation with respect to alleged agreements made between Council officers and the applicant, including the following:
 - Stating Council agreement on amendments being accepted as a modification as opposed to a DA (refer SEE FPD Planning 10.10.2022 p37)
 - Stating Council agreement that a subdivision to reflect the new lots would be submitted on the basis that the previously approved GFA would be transferred to the new residual lot (refer SEE FPD Planning 10.10.2022 p10)
 - Stating Council recommended surrendering of the subdivision approval and GFA allocation (refer RFI response 17.02.2023 p1).

In the above instances, Council officers requested a subdivision pattern that realigned the existing restrictions/covenants on the land. Council officers did not support the transferral of approved GFA (including GFA already used by the SOPHS approval) to a smaller proposed lot. This would have resulted in creating a lot that no longer complied with the 1.25:1 FSR as it proposed a 2.6:1 FSR), and well beyond the scope of a Section 4.55 modification.

SECTION 4.55 MATTERS OF CONSIDERATION

Has the consent lapsed? No

Section 4.55(2) Modification

Substantially the same development

In order to determine whether the application is substantially the same development, the consent authority must comparatively consider the development as originally approved, and the development as proposed to be modified. This involves consideration of the quantitative and qualitative comparisons, and the consideration of the material and essential features of the development to determine whether there is a radical transformation of the approved development. This analysis is indicated below utilising both factual and merit based assessment.



Original Approval



Proposed Modification

Quantitative Comparison (numerical differences)

Some of the feature quantitative comparisons are listed below:

Element	Approval	Proposed Modification	Difference
Peninsula Park Area (including road and new active space)	41,590m ²	46,900m ²	+ 5310m ² (13%)
Road Area	Approx. 5545m ²	Approx. 6820m ² (inc. car park)	+1275m ² (23%)
Park Area	Approx. 35,780m ²	Approx. 31,130m ²	- 4,650m ²
Playing field	None	7500m ²	+7500m ²
Former Lot 204 Dry Dock	9159m ²	Deleted	Deleted lot
Former Lot 203 Mixed Use	25,550m ²	19,870m ²	-5680m ² (22%)
SOPHS site	None	9511m ²	New lot
GFA allocation Lot 203	46,283m ²	Removed	Removal of

Lot 204	5000m ²	Removed	GFA allocation
Ridge Road on-street parking	59 spaces 72 spaces (modA)	62 spaces	+3 spaces -10 spaces
Car park	None	Car park with 30 spaces	+30 spaces

Qualitative Comparison (non-numerical factors)

- (a) *The application seeks to subdivide the land and proposed works do not relate to the same portions of land*

The original consent provided for works that were contained within the relevant subdivided lots approved under DA-273/2014.

The configuration and design of the site (particularly the park and road) is proposed to be modified as part of the current application.

The subject site now contains a new allotment of land which is currently under construction for a high school and is in the location of the approved Ridge Road alignment. Ridge Road is proposed to be relocated to areas that did not form part of the original works (being former Lot 203 and 204). Parts of the approved park are now also being extended into the former Lot 203 (which was the residual future mixed use site).

- (b) *The works do not appropriately consider the constraints of the land in that the extent of works do not correspond with the legal property restrictions and covenants on the land*

As described above, the land contains numerous restrictions and covenants, including those for the construction and delivery of community infrastructure. These restrictions were imposed through the approved subdivision DA-273/2014 and secured on the title through the subdivision certificate registered on 19 July 2016. The development approved by DA-273/2014 was carried out.

The restrictions and covenants include the following:

88B Term Reference	Requirement
Terms of Restriction on Use of Land Numbered 7 in the plan	No more than 350 residential units permitted on Lot 203 prior to Practical Completion of the Peninsula Park
Terms of public positive covenant Numbered 8 in the plan	Requires the construction of the Peninsula Park and dedication to Council on expiry of defect liability period
Terms of public positive covenant Numbered 9 in the plan	<ul style="list-style-type: none"> Before Occupation Certificate for 400th residential unit within Lot 203 the community facility including 10 car spaces is to be constructed The community facility and 10 car spaces to be dedicated to Council following practical completion.
Terms of public positive covenant Numbered 10 in the plan	Burroway Road cul-de-sac must be incorporated in any DA submitted to Council. No Occupation Certificate is to be issued for Lot 204 until practical completion. Cul-de-sac to be dedicated to form part of the public road.

The proposed modification seeks to carry out works that do not align with the boundaries of the restrictions and covenants on the title. The proposed location of the park and the road are different to the location of these items on the title and therefore does not conform to the approved subdivision and existing restrictions on the land. Council officers advised the applicant that a new subdivision should be sought with new restrictions on newly created lots that would reflect the current requirement for the construction and delivery of community assets, albeit with new triggers. New triggers would be required as the mechanism for delivery (at a certain number of apartments) could not be considered appropriate with the newly formed residual development lot.

The applicant has provided an indicative subdivision plan (subject to future approval) however is also seeking to relinquish the requirements of the previous subdivision approval, including the restrictions and covenants with respect to the community deliverables.

Surrender of Consent

The application seeks:

- Surrender (in part) DA-40/2015 being the concept approval of distribution of GFA
- Surrender DA-273/2014 being the consent for subdivision..

Part of a consent cannot be surrendered. If that consent is surrendered then it cannot be modified. Although the applicant has referred to the “surrender” of the GFA distribution, Council officers have interpreted this to refer to the removal of that component from the consent. Seeking to remove the GFA distribution entirely is not substantially the same as the original approval.

The application seeks to surrender the previous subdivision approval DA-273/2014, which is an application separate to the works the subject of this application. It is also proposed that the existing covenants (required through the DA approval and subsequently registered on the title) therefore be removed. The development the subject of DA-273/2014 has been carried into effect. The land was subdivided and covenants registered.

Section 4.63(1) of the EPA Act states that a development consent may be surrendered, subject to and in accordance with the regulations, by any person entitled to act on the consent.

Clause 68 of the EPA Regulations provides for the voluntary surrender of a development consent. The notice of surrender must contain certain information regarding the details and circumstances of the surrender. These details have not been provided in accordance with the regulation requirements.

Notwithstanding that the proper notice has not been provided, Clause 68(4)(b)(ii) of the EPA Regulations also states that a notice of surrender takes effect when the consent authority notifies the person that the consent authority is satisfied that — if there is commenced development — the surrender of the development consent will not have an adverse impact on a third party or the locality. It is noted that the consent was commenced development as the consent was acted upon and the subdivision was carried out and registered. It is considered that the surrender of the consent (with the accompanying covenant requirements) would have an adverse impact on the locality. This is due to the community expectation of the delivery of the infrastructure, and park in particular, and the loss of the delivery mechanism for this infrastructure to be constructed and dedicated to Council. It is therefore considered that the surrender should not be accepted.

Imposition of Conditions

The applicant has made an argument that Council cannot legally impose a condition requiring the dedication of land, and that this should be carried out through a planning agreement.

It is not the intention of Council officers to impose dedication of land through this modification application. The covenant requirements are existing on the land through the Section 88B instrument. Council officers are seeking to ensure that the existing covenants remain as intended on the proposed new reconfigured site.

The conditions imposed on the subdivision approval (DA-273/2014) for the construction and delivery were not disputed by the Crown at the time of the original determination by the former Auburn Council. The application was to be determined by the regional panel as agreement on conditions could not be met, however Urban Growth advised that all conditions had been agreed to with Auburn Council. This is reflected in an email sent by Urban Growth to the Panel Secretariat on 27 November 2015 which reads:

"I am pleased to report that UrbanGrowth NSW/RMS has reached agreement with Auburn Council on the conditions imposed against DA273/2014 (2015SYW160) & DA274/2014 (2015SYW159).

Given that the parties are in agreement, Urban Growth notifies the JRPP that we support the withdraw of the subdivision DA's before the JRPP in preference for the matters to be determined by Council."

The terms of the Section 88B instrument wording which reflected the subdivision consent conditions was not disputed at the time of subdivision certificate release or registration.

The terms of the infrastructure delivery have not been disputed until this modification application.

Commitment to Deliver

The request for the surrender of the subdivision consent and removal of the covenants on the site requiring the construction and delivery of the community infrastructure, and the uncertainty that this creates is contrary to the State government's commitment over the years for the delivery of these assets. Examples of this commitment are indicated below:

- The rezoning for the WP UAP in 2014 acknowledged the delivery and future ownership of the peninsula park in particular, and acknowledge the provision of a community centre.
- The WP UAP Proposal prepared by the DPI in July 2013 contains the following statements:

A number of potential park features have been identified (see page 10) however detailed design of the park will be guided by council and community input. Once established, ownership of the park will be transferred to Auburn City Council for ongoing management. [p9]

In addition to the school, the proposal includes other significant community benefits such as: ► maritime uses, including boat storage and repair, a marina and boat launching facilities, adjoining Homebush Bay to provide greater public access and enjoyment of Sydney's waterways ► a multi-purpose community facility with a

flexible design to accommodate a range of community activities, located in a prominent, accessible location [p11]

- The Wentworth Point UAP Finalisation Report prepared by DPI in support of the rezoning states:

It is agreed that the peninsula park is a key project for the area and its delivery should be prioritised. It is envisaged that the park would receive funding from the Precinct Support Scheme, which the Department of Planning & Infrastructure is currently considering further. The peninsula park would be built to the required standard to allow subsequent dedication to Auburn Council. [p10]

- The development application for the subdivision of the site lodged with Auburn Council by Urban Growth was approved in November 2015 with all parties agreeing to conditions regarding the construction and dedication of community infrastructure, including the peninsula park and a community facility. The condition agreement was not predicated on any planning agreement or contribution offset for future development on the site.
- Since local government amalgamations in May 2016, Council officers have been in discussions with Landcom (particularly in respect to the dedication of the peninsula park) who have expressed their commitment to delivering the community infrastructure. Some of the various communications include the following:
 - Council and Landcom entered into discussions for a delivery agreement in 2018 to detail the expectations and requirements for the park dedication
 - Council, the Department of Planning and Landcom entered into discussions regarding the variation to the existing funding agreement in 2021
 - Landcom advising Council that the “certainty that the park will be delivered and dedicated to Council is already embedded existing approval DA273/2017/A and registered DP1216628 and its 88B created under the conditions of this DA. The DA273/2017/A ensuring the park delivery is Restriction at Item 8 and Positive Covenant at Item 9 ensure the park will be delivered in accordance with approved DA and Item 9 (d) ensures that park will be dedicated to Council on completion of 12 Months maintenance period.” (email Allan Caulley, Landcom on 8 July 2021)
 - Landcom seeking support from Council “that the existing DA’s conditions and 88B instruments are providing sufficient security to Council that the Peninsula Park will be constructed and ultimately transferred to Council” (email Allan Caulley, Landcom on 14 July 2021)

Summary

The proposed modification creates conflict between:

- the long running commitments of the Applicant and the NSW Government to deliver community infrastructure including the Peninsula Park were given legal effect by the conditions of DA-273/2014 and the covenants registered pursuant to that consent. The development so approved was carried out; and
- the lot layouts and land uses now proposed,

which demonstrates that the application is not, properly considered, for a modification and in a manner that is not in the public interest.

(c) The modification no longer complies with the indicative structure of the WPP DCP

The original application was compliant with the Wentworth Point Precinct DCP. The DCP was a result of detailed master planning of the site in association with the UAP rezoning of the land. Of particular importance is the indicative structure plan which establishes the configuration and use of the peninsula land. The indicative structure plan clearly defines the areas for open space, roads, residential and maritime facilities on the site as shown in the figure below.



Indicative Structure Plan (WPPDCP Am1 Figure 2) - The subject site is the eastern precinct

The proposed modification significantly deviates from this structure plan in the location of the key elements described above.

Any future development applications for the site will not be able to comply with the requirements of the DCP as these requirements are currently based on the indicative structure plan. This applies to matters including the street network, open space network, building heights/distribution and key building setbacks.

The modification application is in effect attempting to seek approval for a strategic reconfiguration of the precinct which circumvents the existing DCP controls on the site. The modification application is not the appropriate planning process to implement a new strategic masterplan for the site.

It is noted that the western precinct in the Wentworth Point Precinct DCP was recently amended in December 2021 to cater for a reconfigured site layout. In this regard, the site

known as 14-16 Hill Road went through a planning proposal (primarily to enable greater heights/with no additional floor space) and a DCP amendment to achieve a different outcome for the western neighbourhood precinct than that which was contained within the DCP. Subsequent development applications for that precinct also included the construction and dedication of community infrastructure to Council, including the new east-west transit corridor and a foreshore park, at no cost to Council and in addition to the payment of contributions for proposed development.

It is considered that the proposed modification should not enable such significant departures from the planning controls to be progressed without the same level of assessment and master plan consideration that was undertaken in the western neighbourhood.

Strategically reconfiguring an entire precinct based on an approval for infrastructure works is considered well beyond the scope of a Section 4.55 modification application.

(d) Impacts on Existing Approvals - Jeopardises the vision of the maritime precinct

The approved original application allowed for the development of Lot 204 (adjoining Burroway Road) for maritime uses. In this regard, DA/644/2017 for the construction of a new marina consisting of wet berths (up to 63 vessels) and dry boat storage (up to 228 vessels) with ancillary parking and retail tenancies and a boat launching channel was approved by the regional planning panel on 6 June 2018. This approval is linked to DA/643/2017 for the construction and operation of an overwater licensed rowing club and ancillary uses including cafe, restaurant, gym, boat launching ramp and pontoon, as the required parking for the rowing club is contained within the approved dry dock building.

DA/644/2017 will be severely impacted, and potentially rendered impossible by the proposed modification of the infrastructure application. The proposed relocation of Ridge Road over part of the former Lot 204 impacts the ability to provide for the dry dock building and associated car parking. This in turn affects the provision of all of the maritime facilities approved in this precinct.

The applicant has addressed this issue by stating the following in the SEE:

The proposed location of Ridge Road will intersect with the location of the dry boat store component of DA-644/2017. However this component of the DA is no longer planned to be delivered. Notwithstanding, car parking which formed part of the dry boat store would still need to be provided to support the rowing club and marina. Both DA-644/2017 and DA-643/2017 include conditions which allow for interim car parking arrangement to be agreed with Council.

A separate application is currently being prepared to modify the consent which applies to the DA-644/2017 to:

- *Remove the dry boat store component of the approval*
- *Identify temporary at grade car parking arrangements for the marina and rowing club with car parking to be accommodated within the mixed use development in the longer term*
- *Make associated changes to the landscaping and public domain.*

There will be no change to the marina and over water component of DA-644/2017 as a result of this modification.

The development application for the rowing club (DA-634/2017) is not impacted by the new alignment of Ridge Road with the exception of the requirement for car parking to be provided

as part of the dry boat store which will be addressed through the modification of the marina and dry boat store approval (DA-644/2017).

Any necessary modifications to the maritime precinct DAs to remove the dry boat store and address the car parking arrangements could be required through a condition of consent on this modification. This approach was discussed and agreed with Council at a meeting on 6 September 2022.

Council Comment:

Firstly, Council officers did not agree to the proposal put forward above. Council officers have maintained the issue of the impacts of the proposed modification on the separate (yet affected) other applications in the precinct. Council officers are not in a position to fetter their discretion as to whether any changes to the approved dry dock building are acceptable, or could even be considered substantially the same if modified. No design options have been provided and it has not been demonstrated how the required outcomes will be delivered. It is also not considered an appropriate planning mechanism that this infrastructure modification impose conditions regarding the future requirements of a separate approved application.

It is noted that the applicant has addressed this matter slightly differently within the planning proposal documents submitted to Council. The planning proposal reference scheme indicates the provision of boating facility car parking spaces within the future mixed use site. This proposal has since been withdrawn by Landcom and therefore cannot be considered in this modification application.

It is therefore considered that the proposed modification of the infrastructure DA substantially alters the approved maritime facility approvals within the precinct.

(e) Introduction of new elements

The proposal introduces new elements including playing fields (formal active space) and a car park. It is noted that the provision of these facilities have been incorporated primarily for the future use of the high school (to accommodate Stage 2 development of the school) rather than for purely public community use.

(f) Changes to road configuration

Ridge Road was previously approved as an extension of Wentworth Place in accordance with the DCP, and would utilise access via the same roundabout at the intersection. The modification application now proposes a completely new entry point along Burroway Road (diverting more traffic down Burroway Road). The function of the road has altered as it now services the new high school (in addition to the mixed use development and the park).

Material and Essential Essence

The applicant has identified the material and essential essence of the approval as being the *“delivery of a Peninsula Park of almost the same size and realignment of the previously approved Ridge Road as a new local road.”* This may represent the key physical elements in simplicity, but does not identify the extent of qualitative and quantitative comparisons that ultimately define whether it is substantially the same development.

Given the matters raised above in this section, it is considered that the modification application would alter the development in such a fundamental manner that it would lose the essential and material essence of being:

- Development compliant with the Wentworth Point Precinct DCP

- Development that enables future development to be compliant with the Wentworth Point Precinct DCP
- Development suitable/deliverable with the property restrictions on the land
- A passive and informal active recreation park
- Development with clear publicly beneficial delivery mechanisms for a park, road, community facility and cul-de-sac.

Conclusion

Given the above, it is considered that the cumulative quantitative and qualitative changes to elements of the proposed development 'radically transform' the approved development and the proposal is not 'essentially or materially the same' as the approved development. In this regard, the proposed development to be modified is not considered to be substantially the same development as to that which the original development consent relates.

Notification & Submissions

The application was notified and advertised in accordance with Appendix 1 (Consolidated Notification Requirements) of Council's Community Engagement Strategy between 2 November 2022 and 2 December 2022. In response, 2 submissions were received which raised the following issues:

SUBMISSION 1

14 Burroway Rd, Wentworth Point, 2127

- The new application includes fundamental variations that are completely inconsistent with the Wentworth Point Precinct Development Control Plan 2014 (DCP).
- The application for a modification does not meet the legal requirements of the test for modification applications as the features of the various elements of the new application are materially different and therefore are not "substantially the same" as the originally approved development.
- The application should be rejected as it fails to provide the necessary technical information required for it to be assessed as a new Development Application.

Comment: It is agreed that the proposal includes fundamental variations to the Wentworth Point Precinct DCP. The variations to the structure plan have a flow on effect to numerous requirements within the DCP, including the street network, open space network, building heights/distribution and key building setbacks. As discussed within this report, it is considered that the proposal is not substantially the same as the original approval and therefore does not warrant approval.

SUBMISSION 2

Wentworth Point

- Ridge Road should be removed – it is not necessary, provides insufficient parking, removes the availability of green space and should be used for pedestrian walkways instead.

Comment: Ridge Road is an important access point for the community and maintenance vehicles to the peninsula park and to provide sufficient street address to the future mixed use development site. It is part of the required street network within the Wentworth Point Precinct DCP.

- Biophilic design concepts should be utilised where possible, e.g. using natural materials such as wood instead of concrete for walkways, minimising metals/concrete/plastic

materials in the playground and signage, and retaining trees already in the area.

Comment: The details of the park design will align with Council requirements for the provision and maintenance/management of facilities. There are no proposed changes to the trees to be retained on the site.

SECTION 4.15 ASSESSMENT

The proposed modifications have been briefly assessed in accordance with the relevant matters for consideration under Section 4.15 of the EP&A Act, 1979.

It is considered that a full merit based assessment is not required for the proposed development. In this regard, it is noted that Section 4.55(2)(a) of the Act is a jurisdictional threshold. The consent authority must be satisfied that the development is substantially the same as a pre-condition to consideration of the merits of the application.

Since the application is not deemed to be substantially the same development as that originally granted, the pre-condition has not been met and a merit based assessment is therefore not warranted.

Notwithstanding the above, a certain level of merit assessment and consideration of impacts has been undertaken to determine whether the application is substantially the same development. These matters have been addressed within the report.

KEY ISSUES

Notwithstanding that the proposal is not considered to be substantially the same, the key issue with the proposal is that the applicant is seeking to defer the commitment of the delivery of community assets to a future date. There is no certainty in the delivery mechanism or timing of these assets.

The applicant has clearly identified the intention of removing the requirements for these matters to be delivered as part of the existing and approved process and defer them to a planning proposal process (which has been lodged and withdrawn).

The commitment to providing these deliverables (particularly the peninsula park) has been evident since the establishment of the urban activation precinct and DPI rezoning of the land and has been discussed within this report.

The applicant has offered no options for retaining these requirements as part of this modification application. As such, it is considered that the delivery of the future community assets are no longer secured which is not in the public interest and Council officers cannot support the proposed modification.

OTHER MATTERS

The suitability of the site for the development

The site is not suitable for the proposed development as the modification clearly does not take into consideration the constraints of the land. The existing restrictions on the land and impacts of the potential removal of those restrictions have not been adequately addressed within the application.

Notwithstanding the above, the suitability of the site for the detailed design development the subject of the modification has not been assessed in detail as a merit based assessment is not warranted given the Section 4.55 jurisdictional threshold has not been met.

The public interest

The public interest is served by permitting the orderly and economic development of land, in a manner that is sensitive to the surrounding environment and has regard to the reasonable amenity expectations of surrounding land users.

The modification application proposes a complete masterplan reconfiguration of the site which is inconsistent with the existing DCP controls for the precinct. The proposal is not considered to be orderly development. This is not the appropriate planning mechanism by which to achieve the outcomes sought, and to enable this would not be in the public interest.

The application does not respect the existing covenants on the land. In essence, the applicant is seeking to transfer their obligations to construct and deliver community infrastructure to a future planning process which has no certainty in outcome and at a cost to Council and the community through the waiving of future development contributions for the mixed use site. This is contrary to the public interest.

Development Contributions

No development contributions were imposed on the approval of the original consent as the works did not trigger the payment of contributions under the Auburn Development Contributions Plan 2007.

The proposed modification does not trigger the requirement for the payment of any contributions under the City of Parramatta (Outside CBD) Development Contributions Plan 2021. Any future development on the residual development site will be subject to the payment of contributions under this plan.

CONCLUSION

After consideration of the development against the relevant statutory and policy provisions, the proposed modification to the approved development cannot be approved as it is not substantially the same as the original approved application, and therefore inconsistent with the provisions set out in Section 4.55 of the Environmental Planning and Assessment Act, 1979. Therefore, it is recommended that the application be refused.

Crown Development

Clause 226(1) of the Environmental Planning and Assessment Regulation 2000 provides that a development carried out by, or on behalf of a public authority (not being a council) is a Crown development. Transport for NSW is a public authority and therefore the development is a Crown development for the purposes of Part 4 Division 4.6 of the EPA Act.

Section 4.33 of the EPA Act precludes a consent authority, including a regional panel, from refusing a Crown development application, except with the approval of the Minister, or from imposing a condition of consent to a Crown development application, except with the approval of the applicant or the Minister.

An application for modification of a development consent is not a development application, however s4.35 applies s4.33 to applications lodged by or on behalf of the Crown to modify development consents under s4.55.

RECOMMENDATION

Refusal

That the Sydney Central City Planning Panel as the consent authority request the approval of the Minister for Planning to **refuse consent** to Development Application No. DA/875/2017/B for the modification to amend DA/875/2017/A for the proposed infrastructure works on the site and concept GFA allocation, including changes to the location and design of Ridge Road and the modified design of the proposed park (including the provision of active open space) on land at 7-9 Burroway Road, Wentworth Point for the following reasons:

1. The proposed development cannot be approved as a Section 4.55(2) application as the proposed development is not “substantially the same” as the approved development for the purposes of Section 4.55 of the Environmental Planning and Assessment Act, 1979. The cumulative quantitative and qualitative changes to elements of the proposed development radically transform the approved development so that the proposed development is not essentially or materially the same as the approved development.
2. The proposed development does not comply with the objects of the Environmental Planning and Assessment Act, 1979 in that the proposal:
 - (a) does not promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources,
 - (b) does not promote the orderly and economic use and development of land.
3. The proposed development does not align with the existing covenants and restrictions on the land which will result in the loss of the delivery mechanism for the provision of important community infrastructure in the locality, including a public park, community facility and cul-de-sac.
4. The proposed development is not in the public interest.