



Statement of Environmental Effects (Addendum)

LEC Court Reference: 2022/00044261

Council Reference: DA436/2020/1 ("the development application")

Site: 18 Olphert Avenue, Vaucluse ("the site")

Project Number: 747

Client: Mr Campbell Taylor and Ms Sarah Curtis ("the Applicant" and
"the Owner")

Date: 22 June 2022

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In preparing this report we have made certain assumptions. We have assumed that all information and documents provided to us by the Client or as a result of a specific request or enquiry were complete, accurate and up-to-date. Where we have obtained information from government registers or database, we have assumed that the information is accurate. Where an assumption has been made, we have not made any independent investigations with respect to the matters the subject of that assumption. We are not aware of any reason why any of the assumptions are incorrect.

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1 Purpose

This Addendum Statement of Environmental Effects ("**SEE**") has been prepared for submission with the further amended development application (DA) plans Revision H, as required for lodgement on the NSW Planning Portal in accordance with Clause 24 of the *Environmental Planning & Assessment Regulation 2021* ("**2021 Regulation**").

The 2021 Regulation does not apply to this DA – see Schedule 6 Clause 3 EPA Regulation 2021, however lodgement to the portal is required.

This addendum refers to **Revision H** of the plans that result from the outcome of the section 34AA conference and the heads of agreement as to changes necessary.

The *Environmental Planning and Assessment Act 1979* ("**Act**") does not provide any clarity as to the form or function of the SEE.

Schedule 1, Part 2(4) of the *Environmental Planning and Assessment Regulation 2000* ("**2000 Regulation**") requires:

"A statement of environmental effects referred to in subclause (1) (c) must indicate the following matters:

- a) the environmental impacts of the development,*
- b) how the environmental impacts of the development have been identified,*
- c) the steps to be taken to protect the environment or to lessen the expected harm to the environment,*
- d) any matters required to be indicated by any guidelines issued by the Director-General for the purposes of this clause."*

This SEE is not an assessment under section 4.15 of the Act and limits itself to the requirements of the Repealed Regulation absent any guidelines issued by the Secretary or Deputy Secretary Planning.

Consistent with the note to clause 54(4) of the 2000 Regulation:

"The aim of this provision is to ensure that the consent authority does not oblige the applicant to provide these construction details up-front where the applicant may prefer to test the waters first and delay applying for a construction certificate until, or if, development consent is granted."

This Addendum SEE relies in good faith upon the plans, reports and other documents provided by the registered surveyor, architect and a range of consultant experts and government databases accessible at the date of drafting the SEE, as is necessary and reasonable, subject to section 10.6 of the Act, we have assumed that none of the material is false or misleading in a material particular.

2 Executive Summary

2.1 The site

The site comprises Lot 66 DP 5139, and is also known as 18 Olphert Avenue, Vaucluse and is zoned R2 Low Density Residential under Woollahra Local Environmental Plan 2014. It is located on the northern side of Olphert Avenue and has a street frontage (southern boundary) and rear (northern) boundary of 18.3m, western and eastern side boundaries of 51.8m and a site area of 947.5m². A sewer line extends across the rear of the site.

The site falls approximately 10m from the site frontage to the rear boundary. The site is currently occupied by a single storey dwelling house.

2.2 The locality – existing character

The locality is characterised by 1-3 storey detached dwelling houses. The adjoining properties to the east and west (20 and 16 Olphert Avenue respectively) are each occupied by a 1-3 storey dwelling house.

The adjoining property to the rear (77 Hopetoun Avenue) is approximately 0.8-1.6m lower than the rear section of the site.

2.3 The planning controls

The planning controls relevant to this development application include:

- The Act;
- The 2000 Regulation
- State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004;
- State Environmental Planning Policy (Resilience and Hazards) 2021;
- State Environmental Planning Policy (Biodiversity and Conservation) 2021 - Chapter 2, Sydney Harbour Catchment;

- Woollahra Local Environmental Plan 2014.
- Woollahra Development Control Plan 2015.

2.4 Compliance with the planning controls

The proposal exceeds the maximum Height of Building as detailed by the plans and supporting documents and this is addressed by the Clause 4.6 submission seeking an exception to HOB.

There is no FSR development standard for the site and this is replaced by a DCP Floorplate Control addressed by the plans.

The additional design amendments identified in **Revision H** of the Plans and supporting information further address consistency with the planning controls and mitigate the impact of the proposed development. The most significant of these include, in summary:

- The deletion of the 1.5m high screen wall shown on the eastern edge of the proposed dwelling at the Living Floor Level and replacement with a full height wall (which could incorporate treatments to allow winter sun into the kitchen);
- The inclusion on the Bedroom Floor Plan of a 1.5m high privacy screen on the eastern edge of the building extending to the edge of the terrace of No. 20;
- The increase of the depth of the planter in the non-trafficable sculpture garden to a depth of 300mm on the Bedroom Floor Plan and the Living Floor Plan;
- On the Roof Plan, the glass balustrade 1m height shown on the roof terrace set back by a distance of 1m for its entire length;
- The amendment of new boundary fences to 1.8m high above existing ground level, constructed along the boundaries of No. 16 & No. 20 Olphert Avenue and located wholly within the boundaries of the site;
- The deletion of the 2 additional replacement Christmas bush trees along the eastern boundary shown in the Landscape Plan and replacement with 2 trees of a species which do not grow greater than 3m in height;
- The deletion of clumping bamboo from the Landscape Plan.

- Updates to show the level of fill on any area of the site does not exceed a height greater than 1.2m above existing ground level.
- Deletion of the proposed trellis/ pergola in the north-eastern corner of the site.
- Full height enclosure of the spiral staircase and landing at the rear of the proposed garage.

The relevant DCP provisions addressed by the **Revision H** of the plans and this addendum SEE are:

- B3.2.5 Wall height and incline plane
- B3.5.3 Public and private views
- B3.5.4 Acoustic and visual privacy
- B3.7.1 Landscape areas and private open space
- B3.7.2 Fences
- B3.7.4 Ancillary development – swimming pools

2.5 Desired Future Character

There are two levels of development standards and controls that help inform, but do not determine alone, desired future character:

- That desired future character defined by the LEP (if at all),
- That desired future character defined by the DCP (if at all).

The Court has made it clear in three most relevant matters, *Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 (**SJD**), *Big Property Pty Ltd v Randwick City Council* [2021] (**Big Property**), followed swiftly by *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] (**HPG**), that LEP and DCP provisions are not in of themselves determinative of desired future character

At 57 in HPG:

“The desired future character of the locality can be evaluated by reference to matters other than the development standards that determine the building envelope for the site, including the existing development that forms the built context of the site (*Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 (SJD DB2) at [54]). The desired future character of

an area is not determined and fixed by the applicable development standards for height and FSR, because they do not, alone, fix the realised building envelope for a site. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality (SJD DB2 at [62]-[63]). Development standards that determine building envelopes can only contribute to shaping the character of the locality (SJD DB2 at [53]-[54] and [59]-[60])."

Recent case law shows that 'desired future character' is determined by a range of factors including the LEP and the approved buildings neighbouring a development. The fact that a development exceeds height and FSR standards cannot be used as a carte blanche for claiming that a development is inconsistent with the desired future character of the neighbourhood. Applicants can clearly look at the surrounding site context to consider desired future character, and can assume that not all future development will comply with development standards.

Giving proper consideration to existing and contemporary development in the vicinity and immediate vicinity (visual catchment), the existing character above, the proposal is consistent with the desired future character.

2.6 Accessibility

There are no accessibility issues in contention

2.7 Essential Services

There are no essential services issues other than that the swimming pool will be constructed over the sewer in compliance with Sydney Water's Building Over Sewer requirement.

2.7.1 Potable Water - Sydney Water or Council

A Section 73 Compliance Certificate is required to be obtained from a water servicing coordinator through Sydney Water Developer Direct.

To attain the Compliance Certificate the developer must submit the application to Sydney Water with:

- site plan
- building plan
- development consent, and

- pre-allocated plan number.

The scale of this development and the location of existing services are such that a Compliance Certificate can be required post the grant of development consent.

See: <https://www.sydneywater.com.au/plumbing-building-developing/building/sydney-water-tap-in.html> - Email us at swtapin@sydneywater.com.au.

2.7.2 Sewer –Sydney Water or Council

A Section 73 Compliance Certificate is required to be obtained from a water servicing coordinator directly to online through Sydney Water Developer Direct.

To attain the Compliance Certificate the developer must submit the application to Sydney Water with:

- site plan
- building plan
- development consent, and
- pre-allocated plan number.

The scale of this development and the location of existing services are such that a Compliance Certificate can be required post the grant of development consent.

See: <https://www.sydneywater.com.au/plumbing-building-developing/building/sydney-water-tap-in.html> - Email us at swtapin@sydneywater.com.au.

2.7.3 Electricity – Ausgrid

Further to State Environmental Planning Policy (Transport and Infrastructure) 2021 Clause 2.48 Determination of development applications—other development, the site is serviced by electricity and does not impact upon electricity infrastructure.

The relevant provider is [Ausgrid](https://www.ausgrid.com.au/Connections/Network-area-check) - <https://www.ausgrid.com.au/Connections/Network-area-check>

Any work required new network loads, in line with the requirements of the *Electricity Supply Act 1995*, is deemed to be 'contestable works' and must be undertaken by an Accredited Service Provider.

An Accredited Service Provider is an individual or an entity accredited in accordance with the *Electricity Supply Act 1995* and the *Electricity Supply (General) Regulation 2001*. Level 1 is network construction; Level 2 is connection services and Level 3 is design.

- [List of Level 1 Accredited Service Providers](#) (PDF)
- [List of Level 2 Accredited Service Providers](#) (PDF)
- [List of Level 3 Accredited Service Providers](#) (PDF)

Level 1 – Extending or upgrading the local network

Can extend the overhead or underground network to reach your property. Can increase the capacity of the existing local network. This may include high and low voltage works and substations.

Level 2 – Service from the street mains to your property

Performs work closer to your premises. Disconnecting your premises from the network (class 2A). Installing, upgrading and/or energising an underground service line to connect your premises to the electricity network (class 2B). Installing, upgrading and/or energising an overhead service line to connect your premises to the electricity network (class 2C). Installing and/or upgrading network devices, like Off Peak/Controlled load devices (class 2D)

Level 3 – Design of network extensions or upgrades

Designs extensions or upgrades of the existing electricity network that supplies your property. There are separate classes of Level 3 ASP for distribution of underground and overhead mains.



Figure 1 - Electricity Distributors Map

2.7.4 Natural Gas

Jemena Gas Networks covers Illawarra, Sydney, Central Coast, Hunter, Southern Highlands, Blue Mountains, Riverina, Central West and Orana and supply will be connected in accordance with Jemena's requirements.

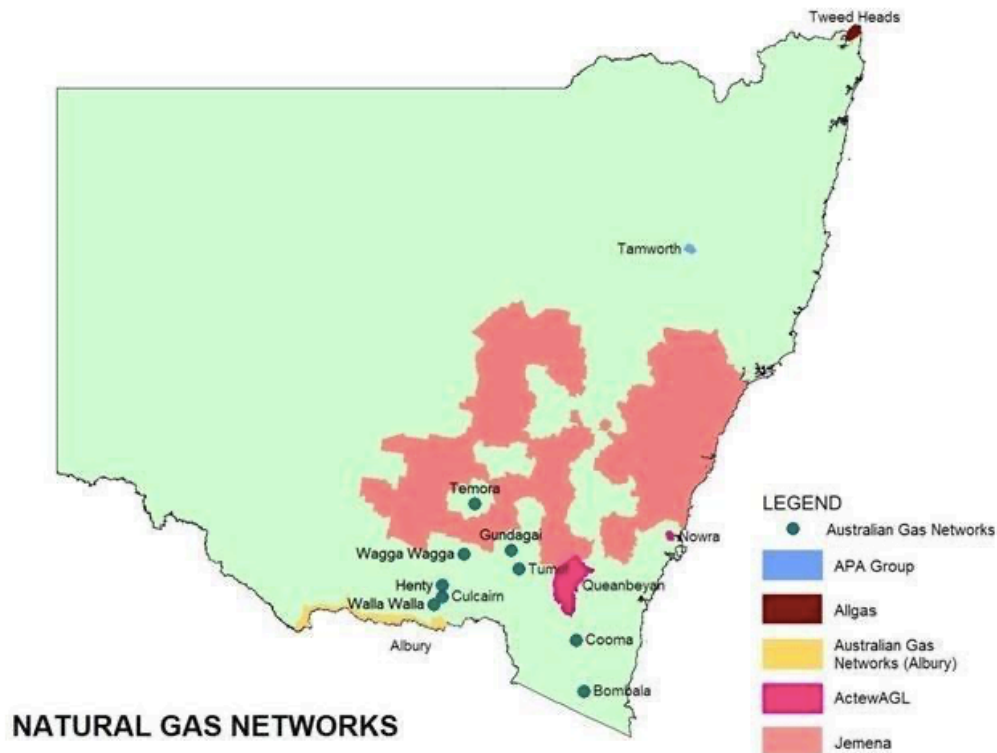


Figure 2 - NSW Natural Gas Infrastructure

2.7.5 Telecommunications

Consistent with Planning Circular PS 17-005 prior to the issue of any Subdivision or Construction Certificate in connection with a development, the developer (whether or not a constitutional corporation) will provide evidence satisfactory to the Certifying Authority that arrangements have been made for:

- (i) the installation of fibre-ready facilities to all individual lots and/or premises in a real estate development project so as to enable fibre to be readily connected to any premises that is being or may be constructed on those lots. Demonstrate that the carrier has confirmed in writing that they are satisfied that the fibre ready facilities are fit for purpose.
and
- (ii) the provision of fixed-line telecommunications infrastructure in the fibre-ready facilities to all individual lots and/or premises in a real estate development project demonstrated through an agreement with a carrier.

[Telecommunications in new developments \(TIND\) policy¹](#)

The Government has published the TIND policy, which outlines its policy for the provision of telecommunications in new developments.

The TIND policy has two key objectives: to provide people moving into new developments with ready access to modern telecommunications, both voice and broadband; and to support a competitive and sustainable market for the provision of such infrastructure by fostering efficiency, innovation, and choice.

The latest version of the TIND policy took effect on 1 September 2020.

The Department has prepared a fact sheet titled 'Telecommunications in New Developments' that provides a guide for consumers and industry.

2.8 Information about concurrence or approvals

Section 3.18 of the Act and the provisions of relevant *Environmental Planning Instruments (EPI)* may trigger the need for concurrence or other approvals.

Concurrence is when agreement from a referral authority must be obtained before the council can determine a DA. Concurrence requirements are typically identified in environmental planning instruments (EPIs), but also exist in other legislation such as the *Roads Act 1993*.

This SEE adopts the *Development Referrals Guide*² as this guide sets out:

- when an integrated development approval concurrence or referral is required
- the referral authority's lodgement requirements
- how the referral authority will assess an application
- what outcome applicants should expect.

¹ <https://www.infrastructure.gov.au/sites/default/files/documents/telecommunications-in-new-developments-august2021.pdf>

² <https://www.planning.nsw.gov.au/-/media/Files/DPE/Plans-and-policies/Policy-and-legislation/Planning-reforms/Development-referrals-guide.pdf>

We note that section 4.13(11) of the Act also provides that if a concurrence authority *“fails to inform the consent authority of the decision concerning concurrence within the time allowed for doing so, the consent authority may determine the development application without the concurrence of the specified person and a development consent so granted is not voidable”*.

Potential Concurrences and Referrals considered:

- Development impacting electricity infrastructure under *State Environmental Planning Policy (Transport and Infrastructure) 2021*
 - Development impacting gas infrastructure
 - Heritage conservation
 - Aboriginal cultural
 - Environment protection
 - Aquatic and marine matters
 - Water management (part 1) – controlled activities
 - Water management (part 2) – water licences and approvals
 - Water Development impacting water infrastructure
 - Flood prevention
 - Coal mine subsidence
 - Mining
 - Development impacting pipeline infrastructure
 - Development impacting railway infrastructure
 - Development impacting roads
 - Development impacting air infrastructure
- This proposal is not considered to impact any air infrastructure
- Development impacting defence infrastructure
- This proposal is not considered to impact any defence infrastructure.
- Proposed education infrastructure

- Development impacting observatory infrastructure
- Urban design
- Land-use planning
- Development at ports
- Hazardous and offensive development

The proposal does not require concurrence in relation to any of the above issues and:

- RMS – is not required
- Rail Corp – is not required
- Heritage – is not required

2.9 Integrated Development

The proposal is not considered integrated development as none of the following areas are required:

- a permit under section 201, 205 or 219 of the *Fisheries Management Act 1994*,
- an approval under Part 4, or an excavation permit under section 139, of the *Heritage Act 1977*,
- an Aboriginal heritage impact permit under section 90 of the *National Parks and Wildlife Act 1974*,
- a bush fire safety authority under section 100B of the *Rural Fires Act 1997*,
- a water use approval under section 89, a water management work approval under section 90 or an activity approval (other than an aquifer interference approval) under section 91 of the *Water Management Act 2000*.

3 The proposal in detail

The proposal is detailed by the plans and supporting reports submitted with the development application.

It is proposed to:

- Provide environmental controls and tree protection zones.
- Demolish the existing buildings in accordance Australian Standard AS 2601—1991: *The Demolition of Structures*, published by Standards Australia, and as in force at 1 July 1993.
- Remove and dispose of all demolition material consistent with the POEO Act and Regulations.
- Carry out site works including all geotechnical work and precautions under the supervision of a professional engineer.
- Construct a dwelling house, swimming pool, retaining walls and related ancillary works including landscaping and fencing, meeting the objectives of all relevant EPI and DCP, in accordance with development consent.
- Carry out landscaping works in accordance with development consent.
- Carry out required public domain works to the frontages of Olphert Avenue in accordance with relevant approvals under the *Roads Act 1993*.
- Occupy and use the building in accordance with development consent and relevant Occupation Certificate(s).

3.1 Demolition

Prior to the commencement of any demolition works a photographic archival record of the building and landscape elements to be demolished will be submitted to the satisfaction of Council.

This will include a copy of the survey and site plan annexed to the development application, postcard sized high resolution photographs of:

- each elevation,
- each structure and landscape feature,
- internal or external details if nominated in Council's heritage officer's assessment, report; and
- views to the subject property from each street and laneway or public space.

This will be done to recording the existing character of the locality.

Consistent with the 2000 *Regulation* all demolition work will be carried out in accordance with Australian Standard AS 2601—1991: *The Demolition of Structures*, published by Standards Australia, and as in force at 1 July 1993, by a Workcover NSW licenced contract. Such contractors are bound by their licence conditions and Workcover NSW OH&S laws and requirement to identify asbestos, lead and other potentially harmful waste and ensure that it's demolition, temporary storage and removal comply with current OH&S and environmental standards.

3.2 Removal and Disposal of Demolition Waste

Section 143 of the *Protection of the Environment Operations Act 1997* requires waste to be transported to a place that can lawfully accept it. The owner of the waste and the transporter are legally responsible for proving the waste was transported to a lawful place.

Waste will be classified by the Licence Demolition Contractor(s), Excavators and trades in accordance with the Environmental Protection Authority's Waste Classification Guidelines (ISBN 978 1 74359 798 9):

- Part 1: Classifying waste
- Part 2: Immobilising waste
- Part 4: Acid sulphate soils
- Addendum to Part 1: Classifying Waste

The hazardous material survey required by AS2601 will determine whether asbestos waste (special waste) exists and, if present, it will be classified and only removed by licensed contractors.

Most of the waste will be recycled general solid waste including virgin excavated natural material (VENM) and general *building and demolition waste*.

Building and demolition waste means unsegregated material (other than material containing asbestos waste or liquid waste) that results from:

- the demolition, erection, construction, refurbishment, or alteration of buildings other than
 - chemical works
 - mineral processing works
 - container reconditioning works
 - waste treatment facilities
- the construction, replacement, repair, or alteration of infrastructure development such as roads, tunnels, sewage, water, electricity, telecommunications, and airports

and includes materials such as:

- bricks, concrete, paper, plastics, glass, and metal
- timber, including unsegregated timber, that may contain timber treated with chemicals such as copper chrome arsenate (CCA), high temperature creosote (HTC), pigmented emulsified creosote (PEC) and light organic solvent preservative (LOSP)

but does not include excavated soil (for example, soil excavated to level off a site prior to construction or to enable foundations to be laid or infrastructure to be constructed).

3.3 Site Works

It is proposed to undertake environmental control and site works ordinarily ancillary to demolition and construction. These include, but may not be necessarily limited to the following activities.

3.3.1 Tree protection zone

Tree protection zones will be established and maintained as required by the development consent.

3.3.2 Environmental Controls

The principal contractor will ensure that the following works, monitoring, measures, and controls are installed and maintained as required by any consent and other statute:

- Erosion and sediment controls,
- Dust controls,
- Filtering of dewatering discharges,
- Hours of work and Noise controls;
- Vibration monitoring and controls as recommended by the Geotechnical engineer;
- Ablutions;
- Site crane;
- Site fences and hoardings.

3.3.3 Erosion and Sedimentation Controls

Erosion and sedimentation controls will be implemented under a *soil and water management plan*, lodged at the Construction Certificate stage, and forming part of the 1st Construction Certificate pursuant to :

- The “Blue Book”, being , Managing Urban Stormwater: Soils & Construction (4th edition, Landcom, 2004), commonly referred to as the “Blue Book” and as in force at the commencement of State Environmental Planning Policy (Infrastructure) Amendment 2018.
- “*Do it Right On Site, Soil and Water Management for the Construction Industry*” published by the Southern Sydney Regional Organisation of Councils, 2001.

The final erosion and sedimentation control work will be assessed and approved pursuant to clause 161 of the 2000 *Regulation*.

3.3.4 Archaeological excavation

Section 139 of the *Heritage Act* 1977 provides that:

"139 Excavation permit required in certain circumstances

- (1) A person must not disturb or excavate any land knowing or having reasonable cause to suspect that the disturbance or **excavation** will or is likely to result in a relic being discovered, exposed, moved, damaged, or destroyed unless the disturbance or **excavation** is carried out in accordance with an **excavation** permit.
- (2) A person must not disturb or excavate any land on which the person has discovered or exposed a relic except in accordance with an **excavation** permit."

We do not know of or have any reasonable cause to suspect that excavation will or is likely to result in a relic being discovered, exposed, moved, damaged, or destroyed.

It is not considered reasonably necessary for the Applicant to seek or obtain an excavation permit under the Section 139 of the *Heritage Act* 1977 in the circumstance of this proposal.

3.3.5 Geotechnical Works

Geotechnical recommendations will be implemented by the principal contractor to comply with Section 177 of the *Conveyancing Act 1919* which creates a statutory duty of care in relation to support of land. Accordingly, a person has a duty of care not to do anything on or in relation to land being developed (the supporting land) that removes the support provided by the supporting land to any other adjoining land (the supported land).

Further, the Regulation contains prescribed conditions under clause 98E requiring " the person having the benefit of the development consent must, at the person's own expense: (a) protect and support the adjoining premises from possible damage from the excavation, and (b) where necessary, underpin the adjoining premises to prevent any such damage."

This condition is deemed whether or not incorporated into any consent.

3.3.6 De-watering

No temporary or permanent dewater is proposed or contemplated. Refer to the Geotechnical Report filed in the Class 1 Application.

3.4 Building Work

The building process may be staged given site constraints. Building work will be approved under one or more Construction Certificates Commissioning.

All building services including all essential fire safety measures detailed by the Construction Certificate(s) will be subject to formal commissioning and certification by relevant professional engineers and licenced trades.

The commissioning of all building services will be completed prior to the issue of any occupation certificate for each relevant part of the building.

3.5 Occupation and Use

The occupation and use of the building will be in accordance with the development consent and relevant Occupation Certificate(s).

4 Development Standards and Controls

The relevant EPI standards and DCP controls have been disclosed by reference to the original SEE and this addendum.

4.1 State Environmental Planning Policies

On 1 March 2022, 43 SEPPs were repealed. There are not any substantive changes to the legal provisions. This is because the contents of the repealed SEPPs have been generally transferred into 11 new SEPPs.

The current SEPPs relevant to this proposal are addressed below.

4.1.1 [State Environmental Planning Policy \(Biodiversity and Conservation\) 2021](#)

This SEPP contains:

- planning rules and controls for the clearing of native vegetation in NSW on land zoned for urban and environmental purposes that is not linked to a development application the land use planning and assessment framework for koala habitat
- provisions which establish a consistent and co-ordinated approach to environmental planning and assessment along the River Murray
- provisions seeking to protect and preserve bushland within public open space zones and reservations
- provisions which aim to prohibit canal estate development
- provisions to support the water quality objectives for the Sydney drinking water catchment
- provisions to protect the environment of the Hawkesbury-Nepean River system
- provisions to manage and improve environmental outcomes for Sydney Harbour and its tributaries
- provisions to manage and promote integrated catchment management policies along the Georges River and its tributaries
- provisions which seek to protect, conserve, and manage the World Heritage listed Willandra Lakes property.

This table summarises its relevance to this proposal:

	Comment
Vegetation in non-rural areas (Chapter 2)	Considered below
Koala habitat protection 2020 (Chapter 3)	Not Applicable to this proposal
Koala habitat protection 2021 (Chapter 4)	Not Applicable to this proposal
River Murray Lands (Chapter 5)	Not Applicable to this proposal
Bushland in urban areas (Chapter 6)	No remnant bush land affects the site
Canal Estate Development (Chapter 7)	Not Applicable to this proposal
Sydney Drinkwater Catchment (Chapter 8)	Not Applicable to this proposal
Hawkesbury-Nepean River (Chapter 9)	Not Applicable to this proposal
Sydney Harbour Catchment (Chapter 10)	Considered below
Georges River Catchment (Chapter 11)	Not Applicable to this proposal
Willandra Lakes Region World Heritage Property (Chapter 12)	Not Applicable to this proposal

4.1.1.1 Vegetation in non-rural areas (Chapter 2)

Vegetation in non-rural areas (previously dealt with under the Vegetation SEPP and the earlier repeal of clause 5.9 and 5.10 of the Standard Instrument LEP) is now controlled by Chapter 2 of the Biodiversity and Conservation SEPP.

Chapter 2 deals with vegetation in non-rural areas:

- (a) to protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and
- (b) to preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.

This only applies to LGA in the Sydney area.

The proposal's impacts upon trees and vegetation has been considered.

The proposal is supported by an Arboricultural Assessment Report by, David Shrimpton, Koala Arbor Consulting Arborists and these impacts are offset by the proposed Landscaping detailed by the Landscape Plans.

Whilst there are short term impacts from the development the medium and long term landscape outcomes are considered to protect the biodiversity values of trees and other vegetation consistent with the Biodiversity and Conservation SEPP.

A Biodiversity Development Assessment Report (BDAR) is not considered necessary to support this proposal.

A Biodiversity Development Assessment Report (BDAR) is only required to accompany a development application if the proposed development is likely to 'significantly affect threatened species' and the Biodiversity Offset Scheme (BOS) will apply.

Section 7.2 of the *Biodiversity Conservation Act 2016* (BC Act) states that a development will 'significantly affect threatened species' if:

- a. it is likely to significantly affect threatened species or ecological communities, or their habitats, according to the test in section 7.3, or
- b. the development exceeds the biodiversity offsets scheme threshold if the biodiversity offsets scheme applies to the impacts of the development on biodiversity values, or
- c. it is carried out in a declared area of outstanding biodiversity value.

The BOS threshold is established by section 7.2(1)(b) of the BC Act and clause 7.1(1) of the Biodiversity Conservation Regulation 2017 (BC Regulation).

The threshold has two components:

- whether the amount of native vegetation being cleared exceeds a threshold area
- whether the development involves clearing of native vegetation or prescribed impacts on an area mapped on the biodiversity values map published by the Minister for the Environment.

This threshold has two main elements:

1. Whether the amount of native vegetation being impacted exceeds a threshold area set out below; or

MINIMUM LOT SIZE ASSOCIATED WITH THE PROPERTY	THRESHOLD FOR CLEARING, ABOVE WHICH THE BAM AND OFFSETS SCHEME APPLY
Less than 1 ha	0.25 ha or more
1 ha to less than 40 ha	0.5 ha or more
40 ha to less than 1000 ha	1 ha or more
1000 ha or more	2 ha or more

2. Whether the impacts occur on an area mapped by the Biodiversity Values Map published by the Minister for the Environment.

The proposal does not exceed the threshold area and is not mapped by the Biodiversity Values Map published by the Minister for the Environment.

4.1.1.2 Bushland in urban areas (Chapter 6)

For the purposes of this Chapter, *bushland* means land on which there is vegetation which is either a remainder of the natural vegetation of the land or, if altered, is still representative of the structure and floristics of the natural vegetation.

The site is highly modified to the point where there is no remnant “*bushland*” that is there is no vegetation that “is still representative of the structure and floristics of the natural vegetation”. Sydney Harbour Catchment (Chapter 10)

The site is within the Sydney Harbour Catchment.

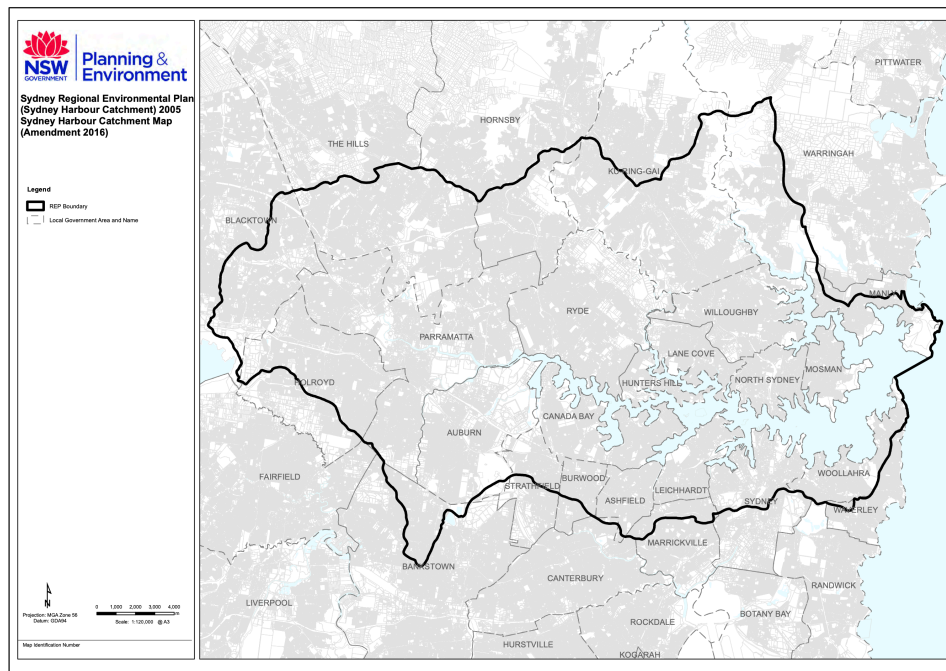


Figure 3 - Sydney Harbour Catchment Map

The site is within the Foreshores and Waterways Boundary:

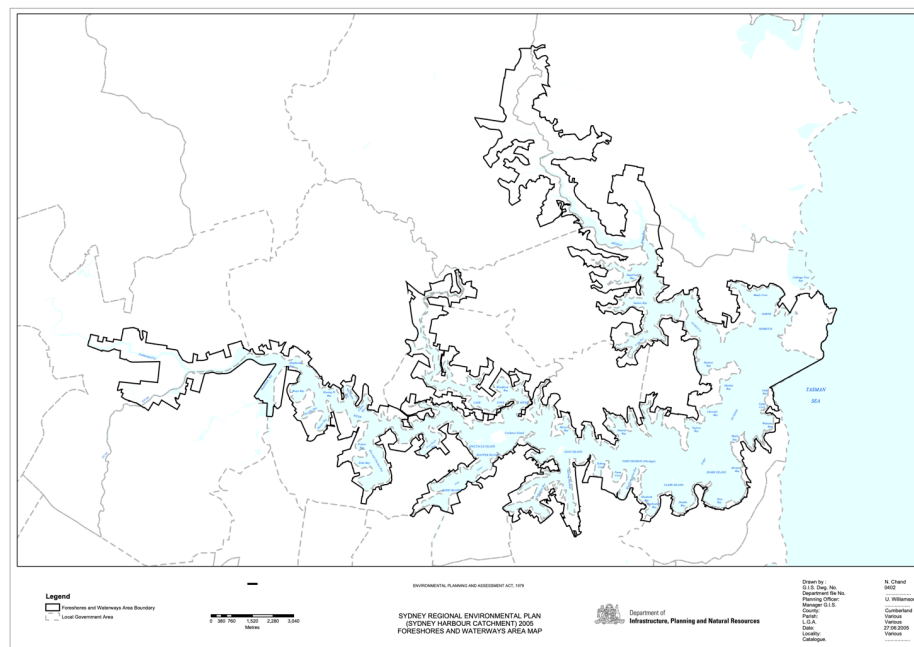


Figure 4 - Sydney Harbour Foreshores and Waterways Area Boundary

The site is not within the immediate vicinity (visual catchment) of any Strategic Foreshore site:

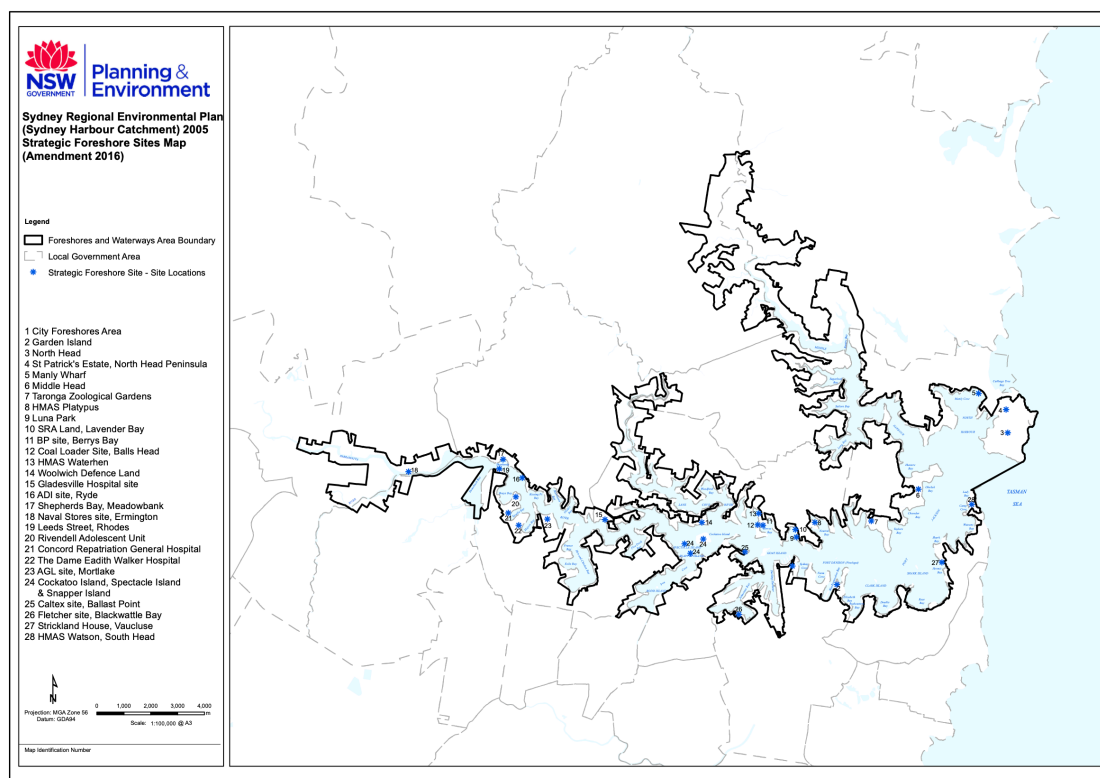


Figure 5 - Sydney Harbour Strategic Foreshore Sites

I have considered the relevant maps and the provisions of Chapter 10 of this SEPP. In particular relevance, Division 2, and even more specifically relevant clause 10.23 as to scenic quality and clause 10.24 maintenance, protection, and enhancement of views.

The proposal is consistent with the objectives of these provisions and to a large extent these provisions repeat the LEP and DCP provisions that also relate to scenic quality and views.

4.1.2 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

The amended proposal is supported by an amended BASIX Certificate 1052152S_04.

4.1.3 State Environmental Planning Policy (Exempt and Complying Development Codes) 2008

The applicant and owner may to any relevant extent also rely upon this SEPP to undertake development permissible under this SEPP.

4.1.4 State Environmental Planning Policy (Housing) 2021

This SEPP is not relevant as the proposal is not:

- Affordable housing
- Diverse housing
- Short term rental accommodation
- Conversion of serviced apartments
- Manufacture home estate
- Caravan park
- Temporary emergency accommodation

4.1.5 State Environmental Planning Policy (Industry and Employment) 2021

This SEPP is not relevant as the proposal:

- Is not within the Western Sydney employment area (Chapter 2)
- Is not advertising or signage (Chapter 3)
- Does not propose any advertising of signage other than building identification signage ancillary to the use of the building.

4.1.6 State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development

The proposal is not a Residential Apartment Development.

4.1.7 State Environmental Planning Policy (Planning Systems) 2021

The proposal is:

- Not State Significant or Regional Development (Chapter 2)
- Not on or within Aboriginal Land (Chapter 3)

4.1.7.1 Chapter 4 Concurrences and consents

Clause 4.3(1) provides that a person whose **concurrence** to development is required to be obtained by a relevant provision fails to inform a consent authority of the decision concerning **concurrence** within the time allowed for doing so, the Planning Secretary may elect to act in the place of the person for the purposes of deciding whether to grant **concurrence** to the development.

The Applicant may, pursuant to clause 4.3(2), provide an election in writing to the consent authority. This provision is not triggered by the Application.

4.1.8 State Environmental Planning Policy (Precincts—Central River City) 2021

This SEPP applies only to:

- State significant precincts (Chapter 2)
- Sydney region growth centres (Chapter 3)
- Homebush Bay area (Chapter 4)
- Kurnell Peninsula (Chapter 5)
- Urban Renewal precinct (Chapter 6)

The site is not within any of the precincts, centres, or areas.

4.1.9 State Environmental Planning Policy (Precincts—Eastern Harbour City) 2021

This SEPP applies only the areas detailed upon the following maps and the site is not located within any of these areas:

- State Environmental Planning Policy (State Significant Precincts) 2005 The Luna Park site Luna Park Amusement Zone Map
- State Environmental Planning Policy (State Significant Precincts) 2005 The Redfern–Waterloo Authority Sites Additional Permitted Uses Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Redfern–Waterloo Authority Sites Floor Space Ratio Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Redfern–Waterloo Authority Sites Gross Floor Area Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Redfern–Waterloo Authority Sites Height of Buildings Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Redfern–Waterloo Authority Sites Heritage Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Redfern–Waterloo Authority Sites Land Application Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Redfern–Waterloo Authority Sites Land Zoning Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Barangaroo site Gross Floor Area Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Barangaroo site Height of Buildings Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Barangaroo site Heritage Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Barangaroo site Land Application Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Barangaroo site Land Zoning Map

- State Environmental Planning Policy (State Significant Precincts) 2005 Wahroonga Estate site Height of Buildings Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Wahroonga Estate site Land Application Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Wahroonga Estate site Land Zoning Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Sirius site Active Street Frontages Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Sirius site Height of Buildings Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Sirius site Land Application Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Sydney Harbour Foreshore Sites Map
- State Environmental Planning Policy (State Significant Precincts) 2005 Sydney Harbour Port and Related Employment Lands Map
- Sydney Regional Environmental Plan No 26—City West—Map 1
- Sydney Regional Environmental Plan No 26—City West—Map 2
- Sydney Regional Environmental Plan No 26—City West—Map 3
- Sydney Regional Environmental Plan No 26—City West—Map 4
- Sydney Regional Environmental Plan No 26—City West—Map 5
- Sydney Regional Environmental Plan No 26—City West—Map 6
- Sydney Regional Environmental Plan No 16—Walsh Bay
- Sydney Regional Environmental Plan No 33—Cooks Cove Additional Permitted Uses Map
- Sydney Regional Environmental Plan No 33—Cooks Cove Zoning Map
- State Environmental Planning Policy No 47—Moore Park Showground Land Application Map

The site is not within any of these precincts.

4.1.10 State Environmental Planning Policy (Precincts—Regional) 2021

This SEPP only applies to:

- State significant precincts (Chapter 2):
 - Kings Forest
 - Tomago Industrial
 - Sandon Point
 - Rise Bilambil Heights
 - Calderwood

- Southern Highlands Regional Shooting Complex
- Activation precincts (Chapter 3)
 - Wagga Wagga
 - Moree
- Kosciuszko National Park and alpine resorts (Chapter 4)
- Gosford city centre (Chapter 5)

The site is not within any of these precincts, activation precincts or areas.

4.1.11 State Environmental Planning Policy (Precincts—Western Parkland City) 2021

This SEPP applies only the areas detailed upon the following maps and the site is not located within any of these areas:

- State significant precincts (Chapter 2)
 - Edmondson Park South
 - Oran park and Turner Road
 - Marsden Park Industrial
 - Liverpool Growth Centres
 - Camden Growth Centres
 - South East Wilton
 - North Wilton
- Sydney region growth centres (Chapter 3)
- Western Sydney Aerotropolis (Chapter 4)
- Penrith Lake Scheme(Chapter 5)
- St Marys (Chapter 6)
- Western Sydney parklands (Chapter 7)

The site is not within any of these precincts, activation precincts or areas.

4.1.12 State Environmental Planning Policy (Primary Production) 2021

This SEPP contains planning provisions:

- to manage primary production and rural development including supporting sustainable agriculture
- for the protection of prime agricultural land of state and regional significance as well as regionally significant mining and extractive resources.

This SEPP is not relevant to this proposal.

4.1.13 State Environmental Planning Policy (Resilience and Hazards) 2021

4.1.13.1 Coastal Management (Chapter 2)

This Chapter refer to the relevant maps under the State Environmental Planning Policy (Coastal Management) 2018.

Clause 2.15 provides a hierarchy of development controls if overlapping controls apply within this Chapter:

“If a single parcel of land is identified by this Chapter as being within more than one coastal management area and the development controls of those coastal management areas are inconsistent, the development controls of the highest of the following coastal management areas (set out highest to lowest) prevail to the extent of the inconsistency—

- (a) the coastal wetlands and littoral rainforests area,
- (b) the coastal vulnerability area,
- (c) the coastal environment area,
- (d) the coastal use area.”

By reference to the defined maps under clause 2.2 of this Chapter the site is:

- Not within Coastal wetlands and littoral rainforests area, therefore Clause 2.7 of this Chapter (Coastal wetlands and littoral rainforests) does not apply.
- Not within land in proximity to coastal wetlands or littoral rainforest, therefore Clause 2.8 (Land in proximity to coastal wetlands or littoral rainforest) does not apply.

- Not within Coastal vulnerability area, therefore Clause 2.9 (Development on land within the coastal vulnerability area) does not apply .
- Not within Coastal environment area, therefore, Clause 2.10 (Development on land within the coastal environment area) Part 2, Division 3 does not apply.
- Not within Coastal use area, therefore, Clause 2.11 (Development on land within the coastal use area) does not apply.
- Not within Coastal zone, therefore Clause 2.12 – 2.15 (Development on land within the coastal zone generally) does not apply.

Hazardous and offensive development (Chapter 3)

The proposal does not include, as defined by this Chapter, any:

- hazardous industry
- hazardous storage establishment
- offensive industry
- offensive storage establishment

Note further consideration of this Chapter is not required.

In this Chapter—

hazardous industry means a development for the purposes of an industry which, when the development is in operation and when all measures proposed to reduce or minimise its impact on the locality have been employed (including, for example, measures to isolate the development from existing or likely future development on other land in the locality), would pose a significant risk in relation to the locality—

(a) to human health, life, or property, or

(b) to the biophysical environment.

hazardous storage establishment means any establishment where goods, materials or products are stored which, when in operation and when all measures proposed to reduce or minimise its impact on the locality have been employed (including, for example, measures to isolate the establishment from existing or likely future development on the other land in the locality), would pose a significant risk in relation to the locality—

- (a) to human health, life, or property, or
- (b) to the biophysical environment.

offensive industry means a development for the purposes of an industry which, when the development is in operation and when all measures proposed to reduce or minimise its impact on the locality have been employed (including, for example, measures to isolate the development from existing or likely future development on other land in the locality), would emit a polluting discharge (including, for example, noise) in a manner which would have a significant adverse impact in the locality or on the existing or likely future development on other land in the locality.

offensive storage establishment means any establishment where goods, materials or products are stored which, when in operation and when all measures proposed to reduce or minimise its impact on the locality have been employed (including, for example, measures to isolate the establishment from existing or likely future development on other land in the locality), would emit a polluting discharge (including, for example, noise) in a manner which would have a significant adverse impact in the locality or on the existing or likely future development on other land in the locality.

4.1.13.2 Remediation of land (Chapter 4)

The provision of the repealed SEPP 55 have been effectively transferred to this chapter. The Court has confirmed in *Barel v Randwick City Council* [2022] NSWLEC 1176³ that it is necessary for the Applicant to provide information to allow the consent authority to complete a consideration of the likelihood of contamination. Nevertheless, the Council may have information beyond that found within the initial investigation below.

Clause 4.6 requires that:

“(1) A consent authority must not consent to the carrying out of any development on land unless—

- (a) it has considered whether the land is contaminated,
- and

³ <https://www.caselaw.nsw.gov.au/decision/17fde164c1134ea09673f8af>

(b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and

(c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.

(2) Before determining an application for consent to carry out development that would involve a change of use on any of the land specified in subsection (4), the consent authority must consider a report specifying the findings of a preliminary investigation of the land concerned carried out in accordance with the contaminated land planning guidelines.

(3) The applicant for development consent must carry out the investigation required by subsection (2) and must provide a report on it to the consent authority. The consent authority may require the applicant to carry out, and provide a report on, a detailed investigation (as referred to in the contaminated land planning guidelines) if it considers that the findings of the preliminary investigation warrant such an investigation.

(4) The land concerned is—

(a) land that is within an investigation area,

(b) land on which development for a purpose referred to in Table 1 to the contaminated land planning guidelines is being, or is known to have been, carried out,

(c) to the extent to which it is proposed to carry out development on it for residential, educational, recreational or child care purposes, or for the purposes of a hospital—land—

(i) in relation to which there is no knowledge (or incomplete knowledge) as to whether development for a purpose referred to in Table 1 to the contaminated land planning guidelines has been carried out, and

(ii) on which it would have been lawful to carry out such development during any period in respect of

which there is no knowledge (or incomplete knowledge)."

This SEE relies upon the Draft Contaminated Land Planning Guidelines (**CLPG**)⁴ and the Managing Land Contamination Planning Guidelines SEPP 55–Remediation of Land 1998 (ISBN 0 7310 9005 5) (**MLCPG**).

Both the CLPG and MLCPG contain Appendices that list Potentially contaminating land uses, activities, industries, and chemicals. This is referred to as Table 1 in Appendix 1 of the **CLPG**. This list is referred to in the **Stage 1 - Initial Assessment**.

The **CLPG** at Appendix 2 provides a suggested checklist for initial investigation and this SEE adopts that checklist.

Previous evidence of contamination

(If the answer to all of these questions is "NO" it is unlikely that the land is contaminated, and normal processes may be followed.)

(a) Was the subject land at any time zoned for industrial, agricultural or defence purposes? **NO**

(b) Do existing records held by the planning authority show that a potentially contaminating activity listed in Table 1 in Appendix 1 has previously been approved or carried out on the subject land? **NO**

(The use of records held by other authorities or libraries is not required for an initial evaluation.) Note: We relied upon the Council's DA tracking and SIX aerial photographs for this purpose and the Council may hold older records not readily accessible to Daintry Associates Pty Ltd.

(c) Is the subject land currently used for a potentially contaminating activity listed in Table 1 in Appendix 1? **NO**

(d) Has the subject land ever been regulated through licensing or other mechanisms in relation to any potentially contaminating activity listed in Table 1 in Appendix 1? **NO**

⁴ <https://www.planning.nsw.gov.au/-/media/Files/DPE/Guidelines/contaminated-land-planning-guidelines-2018-01.pdf?la=en>

(e) Are there any land use restrictions on the subject land relating to possible contamination, such as orders or notices issued under the CLM Act? **NO**

(f) Has a site inspection indicated that the site may have been associated with any potentially contaminating activities listed in Table 1? **NO**

(g) Are there any contamination impacts on immediately adjacent land which could affect the subject land? **NO**

(h) Are there any human or environmental receptors that could be affected by contamination? **NO**

i) Is the site adjacent to a site on the EPA's list of notified sites under s60 of the CLM Act, or adjacent to a site regulated by the EPA under the CLM Act? **NO**

<https://www.epa.nsw.gov.au/your-environment/contaminated-land/notified-and-regulated-contaminated-land/list-of-notified-sites>

and

<https://www.gmapgis.com/contaminated-land-sydney-nsw-australia.htm>

On the above basis the initial investigation does not indicate that a Stage 2 -Detailed Site Investigation (DSI) is required.

Nevertheless the Consent Authority, taking a precautionary approach, should impose a general "unexpected finds" condition under any development consent.

Such a condition would require the owners or their agents to make a required notification under the CLM Act, POEO Act, or both or notifying the relevant planning authority for management under the planning and development process and seeking to amend any consent or lodge a new development application for remediation, if there are any unexpected finds during development work.

An unexpected find would trigger the need for a DSI and Remediation Action Plan and validation of any remediation.

4.1.14 State Environmental Planning Policy (Resources and Energy) 2021

This SEPP contains planning provisions:

- for the assessment and development of mining, petroleum production and extractive material resource proposals in NSW
- which aim to facilitate the development of extractive resources in proximity to the population of the Sydney Metropolitan Area by identifying land which contains extractive material of regional significance.

This SEPP is not relevant to this proposal.

4.1.15 State Environmental Planning Policy (Transport and Infrastructure) 2021

This SEPP contains planning provisions:

- for infrastructure in NSW, such as hospitals, roads, railways, emergency services, water supply and electricity delivery
- for child-care centres, schools, TAFEs, and Universities
- planning controls and reserves land for the protection of three corridors (North South Rail Line, South West Rail Link extension and Western Sydney Freight Line)
- the land use planning and assessment framework for appropriate development at Port Kembla, Port Botany and Port of Newcastle.

This SEPP also addresses as critical to some developments:

- Chapter 2 Part 2.3 Division 15 Subdivision 2 - Development in or adjacent to rail corridors and interim rail corridors—notification and other requirements
- Chapter 2 Part 2.3 Division 17 Subdivision 2 - Development in or adjacent to road corridors and road reservations
- Chapter 2 Part 2.3 Division 17 Subdivision 2 Section 2.121 – Traffic Generating Development.

The site is, having regard to this SEPP's provisions:

- Not affected by potential rail noise or vibration on non-rail development
- Not affected by excavation in, above, below, or adjacent to rail corridors
- Not affected by road noise or vibration on non-road development
- Not Traffic Generating Development having regard to Schedule 3 Traffic-generating development to be referred to Transport for NSW.

Traffic generating development

The proposal **is not** traffic generating development having regard to Schedule 3 Traffic-generating development to be referred to Transport for NSW

Clause 2.121(4) requires:

“(4) Before determining a development application for development to which this section applies, the consent authority must—

(a) give written notice of the application to TfNSW within 7 days after the application is made, and

(b) take into consideration—

(i) any submission that RMS provides in response to that notice within 21 days after the notice was given (unless, before the 21 days have passed, TfNSW advises that it will not be making a submission), and

(ii) the accessibility of the site concerned, including—

(A) the efficiency of movement of people and freight to and from the site and the extent of multi-purpose trips, and

(B) the potential to minimise the need for travel by car and to maximise movement of freight in containers or bulk freight by rail, and

(iii) any potential traffic safety, road congestion or parking implications of the development.

(5) The consent authority must give TfNSW a copy of the determination of the application within 7 days after the determination is made.”

4.2 Woollahra Local Environmental Plan 2014 (LEP)

The LEP is a standard instrument LEP. The site is Zone R2 (the zone) under Part 2 of the LEP.

4.3 Draft LEP

A search of the Department of Planning, Infrastructure and Environment's LEP tracking system and Council's Website disclosed the following Draft LEPs as at 17 June 2022:

- [Planning proposal for Earthworks and associated groundwater dewatering - proposed enhanced provisions](#)
Submissions closed on 11 March 2022

The Council's current statement is:

"Council has exhibited a planning proposal(External link) to amend the Woollahra Local Environmental Plan 2014 (Woollahra LEP 2014).

The planning proposal seeks to enhance the existing provisions to:

- *Minimise the impacts of dewatering from the construction of underground structures; and*
- *Ensure there are no adverse impacts on any surrounding properties, both during and after construction.*

The amendments apply to the whole Woollahra Local Government Area.

These changes will complement revisions made to the Woollahra Development Control Plan 2015 (Woollahra DCP 2015), which came into force on 6 December 2021.

Information on the Woollahra DCP 2015 amendments is available here: <https://yoursay.woollahra.nsw.gov.au/dcp-amendment18>

The planning proposal will proceed through a public exhibition phase and, subject to the consideration of submissions, a draft LEP will be prepared to amend the Woollahra LEP 2014.

The Council has not been authorised by the Department of Planning, Industry and Environment to make the LEP under section 3.36 of the Environmental Planning and Assessment Act 1979."

This planning proposal will:

- *Strengthen the existing objectives and controls relating to assessing and minimising the impacts of groundwater drawdown as a consequence of underground structures.*
- *Minimise adverse hydrogeological impacts on surrounding properties and infrastructure, both during and after construction, through introducing additional requirements, measurements, and controls.*

The LEP amendments sought are:

Insertions - identified in blue and underlined

~~Deletions – identified in red and strikethrough~~

Proposed amendments to Cl. 1.2 Aims of Plan

(2)(m) to minimise excavation and manage impacts including the potential impact of the change in the groundwater regime.

Proposed amendments to Cl. 6.2 Earthworks

- (1) The objective of this clause is to ensure that earthworks and associated groundwater dewatering for which development consent is required will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land.
- (2) Development consent is required for earthworks and associated groundwater dewatering unless—
 - (a) the earthworks and associated groundwater dewatering are exempt development under this Plan or another applicable environmental planning instrument, or
 - (b) the earthworks and associated groundwater dewatering are ancillary to development that is permitted without consent under this Plan or to development for which development consent has been given.
- (3) In deciding whether to grant development consent for earthworks and associated groundwater dewatering (or for development involving ancillary earthworks), the consent authority must consider the following matters—
 - (a) the likely disruption of, or any detrimental effect on, drainage patterns and soil stability in the locality of the development,
 - (b) the effect of the development on the likely future use or redevelopment of the land,
 - (c) the quality of the fill or the soil to be excavated, or both,
 - (d) the effect of the development on the existing and likely amenity of ~~adjoining~~ surrounding properties,
 - (e) the source of any fill material and the destination of any excavated material,
 - (f) the likelihood of disturbing relics,
 - (g) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area,
 - (h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development,
 - (g) the effect of the development on the structural stability of the existing surrounding properties.

To the extent that any are relevant, the consent authority must take them into consideration in accordance with section 4.15(1)(a)(ii) of the EPA Act.

This proposal does not seek as part of earthworks to undertake any ground water dewatering and the proposed works will not impede the dispersion of any ground water by reference to the JK Geotechnics Report dated 7 February 2020 Ref: 32829SCrptRev2.

At page 3 *"No groundwater seepage was encountered within the boreholes during or on completion of drilling."*

4.4 Woollahra Development Control Plan 2014 (DCP)

The relevant DCP provisions addressed by the **Revision H** of the plans and this addendum SEE are:

- B3.2.5 Wall height and incline plane
- B3.5.3 Public and private views
- B3.5.4 Acoustic and visual privacy
- B3.7.1 Landscape areas and private open space
- B3.7.2 Fences
- B3.7.4 Ancillary development - swimming pools

4.4.1 Weight given to the Development Control Plan

The NSW Court of Appeal in *Zang V Canterbury City Council* [2001]NSWCA 167 found that a DCP is to be treated as a fundamental element in, or a focal point of, the decision making process.

Based upon *Zang in Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472 at 86-88 and 89-93; revised - 01/10/2004 the Court clarified the weight to be afforded a DCP at par 87:

"91 In my opinion, the weight to be given to a detailed policy will depend upon a number of matters. If the policy has been generated with little, if any, public consultation and was designed to defeat a project which is known to be under consideration by a developer for a particular site, it may be given little weight. Of course, the intrinsic attributes of the policy may be given significant weight, but that weight is not dependent on then being included in a policy. It can be established in other ways. However, the position would be markedly different if the policy is the result of detailed consultation with relevant parties, including the community and

the owners of affected land, and reflects outcomes which are within the range of sensible planning options.

92 To my mind, the matters which are relevant when determining the weight to be given to a planning policy adopted by a council are as follows:

- the extent, if any, of research and public consultation undertaken when creating the policy;
- the time during which the policy has been in force and the extent of any review of its effectiveness;
- the extent to which the policy has been departed from in prior decisions;
- the compatibility of the policy with the objectives and provisions of relevant environmental planning instruments and development control plans;
- the compatibility of the policy with other policies adopted by a council or by any other relevant government agency;
- whether the policy contains any significant flaws when assessed against conventional planning outcomes accepted as appropriate for the site or area affected by it."

As was outlined by Moore AJ in *Trinvivass Pty Ltd v Council of the City of Sydney* [2015]NSWLEC15, at [68]: the effect of s79C(3A)(b) mandates taking a flexible approach to the matters in dispute between the parties and at 69 that this provision modifies the position that has followed since the decision in *Zang V Canterbury City Council* [2001]NSWCA 167, so that the issue is whether the objective of the development control is achieved by the proposal.

In *Rose & Sanchez v Woollahra Municipal Council* [2016] NSWLEC 1348 the Court held that the effect of sub-s 79C(3A)(b) is to require a flexible approach to those standards, allowing alternative solutions that would achieve the objects of the relevant standards.

"20 The EPA Act, at s79C(3A)(b) [s.4.15(3A)(b)] outlines how consent authorities are to give weight to, and apply provisions of, the relevant development control plans as detailed below:

S79C(3A) Development control plans If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority:

- (a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards-**is not to require more onerous standards** with respect to that aspect of the development, and
- (b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards - **is to be flexible in applying those provisions and allow reasonable alternative solutions** that achieve the objects of those standards for dealing with that aspect of the development, and
- (c) may consider those provisions only in connection with the assessment of that development application.

21 As was outlined by Moore AJ in *Trinvivass Pty Ltd v Council of the City of Sydney* [2015]NSWLEC151, at [68]: the effect of s79C(3A)(b) mandates taking a flexible approach to the matters in dispute between the parties and at 69 that this provision modifies the position that has followed since the decision in *Zang V Canterbury City Council* [2001]NSWCA 167, so that the issue is **whether the objective of the development control is achieved by the proposal**.

22 This approach was followed by Pearson C in *Kotronakis v Pittwater Council* [2015] NSWLEC1508 at [37] outlines the task for the consent authority to determine how the provisions of the DCP, which is a mandatory relevant consideration under s79C(1)(a)(iii) of the Act, should be applied to the development proposed.

23 I agree that the effect of sub-s 79C(3A)(b) is to require a flexible approach to those standards, allowing alternative solutions that would achieve the objects of the relevant standards."

In *Hillcrest Rose Bay Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1662 the Court accepted that section 4.15(3A)(a) of the EP&A Act) applied.

This provision says that where a development control plan contains relevant provisions — and those provisions set standards with respect to an aspect of the development — the consent authority 'is not to

require more onerous standards with respect to that aspect of the development'.

4.4.2 DCP Objectives

B3.2.5 Wall height and incline plane

There is no change to the minor encroachment of the incline plane under the DCP control as the objectives of the DCP are achieved.

B3.5.3 Public and private views

Revision H plans lower the pool, provide landscaping not exceeding 1.2m above the swimming pool terrace, and provides a maximum 3m mature height limit for replacement trees in the vicinity of the northwest corner of the house at No.20 Olphert Avenue. The harbour views from neighbouring properties remain panoramic and there are negligible impacts on views. The views impacted are views across a side boundary that would be lost to a great extent if the house was proposed to extend to the full depth permitted under the DCP. The rear setback is consistent with No.16 and No.20, the immediate neighbours.

B3.5.4 Acoustic and visual privacy

Revision H plans address acoustic and visual privacy impacts by:

1. providing a full height wall to the eastern elevation of the POS at the living room level (terminating in alignment with the northwest corner of the house at No.20 Olphert Avenue) and additional privacy screen in the first quadrant of the POS. This achieves the acoustic and visual privacy objectives with respect to the impacts upon No.20.
2. providing an additional 1m setback for the roof terrace balustrade ensuring that direct lines of sight within 12m from the roof terrace to and within No.16 Olphert Avenue are mitigated.
3. Providing minimum 300mm deep on structure planting depths to maintain non-trafficable balcony areas and ensure that direct lines of sight within 9m to from the living and POS area to and within No.16 Olphert Avenue are mitigated.

The acoustic and visual privacy objectives are achieved.

B3.7.1 Landscape areas and private open space

The lowered pool, terraced landscaping and height limits placed upon landscaping at maturity to achieve the objectives, striking an appropriate balance between the objectives :

O2 To provide sufficient deep soil landscaped area to support substantial vegetation.

O3 To provide for on-site stormwater absorption.

O4 To ensure the adequate provision of accessible and useable primary open space.

O6 To ensure that private open space areas are well-designed.

O7 To retain important existing mature trees, C16 vegetation and other landscape features.

O9 To ensure that landscaping contributes positively to the streetscape and the C18 amenity of adjoining residents.

O10 To ensure that landscaping allows view sharing.

Whilst it is clear from submissions that neighbour would be happy to eliminate most landscaping to preserve their views to Sydney Harbour Objective 10 requires view sharing as a consideration along with the provision of "substantial vegetation" under objective 2.

Revision H of the plans provide a maximum fill of 1.2m above GL(E) consistent with Figure 21 of the DCP.

B3.7.2 Fences

The fence heights detailed by Revision H achieve the objectives. There is no unreasonable loss of views or sunlight as a result of the fencing having regard to Objective 5 in recognition that boundary fencing must provide reasonable privacy having consideration for views and sunlight.

B3.7.4 Ancillary development - swimming pools

Revision H of the plans provide a maximum pool terrace height of 1.2m above GL(E) consistent with Figure 25 of the DCP.

The terrace landscaping and mature vegetation height (not exceeding 1.2m above the pool terrace) provides an acceptable privacy outcome for No.77 Hopetoun Avenue, Vaucluse, and No.77A

Hopetoun Avenue, Vaucluse, whilst preserving near all existing views from both elevated and lower level POS within No.16 and No.20.

4.4.3 DCP Summary

Subject to the clause 4.6 for HOB, the proposal is consistent with the DCP's objectives and applying *Rose & Sanchez v Woollahra Municipal Council* [2016] NSWLEC 1348 and is fully supportable.

The effect of sub-s 4.15(3A)(b) of the Act is to require a flexible approach to those standards, allowing alternative solutions that would achieve the objects of the relevant standards.

The standards and objectives for HOB are addressed by the clause 4.6 submission and the merit impacts are cumulatively acceptable.

4.5 Draft DCP

A Draft DCP is a relevant consideration under section 79C(1)(e), *ibid Terrace Tower Holdings v Sutherland Shire Council* (2003) 129 LGERA 195; [2003] NSWCA 289. The weight to be afforded a Draft DCP is dependent upon how final and certain the Draft DCP is but ultimately a Draft DCP is no more than a draft council "policy".

The Court's relevant planning principle addressing to policies which had been adopted by councils, although not embodied in DCPs is *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472 at 86-88 and 89-93; revised - 01/10/2004.

A Draft DCP is no more than a draft policy and at par [91-92] in *Stockland* the Court held:

"91 In my opinion, the weight to be given to a detailed policy will depend upon a number of matters. If the policy has been generated with little, if any, public consultation and was designed to defeat a project which is known to be under consideration by a developer for a particular site, it may be given little weight. Of course, the intrinsic attributes of the policy may be given significant weight, but that weight is not dependent on then being included in a policy. It can be established in other ways. However, the position would be markedly different if the policy is the result of detailed consultation with relevant parties, including the community and the owners of affected land, and reflects outcomes which are within the range of sensible planning options.

92 To my mind, the matters which are relevant when determining the weight to be given to a planning policy adopted by a council are as follows:

- the extent, if any, of research and public consultation undertaken when creating the policy;
- the time during which the policy has been in force and the extent of any review of its effectiveness;
- the extent to which the policy has been departed from in prior decisions;
- the compatibility of the policy with the objectives and provisions of relevant environmental planning instruments and development control plans;
- the compatibility of the policy with other policies adopted by a council or by any other relevant government agency;
- whether the policy contains any significant flaws when assessed against conventional planning outcomes accepted as appropriate for the site or area affected by it."

Information on the Woollahra DCP 2015 amendments is available here: <https://yoursay.woollahra.nsw.gov.au/dcp-amendment18>.

The amendments to the Woollahra Development Control Plan 2015 (Woollahra DCP 2015) seek to update and strengthen the existing objectives and controls to:

- *minimise the impacts of groundwater drawdown as a consequence of underground structures, and*
- *ensure there are no adverse hydrogeological impacts on any surrounding properties and infrastructure, both during and after construction.*

The draft DCP applies to the entire Woollahra local government area. It amends the following chapters of the Woollahra DCP 2015(External link).

Chapter A1: Introduction

Chapter D5: Double Bay Centre

Chapter E2: Stormwater and Flood Risk Management

The proposal is consistent with the Draft DCP amendments.

5 Statement of Environmental Effects

5.1 Impacts of the development

Revision H specifically addresses the identified impacts and the DCP objectives as detailed above.

The positive impacts of Revision H include:

- The achievement of the LEP and DCP objectives as addressed above.
- Better privacy outcomes for No.16 in that the existing dwelling at No.18 mitigates direct line of sight from living and POS within the 9m to 12m distance depending upon elevation.
- Mitigation of aural and visual privacy impacts upon No.16 and No.20.
- Maintenance of the majority of views to Sydney Harbour from No.20.

The negative impacts are :

- Perceived loss of views and privacy impacts by neighbours addressed in detail by the Joint Expert Report of the Planners in the class 1 proceedings and considered by the parties and the Court within the section 34AA conciliation. Revision H results in minor amendments to the proposal to mitigate the impacts and achieve the LEP and DCP objectives, primarily striking a balance between preservation of private views and privacy.

5.2 Impact Identification

The environmental impacts have been identified by reference to:

- The Applicant's DA Package including plans and expert reports.
- *Environmental Planning and Assessment Act 1979* (EPA Act)
- *Design and Building Practitioners Act 2020* (DAB Act)
- *Local Government Act 1993* (LG Act)
- *Protection of the Environment Operations Act 1997* (POEO Act)
- *Roads Act 1993* (Roads Act)
- *Conveyancing Act 1919* (Conveyancing Act)

- Environmental Planning and Regulation Act 2000 (2000 Regulation)
- Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021 (Certification Regulation)
- Design and Building Practitioners Regulation 2021 (DAB Reg)
- Protection of the Environment Operations (Clean Air) Regulation 2021 (Clean Air Regulation)
- Protection of the Environment Operations (Noise Control) Regulation 2017 (Noise Regulation)
- Protection of the Environment Operations (Waste) Regulation 2014 (Waste Regulation)
- National Construction Code (NCC) – Building Code of Australia (BCA)
- State Environmental Planning Policies addressed in more detail below. Note as of 1 March 2022 these have been consolidated, but to a large extent the issues requiring consideration have not changed in any substantial way.
- Woollahra Local Environmental Plan 2014 (LEP)
- Woollahra Development Control Plan 2014 (DCP)
- Australian and New Zealand Standards as referenced by the Acts, regulations, and NCC-BCA.
- NSW Planning Portal "*the approved form*"

5.3 Mitigation

The steps to be taken to protect the environment or to mitigate any perceived harm to the environment include a design that responds the planned and desired future character articulated through **Revision H** of the Plans are primarily the lowering of the swimming pool and associated landscape and fencing changes, the full height wall along the eastern faced to the alignment of the rear wall of No.20 and further tweaking of balustrades and privacy screens to further mitigate impacts upon No.16, No.20, No.77 and No.77A.

The implementation of the numerous recommendations of the expert reports address all other potential impacts for and from the proposed building and development consent conditions will ensure that these recommendations are implemented.

5.4 Director Generals Guidelines

At the date of drafting this Addendum SEE the Regulation provides no guidelines. The format of this SEE and relevant content follows DoPI draft guidelines (un-published).

The Land & Environment Court's focus upon "*jurisdictional preconditions*" and the Chief Justice's judgement in *Jeffrey v Canterbury Bankstown Council* [2021] NSWLEC 73 make it clear that the consent authority cannot grant consent unless it is satisfied as to all relevant *jurisdictional preconditions*.

There has never been any guideline specific to Statement of Environmental Effects published by the Secretary (previously Director General).

Where relevant this SEE adopts current and past:

- planning (<https://www.planning.nsw.gov.au/Policy-and-Legislation/Planning-System-Circulars>) and
- building system circulars as guidance (<https://www.planning.nsw.gov.au/Policy-and-Legislation/Building-Systems-Circulars>).

6 Conclusion

This SEE details as required by Schedule 1, Part 2(4) of the 2000 Regulation:

- a) *the environmental impacts of the development,*
- b) *how the environmental impacts of the development have been identified,*
- c) *the steps to be taken to protect the environment or to lessen the expected harm to the environment,*
- d) *any matters required to be indicated by any guidelines issued by the Director-General for the purposes of this clause."*

The proposal has been assessed against the requirements of the Act and the relevant planning controls and has been found to be entirely supportable.