



MODIFICATION REQUEST:

**Mixed Use Development
78-90 Old Canterbury Road, Lewisham**

MP 08_0195 MOD 5

Modification to approved Concept Plan



Director-General's
Environmental Assessment Report
Section 75W of the
Environmental Planning and Assessment Act 1979

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1. BACKGROUND

The purpose of this report is to assess a request to modify the approved Concept Plan for the Lewisham Estate Mixed Use Development, 78-90 Old Canterbury Road, Lewisham. The modification seeks approval to amend the Voluntary Planning Agreement (VPA) / Section 94 Contribution requirements in order to clarify items to be included and potential offsets available to assist with finalising a VPA with Marrickville Council.

1.1 Site Description

The site is within the Marrickville Local Government Area (LGA), approximately 6 kilometres west of the Sydney CBD (Figure 1).



Figure 1: Local Context Plan

1.2 Previous Approvals

On 15 March 2012, the Planning Assessment Commission (PAC) approved a Concept Plan for a mixed use development consisting of 7 separate buildings ranging in height from 4 to 10 storeys, basement level and at grade car parking, internal and external road works, public open space and public pedestrian and cycle pathways.

On 13 February 2013, **MOD 2** was approved by the Deputy Director General of Development Assessment and Systems Performance to modify Condition A3 relating to timing of the required Voluntary Planning Agreement (VPA). Rather than requiring that the VPA be entered into prior to the first development application being lodged, it required that negotiations shall be underway by the time of the first DA.

On 5 July 2013, **MOD 1** was approved by the Planning Assessment Commission to modify the Concept Plan in relation to the building heights, separation, footprints, open space and public domain, commercial and retail uses, solar access, affordable housing, Terms of Approval and the Statement of Commitments.

On 11 February 2014, **MOD 4** was approved by the Planning Assessment Commission for modifications to Condition B3 relating to the solar access requirements for the central open space. There was a clerical error in the numbering of the modifications and there is no **MOD 3**.

The agency is currently considering a modification (**MOD 6**) seeking to amend Future Environmental Assessment Requirement (FAR) 11 of the approved Concept Plan to permit through site links and drainage reserves in the calculation for a minimum provision of 3,000m² of central open space. At the proponent's request the application is on hold while additional information is prepared.

The current approved layout is depicted in **Figure 2**.



Figure 2: Modified approved site plan

Other than the Term of Approval (TOA) and FAR sought to be modified by this approval, other FARs relevant to the assessment of this modification include:

Car Parking

9. Future Development Applications are to demonstrate that a minimum of 13 on- street car parking spaces will be provided within the Hudson Street road reserve adjacent to the public open space.

Public Open Space

12. Future Development Applications shall provide for the embellishment and dedication of the public open space north of Hudson Street to Council in accordance with the terms of the VPA between the proponent and Council.

Linkages to the Lewisham railway station and Lewisham West light rail stop

16. Future Development Applications shall provide for new and/or upgraded pedestrian connections between the site and Lewisham railway station and the Lewisham West light rail stop in consultation with Council and RailCorp in accordance with the terms of the VPA.

RailCorp Requirements

26. Future Development Applications shall address RailCorp's requirements in relation to:

(e) Pedestrian connections

Future Development Applications shall demonstrate upgraded and/or new pedestrian pathway between the site and Lewisham railway station and Lewisham West light rail stop.

2. PROPOSED MODIFICATION

The proponent seeks to amend the Concept Approval by modifying TOA A3 – Voluntary Planning Agreement (VPA) and FAR 20 – Section 94 Contributions. The amendments are proposed following detailed discussions (since November 2012) between the proponent and Marrickville Council and the inability to finalise negotiations between the parties.

The proposed changes can be categorised as:

- modifications to clarify the scope of works to be included in the VPA by itemising specific works or upgrades and that works are to be generally in accordance with specific plans now to be referenced in the TOA;
- requiring that nominated proportions of costs associated with the works are offset against s94 contributions;
- specifying the timing of the execution of the VPA;
- specifying the method to establish the cost of the works (and therefore the offsets); and
- deleting the requirement that the VPA be negotiated in consultation with Transport for NSW.

TOA A3 and FAR 20 are proposed to be amended in the following terms:

Voluntary Planning Agreement

A3 Prior to the submission of any future application under Part 4 of the Act, negotiations shall be underway with respect to a Voluntary Planning Agreement between the proponent and Marrickville Council, ~~in consultation with Transport for NSW~~, with terms outlined in the EA, PPR and Revised Statement of Commitments, including

- Upgrade of Hudson Street **generally in accordance with AT&L Drawing SKC23 Issue P5;**
- Embellishment and dedication of public open space to the north of Hudson Street;
- Upgrade and embellishment of pedestrian and cycle access links to the Lewisham West light rail stop, and Lewisham railway station **from the site**, and surrounding residential areas **(generally in accordance with AT&L Plan SKC 10 Issue P1);**
- **Stormwater, footpath and road upgrade works in Brown Street and William Street generally in accordance with plan SKC 22 Issue P4;**
- **Stormwater Works in McGill Street generally in accordance with AT&L Drawing SKC23 Issue P5; and**
- **Upgrade and realignment of the trunk drainage infrastructure generally in accordance with AT&L Drawing SKC 22 Issue P4 and SKC23 Issue P5.**

- ~~Other parts of the site that will be upgraded, embellished, constructed or dedicate to Council.~~

The items and works listed above must be offset against the final payable Section 94 Contributions except for the following:

- **Dedication of a minimum 3000m² Open Space Park;**
- **50% of the value of the upgrade works to Hudson Street;**
- **50% of the value of Brown Street storm water works;**
- **50% of the value of the footpath and road upgrades to William and Brown Streets; and**
- **50% of the value of the upgrade and realignment of the trunk drainage infrastructure**

The Voluntary Planning Agreement shall be entered into prior to the issue of the Occupation Certificate of the last residential tower.

Actual quotes from an independent Quantity Surveyor shall be obtained from the proponent to establish the final cost of works to be included in the Voluntary Planning Agreement.

Section 94 Contributions

20. *Future applications shall be required to pay developer contributions to the Council towards the provision or improvement of public amenities and services. The amount shall be determined by Council in accordance with the requirements of the Contributions Plan current at the time of approval. A **The VPA with Council may must offset against the final payable Section 94 or cash Contributions the items and works in accordance with Condition A3.***

3. STATUTORY CONTEXT

3.1 Continuing Operation of Part 3A to Modify Approvals

In accordance with Clause 3 of Schedule 6A of the Environmental Planning and Assessment Act (EP&A Act), Section 75W of the EP&A Act as in force immediately before its repeal on 1 October 2011 and as modified by Schedule 6A, continues to apply to transitional Part 3A projects.

Consequently, this report has been prepared in accordance with the requirements of Part 3A and associated regulations, and the Minister (or his delegate) may approve or disapprove of the carrying out of the project under Section 75W of the EP&A Act.

3.2 Modification of a Minister's Approval

The modification application has been lodged with the Director-General pursuant to Section 75W of the EP&A Act. Section 75W provides for the modification of a Minister's approval including "revoking or varying a condition of the approval or imposing an additional condition of the approval."

The Minister's approval for a modification is not required if the project as modified will be consistent with the existing approval. However, in this instance, the proposal seeks to modify a specific Term of Approval and Future Environmental Assessment Requirement and therefore approval to modify the application is required.

3.3 Environmental Assessment Requirements

Section 75W(3) of the EP&A Act provides that the Director General may notify the proponent of environmental assessment requirements (DGRs) with respect to the proposed modification that the proponent must comply with before the matter will be considered by the Minister.

In this instance, following an assessment of the modification request, it was considered unnecessary to notify the proponent of environmental assessment requirements pursuant to Section 75W(3) with respect to the proposed modification, as suitable information was provided to the agency to consider the application.

3.4 Delegated Authority

As Council has objected to the proposed modification, the application is referred to the Planning Assessment Commission for determination in accordance with the Minister's delegation dated 14 September 2011.

4. CONSULTATION AND SUBMISSIONS

In accordance with Section 75X of the EP&A Act and clause 8G of the EP&A Regulation, the Director-General is required to make the modification request publicly available. The modification request was made available on the agency's website and referred to Marrickville Council and Transport of NSW for comment. Due to the nature of the proposed modification, the modification request was not exhibited by any other means.

Marrickville Council's Submission

Council suggest the main reason for the failure between the parties to negotiate an outcome on the VPA is that the proponent has failed to distinguish between infrastructure that is required as a direct consequence of the development and infrastructure that is provided to specifically service the wider community. As the majority of infrastructure works are required as a direct consequence of the development, Council suggest they should remain as conditions of the concept approval without the potential for an offset.

Council advises it is unwilling to enter into a VPA on the terms sought by the proponent and would rather support an amendment requiring the payment of ordinary contributions pursuant to Councils s94 plan, and that remaining infrastructure and facilities required as a consequence of the development be separately conditioned.

Marrickville Council has provided some more detailed comments in respect of certain aspects of the proposed modification. Where relevant the issues are discussed in **Section 5** of this report.

Transport for NSW Submission

TfNSW requested that it remain included in the discussions about the matters in the VPA as the works relate to TfNSW priorities. It also advised that a shared use bicycle/pedestrian path is required to link the sites between Longport Street and Old Canterbury Road along the Inner West Light Rail corridor.

5. ASSESSMENT

The proposed modification includes the following aspects:

- deleting the requirement that Transport for NSW be consulted;
- clarifying the scope of works;
- specifying the level of offset, if any, against Section 94 contribution payments and its costing;
- making offsets mandatory instead of discretionary; and
- specifying the timing for entering into the VPA.

The agency has considered each of these aspects of the modification below.

5.1 Transport for NSW's Involvement

The proponent is seeking to delete the requirement that Transport for NSW (TfNSW) be consulted in relation to the VPA. It argues that the need to consult with TfNSW was in relation to a pedestrian bridge which is now no longer proposed.

The application was referred to TfNSW which has requested that it remains involved in the discussions regarding the VPA, as the pedestrian and cycle link works relate to a number of TfNSW priorities.

In its assessment of the original Concept Plan application the agency considered the improvements to pedestrian and bicycle connections between the adjacent light rail stop and Lewisham Station. In this regard RailCorp raised concern at the time with the envisaged works (including a potential bridge over Longport Street) and instead suggested that a more suitable option would be to improve and upgrade exiting pedestrian paths to Lewisham Station. In its consideration of this suggestion the agency noted that this may be incorporated into the proposed VPA offer and therefore confirmed in its recommendation that the VPA would include upgrade or embellishment of pedestrian and cycle access links to the Lewisham West Light Rail Station and to Lewisham Railway Station and surrounding residential areas. The agency's assessment noted that the proponent should consult with RailCorp in this regard.

The agency considers that TfNSW (which in part comprises RailCorp) remains a key stakeholder and should be consulted in relation to the pedestrian and cycle linkages between the stations.

The proposed deletion of TfNSW's involvement has therefore not been recommended for adoption, although a modification to the wording of the TOA is recommended to clarify that its involvement relates to the upgrade and embellishment of pedestrian and cycle links (as opposed to other works such as stormwater and trunk drainage).

5.2 Scope of Works

To provide some certainty as to the scope of works to be included in the VPA, the proponent proposes to modify the TOA to specify the works in more detail.

In addition to already included works relating to the upgrade of Hudson Street, embellishment and dedication of open space, and upgrade of pedestrian and cycle links, the proponent seeks to replace the general provision for upgrade, embellishment, construction or dedication of other parts of the site with specifically itemised inclusions, namely:

- stormwater, footpath and road upgrade works in Brown Street and William Street;
- Stormwater works in McGill Street; and
- upgrade and realignment of the trunk drainage infrastructure.

With the exception of the embellishment and dedication of public open space, it is proposed that all of the identified upgrade works are to be generally in accordance with specific plans proposed to be referenced in the TOA.

TfNSW has advised of a concern in relation to the plan detailing the scope of works for the off-site pedestrian and cycle links, being that the plan does not incorporate a new shared use bicycle/pedestrian path along the IWLR corridor. However the agency considers that a new shared use path along the IWLR corridor was never envisaged by TfNSW or the agency as part of the original approval, which only requires the upgrade and embellishment of existing links.

Marrickville Council has raised no objection to the proposed clarification of the scope of works to be included in the VPA.

The agency considers that the submitted plans and proposed changes are acceptable and would assist with clarity for both parties in moving forward with negotiations. However, the agency considers it appropriate that the plans are subject to further consideration by Council through the development assessment process, and in the case of the plans for the pedestrian links, also subject to detailed consideration by TfNSW. Therefore, a further modification to the TOA is recommended, providing that works are to be broadly in accordance with the plans. However, the plans may only be varied by:

- negotiation with Council;
- as a result of consultation with TfNSW; or
- in order to reflect plans approved through future development applications.

5.3 Offsets against s94 Contributions

The application seeks to detail offset requirements within the approved TOA A3 – Voluntary Planning Agreement following the inability of the proponent and Council to reach agreement on the terms of the VPA. The proponent is seeking to establish the proportion of the cost of the works set out in the VPA that would be offset against s94 contributions payable in accordance with FAR 20.

Council's original submission to the proposal objected to most of the proposed offsets, as Council is of the opinion that most of the works for which the proponent is seeking an offset arise as a direct consequence of the development, rather than being works designed to provide a public benefit to the wider community. The position of both Council and the proponent with respect to the proposed offsets is summarised in **Table 1** below.

To assist with its assessment, the agency engaged Michael Collins & Associates (MCA) to undertake an independent review of the proposed VPA amendments, particularly in relation to the proposed offsets sought. It also engaged Evans & Peck to provide advice on any offsets relevant to the stormwater drainage design. As part of the review, MCA consulted with both the proponent and Council officers, as well as reviewing documentation relevant to the history of the concept approval, negotiations between the parties, and the report prepared by Evans and Peck. The report by MCA, which includes the report by Evans & Peck, is provided in **Appendix C**.

MCA considered the proponent's and Council's position with respect to the proposed offsets and made its own recommendations. The detailed reasons are set out in its report at **Appendix C**. A summary of the proponent's, Council's and MCA's position is provided in Table 1:

Proposed Infrastructure	Material Public Benefit Offset		
	Proponent's Proposed Offset	Council's Proposed Offset	MCA's Determination
Upgrade of Hudson Street	50%	0%	0%
Dedication of 3,000m ² of public open space at no cost	Agreed	Agreed	Agreed
Embellishment of 3,000m ² of public open space	100%	100%	100%
Upgrade/embellishment of pedestrian and cycle links to Lewisham West light rail stop (onsite works)	Included in embellishment of public open space	Included in embellishment of public open space	Included in embellishment of public open space
Upgrade/embellishment of pedestrian and cycle links to Lewisham railway station & surrounds (off-site works)	100%	50%	50%
Upgrade/embellishment of stormwater works to Brown Street	50%	0%	0%
Footpath and road upgrades to Brown and William Streets	50%	0%	0%
Stormwater works in McGill Street	100%*	0%	0%
Upgrade and realignment of trunk drainage from Old Canterbury Road to the light rail corridor	50%	0%	0%

Table 1: Comparison of Public Benefit Offsets (Source: MCA & Associates)

* The proponent has subsequently advised it would accept a 50% offset for these works

From the above table, there are two items, to which the parties agree:

- dedication of the public open space (no offset); and
- costs of the embellishment of the public open space including pathways and cycle links on site (100% offset).

The remaining works in contention can be placed into four categories:

- stormwater works;
- upgrade of Hudson Street;
- upgrade of Brown and William Streets; and
- off-site pedestrian and cycle links.

The agency considers that the key issue for the assessment of the proposal is whether the proposed works provide a material public benefit over what would be expected to be provided for the development to be carried out on the site. This issue is considered with regards to each of the four categories of works.

Stormwater Works

The existing stormwater drainage easement includes a covered channel and a pipe which bisects the site running from Old Canterbury Road to the light rail corridor. It is proposed to extinguish the easement and to replace the existing system with a new trunk drainage system incorporating:

- a twin-pipe system across the site from Brown Street to the light rail corridor;
- new pipes along the north-south street on the western boundary of the site; and

- a twin pipe system and overland flow path within the public open space north of Hudson Street.

Some associated stormwater works are also proposed in Brown and William Streets and McGill Street to the south. The approximate location of the new works is depicted on **Figure 3**.

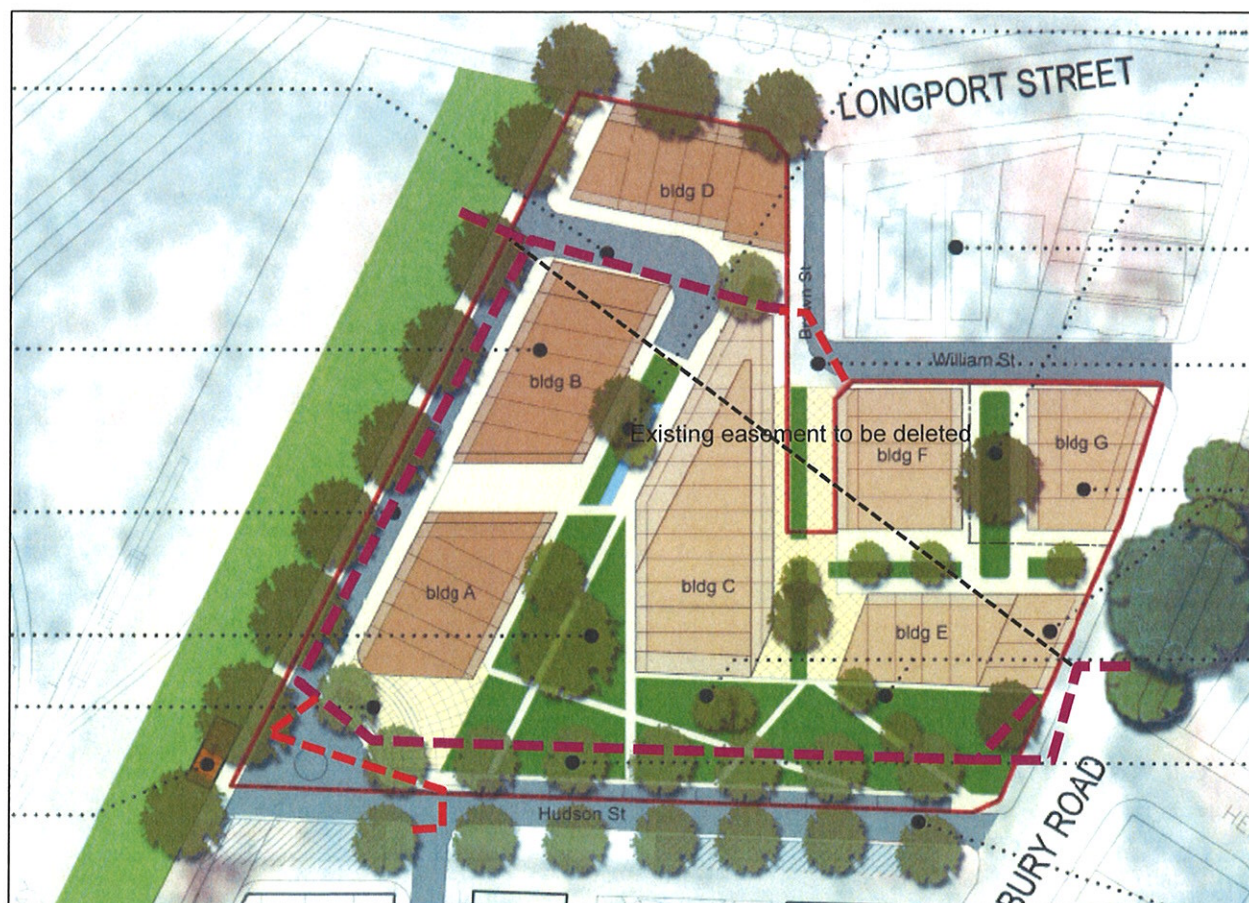


Figure 3: Agency's depiction of approximate location of stormwater works

The proponent seeks a 50% offset for all stormwater works. The offsets are sought on the basis that the works will increase the capacity of the system, benefiting properties outside of the development site. The proponent argues that the development will only contribute 6% of stormwater flows into the pipes and on this basis an offset should be provided. In addition, the proponent advises that the works in McGill Street are of no benefit to the development, but rather will enable the redevelopment of other land to the south of the site. The Brown and William Street works will significantly increase the capacity of the system, benefiting properties outside of the development site.

Council argue that no offset should be provided on the grounds that the proposed stormwater works are a direct result of the proponent's design and would not otherwise be required to be carried out. Council also advises that as its s94 Contributions Plan does not levy for stormwater infrastructure, any offset would be at the expense of planned works for other purposes under the s94 plan, resulting in an inequitable outcome and undermining the operation of the s94 plan as a result of loss of anticipated funds.

In its review, Evans and Peck advised that the fact that the proposed development will only contribute to 6% of flows in major storm events is not relevant. The site's location dictates that stormwater will drain towards it. Therefore if the proponent wishes to develop the site and provide appropriate amenity it will need to provide drainage, including amplification of the existing system to accommodate flows upstream of the site. The purpose of the diversion of

overland flow around the site is to allow the proposed development to occur without the encumbrance of an overland flow path through the site.

While Evans and Peck considered that there may be some (limited) merit in the Council bearing a marginal portion of the cost of the Brown Street works due to significant improvements in this area, there was not a sufficient demonstration of a public benefit in relation to the remainder of the works that would warrant any offset.

MCA considered the report by Evans and Peck as well as the arguments put forward by the proponent and Council. MCA found that none of the proposed stormwater works constitute a material public benefit that would warrant an offset against s94 contributions. Rather, the works constitute the usual types of ancillary works expected from large scale development and are expenditure related to private development.

The agency has considered the arguments put forward by the proponent, Council, Evans and Peck and MCA. It is considered that whilst substantial, the proposed stormwater works are typical of the kinds of works often carried out as ancillary to development of this scale as they are necessary to facilitate the proposed development, to allow for construction of basements and new buildings, to protect the site from flooding, improve amenity for future occupants of the site and to ensure the development does not result in any unacceptable flooding impacts. The agency accepts the MCA review that the proponent has not demonstrated that the works go beyond what is reasonably required to develop a site that is affected by upstream flows to and ensure it does not result in any flooding impacts. Any public benefit arising from the works would be incidental to the primary purpose of facilitating the proposed development. As such, the agency considers that it is not appropriate that the proponent receive an offset for the works against the required s94 contributions.

Hudson Street Upgrade

Works to Hudson Street broadly include road widening and upgrade, provision of a turning area and provision of on-street slip-lane parking.

The proponent seeks a 50% offset on the basis that the works provide a tangible public benefit and are critical to the operation of the adjacent light rail station. The proponent also advises that in similar circumstances it would usually only be required to resurface half the road and reinstate the footpath as opposed to dedicating land, widening, and delivering parking.

Council argue that no offset should be provided on the grounds that there is no material public benefit and that the works are fundamental to the proposed development and are caused by the development's project requirements.

MCA has considered both positions and has recommended that no offset be provided. It considers that the works do not constitute a material public benefit, but rather are expenditure related to private development, and would be required irrespective of the light rail extension. MCA's detailed reasons are set out in **Appendix C**.

The agency agrees with the analysis and recommendations of MCA. In particular, it is considered that while the works would provide a benefit to users of the light rail station, the light rail is not the reason for the works. The upgrade works would still be required as a necessary part of the Concept Plan approval, irrespective of the light rail station. The road widening was included in the site design by the proponent to allow for two-way vehicle movements in lieu of dual one-way streets on either side of the park (as envisaged by the McGill Street Masterplan applying to the site). The roundabout is a necessary extension of this, allowing vehicles to turn around without reversing into oncoming traffic, and would not have been necessary if the dual one way street system had been adopted instead. The on-street parking spaces were in part a response by the proponent to address concerns raised by Marrickville Council and the independent traffic consultant engaged by the agency that recommended some on-street visitor

parking should be provided within the site. The provision of these spaces, formed a requirement of the Concept Plan approval (TOA 9).

Furthermore the project application for the light rail did not envisage that any upgrades were needed to Hudson Street other than the potential for some upgrading in terms of lighting, line marking and signage. It did not envisage a turning circle, on-street parking or road widening.

The agency therefore considers that the proposed works are necessary to facilitate the development of the site and to mitigate traffic impacts associated with the development. Any public benefit or benefit to the light rail system derived from the works is considered to be incidental to the primary purpose of facilitating the proposed development. As such, the agency considers that it is not appropriate that the proponent receive an offset for the works against the required developer contributions.

Footpath and road upgrades to Brown and William Streets

Works include regrading of the road surface, as well as new footpath, kerb and guttering and driveway crossing on the side of the road adjacent to the development. No change to footpaths or kerbs on the opposite side of the street are proposed.

The proponent seeks a 50% offset on the basis that the works provide will provide a benefit both to the development, but also to the surrounding community.

Council argue that no offset should be provided on the grounds that the proposed works are typical of ancillary works expected from new large scale development and should not result in public benefit exemptions. Further the need for the works arises in part due to the substantial increase in pedestrian and vehicle traffic on these roads as a result of the proposal.

MCA agree and consider that it is incumbent upon the developer as part of the development approval process to improve the quality of Brown and William streets to ameliorate the impact of private development on the public domain and to facilitate the additional demand on these streets caused by the project. Further, MCA note that Council's s94 Contribution Plan does not include any allowances for these street upgrades and anticipates that such upgrades would be 100% developer funded.

The agency agrees with Council and MCA's analysis and considers that the footpath and road upgrade works arise as a direct result of the development of the site, and are required to mitigate impacts of the development. Any public benefit derived from the works is incidental to this primary purpose and an offset against s94 contributions would not be appropriate.

Upgrade/ embellishment of off-site pedestrian and cycle links

As discussed above, it has been agreed by both the proponent and Council that on-site links form part of the embellishment of the publicly dedicated open space which would receive a 100% offset against s94 contributions.

However, the proponent is also seeking a 100% offset for off-site works linking the site to Lewisham Railway Station. The works depicted in the plans include a new shared zone on William Street (forming part of the footpath works for Brown and William Streets discussed above); an embellishment of a 2m wide shared path on Old Canterbury Road and Jubilee Street and embellishment of existing 1.5m wide pedestrian footpaths on Jubilee and Victoria Streets with associated signage. It is noted that the scope of the works may vary following consultation with TfNSW.

MCA advise that Council have agreed to a 50% offset on the basis that the works provide access to and from the site for future occupants as well as the wider community. Given that Council have objected to any offset for the William Street footpath works as discussed above, it

is accepted that the 50% offset would relate to the remainder of the pedestrian linkages – that is, those links not immediately adjacent to the site.

MCA agrees with Council's view and considers that a 50% offset should apply to the off-site works on the basis that it is reasonable for 50% of the works to be assessed as expenditure related to private development, and 50% as constituting a material public benefit under Council's Contribution Plan.

The agency generally agrees with the MCA analysis and recommendation. However, for the reasons discussed above, the works on William Street shown with a direct frontage to the site (including the new shared ways or footpaths) which are also shown on the pedestrian and cycle link plan, should not receive an offset against s94 contributions. In the case of the remaining links, it is considered that although the demand for the upgrade and embellishment of these links is generated partly as a result of the development, there is not a complete nexus between these works and the proposed development. As such it is considered reasonable to provide a 50% offset for the embellishment of pedestrian and cycle linkages (excluding William Street).

Calculation of Offsets

The proponent seeks a modification to clarify that the cost of the works (and therefore the offsets) are to be based on quotes from an independent quantity surveyor.

Council argues that while the offsets may have a value calculated by a quantity surveyor, the developer will be able to build them with the economies of scale associated with being part of the larger development. Further, it argues that the works will be delivered incrementally, while section 94's are paid up front in a lump sum. These factors result in a financial benefit to the developer, which the Council believes the community should share in. Council therefore suggest that there should be a 15% premium applied to the benefits that the developer receives in calculating the offset to be applied.

MCA considers that the benefit of a VPA is that, on the one hand, it allows Council and the community to receive benefits of infrastructure in excess of that deliverable by Council and on the other hand, it provides a cost saving to the developer due to economies of scale. That is, there would be a commercial benefit to both parties. As the VPA is voluntary, MCA suggest that the respective parties should not enter into it unless it makes good commercial sense to do so. As such, MCA suggest that mandating an outcome such as a 15% premium would curtail and interfere with these commercial dynamics.

The agency considers that a cost based on a quantity surveyors report would be reasonable and in this case gives some clarity to assist with resolution of the VPA. If the developer, due to economies of scale or good management is able to deliver the infrastructure at a cost below the usual market or assessed rate, it is reasonable that the developer should be the beneficiary of any savings. Likewise if the developer exceeds the cost estimate, it will need to bear the additional expense. The recommendation has therefore included a modification to this effect.

Conclusion

The agency considers that the stormwater works and the upgrade of roads and footpaths with an immediate frontage to the site are works that are necessary to reasonably facilitate development of the site. Other than the embellishment of the public open space as already agreed between the parties, the only works which the agency considers should result in a partial off-set is the upgrade and embellishment of pedestrian and cycle links between the site and Lewisham Station. The offsets should be calculated on the basis of an independent quantity surveyors costing.

5.4 Discretionary vs Mandatory Offsets

The proponent is seeking to modify the approval to change the requirement that the works in the VPA, or a proportion of them may be offset against s94 contribution payments to a requirement that they must be offset.

The Council advise that the use of the words "may offset" was deliberately included in the approval as infrastructure provision was a major issue raised by Council in its representations to the PAC who were aware of the complex infrastructure demands of the development and that offsets would depend on the type of infrastructure being provided in the context of the applicable s94 Contributions Plan. The proposed change would result in a VPA that Council would be unwilling to enter into as it would result in shifting of infrastructure costs directly associated with the development onto the community.

The agency considers that the modification will assist with giving some certainty to the terms of the VPA and future negotiations. However given the recommendations discussed above, the extent of offsets recommended by the agency is limited to those already agreed to by Council, as outlined in **Table 1**.

The agency however also acknowledges that the VPA is a voluntary agreement between the parties and the scope of the works may vary slightly as a result of negotiations between the parties or through the development application process. An example being discussed by both parties is the provision of commuter bicycle parking or kiss and ride facilities adjacent to the light rail within the Hudson Street upgrade works. If such works (which are more for the benefit of the light rail, rather than the development) were to be included in the Hudson Street works, there should remain a discretionary provision for the Council to consider an offset the works against s94 contributions.

The recommendation therefore includes appropriate amendments to the TOA and FAR to reflect these changes.

5.5 Timing for entering into the VPA

On 13 February 2013, MOD 2 was approved to modify Condition A3 to modify the requirement that the Voluntary Planning Agreement be entered into prior to the submission of a development application to a requirement that negotiations shall be underway by this time. This allows flexibility for the parties to negotiate the timing of the VPA.

The proponent now seeks to modify the TOA to require that the VPA be entered into prior to the occupation of the last residential tower.

Council have not commented on the proposed timing. MCA considers that the timing is not in accord with industry practice and could have the effect of frustrating the eventual completion of the VPA.

The Agency considers that the VPA will determine essential aspects of the development including the scope of certain works to be included in development, timing of their provision, and offsets against section 94 contributions which would be payable in conjunction with the first construction certificate associated with residential dwellings. It is therefore considered appropriate that the VPA be entered into prior to the issue of the first construction certificate which includes residential dwellings.

6. CONCLUSION

The proponent is seeking to modify various aspects of TOA A3 and FAR 20 to provide some certainty and assist the proponent and Council to reach agreement on the terms of the VPA.

The agency is supportive of a number of the proposed modifications, including modifications which clarify the scope of the works within the VPA and detail the method for costing the works. The agency is also supportive of modifications which establish an offset for embellishment of the new open space and a partial offset for new off-site pedestrian and cycle links against Section 94 contributions as it is considered that these works result in a material public benefit to the wider community.

However the agency is not supportive of a range of other offsets sought by the proponent for stormwater and road upgrade works immediately adjacent to the site as it is considered that these works arise as a direct result of the development of the site, and are required to mitigate impacts of the development. In these circumstances, an offset against Section 94 contributions is not considered appropriate.

The agency also considers that Transport for NSW should still be consulted with respect to pedestrian and cycle links, and that VPA must be entered into before the first Construction Certificate for residential dwellings, rather than prior to the issue of the last occupation certificate.

The agency considers that with the recommended changes the modification provides an enhanced level of clarity around the VPA structure which sets a reasonable balance between the requirements of the development and the wider public benefits associated with the Concept Plan.

TOA A3 and FAR 20 are recommended to be modified as set out in **Appendix D**.

7. RECOMMENDATIONS

It is therefore recommended that the Planning Assessment Commission:

- (a) **consider** the findings and recommendations of this report;
- (b) **approve** the modifications subject to conditions under Section 75W of the Environmental Planning and Assessment Act 1979; and
- (c) **sign** the attached Instrument of Modification (**Appendix D**).

Endorsed by:



Daniel Keary
Director
Industry, Key Sites and Social Projects



Chris Wilson
Executive Director
Development Assessment Systems & Approvals

1.4.14

APPENDIX A MODIFICATION REQUEST

See the agency's website at

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=6224

APPENDIX B SUBMISSIONS

See the agency's website at

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=6224

APPENDIX C CONSULTANT REPORTS

See the agency's website at

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=6224

APPENDIX D RECOMMENDED MODIFYING INSTRUMENT
