

## ADDENDUM COUNCIL ASSESSMENT REPORT

### SYDNEY EASTERN CITY PLANNING PANEL

<b>PANEL REFERENCE &amp; DA NUMBER</b>	PPSSEC-238 – DA-483/2022
<b>PROPOSAL</b>	Construction of three buildings ranging in height between 5 and 7 storey containing a mixed use industrial, warehouse and recreational development with 2 basement levels for parking, storage and plant areas (Water NSW & Integrated Development).
<b>ADDRESS</b>	Lot 2 DP 261143, Lot 1 DP 219847, Lot 3 DP 271143 2-6 Girawah Place, Matraville
<b>APPLICANT</b>	Mr Agy Dassakis, Spirecorp Pty Ltd
<b>OWNER</b>	Spirecorp Pty Ltd
<b>DA LODGEMENT DATE</b>	4 October 2022
<b>APPLICATION TYPE</b>	Development Application
<b>REGIONALLY SIGNIFICANT CRITERIA</b>	Clause 2, Schedule 6 of <i>State Environmental Planning Policy (Planning Systems) 2021</i> : Development that has a capital investment value of more than \$30 million.
<b>CIV</b>	\$37,802,636 (excluding GST)
<b>CLAUSE 4.6 REQUESTS</b>	None
<b>KEY SEPP/LEP</b>	Transport and Infrastructure SEPP, Biodiversity and Conservation SEPP, Resilience and Hazards SEPP Randwick LEP
<b>TOTAL &amp; SUBMISSIONS ISSUES SUBMISSIONS</b> <b>UNIQUE KEY IN</b>	Two (2) submissions were received. The following issues were raised: <ul style="list-style-type: none"> <li>• Visual privacy and security due to the height of the buildings.</li> <li>• Visual impact of the 5-7 storey buildings.</li> <li>• Appropriateness of sensitive land uses (e.g. child care centre) adjacent to Port Botany and the port operations.</li> <li>• Cumulative impacts of proposing sensitive land uses near the port and potential to negatively impact on the ability for the port to operate in the future due to changing noise/amenity expectations.</li> <li>• Traffic impacts on port operations and conflicts with large dangerous goods vehicles.</li> <li>• Acoustic and air quality impacts of port operations are not adequately assessed for the child care centre.</li> </ul>
<b>DOCUMENTS SUBMITTED FOR CONSIDERATION</b>	<ul style="list-style-type: none"> <li>• Architectural Plans</li> <li>• Landscape Plans</li> <li>• Traffic and Parking Impact Assessment</li> <li>• Noise Impact Assessment</li> </ul>

	<ul style="list-style-type: none"> <li>• Plan of Management (King Beats Fitness)</li> <li>• Gym Floor Plan Layout</li> <li>• Bunnerong Creek Plans</li> <li>• Waste Management Plan</li> <li>• Response Letter to Traffic Issues</li> <li>• Industrial Market Commentary Letters</li> </ul>
<b>SPECIAL INFRASTRUCTURE CONTRIBUTIONS (\$7.24)</b>	No
<b>RECOMMENDATION</b>	Deferred Commencement
<b>DRAFT CONDITIONS TO APPLICANT</b>	No
<b>SCHEDULED MEETING DATE</b>	27 February 2024
<b>PLAN VERSION</b>	2 November 2023
<b>PREPARED BY</b>	Angela Manahan
<b>DATE OF REPORT</b>	15 February 2024

## EXECUTIVE SUMMARY

Council is in receipt of a Development Application (DA-483/2022) seeking consent for the construction of three buildings ranging in height between 5 and 7 storeys containing a mixed use industrial, warehouse and recreational development with 2 basement levels for parking, storage and plant areas at 2-6 Girawah Place, Matraville. The proposal is classified as Integrated Development requiring approval under the Water Management Act 2000 due to the development being located within 40m of a watercourse and the requirement for dewatering, and requires concurrence from Transport for NSW (TfNSW) for being a traffic-generating development under *State Environmental Planning Policy (Transport and Infrastructure) 2021*.

The final assessment report was reported to the SECPP on 23 January 2024 for determination. The application was recommended for approval, subject to a deferred commencement consent which required the following:

- A1. *The building on Lot 1 is to be modified to introduce an 8m setback to the eastern boundary on Levels 3, 4 and 5. The displaced floor area associated with the gym tenancy on Level 3, the outdoor play area of the child care centre on Levels 3 and 4 and the indoor recreation tenancy on Level 5 may be relocated within the 8m setback. An overall increase in the GFA proposed as a consequence of relocating floor area is not permitted.*
- A2. *The eastern elevation of the aquatic centre level is to be modified to increase the size and amount of glazing to create an improved visual connection between the pool area and the RE1 Public Recreation zoned land.*
- A3. *The green wall is to be extended vertically on the southern half of the east elevation of the building on Lot 1 to enhance the visual appearance up to and including Level 2.*
- A4. *Requirement to provide a median island on the main driveway to separate movements, accommodate intercom, and allow for a pedestrian refuge along the public footpath.*
- A5. *That accommodation be made for at least one service bay to accommodate an 8.8m Medium Rigid Vehicle (MRV) in accordance with AS2890.2. An MRV must be able to enter and exit the site in a forward gear.*

However, during the course of the determination meeting, it came to the attention of Council that approval from the relevant authority (now known as the Department of Climate Change, Energy, the Environment and Water (DCCEEW)) for the integrated referral pursuant to s4.46 of the EP&A Act had not been received. In accordance with s4.47 of the EP&A Act, as the general terms of approval (GTAs) had not been obtained, it was Council's opinion that the application was not able to be determined. Council sought legal advice from Council's In-house Special Counsel which confirmed this.

As such, the Panel deferred the matter on 29 January 2024 for the following reasons:

*The Panel agree to defer the determination of the matter until March/April 2024. The matter was deferred to allow for the provision of the General Terms of Approval under section 91 of the Water Management Act 2000 and the inclusion in the assessment as it is a legislative requirement that these be obtained prior to the determination of the application.*

In response to the reasons for deferral, the Applicant submitted legal advice which concluded that the onus is on the Applicant to nominate a Development Application as integrated development, however an application could proceed and be determined as a non-integrated development in which case GTAs would not be required. The submission also advised that it was the intent of the Applicant to formally amend the application to un-nominate the application as an integrated development application in relation to the development being within 40m of the watercourse. On 01 February 2024, the Applicant formally amended the application pursuant to s37 of the EP&A Regs through the NSW Planning Portal to remove the nomination of the application as 'integrated development' under s91 of the Water Management Act 2000.

This addendum assessment report is supplementary to the original and supplementary assessment reports dated 7 September 2023 and 16 January 2024 respectively, and serves to respond to the deferral of the application in relation to the nomination as integrated development.

Following a detailed assessment of the amended proposal, pursuant to Section 4.16(1)(b) of the *Environmental Planning and Assessment Act 1979*, DA-483/2022 is recommended for a Deferred Commencement consent subject to the conditions contained in **Attachment A** of this report.

## **1. BACKGROUND**

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The development application (DA-483/2022) as amended seeks consent for the construction of three buildings ranging in height between 5 and 7 storeys containing a mixed use industrial, warehouse and recreational development with 2 basement levels for parking, storage and plant areas at 2-6 Girawah Place, Matraville.

The subject Development Application was lodged on 4 October 2022. The DA form identified the application as being integrated development as the development involved "*works within 40 metres of a watercourse*", and the Portal application form identified the application as integrated development under the *Water Management Act 2000* (WMA) (noting that no specific clause was required to be nominated). Section 91 of the WMA relates to activity approvals, and requires a controlled activity approval to carry out a specified controlled activity at a specified location in, on or under waterfront land. Waterfront land is defined as:

***waterfront land*** means—

- (a) *the bed of any river, together with any land lying between the bed of the river and a line drawn parallel to, and the prescribed distance inland of, the highest bank of the river, or*
- (a1) *the bed of any lake, together with any land lying between the bed of the lake and a line drawn parallel to, and the prescribed distance inland of, the shore of the lake, or*
- (a2) *the bed of any estuary, together with any land lying between the bed of the estuary and a line drawn parallel to, and the prescribed distance inland of, the mean high water mark of the estuary, or*
- (b) *if the regulations so provide, the bed of the coastal waters of the State, and any land lying between the shoreline of the coastal waters and a line drawn parallel to, and the prescribed distance inland of, the mean high water mark of the coastal waters,*

*where the prescribed distance is 40 metres or (if the regulations prescribe a lesser distance, either generally or in relation to a particular location or class of locations) that lesser distance. Land that falls into 2 or more of the categories referred to in paragraphs (a), (a1) and (a2) may be waterfront land by virtue of any of the paragraphs relevant to that land.*

Controlled activity is defined as:

**controlled activity** means—

- (a) *the erection of a building or the carrying out of a work (within the meaning of the Environmental Planning and Assessment Act 1979), or*
- (b) *the removal of material (whether or not extractive material) or vegetation from land, whether by way of excavation or otherwise, or*
- (c) *the deposition of material (whether or not extractive material) on land, whether by way of landfill operations or otherwise, or*
- (d) *the carrying out of any other activity that affects the quantity or flow of water in a water source.*

As the proposed development involved works within 40m of the creek/river, the application was referred to Water NSW under s91 of the Water Management Act, however the referral was rejected with Water NSW advising that the application should be re-referred under s90 of the WMA to dewatering requirements.

General Terms of Approval were issued by Water NSW on 6 December 2022.

On 15 January 2024, on reviewing the final assessment report, it was noted that as part of the application documentation a Riparian and Aquatic Assessment Report was provided. That Report advised that the positioning of the building was considered under a separate Controlled Activity Approval (10CX122698) (CAA) from Natural Resources Access Regulator (NRAR) for works on waterfront land, and a Vegetation Management Plan (VMP) was implemented for the agreed riparian corridor extent. The Report also concluded that a CAA will be required for the works on waterfront land, but the previous VMP and riparian extent would apply to the current proposed development. However, the report noted that NRAR should advise if extension of the VMP maintenance period is required. Additionally, it was noted that the GTAs from Water NSW did not contain any requirements or approvals in relation to the Riparian corridor or the creek/waterway, including a VMP.

As such, an email was sent to Water NSW to clarify that no further approval or referral was required prior to determination in relation to the works being within 40m of the creek, noting the rejection of the integrated referral under s91 by Water NSW when the application was first lodged.

On 23 January 2024 a response received from Water NSW which advised that an assessment under s91 of the WMA had not been carried out by Water NSW and that any questions relating to controlled activities should be referred to DCCEEW. Given that the Applicant had specifically nominated the Development Application as integrated development in relation to works within 40 metres of a watercourse, and the requirement for a controlled activity approval under s91 of the WMA, it was considered that GTAs were required from DCCEEW before granting consent to the development.

In this regard, legal advice was obtained from Council's In-house Special Counsel which concluded that GTAs from the relevant authority are required to be obtained before the granting of development consent in accordance with s4.47(2) of the EP&A Act. As no GTAs had been received from DCCEEW pursuant to s91 of the Water Management Act, and s4.46 of the EP&A Act, the application was not able to be determined.

As such, the application was deferred by SECPP to allow to allow for the provision of the General Terms of Approval under section 91 of the WMA.

In response to the deferral, the Applicant submitted legal advice, and subsequently formally amended the Development Application pursuant to s37 of the EP&A Regulation 2021 to remove the nomination of the application as 'integrated development' under s91 of the Water Management Act 2000. It should be noted that the application would still remain an integrated development application in relation to s90 of the WMA, as GTAs have already been obtained from the relevant authority, being Water NSW.

## **2. CONSIDERATION OF AMENDED APPLICATION AND LEGAL ADVICE**

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The Applicant's legal advice acknowledges that the subject application is nominated as integrated development and requires approval under the WMA due to the development being located within 40m of a watercourse (s91 of the WMA), and that the GTAs are a legislative requirement of an integrated application. However, advises that if the application was non-integrated, then concurrence would not be necessary for the Panel to determine the application and grant development consent.

While there were some errors in the advice in relation to reference to Transport for NSW instead of the correct authority of DCCEEW, the intent and reasoning of the advice was clear.

The Applicant's legal advice refers to precedent and caselaw regarding the decision to make an integrated development application which is shown to be an election made by the application (and not a requirement triggered by the necessity to obtain a third-party approval). As such, a consent authority can still determine an application regardless of whether a separate approval is required pursuant to Division 4.8 of Part 4 of the EP&A Act, provided an integrated development application is not made. The legal advice relies on the cases of *Sandig & Anor v Ku-ring-gai Council* [2001] NSWLEC 74 and *Maule v Liporoni & Anor* [2002] NSWLEC 25 to demonstrate that an applicant can make an application for non-integrated development consent, even when the proposed development falls within the definition of 'integrated development'. Furthermore, it is not a legal requirement of an applicant to make an integrated development application and it is open to the applicant to apply for development consent and then separately apply for all other necessary approvals at a separate time. While there is a significant risk on the Applicant's part in this approach, the legal advice demonstrated that there is legal precedent that says the applicant can nominate whether or not the application can be treated as integrated development or not.

In order to allow the determination of the subject application to progress, the Applicant sought to amend the development application pursuant to s37 of the EP&A Regulation 2021 and un-

nominate the application as integrated development under s91 of the WMA. This would allow the Panel to determine the application in the absence of any concurrence and GTAs.

As such, the application was formally amended on 1 February 2024 through the NSW Planning Portal, to amend the application and remove the nomination of the application as integrated development in relation to works within 40m of a watercourse (s91 of the WMA). The submission advised that approval under the WMA for a controlled activity would be sought by the Applicant separately.

As outlined previously, the application would still be classified as an integrated development application as approval from Water NSW under s90 of the WMA has been granted and GTAs provided, however the application would no longer require an approval under s91 of the WMA which will be obtained separately. As such, the application is no longer nominated as an integrated development in relation to the approval required by DCCEEW under s91.

It is noted that if the separate approval from DCCEEW is not granted, then the development as approved would not be able to proceed, or alternatively any GTAs or approval from DCCEEW may require amendments to the proposal.

As such, it is recommended that an additional condition be added for the Applicant to obtain the relevant approval from DCCEEW as part of the deferred commencement condition.

### 3. CONCLUSION

In view of the above, it is considered that the approval from DCCEEW is no longer required at this stage, with any controlled activity approval under s91 of the WMA to be sought separately. As the Applicant has formally amended the application to make this change, it is considered that the Panel can proceed with the determination of the application without the need for the approval or GTAs from DCCEEW.

The prior amendments to the proposal largely address the outstanding issues raised in the original assessment report and the draft reasons for refusal. The outstanding key issues as outlined in the supplementary assessment report, dated 16 January 2024, have been resolved satisfactorily through amendments to the proposal, by converting the application from seeking operational consent to approval for the built form subject to separate applications, and through the proposed deferred commencement conditions. The imposition of the new deferred commencement condition requiring the relevant controlled activity approval will ensure that all necessary approvals are obtained prior to activating the consent.

The development application has been considered in accordance with the requirements of the EP&A Act and the Regulations as outlined in the original assessment report, the supplementary report dated 16 January 2024 and this final addendum report. Following a thorough assessment of the relevant planning controls, issues raised in submissions and the key issues identified in the original report, it is considered the application can be supported subject to deferred commencement conditions.

### 4. RECOMMENDATION

The Development Application DA-483/2022 for the construction of three buildings ranging in height between 5 and 7 storeys containing a mixed use industrial, warehouse and recreational development with 2 basement levels for parking, storage and plant areas at 2-6 Girawah Place, Matraville be granted a **DEFERRED COMMENCEMENT** consent pursuant to Section

4.16(1)(b) of the *Environmental Planning and Assessment Act 1979* subject to the conditions attached to this report at **Attachment A**.

The following attachments are provided:

- Attachment A: Draft Deferred Commencement Conditions of Consent
- Attachment B: Letter from Planning Ingenuity formally requesting the amendment of the Development Application, dated 1 February 2024.