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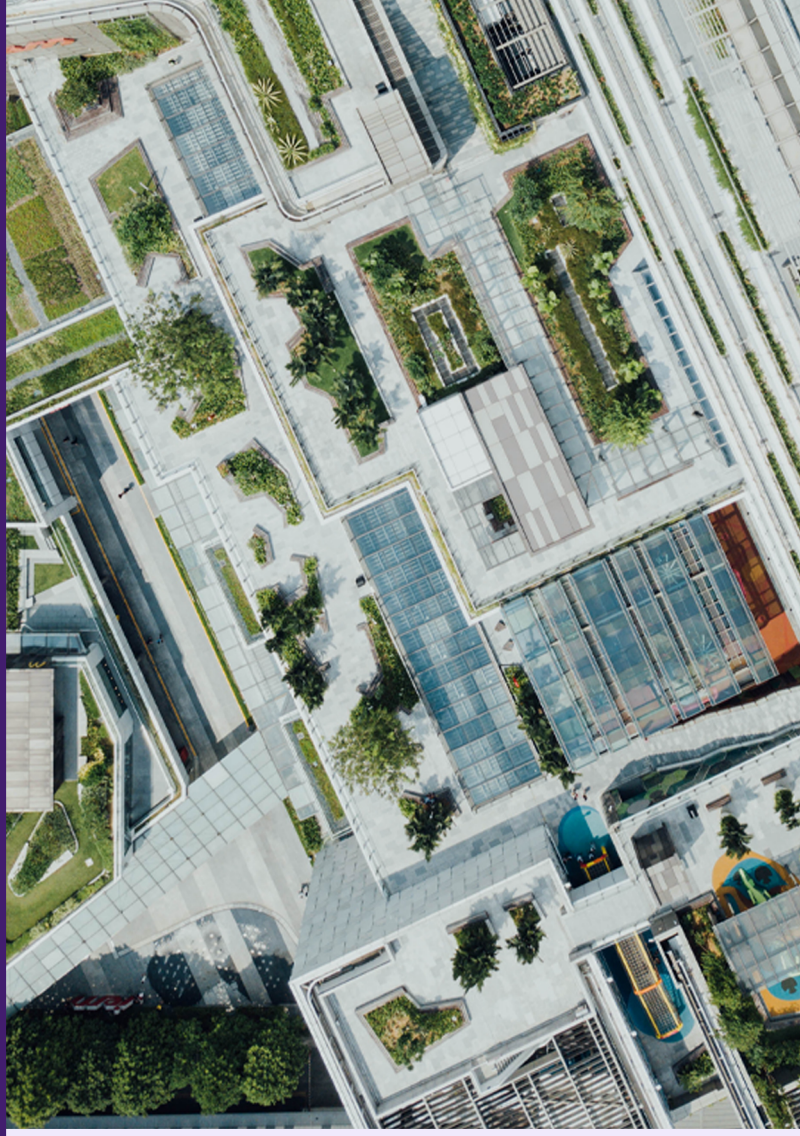


7-9 Burroway Road, Wentworth Point NSW 2127

Substantially the Same Development Planning Advice

On behalf of Department of Planning, Housing and Infrastructure

1 February 2024

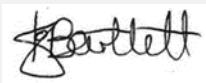
The Planning Studio acknowledges the traditional custodians of the lands + waters of Australia, particularly the Gadigal People on whose traditional lands our office is located, and pay our respects to Elders past, present + emerging. We deeply respect the enduring Connection to Country + culture of Aboriginal and Torres Strait Islander peoples and are committed to walk alongside, listen + learn with community as we plan for equitable, sustainable, generous, and connected places. Always was, Always will be.

Project Director

Kate Bartlett

Contributors

Kate Bartlett (Director)

Revision	Revision Date	Status	Authorised	
			Name	Signature
V1	28 January 2024	Draft	Kate Bartlett	
V2	29 January 2024	Final	Kate Bartlett	
V3	1 February 2024	Final	Kate Bartlett	

* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

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1 Introduction and Scope

This report has been prepared on behalf of the Sydney Central City Planning Panel (the Panel) to provide independent planning merit advice considering whether the modification (DA/875/2017/B) for 7-9 Burroway Road, Wentworth Point NSW 2127 ('the Site') can meet the test of 'substantially the same' in accordance with Section 4.55(2)(a) of the Environmental, Planning and Assessment Act (1979) ('the Act').

The Panel engaged me in December 2023 to provide independent planning advice to consider:

"Whether the development as modified by the Modification is 'substantially the same as the development' for which the consent was originally granted and before the consent as originally granted was modified will require a comparative exercise to evaluate the development as proposed to be modified (and its impacts) as compared to the development the subject of the Concept Approval as originally granted.

This technical assessment of the Modification application will have regard to the legal principles outlined below:

1. *Is the modified development substantially the same as the originally approved development is a matter of fact and degree and is determined in accordance with the principles established by caselaw:*

   Does the proposed Modification meets the 'substantially the same development' test, the following legal principles, as set out in Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3) [2015] NSWLEC 75, apply to the assessment:

   (a) the modification power is beneficial and facultative (North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468)

   (b) it is for the applicant to demonstrate that the modified development is 'substantially the same' (Vacik Pty Ltd v Penrith City Council [1992] 43 NSWLEC 8 (Vacik))

   (c) 'modify' means 'to alter without radical transformation' (Sydney City Council v Ilenace Pty Ltd [1984] 3 NSWLR 414 at 42)

   (d) 'substantially' means 'essentially or materially having the same essence' and assessing whether a consent as modified will be substantially the same development, requires a comparison of the before and after situation (Vacik)

   (e) the comparison involves more than merely a comparison of the physical features or components of the developments as currently approved and modified but also a qualitative and quantitative appreciation of the developments in their 'proper contexts (including the circumstances in which the development consent was granted)' (Moto Projects (No 2) Pty Ltd v North Sydney Council (1999) 106 LGERA 298 (Moto Projects)).

2. *Whether multiple consents can operate together on the same land. As there are multiple consents applying to the land, if the application is a modification, whether conditions would be required to ensure that all the consents can operate harmoniously.*

3. *The Panel Chair also subsequently requested advice as to what Conditions might be appropriate under the circumstances where consent was granted to the modification application given the development constitutes 'Crown Development'.*

The report is structured in the following manner to respond address the specific questions raised by the Panel:

- **Section 2 Site and planning history:** which will describe the site and outline existing relevant consents including DA-40/2015 (and subsequent modifications through DA/875/2017) DA-644/2017 (Dry Boat Store), DA-643/2017 (rowing club) and DA-273/2014 (original subdivision).
- **Section 3 subject application:** which will describe the application, as originally submitted, and the application (as amended) currently before the Panel, including consideration of the application as Crown Development.
- **Section 4 evaluation:** which will review the proposal against the 'substantially the same' test and whether/how multiple consents can operate on a site.
- **Section 5 conclusion and recommendations:** which will outline the report conclusion and any recommendations, including conditions that could be considered by the Panel if they choose to support the application.

In forming this advice, I have relied upon the following documents:

- Statement of Environmental Effects (SEE) prepared by File Planning and Development (FPD) – dated October 2022;
- Indicative Subdivision Plans dated October 2022 and February 2023;
- Wentworth Point Peninsula Park, Road and Drainage Design dated January 2023;
- Wentworth Point, Landscape Plans dated February 2023;
- Report to Sydney Central City Planning Panel (PPSSCC-481) by Parramatta Council dated August 2023);
- Record of Briefing, Sydney Central City Planning Panel (PPSSCC-481), dated 17 August 2023;
- Letter to Sydney Central City Planning Panel from Landcom dated 5 October 2023;
- Legal Advice from Lindsay Taylor Lawyers to Landcom dated 28 September 2023 as to whether the modification can meet the 'substantially the same' test in accordance with Section 4.55(2) of the Act; and
- Planning Report from FPD dated October 2023 regarding 'substantially the same' planning analysis;
- Notice of Determination for original Staged DA-40/2015 (now DA/875/2017) by Auburn Council;
- Council Assessment Report, Plans, Notice of Determination and Panel and Notice of Panel meeting for Marina and dry boat storage DA (DA/644/2017) and rowing club DA (DA/643/2017);
- NSW Land and Environment Court Case: Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3) [2015] NSWLEC 75.

2 The Site and planning history

2.1 Site Description

The subject site of 7-9 Burroway Road, Wentworth Point NSW 2127 relates to an area located on the peninsula at Wentworth Point. It has an area of 76,281m² and forms part of the identified Maritime Precinct within the Wentworth Point Urban Activation Precinct (rezoned by DPI on 4 July 2014).

The site adjoins Parramatta River to the north, Homebush Bay to the east, Wentworth Point Primary School to the west and vacant industrial land (future mixed use development site) to the south along Burroway Road. The land is relatively flat and slopes gradually towards the Parramatta River.

The site was formed by land reclamations of the Parramatta River mud flats from the late 1800s to facilitate farming, industrial and military uses. It was subsequently used for light industrial and maritime uses. All buildings on the site have previously been demolished and it is largely cleared of vegetation, except for saltmarsh and mangrove communities on the tip of the peninsula and two Port Jackson Figs on the north-east corner of the precinct.

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

Figure 1: Subject site (SIX Maps)

2.2 Planning History

The site has significant planning history with a number of enacted and approved development consents, which are summarised below.

2.2.1 DA-273/2014 (original subdivision consent)

DA-273/2014 was approved by Auburn Council and granted consent for subdivision of a larger parcel of land into four Torrens Title lots, being Lot 201, which is now operating as Wentworth Point Public School, and Lots 202 (Peninsula Park), 203 and 204 (future development sites and Maritime Precinct).

The consent included a number of conditions requiring covenants and restrictions to be registered on the land to ensure delivery of a park, a community facility and Burroway Road cul-de-sac. The consent also included a condition that the Park be dedicated to Council before 350 residential units on Lot 203 could be occupied. However, the relevant Conditions on the subdivision consent also included the following statement:

"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."

The subdivision plan was registered on 19 July 2016, with works undertaken in accordance with the subdivision plan and relevant covenants and restrictions registered on the titles of the new lots. The approved subdivision plan is shown in the Figure below.

Figure 2: Approved Subdivision Plan DA-273/2014 (Calibre)

2.2.2 DA-40/2015 and DA/875/2017 (as modified)

DA-40/2015 was approved by Auburn Council on 17 February 2016 and granted consent for *"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."*

It is noted that since this consent was granted, changes were made to the Act so that previously defined 'staged' development applications are now described as 'Concept' (formerly Stage 1) and 'Detailed' (formerly Stage 2) development applications.

The relevant Section of the Act is outlined below:

*"**4.22 Concept development applications (cf previous s 83B)***

(1) For the purposes of this Act, a concept development application is a development application that sets out concept proposals for the development of a site, and for which detailed proposals for the site or for separate parts of the site are to be the subject of a subsequent development application or applications.

(2) In the case of a staged development, the application may set out detailed proposals for the first stage of development...."

Under current terminology, this consent granted the following:

- Concept approval for the uses and layout, including a new public open space (Peninsula Park) and associated road (Ridge Road) and new mixed use development across lots 203 and 204 (maximum 51,283sqm); and
- Detailed approval for the first stage of development (lot 2) comprising:
    - Construction, embellishment and landscaping of a new public open space and access road comprising 4.16ha of land;
    - Associated works comprising site preparation and infrastructure works including remediation, bulk earthworks, and utility servicing; and
- Subdivision of Lot 202 and 203 to create a separate land parcel for Ridge Road.

The Figure below outlines the approved concept and landscape plan for the consent.

Figure 3: Approved Landscape Plan DA-40-2015 (DA/875/2017 as modified)

The land now being used for Wentworth Point Public School (Lot 201) did not form part of the application.

The consent was subsequently modified twice once the land was integrated into the Parramatta Local Government Area for the following reasons:

- Amend the approved seawall design - DA/875/2017 (note the change of DA number); and
- Stage the remediation works and amend the Peninsula Park road design - DA/875/2017A.

2.2.3 DA-643/2017 (Rowing Club) and DA/644/2017 (Dry Boat Shed)

These two applications were granted consent as Detailed DAs related to the previous Lot 204. DA/643/2017 was granted consent on 6 June 2018 for:

"Construction and operation of an overwater licensed rowing club and ancillary uses including cafe, restaurant, gym, boat launching ramp and pontoon."

DA/644/2017 was granted consent on 6 June 2018 for:

"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."

Refer to the below Figures for the Site Plan showing the approved rowing club building adjacent to the separately approved Marina and dry boat storage.

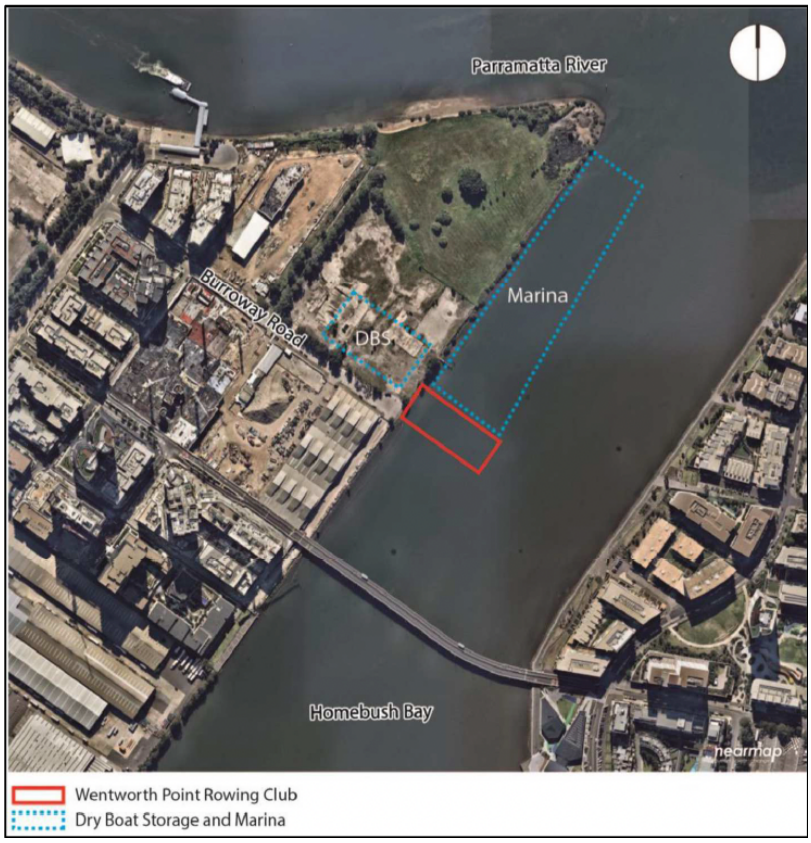

Figure 4: Aerial Image showing rowing and Marina/boat storage locations (Parramatta Council)

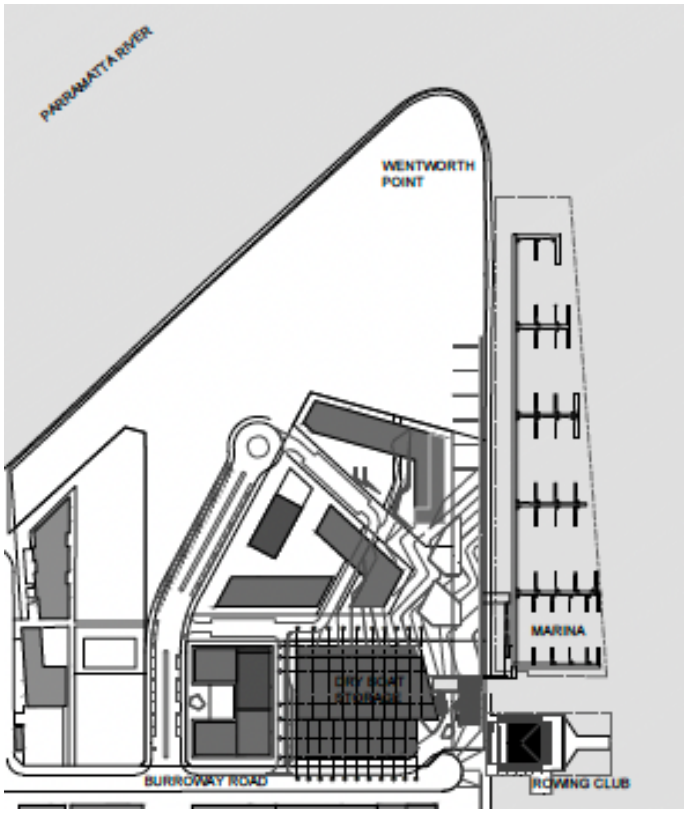

Figure 5: Approved Site and Location Plan DA/644/2017 (CM+)

2.2.4 High School Site and further subdivision (2020)

In 2020 the Department of Education acquired a portion of the site for the purposes of a high school and utilised exempt development provisions to further subdivide the site (formerly lots 202, 203 and 204) into Lots 1 and 2 DP1276305 and update the subdivision plan.

The current subdivision plan is in the Figure below. Development consent was not required to update the subdivision plan as the proposal utilised the provisions of Section 2.75(f) of *State Environmental Planning Policy – Exempt and Complying Development Codes (2008)* (the 'Codes SEPP').

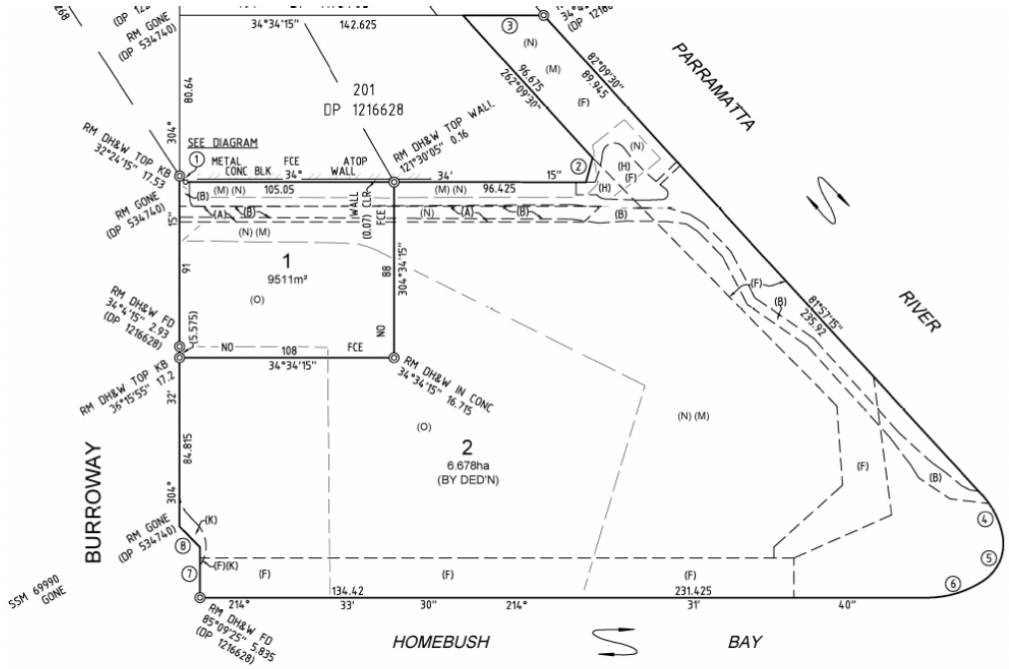

Figure 6: Existing Registered Subdivision Plan

This subdivision plan had the effect of superseding the previous subdivision consent (DA-273/2017). The restrictions and covenants of the previous subdivision plan were transferred to Lots 1 and 2 of the new subdivision plan and associated instruments. However, they no longer strictly aligned with the new titles and layout.

3 Subject Application

This Section of the report outlines the modification application as originally submitted and the changes made to the application that now is before the Panel.

3.1 Originally submitted application (October 2022)

Modification DA/875/2017/B was submitted to Council in October 2022 and sought approval for the following:

- Amend the Peninsula Park to include the location of the future playing field, noting that the embellishment of the playing field would be subject of a future modification;
- Re-align Ridge Road to respond to the proposed location of the playing field and high school and provide an increased street interface to the park;
- Amend the subdivision plan to reflect the new land configuration and retain the intent of the existing covenants;
- Amend the Concept Plan approval to re-allocate the approved 51,283m^2 of floor space onto the reconfigured mixed use site; and
- Amend the proposed stormwater management and erosion control works to reflect the updated park layout and road alignment.

The Figures below outline the proposed amended Concept and landscape plan (**Figure 7**) and proposed amended subdivision plan (**Figure 8**).

Figure 7: Proposed amended Concept and landscape plan (Context)

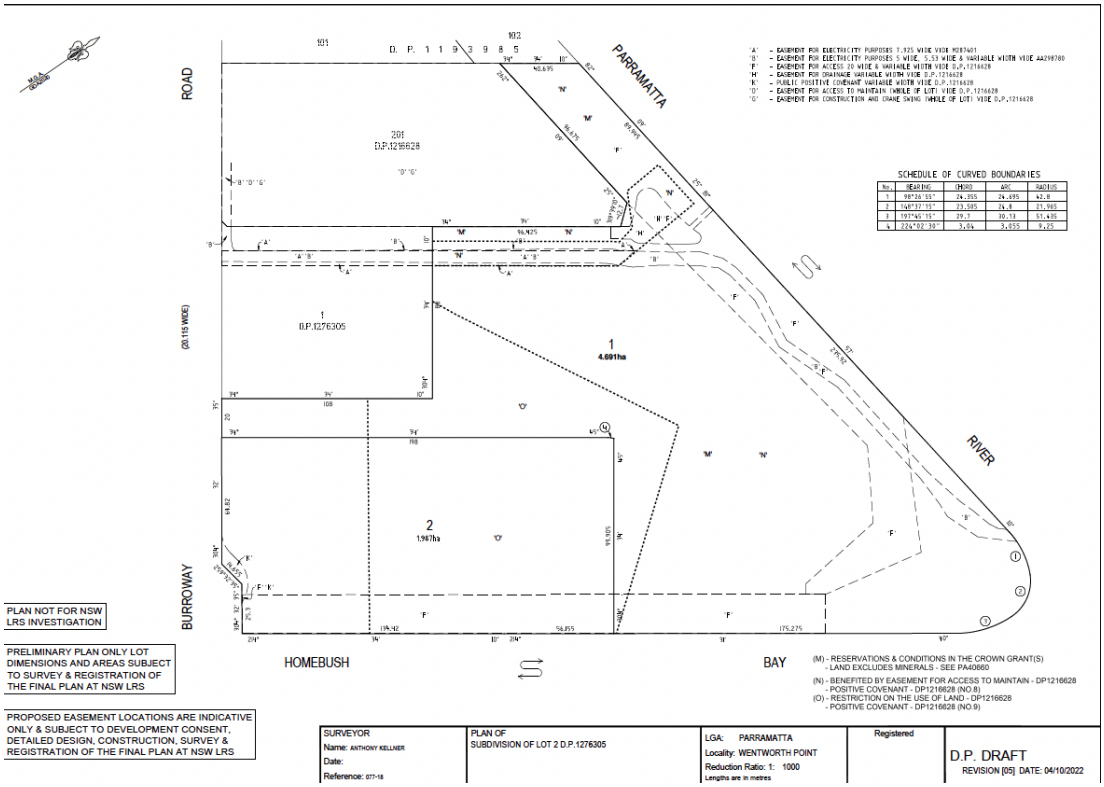

Figure 8: Proposed amended subdivision plan (Context)

3.2 Application before the Panel (January 2024)

Some changes were made to the modification after it was submitted to Council for assessment. As a consequence of these changes, the application now before the panel seeks approval to:

- Amend the Peninsula Park to increase the approved area of open space by 4,575sqm including the location of the future playing field, noting that embellishment of the playing field would be subject of a future development application;
- Re-align Ridge Road to respond to the proposed location of the future playing field, provide access to the high school and provide an improved street interface to the park;
- Subdivide the land so that the future mixed use and maritime development site is separated from the land utilised for Peninsula Park and Ridge Road; and
- Amend the proposed stormwater management and erosion control works to reflect the updated park layout and road alignment.

The application no longer seeks to re-allocate the GFA originally approved under DA-40/2015 into the amended concept 'mixed use development site (lot 2)' - see original condition in the Figure below.

2. **Gross floor area allocation**

   Lot 203 shall not exceed a maximum GFA of 46,283m^2
   Lot 204 shall not exceed a maximum GFA of 5,000m^2

   Reason:- to ensure compliance with approved GFA distribution.

Figure 9: Condition 2 of DA-40/2015 (former Auburn Council)

Given Lots 203 and 204 no longer exist, this condition is no longer strictly applicable if the application no longer seeks to re-allocate the maximum GFA to the proposed mixed-use development lot (proposed lot 2). There are existing FSR controls across the site that would continue to govern the maximum GFA permitted for any future Detailed DA for the lot irrespective of the application of Condition 2.

3.2.1 Council report dated August 2023

Council drafted a report to the Panel dated 1 August 2023 recommending refusal of the application for the following reasons:

"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."*

Council's report also states that the application seeks to 'surrender' the previous subdivision consent DA-273/2014. I cannot see this request anywhere in the documentation submitted with the application. Further, given that this consent was enacted and finalised, with the subdivision plan registered and lots created – and then superseded, I agree with the advice provided by Megan Hawley of Lindsay Taylor Lawyers that this consent is not strictly relevant to the subject modification, and that delivery of the public park can and will occur through the RE1 zoning irrespective of the delivery conditions in this consent.

Whilst DA-273/2014 included a number of conditions outlining how aspects of the public infrastructure was to be delivered, it is my opinion that the covenants and restrictions

placed on title through DA-273/2014 are not relevant to the assessment of the subject modification.

I agree with the LTL advice that *"changes are not proposed by the MOD. They have occurred as a result of the acquisition of land by the Department of Education and are extraneous to the MOD. The MOD must be determined having regard to what it proposes and the matters of relevance under s4.15 of the EPA Act to the actual proposed modifications"*.

I also note and agree with LTL's view on the applicability *L& G Management Pty Ltd v Council of the City of Sydney [2021] NSWLEC 149* that consent conditions cannot require dedication of land free of cost – the only mechanisms available are through a Planning Agreement or a Section 7.11 contribution. Accordingly, even where DA-273/2014 was a relevant consent, the applicable conditions would be invalid in my opinion.

3.3 Crown Development

In accordance with Division 4.6 (Crown development) of the Act, the subject modification (and original consent) constitutes Crown Development. The relevant provisions are below.

4.33 Determination of Crown development applications (cf previous s 89)

(1) A consent authority (other than the Minister) must not—

(a) refuse its consent to a Crown development application, except with the approval of the Minister, or

(b) impose a condition on its consent to a Crown development application, except with the approval of the applicant or the Minister.

(2) If the consent authority fails to determine a Crown development application within the period prescribed by the regulations, the applicant or the consent authority may refer the application—

(a) to the Minister, if the consent authority is not a council, or

(b) to the applicable Sydney district or regional planning panel, if the consent authority is a council....

4.35 Modification of Crown development consents (cf previous s 89B)

This Division applies to an application made by or on behalf of the Crown under section 4.55 in the same way as it applies to an application for development consent.

As Crown Development with a value greater than $5 million, the application is also regionally significant development with the Panel as the consent authority.

4 Evaluation

This Section of the report provides a planning merit evaluation of the questions put by the Panel within the context of the planning history and application as it currently sits before the Panel.

4.1 'Substantially the Same'

An evaluation against the following legal principles, as set out in Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3) [2015] NSWLEC 75, is provided below:

(a) the modification power is beneficial and facultative (North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468)

The elements relevant to this principle are that Parliament has *"chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity."*

For the subject application, the modification is seeking to amend the consent to respond to external changes, including the allocation of a portion of the site for a new public high school, which occurred subsequent to the granting of consent under DA/875/2017/A (initially DA-40/2015).

In particular, the subject modification application seeks to:

- Amend the Peninsula Park to increase the approved area of open space by 4,575sqm including the location of the future playing field, noting that embellishment of the playing field would be subject of a future development application;
- Re-align Ridge Road to respond to the proposed location of the future playing field, provide access to the high school and provide an improved street interface to the park; and
- Amend the proposed stormwater management and erosion control works to reflect the updated park layout and road alignment.

These changes are required to enable delivery of the key aspects of the development approved through DA-40/2015 (DA/85/207/A) being the future park, road and mixed use development block now that the site has been further subdivided. The future road design needs to be amended so that it no longer traverses lot 1 allocated for a high school. The park design also requires modification to incorporate the future playing field.

Approval of the modification will enable these changes to occur in a timely and efficient manner so that fundamental elements of the consent can be delivered – being the park and road – thus meeting the 'beneficial and facultative' principle.

The principle of 'beneficial and facultative' is also relevant to the application's status as Crown development. Crown development has been specifically identified within Division 4.6 (Crown development) within the Act in recognition of the public benefit of development undertaken by the Crown. Approval of the subject modification will enable delivery of public infrastructure in Wentworth Point in the form of a park and associated road in a 'beneficial and facultative' manner. In contrast, recommendation of refusal to the Minister would delay construction and delivery of this important social infrastructure by forcing the applicant through a lengthy new DA process likely to take between 12-18 months.

(b) it is for the applicant to demonstrate that the modified development is 'substantially the same' (Vacik Pty Ltd v Penrith City Council [1992] 43 NSWLEC 8 (Vacik))

The applicant has provided a detailed justification as to why the proposal meets the test of substantially the same, particularly since the Panel meeting in August 2023, including:

- Detailed response to Council Planning Report prepared by applicant Landcom (on behalf of Transport of NSW) dated 5 October 2023 accompanied by:
    - Consideration of 'substantially the same' test prepared by FPD Planning that provides a detailed analysis of each aspect of the development originally approved under DA-40/2015 and how the development, as proposed to be modified, is quantitively and qualitatively consistent.
    - Legal advice prepared by Lindsay Taylor Lawyers as to how the legal tests have been met for the subject modification, and why the prior subdivision consent DA-273/2014 – and associated conditions relating to delivery of community infrastructure - is not relevant to the subject modification application.
- Statement of Environmental Effects (dated 10 October 2022) outlining the development sought, as modified, and consideration of environmental impacts.

Importantly, the justification provided by the applicant clearly demonstrates that the modification has been prepared in response to external changes to the site, being the subdivision of a portion of the land for a high school, and that the 'materiel' and 'essential' elements of the development are retained, including the public park, road, future mixed use development lot and 'maritime precinct' being the marina and rowers club.

(c) 'modify' means 'to alter without radical transformation' (Sydney City Council v Ilenace Pty Ltd [1984] 3 NSWLR 414 at 42)

In considering the principle of 'altering without radical transformation' I have also considered Preston CJ's view in *Arrage v Inner West Council [2019] NSWLEC 85*, that *"comparison could be made of the consequences, such as the environmental impacts"* of carrying out the modified development compared to the originally approved development.

In my opinion, the development, as proposed to be modified, does not create any additional environmental impacts beyond that originally approved. The development, as proposed to be modified does not create any inappropriate environmental impacts related to open space and social infrastructure, contamination, flooding or traffic. The modification will actually deliver improved outcomes in terms of social infrastructure and improved car parking opportunities.

The delivery of key infrastructure, including the park, is guaranteed through the RE1 zoning for 'public recreation' that must be retained in public ownership, thus ensuring delivery of public infrastructure, even where DA-273/2014 is no longer applicable. The modification of the concept DA will also still enable delivery of a future mixed use and maritime precinct (albeit somewhat modified).

Further, whilst the application relates to a slightly different parcel of land, I accept the advice by Meghan Hawley of Lindsay Taylor Lawyers that:

"It is not the case that a modification application cannot have the effect that development will be carried out on additional land (see: Scrap Realty Pty Limited v Botany Bay City Council [2008] NSWLEC 333).

The fact that the development as proposed to be carried out pursuant to the MOD relates to different land titles or portions of land is therefore not a matter that makes the development as proposed to be modified not substantially the same development as that originally approved." [Paragraphs 20 and 21]

Additionally, the original consent always included further subdivision of land (originally the road into its own parcel of land). The subject application also includes subdivision for a future 'mixed use development lot' now that the road has been realigned and does not require its own lot.

The fundamental aspects of the original consent have been retained, being: delivery of a road and park, subdivision of land to enable this delivery, and concept approval for a future mixed use and maritime precinct. The application has been modified, but does not 'radically transform' the approved development.

(d) 'substantially' means 'essentially or materially having the same essence' and assessing whether a consent as modified will be substantially the same development, requires a comparison of the before and after situation (Vacik)

I agree with the advice prepared by Meghan Hawley of Lindsay Taylor Lawyers (LTL) that:

"The modifications to the Concept Consent still retain the essence of the original development, as it remains an application primarily for the delivery of significant open space (the Peninsula Park), associated infrastructure, and the reservation of part of the land for future urban development." [Paragraph 18]

The Table below summarises the key aspects of the approved development, and a comparison to the subject modification.

Table 1 – Approved DA and Modification Comparison

Aspect of Development	**DA/875/2017/A**	**Current Proposal**
Delivery of Peninsula Park	3.58 hectare park of passive open space	4.037ha park of 3.23ha of passive recreation space and 0.81ha of active recreation space. Park design modified to align with new park area and playing field.
Local road for access to Park	Local road including car parking comprising an area of 6,206sqm	Local road including car parking comprising an area of 6,525sqm. Local road now also enables access to future public school and playing field through modified location given future high school site location.

Table 1 – Approved DA and Modification Comparison		
Aspect of Development	**DA/875/2017/A**	**Current Proposal**
Subdivision approval	The Consent allowed for subdivision to create a separate allotment for Ridge Road by modifying Lots 202 and 203.	Amended subdivision plan has meant that modified Concept application needs to align with this plan. Subdivision now proposed to deliver separate mixed use and maritime development lot now that lots 202, 203 and 204 do not exist.
Mixed use and Maritime development sites	• Lots 203 and 204 were approved for: ○ Lot 203 - 25,410sqm of land (mixed use development) ○ Lot 204 - 9,159sqm of land. (Rowing Club and Dry Boat and Marina)	Given that lots 203 and 204 no longer exist, a new 'mixed use' development lot is proposed for 19,870sqm, including mixed use and maritime uses. The Marina and rowing club (subject to detailed DAs) can still be delivered. The applicant advises the dry boat store is no longer required.
Car parking	72 spaces have been previously approved	The modification seeks approval for 93 car parking space.
Area of application of the Consent	Consent was originally granted approval across Lots 202, 203 and 204 of DP 1216628.	Whilst the application seeks to reconfigure the site as a consequence of the new high school site, the application still sits across the previously approved land as the remediation works will apply to both Lots 1 and 2 of DP1276305.

Based on the above analysis, I am satisfied that the modification can be considered substantially the same once a before and after analysis has been conducted.

(e) the comparison involves more than merely a comparison of the physical features or components of the developments as currently approved and modified but also a qualitative and quantitative appreciation of the developments in their 'proper contexts (including the circumstances in which the development consent was granted)' (Moto Projects (No 2) Pty Ltd v North Sydney Council (1999) 106 LGERA 298 (Moto Projects)).

The analysis provided in (a)-(d) above provides both a qualitative and quantitative appreciation of the development within its context. However, it is important to also consider the 'circumstances in which the development consent was granted'.

The original consent was granted in order to deliver a concept for the precinct, whilst also enabling detailed development consent for stage 1 – being the delivery of the park and road. The consent was always designed to deliver key infrastructure, whilst permitting concept consideration of both future mixed use and maritime development.

The modification still seeks to do this. It is responding to the amended subdivision that has occurred to deliver a high school – and the modification seeks to amend the street and park design, so that this infrastructure can still be delivered. It still outlines concept approval for both mixed use and maritime development, but these are not the priority.

Refusal of the modification application would delay the key intent of the original consent, which was to deliver social infrastructure to Wentworth Point as part of a broader staged development with mixed use and maritime precinct.

4.2 Consideration of multiple consents

The Panel's scope also requested that I consider whether multiple consents can operate on the same site. There is clear case law recognising that multiple consents can operate on the same site and the circumstances under which they operate. A Court Case I have utilised when considering the application of multiple consents on the same site is *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 4)* [2019] NSWLEC 58.

In this case, Justice Pepper noted that multiple consents can operate on a site and that a "fundamental tenet of planning law", is that a planning approval does not have to be acted upon, as well as:

- where multiple consents apply to the same parcel of land, all of the consents may operate unless the implementation of one consent is no longer a practical possibility due to development already having been undertaken pursuant to another consent, and
- the granting of a further consent does not operate to revoke prior consents which are in effect, and a later consent does not, of itself, take precedence over an earlier approval (unless a statute otherwise provides).

4.2.1 DA-273/2014 – Original Land Subdivision

One of Council's key contentions is that the provisions of DA-273/2014 must be considered within the context of the modification application and that the subject modification would create a 'fundamental inconsistency' with this consent.

I do not agree with this view. The subject consent was granted, and the consent enacted, the subdivision plan made and restrictions and covenants made on the relevant titles. The

land was then further subdivided (lots 1 and 2) and the restrictions transferred to the new lots. I accept that the covenants do not strictly align with the new subdivision pattern. However, this is not a reason to reject the subject modification – which never incorporated these conditions or title requirements.

I agree with the opinion of Megan Hawley of LTL that the covenants and restrictions placed on title through DA-273/2014 are not relevant to the assessment of the subject modification. I agree with her that *"changes are not proposed by the MOD. They have occurred as a result of the acquisition of land by the Department of Education and are extraneous to the MOD. The MOD must be determined having regard to what it proposes and the matters of relevance under s4.15 of the EPA Act to the actual proposed modifications"*.

I also note and agree with her view on the applicability *L& G Management Pty Ltd v Council of the City of Sydney [2021] NSWLEC 149* that consent conditions cannot require dedication of land free of cost – the only mechanisms available are through a Planning Agreement or a Section 7.11 contribution. I also note (although not strictly relevant) that the original subdivision DA-273/2014 included a note accepting that the covenants/restrictions could be extinguished by either party in the event a VPA was entered into. With respect to the Condition requiring no more than 350 dwellings be delivered prior to transfer of the future Park, is now tied to the new subdivision plan and remains.

4.2.2 DA/644/207 – Marina and Dry Boat Store

Within the broader framework, DA/644/2017 for the Marina has one aspect (being the dry boat store) that would explicitly conflict with the subject modification, as the approved boat store location sits across part of the proposed re-aligned Ridge Road.

However, documentation provided by the applicant (TfNSW – the same applicant for the Marina DA/644/2017) states that this consent has not become operative and that the dry dock building component is no longer sought and this application will be amended accordingly.

As the subject development is a part-Concept DA and part-Detailed DA, an appropriate condition can be imposed as part of the modification to remove the dry boat store and any car parking arrangements consistent with Section 4.24 (Status of concept development applications and consents) if required.

5 Conclusion and Recommendations

In conclusion, in my opinion the subject modification application (DA/875/2017/B) is capable of meeting the 'substantially the same' test under Section 4.55(2) of the Act as outlined in Section 4 of this report.

From my review of the documentation, much of the conflict appears to have been derived from conditions first imposed upon the original subdivision DA-273/2014 (and registered subdivision plan), including:

- Mechanisms such as restrictions on title or covenants to deliver public infrastructure such as the park; and
- Tying delivery of housing to the delivery of public infrastructure such as the park on a subdivision DA that did not deliver either a park or housing.

This application and consent only sought approval of subdivision into four Torrens title lots, and may not have been the most appropriate consent to impose restrictions or covenants on. Further, there has been dispute as to whether the conditions, as imposed, would be able to meet a legal test if challenged.

Consideration of the subject application must also incorporate the implications of the application being refused. The site is a critical infrastructure site for Wentworth Point – delivering both a needed park, and later playing field, high school and mixed-use/maritime precinct. Refusal of the subject application would delay the delivery of key infrastructure – particularly the road and park - at least 12 months in order to coordinate and submit a new application.

Given the proposal is capable of meeting the test of 'substantially the same', the impacts of the application's refusal should also be considered within the perspective of the Aims of the Act and the intent of Crown Development.

In concluding, I note that I am a town planner and do not hold a legal degree, Accordingly, my consideration of the tests outlined in this report are from a planning merit perspective, and not a legal one.

5.1 Recommended Conditions

I was also requested to note any conditions I thought to be of value should the Panel decide to approve the modification. Within this circumstance, my recommendations would be:

- Modify Condition 1 to reflect the updated drawings and civil reports referenced;
- Delete Condition 2, which relates to maximum GFA allocation for Lots 203 and 204. As these lots no longer exist, the condition could be retained, but would have no relevance. Deletion of the condition would remove a redundant condition, and would still ensure that any future mixed use development on the site complies with the height and FSR controls in the LEP; and
- Insert a condition to amend 644/2017 to delete the Dry Boat Store area. I would recommend the particular wording of this condition be confirmed with Legal to ensure it meets the obligations of Section 4.24 of the Act.

- Consider inclusion of a note along the lines of: *"Note: Parramatta 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 Planning Agreement with the developer for the delivery of a Peninsula Park."*