

3 May 2022

17156

Michael Cassel
Secretary
Department of Planning and Environment
12 Darcy Street,
Parramatta NSW 2150

Attn: Rodger Roppolo

SECTION 4.55(1A) MODIFICATION APPLICATION - SSD 8903 Stage 1 of Ivanhoe Estate (Midtown), Macquarie Park

This application has been prepared by Ethos Urban on behalf of Frasers Property Australia pursuant to section 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) to modify SSD-8903 relating to the Ivanhoe Estate (the site).

The modification seeks to remove seven (7) trees that were approved for retention, but owing to further detailed investigations into the structure of a crib wall and the location of structural roots, these trees are not able to be retained as part of site preparation works and the delivery of the road connection to Lyonpark Road undertaken as Stage 1 of the Ivanhoe Estate (Midtown) redevelopment.

This application identifies the consent, describes the proposed modifications and provides an assessment of the relevant matters contained in section 4.55(1A) of the EP&A Act. This application is accompanied by an Arboricultural Impact Assessment prepared by Eco Logical (**Attachment A**), an Ecological Impact Assessment prepared by Eco Logical (**Attachment B**), and a survey demarcating the location of the crib wall (**Attachment C**).

1.0 Consent to be modified

Development consent was granted by the (then) Minister for Planning and Public Spaces on 30 April 2020 for State Significant Development (SSD-8903) for Stage 1 of the Ivanhoe Estate development in Macquarie Park. The development is pursuant to the approved Ivanhoe Estate Masterplan (SSD-8707) and comprises:

- Site preparation works, including removal of trees, demolition, bulk earthworks and excavation
- Construction of new roads, bridge over Shrimptons Creek and new road connection to Lyonpark Road
- Construction of two residential apartment buildings (Building A1 and Building C1) with basement car parking
- Landscaping and public domain works
- Amalgamation and subdivision

The consent has been previously modified on three (3) previous occasions, comprising:

- Section 4.55(1a) - MOD 1 - amendments to a number of conditions of consent to clarify specific requirements, timings, and nominated personnel or issues; approved on 10 November 2020.
- Section 4.55(2) - MOD 2 - detailed design changes to Building C1; approved on 7 May 2021.
- Section 4.55(1a) – MOD 3 – for the removal of three (3) trees that were approved for retention, and retain two (2) trees that were approved for removal; approved 21 December 2021.

2.0 Strategic context

The strategic context of the approved development has not materially changed since the Minister for Planning and Public Spaces granted consent to the Stage 1 SSDA on 30 April 2020, and the subsequent three (3) Modification Applications. DPE considered when granting consent to the Stage 1 SSDA that this first stage of physical works to deliver the Ivanhoe Estate Masterplan was appropriate for the site given it was consistent with the relevant strategic plans of the State.

3.0 Description of modifications

3.1 Modification to the development

Stage 1 of the Ivanhoe Estate redevelopment approves the removal or retention and protection of trees as part of site preparation works occurring across the site. However, through post-approval design development and testing, changes are required to these approved works to enable the removal of seven (7) trees associated with the delivery of a bridge and road connection to Lyonpark Road.

The original assessment (ELA 2020; AIA v6) indicated that these trees in question could be retained as they were located above a crib wall, situated 2+metres above the proposed works footprint. Based on the detailed plans (ADW Johnson 2018), disturbance of the structural root zone was not expected to occur.

However, due to changes in the ground level necessary to facilitate the provisions of the new roadway between Main Street and Lyonpark Road (approved as part of the Concept Masterplan and Stage 1 SSDA), excavation of the embankment adjacent to the crib wall is required to a depth of approximately 3 metres from the current level which would result in significant impacts to the structural root zone of these the seven (7) trees along this wall. This is compounded by the growth of the trees, which have adapted to their surrounds and have grown over the crib wall and into the embankment within the Ivanhoe Estate site.

The embankment and a portion of the crib wall sits within the land owned by Local Government Super which forms part of the Ivanhoe Estate (Midtown) site, as detailed in the site survey at **Attachment C**.

Photographs of the existing wall and trees are shown below. An extract of the tree retention and removal plan showing the location of these trees is provided at **Figure 3**.

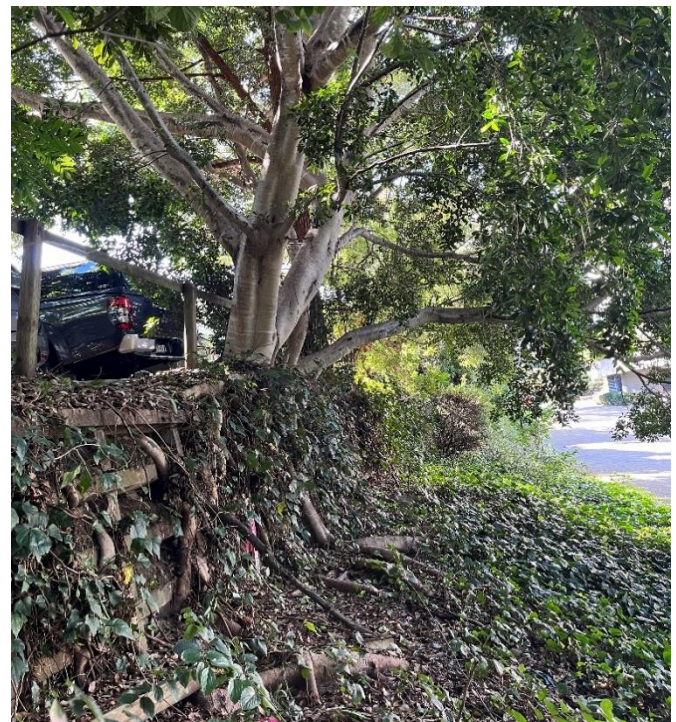


Figure 1 Structural roots and tree branches growing into the FPA site and area of approved works

Source: FPA



Figure 2 Test excavation showing the presence of considerable structural roots in the area of works

Source: FPA

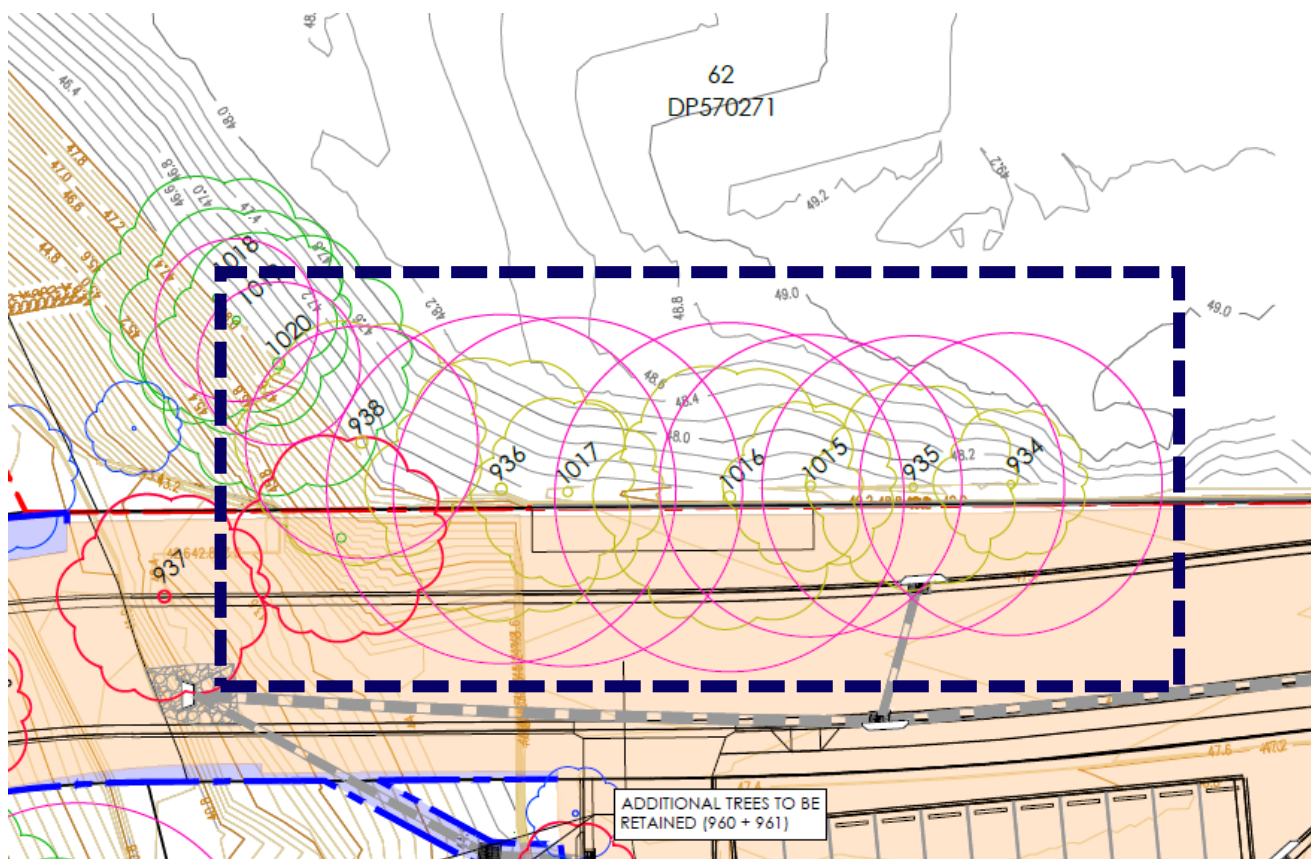


Figure 3 *Trees subject to this application (outlined)*

Source: ADW Johnson

Table 1 Details of the trees necessary for removal

Tree Number	Botanical Name	Common Name	Native or Exotic	Height (m)	Spread (m)
934	<i>Lophostemon confertus</i>	Brush Box	Native	10	3
935	<i>Eucalyptus microcorys</i>	Tallowwood	Native	14	7
936	<i>Ficus microcarpa</i>	Chinese Banyan	Exotic	11	10
938	<i>Eucalyptus microcorys</i>	Tallowwood	Native	13	7
1015	<i>Eucalyptus microcorys</i>	Tallowwood	Native	19	7
1016	<i>Ficus microcarpa</i>	Chinese Banyan	Exotic	15	10
1017	<i>Ficus microcarpa</i>	Chinese Banyan	Exotic	15	10

Source: Eco Logical

3.2 Modification to the conditions of consent

The proposed modifications described above necessitate amendments to the consent conditions which are identified below. Words proposed to be deleted are shown in ~~**bold strike through**~~ and words to be inserted are shown in ***bold italics***.

The plan that was approved as part of MOD 3 has been updated to reference the additional trees that are required for removal as part of this Modification Application. The tree removal and retention works shown in the updated plan are cumulative; displaying the combined changes that were approved as MOD 3 and are proposed as MOD 4 for completeness.

TERMS OF CONSENT

A2. The development may only be carried out:

...

Drawing No.	Revision	Name of Plan	Date
300001-ESK-213	E	Tree Retention Plan	02/05/2022

As described in **Section 3.1** above, the proposed trees requiring removal to facilitate the approved works for the delivery of the new road connection, will require works within 6-8 Lyonpark Road. Accordingly, to enable these works to occur it is necessary to amend Condition A6 of the consent as follows. Landowners consent for these works within 6-8 Lyonpark Road is provided under separate cover.

A6. No works, ~~including tree removal~~ ***excluding tree removal and structural works approved under MOD 4,*** are approved to 6-8 Lyonpark Road, Macquarie Park (Lot 62 DP570271).

In addition to updating the specific tree removal plan in Condition A2 that was approved as part of MOD 3 to the Stage 1 SSDA, we also propose replicating the condition of consent at A16 of the Concept Masterplan consent. As is acknowledged in the development description at Schedule 1 of the Stage 1 SSDA, as well as Condition C39 and DPE's assessment report prepared for the Stage 1 SSDA, tree removal is approved to be physically undertaken as part of the site preparation works that form part of this SSDA. However, the condition of consent specifically enabling such tree removal works to occur is ambiguous and as such for completeness and administrative purposes, we would request including the following:

A29. All tree removal must be consistent with Table 3 and drawings in Appendix C, contained in the Arboricultural Impact Assessment, prepared by Eco Logical Australia, dated February 2020, as modified by 300001-ESK-213 Revision E dated 02/05/2022.

4.0 Statutory Context

4.1 Section 4.55 of the EP&A Act

Substantially the same development

Section 4.55(1A) of the EP&A Act states that a consent authority may modify a development consent if *"it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all)"*.

The development, as proposed to be modified, is substantially the same development as that originally approved as no change is proposed to the approved land uses, the extent of development on the site including the approved buildings, public domain areas or road network, or the qualitatively essential parts of the approved development such as the overall built form and scale, impacts on surrounding development, traffic and parking, amenity, and the like.

Further, while the proposed works will require utilising a very minor, ancillary, component of 6-8 Lyonpark Road, Section 4.55 provides the power to modify the consent to enable this to occur as per *Scrap Realty* and other case law that clarifies the meaning of "modify" in the context of Section 4.55:

- In the judgement *Scrap Realty Pty Ltd v Botany Bay City Council* [2008] NSWLEC 333 (*Scrap Realty*), the Chief Justice of the NSW Land and Environment Court confirmed that a development consent issued under Part 4 can be modified to include additional land beyond that originally included in the consent, provided that the development overall continued to satisfy the 'substantially the same' test that applied to modification under Part 4. In the same case, Preston CJ noted that *"an expansion of the area on which development is carried out by adding land not the subject of the original consent is not inherently outside the concept of modification of the development under (s 4.55)."*
- Section 4.55 establishes the power to "modify" a consent. As per *Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414, the concept of modification involves "alteration without radical transformation". This approach was followed by Mason P in the NSW Court of Appeal in *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* (1999) 104 LGERA 133 in the context of a modification to an activity approval under Part 5 of the EP&A Act.
- In *Transport Action Group*, Sheller JA offered an alternative definition of "modify" in the following terms: I think it is correct to say that what there was meant by "modify" was a change which might add to or subtract from the proposed activity, the substance of which continued, and which was less than its wholesale rejection and replacement.

Based on the above, our view is that the development as modified remains substantially the same as the development as originally approved. The extent of additional land required to complete the proposed tree removal works is immaterial in the context of the 8.2 hectare site approved for redevelopment. Further, this additional land will not be converted into any new land use or utilised in any new way, rather, it will simply enable the delivery of the approved road connection which remains entirely within the approved Ivanhoe Estate (Midtown) site.

Environmental impacts

Section 4.55(1A) of the EP&A Act also states that a consent authority may modify a development consent if *"it is satisfied that the proposed modification is of minimal environmental impact"*. Under section 4.55(3) the consent Authority must also take into consideration the relevant matters to the application referred to in section 4.15(1) of the EP&A Act and the reasons given by the consent authority for the grant of the original consent.

The planning assessment of the proposed modified development remains generally unchanged with respect to these matters, with further assessment provided at **Section 6.0** below.

4.2 Section 4.22 of the EP&A Act

Under Section 4.24 of the EP&A Act, while a Concept Proposal remains in force, any further detailed application cannot be inconsistent with the consent for the Concept Proposal.

The modified development remains not inconsistent with the Ivanhoe Estate Masterplan. The proposed modifications are minor and will not result in any adverse or significant new environmental impacts, including with respect to biodiversity and the approved offset strategy for the Ivanhoe Estate redevelopment. The proposal does not hinder the

Concept Masterplan's commitments to rehabilitate the Shrimptons Creek Corridor, protect the ecologically significant corridor fronting Epping Road, and provide a minimum of 950 replacement trees across the Estate.

4.3 Biodiversity Conservation Act 2016

The Concept Masterplan and Stage 1 SSDA, which granted consent for all tree removal across the Estate, was assessed as a transitional project against the *Environment Protection and Biodiversity Conservation Act 1999* and an offset strategy was approved for all development within the Estate. The proposed modifications do not impact the agreed offset measures for the Ivanhoe Estate redevelopment as confirmed in the Biodiversity Impact Assessment provided at **Attachment B**.

5.0 Engagement

No consultation has been completed for this application outside of that undertaken as part of the preparation and refinement of the Stage 1 SSDA. The scale of the proposed changes, and associated environmental impacts, are shown to be minor and as such are not considered to warrant further consultation.

6.0 Assessment of impacts

Section 4.55(1A) of the EP&A Act states that a consent authority may modify a development consent if "*it is satisfied that the proposed modification is of minimal environmental impact*". Under section 4.55(3) the consent Authority must also take into consideration the relevant matters to the application referred to in section 4.15(1) of the EP&A Act and the reasons given by the consent authority for the grant of the original consent.

Biodiversity

The assessment by Eco Logical at **Attachment B** confirms that the removal of the seven (7) trees will not significantly alter the conclusions of the biodiversity assessment or the offset measures for this project. The trees proposed to be removed are not part of any Threatened Ecological Community (TEC) under the *NSW Biodiversity Conservation Act 2016* or the *Commonwealth Environment protection and Biodiversity Conservation Act 1999*, and are not threatened species under this same act. These trees may host Grey Headed Flying Foxes but there is no evidence that they have ever used these trees.

The impact of the proposed seven (7) trees being removed represents a numerical increase of 0.05ha of the 1.1ha of Plant Community Type ME041 that was approved for removal in the Stage 1 SSDA. Owing to the conditions of this plant type, it was confirmed that this plant community did not need offsetting. Since the three exotic ficus dominate this particular area, the biodiversity loss would be negligible and should also not require offsetting.

Further, it is noted that while a few of the subject trees were considered to have high retention value under the original Arboricultural Impact Assessment, Section 2.2 of that assessment confirms that the order of priority trees for retention to removal is where design allows. As detailed in the assessment at **Attachment A**, completing the approved Stage 1 SSDA works will have unavoidable impacts to these trees resulting in failure and causing damage to property, injury and worst-case loss of life.

Reasons given for granting consent

The proposed modification does not alter the development insofar as the matters identified by the Minister as the reasons for granting the original development consent.

7.0 Justification

This Modification Application seeks to remove seven (7) trees that were approved for retention as part of approved site preparation works undertaken as part of Stage 1 of the Ivanhoe Estate (Midtown) redevelopment. The proposed works are as a result of post-approval structural and arboricultural assessments, which have identified that the delivery of the approved road connection between Main Street and Lyonpark Road will unavoidably impact these trees which have grown considerably into the Ivanhoe Estate (Midtown) site.

The project as a whole and as modified is considered to be appropriate and supportable with regard to social, economic, and environmental impacts.

In accordance with section 4.55(1A) of the EP&A Act, DPE may modify the consent as:

- the proposed modification is of minimal environmental impact; and
- is substantially the same development as development for which the consent was granted.

We trust that this information is sufficient to enable a prompt assessment of the proposed modification request.

Yours sincerely,



Anna Nowland
Principal Planner