

11.3. North Sydney Council's Compensation Claim - TfNSW Compulsory Acquisitions - Council's Parks Reserves - Update Report No 2- Public

AUTHOR: Duncan Mitchell, Director of Engineering and Property Services

ENDORSED BY: Rob Emerson, Acting General Manager

ATTACHMENTS:

1. Gazettal Notice Nov 2020 and TfNSW plan for upgrade of Warringah Fwy Oct 2020
[11.3.1 - 1 page]

PURPOSE:

The purpose of this report is to update Council on the current class 3 court proceedings Council is undertaking in relation to its compensation claim for the land that TfNSW has compulsorily acquired for the purposes of the Warringah Freeway upgrade.

EXECUTIVE SUMMARY:

A class 3 Application was filed with the Land and Environment Court by Councils Lawyers on 3 June 2022. A report was subsequently prepared for the Legal and Governance Committee held on Tuesday 14 June – Item 5.2. Legal Matter - Class 3 Proceedings Land & Environment Court - Compensation Claim – land occupied by TfNSW for the Warringah Freeway.

The report from the Legal and Governance Committee was reported to Council at the July 21, Council meeting – Item 10.4 – Confidential Matters.

In summary the report outlined the final determination of compensation that the NSW Valuer General had arrived at and the subsequent final offer of compensation that Council had received from TfNSW on the three (3) sites, comprising 11 lots of land that TfNSW had compulsorily acquired for 4 years and 11months.

Contained within the confidential attachment to the 21 July Council Report was legal advice from Councils lawyers and Senior Counsel on the NSW Valuer Generals final determination on Councils Claim.

In order to discuss the subject of this report, it is recommended that the meeting be closed to the public in accordance with Section 10A (2) of the Local Government Act and the Local Government (General) Regulation 2005 for the reason listed below:

(d)(i) commercial information of a confidential nature that would, if disclosed prejudice the commercial position of the person who supplied it and because consideration of the matter would, on balance be contrary to the public interest as publication of all tendered amounts would discourage potential tenderers from submitting commercial information in future and would affect Council’s ability to obtain value for money services.

RECOMMENDATION:

1. THAT the meeting be closed to the public in accordance with Section 10A (2):

(d)(i) commercial information of a confidential nature that would, if disclosed prejudice the commercial position of the person who supplied it and because consideration of the matter would, on balance be contrary to the public interest as publication of all tendered amounts would discourage potential tenderers from submitting commercial information in future and would affect Council's ability to obtain value for money services.

(g) advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the grounds of legal professional privilege and because consideration of the matter in open Council would be, on balance, contrary to the public interest as it would affect Council's ability to manage legal matters effectively and in the best interests of the community.

2. THAT the report be treated as confidential and remain confidential unless Council determines otherwise.

LINK TO COMMUNITY STRATEGIC PLAN

The relationship with the Community Strategic Plan is as follows:

1. Our Living Environment

1.1 Protected, enhanced and biodiverse natural environment

2. Our Built Infrastructure

2.1 Infrastructure and assets meet diverse community needs

5. Our Civic Leadership

5.2 Strong civic leadership and customer focussed services

BACKGROUND

A report from the Engineering and Property Services Division was brought to the November 2020 Council Meeting, informing Council that correspondence had been received from TfNSW in relation to the issuing of a Proposed Acquisition Notice (PAN) for three (3) sites, comprising 11 lots of land that included parts of the Cammeray Golf Course, St Leonard's Park and ANZAC Park for the purposes of the Warringah Freeway upgrade.

Refer to Figure 1 and 2 contained within this report.

The report also identified that Council would be seeking compensation from TfNSW under the "Land Acquisition (Just Terms Compensation) Act 1991" for the proposed acquisition of these three (3) sites and that legal advice was being sought on Council's right to compensation.

The actual Proposed Acquisition Notice (PAN) for the compulsory acquisition of a leasehold interest in each of the sites was issued to Council by TfNSW on 14 December 2020. The acquisition of the leasehold interests occurred on 26 March 2021.

TfNSW intend to occupy the leasehold interests that they have compulsorily acquired in all three (3) sites for the duration of the Warringah Freeway upgrade works which is estimated at 4 years and 11 months. The sites will then be returned to Council in a condition determined under an Interface Agreement that Council is currently negotiating with TfNSW.

The legal advice that Council has received confirmed that Council does have a right to compensation and compensation claims were lodged with the NSW Valuer General under the "Just Terms Act" – on 24 June 2021 and supplemented on 9 July 2021.

The NSW Valuer General got back to Council on 8 March 2022 with a final determination for compensation for the occupation of these parcels of land and determined that Council was entitled to \$35,000 for disturbance and the net value of Council land that had been compulsorily acquired by TfNSW was determined to be \$3.

Total compensation payable to Council was \$35,003.

Subsequently on 9 March TfNSW issued to Council a final compensation offer and Compensation Notice under the Land Acquisition - Just Terms compensation Act for the same amount as determined by the NSW Valuer General - \$35,003.

From that date Council had 90 days to appeal the decision which took the deadline for an appeal to Monday 6 June 2022.

A class 3 Application was filed with the Land and Environment Court on **3 June 2022** by Councils Lawyers.

Orders were made by the Court on **7 July 2022** which set up a timetable (terms of order) for the matter.

To date Councils Lawyers have served Council Points of Claim on **3 August 2022** and TfNSW have served their Points of Defense on **25 August 2022**.

The following further dates have been set down in the terms of order determined by the court.

By 26 September 2022, the applicant (North Sydney Council) is to serve:

its position paper for the conciliation conference (including identifying the amount of compensation claimed and how that amount has been calculated);

- evidence of losses attributable to disturbance under s 55 (d) and s 59(1)(a)-(f); and
- the applicant's lay evidence.

By 31 October 2022 the respondent (TfNSW) is to serve:

- its position paper for the conciliation conference (including identifying the amount of compensation to which the respondent contends the applicant is entitled and how that amount has been calculated);
- a reply to the applicant's schedules of losses attributable to disturbance under s 59(1)(a) to (e) and other financial costs claimed under s 59(1)(f); and

The matter is listed for a conciliation conference on **7 December 2022**

If the conciliation conference is unsuccessful, the parties will attend a second directions hearing on the **16 December 2022**.

Note: The confidential memorandum which is an attachment to this report includes North Sydney Council's Points of Claim, TfNSW Points of defense and further advice from Councils solicitors and Senior Counsel.

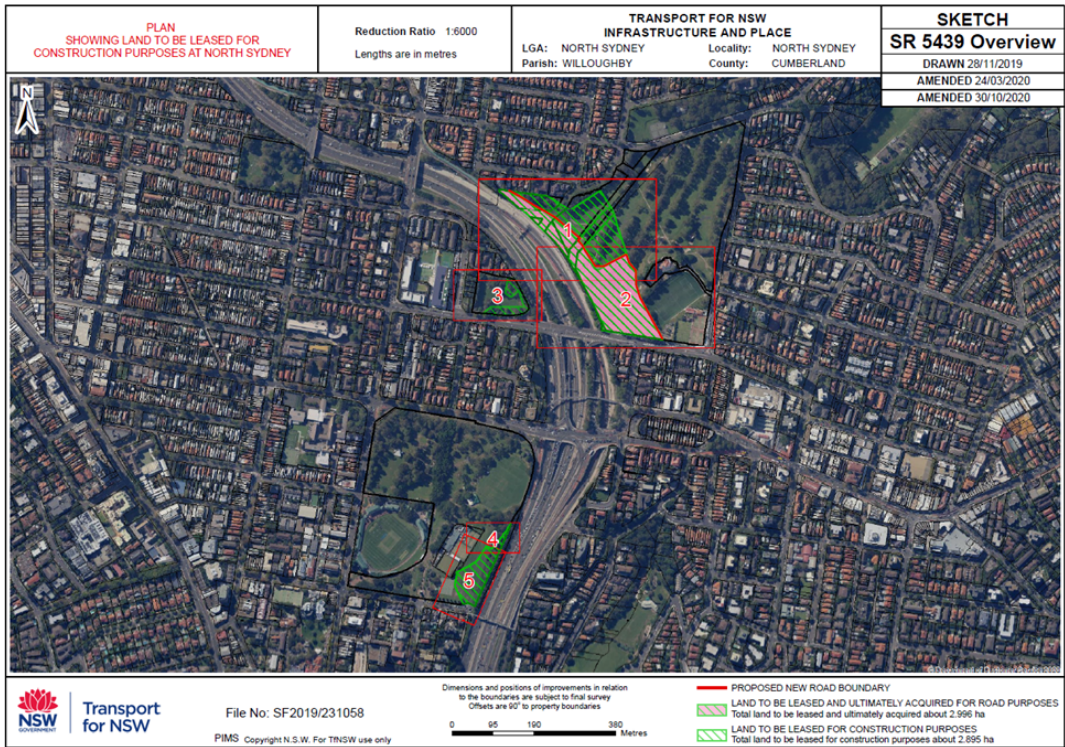


Figure 1. Plan prepared by TfNSW – October 2020 that shows areas to be utilised for the upgrade of the Warringah Freeway.

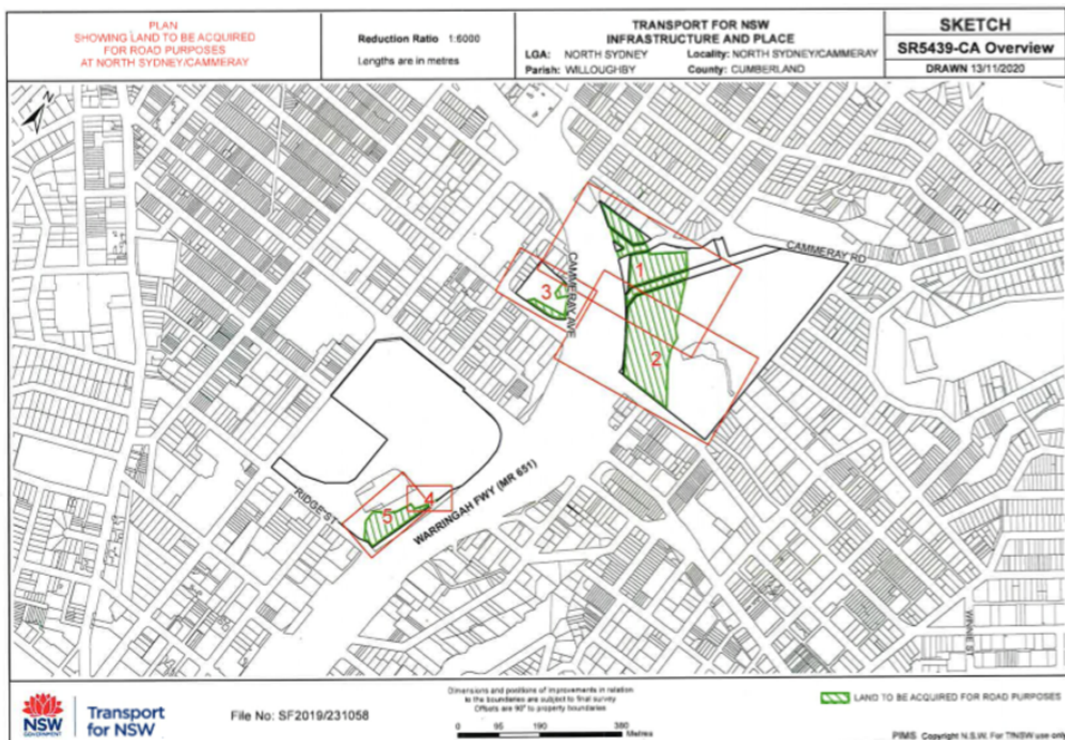


Figure 2. Gazettal Notice of Land that has been compulsorily Acquired by TfNS (Leasehold Interests) for the purposes of upgrading the Warringah Freeway – November 2020.

Section 175 of the Roads Act – Compensation for Council land occupied under Section 175

North Sydney Council has also received to date fourteen (14) Section 175 Notices from TfNSW which permits them as a road authority to use and occupy any land along or near the line of a road for the purpose of carrying out road work.

Note: Some of the Notices that Council has received are extensions to earlier notices for the same parcels of land.

Section 175(7) states that the roads authority must pay compensation to the owner of the land for any loss or damage arising from the exercise of any power under s175.

Section 226 provides that compensation may be claimed by serving notice of the claim on TfNSW. A claim for compensation may be referred for arbitration, or if the parties fail to agree on the claim within 28 days, either may refer the claim to the Land and Environment Court.

The legal advice that Council has received is that there is no statutory limitation period by which a claim for compensation must be brought by Council. However once Council has made a claim, there is a time limit within which the claim may be referred to the Court.

To date North Sydney Council has received section 175 notices concerning parcels of land in Cammeray Park, ANZAC Park, St Leonard's Park, High Street Reserve, Jeafferson Jackson Reserve, McIntosh Lane Reserve, Merlin Street Reserve, and Whaling Park.

Note: The land currently occupied by TfNSW under section 175 of the Roads Act *does not* currently form part of Councils Compensation Claim.

Proposed Acquisition of North Sydney Councils Interests as Care Control Managers in Various Lots.

On 8 September 2022 Council received a letter from TfNSW seeking Council's concurrence to revoke Council's interest in some of the land currently occupied under section 175 of the Roads Act 1993. TfNSW requested the extinguishment / revocation of North Sydney Councils interest in relation to the Care Control and Management of the following respective sites.

- Lot 18-20 in Deposited Plan 250372 – Merlin Street Reserve
- Part of lot 6 in deposited Plan 828726
- Lot 15 in Deposited Plan 816476
- Lot 40 in Deposited Plan 828060

The letter stated that TfNSW is currently in occupation of the land under Section 175 of the Roads Act 1993 and as owner of the land requires possession to complete works associated with the Warringah Freeway upgrade within required time frames.

The letter also stated that if Councils concurrence is not forthcoming then TfNSW will acquire the land by compulsory process, in the event agreement is not reached.

Council has written back to TfNSW on 9 September, requesting that they confirm whether

this request for revoking Councils interests in relation to care control and management on these sites and intention to compulsory acquire the sites is a temporary or permanent arrangement. Council is yet to receive a response from TfNSW.

Note: Refer to attachment No 4 - Legal Advice - Section 175 Notices and accompanying Maps in the confidential report.

Notices issued by TfNSW under Section 175 of the Road Act 1993

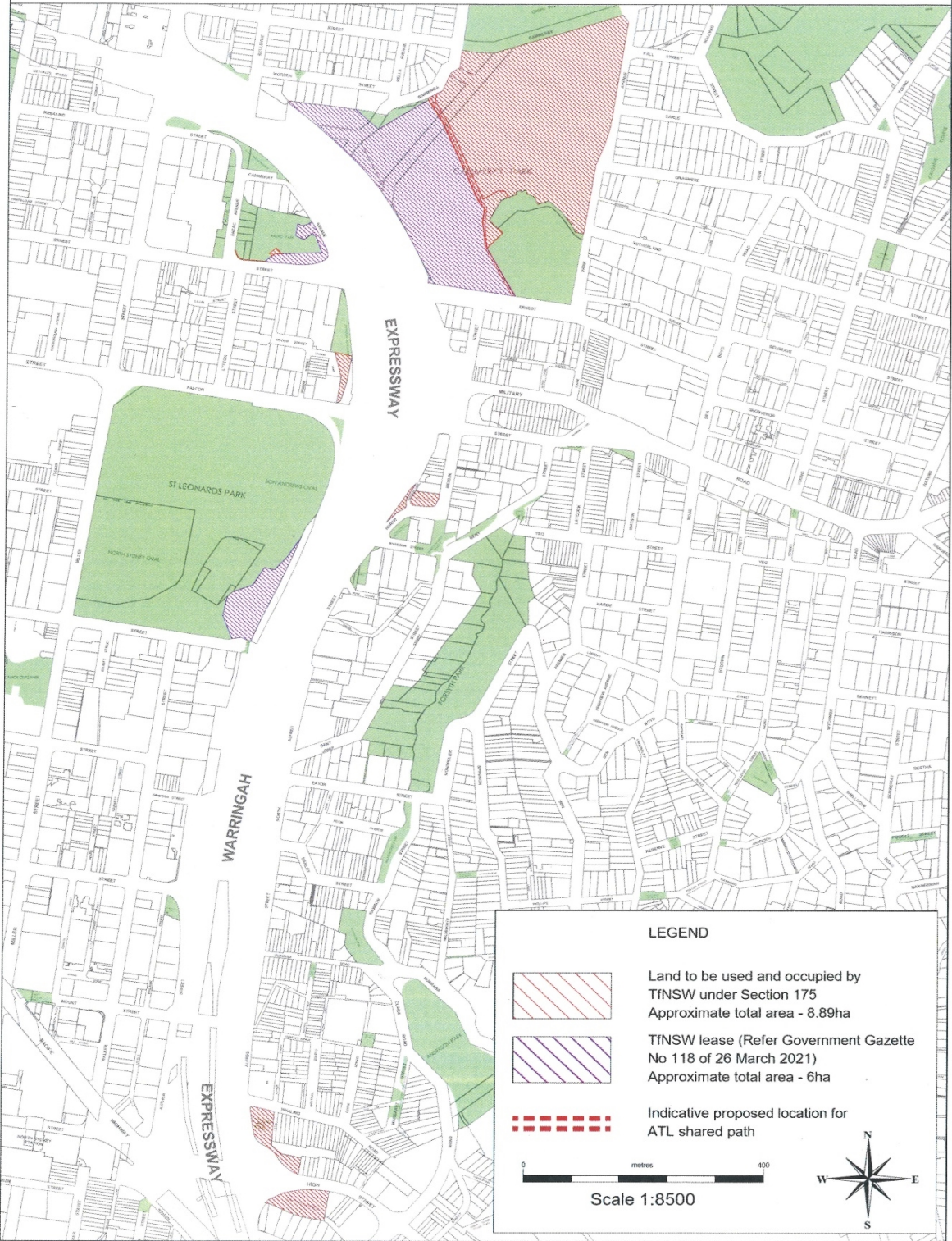
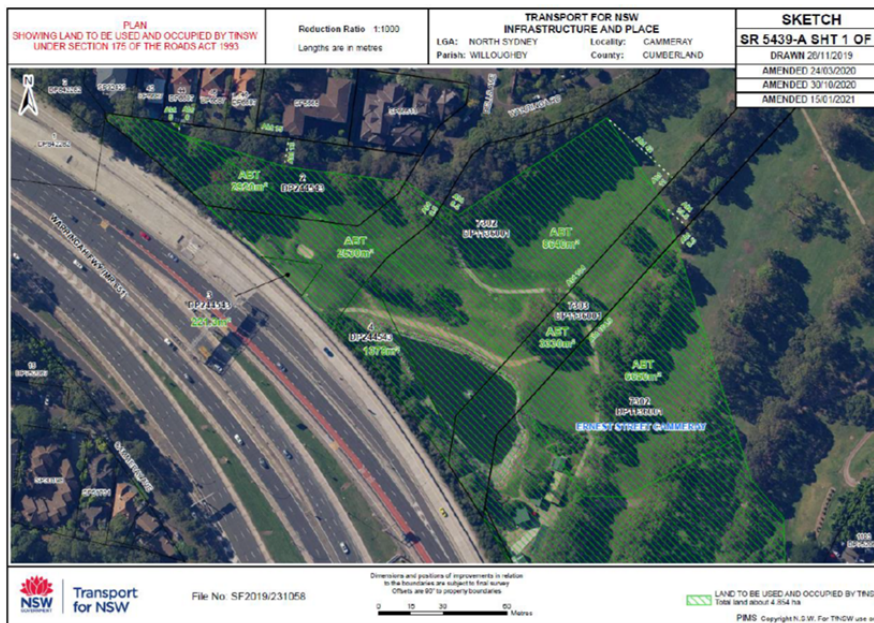
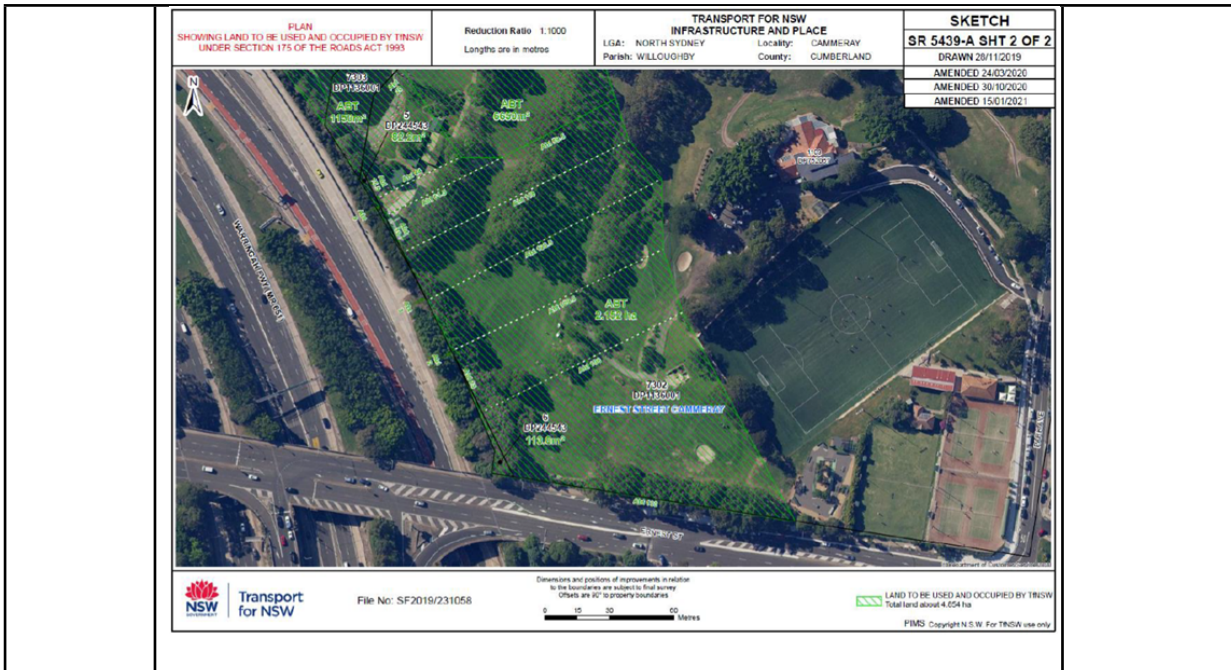


Figure 3 Key Map of land occupied by TfNSW under section 175 of the Roads Act (Red Areas) as well as three (3) large sites, comprising 11 lots of land that TfNSW had compulsorily acquired for 4 years and 11months (Purple Areas)

Occupation of Land by TfNSW under s 175 Roads Act – Chronology

Date	Event	Reference source
11 February 2021	Council's solicitors advise on lawfulness of TfNSW's exercise of power to occupy land under s175 Roads Act, and entitlement to compensation.	Council's solicitors advice dated 11 February 2021 [1]
17 February 2021	<p>Cammeray Park, Anzac Park and St Leonard's Park</p> <p>TfNSW sends a covering letter about Early Works required in the three park locations. The letter includes the scope of Early Works activities. The letter encloses the three 17 February 2021 notices (see table entries below).</p>	TfNSW letter dated 17 February 2021 [2]
17 February 2021	<p>Cammeray Park</p> <p>TfNSW gives notice of intention to occupy two areas of green land below from 1 March 2021 to 6 September 2021 (Cammeray Notice 1). No reference number given. This appears to cover portions of Cammeray Park that were subsequently part of the leasehold acquisition by TfNSW on 26 March 2021.</p>	TfNSW Notice dated 17 February 2021 (Cammeray) [3]



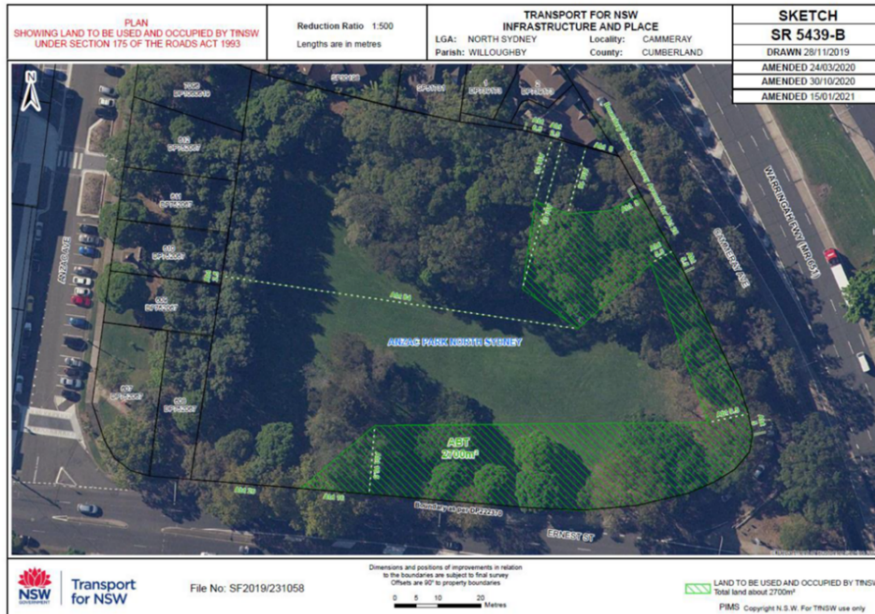


17 February 2021

ANZAC Park

TfNSW gives notice of intention to occupy green land below within ANZAC Park from 1 February to 6 September 2021 (ANZAC Notice 1). This appears to cover portions of ANZAC Park that were subsequently part of the leasehold acquisition by TfNSW on 26 March 2021.

TfNSW Notice dated 17 February 2021 (Anzac Park) [4]

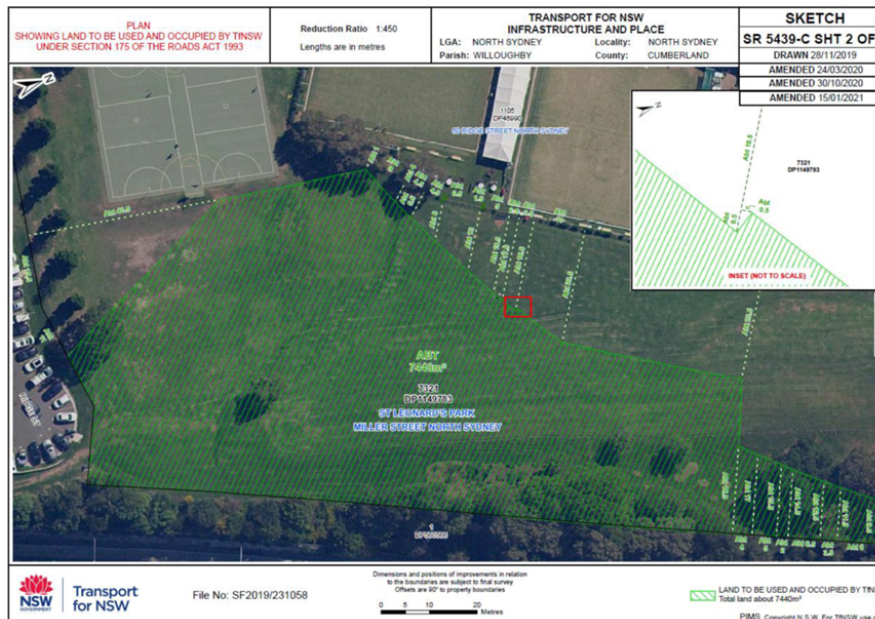
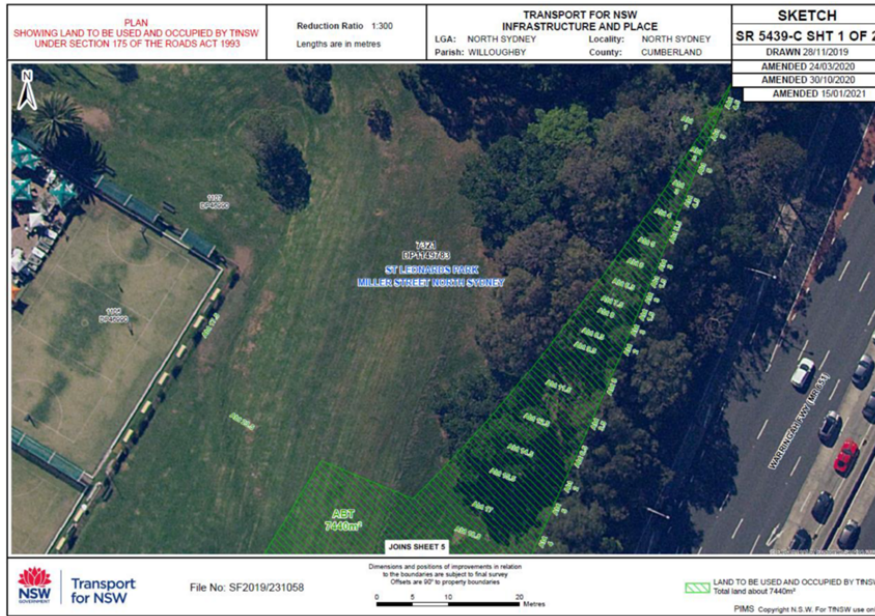


17
February
2021

St Leonard's Park

TfNSW gives notice of intention to occupy green land below from 1 March 2021 to 6 September 2021 in St Leonard's Park (St Leonard's Notice 1). This appears to cover portions of St Leonard's Park that were subsequently part of the leasehold acquisition by TfNSW on 26 March 2021.

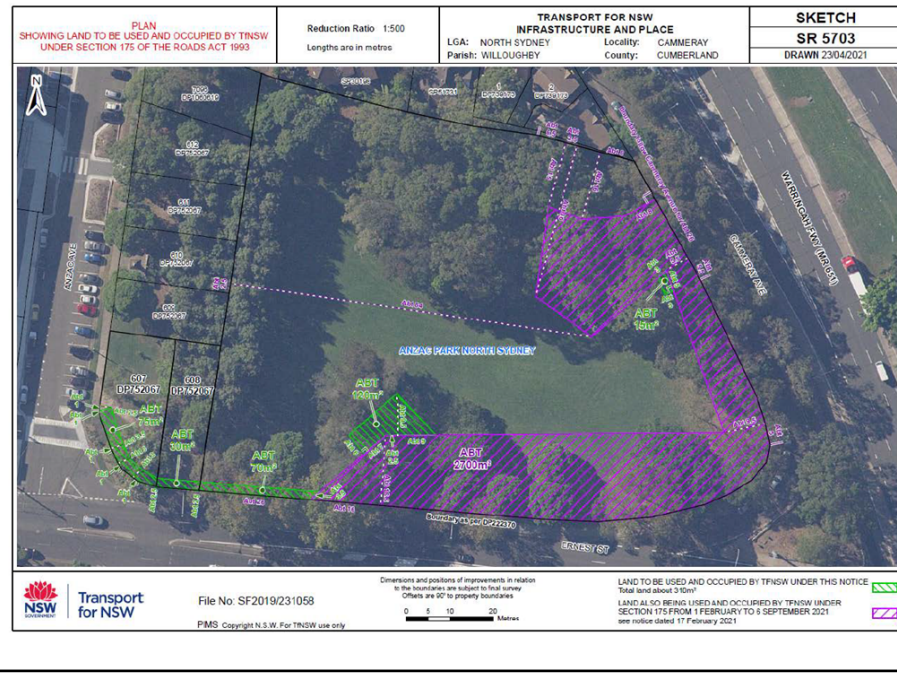
TfNSW
Notice dated
17 February
2021 [5]



4 May 2021

ANZAC Park
 TfNSW gives notice of intention to occupy green land below from 14 May 2021 to 31 December 2021 in Anzac Park.
 Notice: TfNSW reference no. A37363152 (ANZAC Notice 2). Council could not locate any request for an extension to this notice, so we have assumed that this section is no longer being occupied by TfNSW. (Purple land is ANZAC Notice 1).

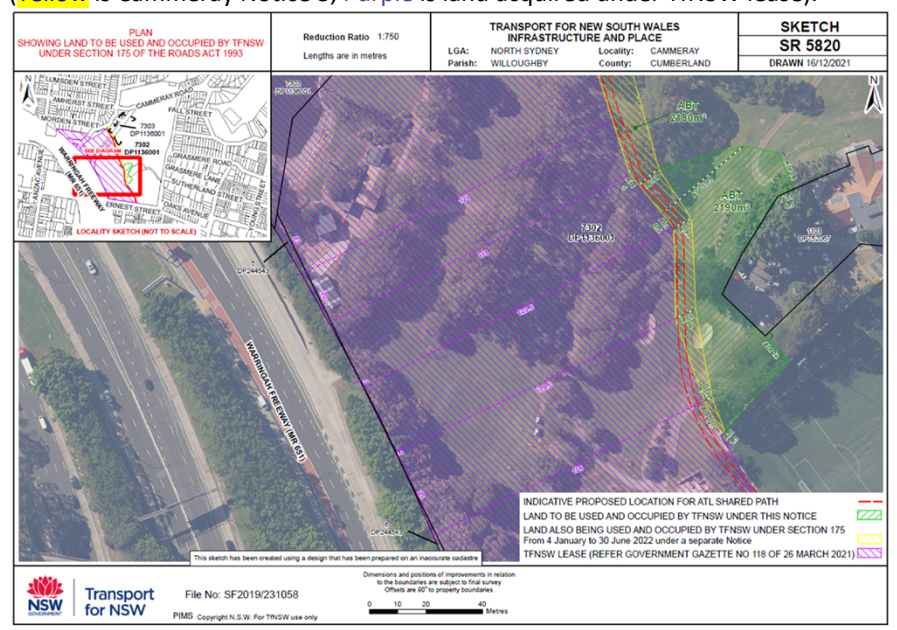
TfNSW
 Notice dated 4 May 2021 [6]



16 December 2021

Cammeray Park
 TfNSW gives notice of intention to occupy green land below from 4 January 2022 to 30 June 2022 in Cammeray Golf Course.
 Notice: TfNSW reference no. A41013126 (Cammeray Notice 2)
 Note, this was later extended until 31 December 2022 (see letter of 1 July 2022)
 This appears to be the first notice for this area of land.
 (Yellow is Cammeray Notice 3, Purple is land acquired under TfNSW lease).

TfNSW
 Notice dated 16 December 2021 (Cammeray 2) [7]

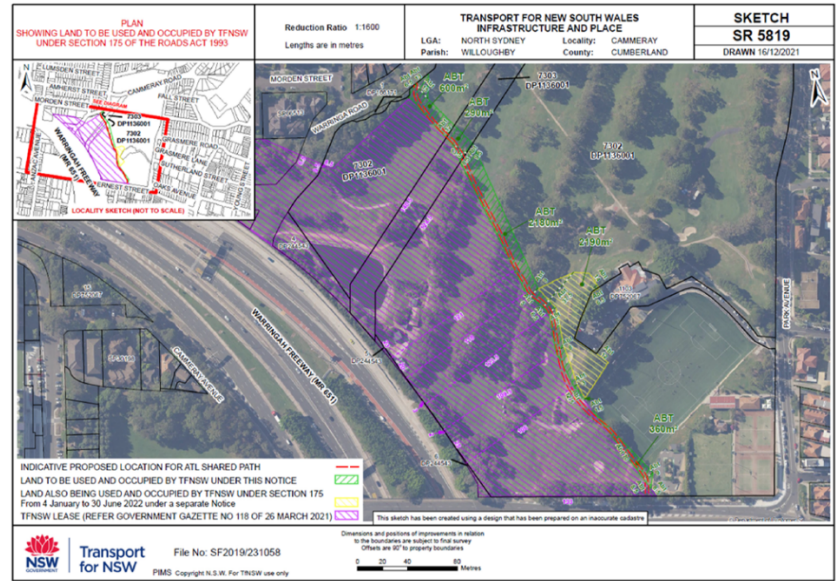


16
December
2021

Cammeray Park

TfNSW gives notice of intention to occupy green land below from 4 January 2022 to 30 June 2022 (Cammeray Notice 3).

Note, this was later extended until 31 December 2022 (see letter of 23 June)
(Yellow is Cammeray Notice 2, Purple is land acquired under TfNSW lease).



TfNSW Notice
dated 16
December
2021
(Cammeray 3)
[8]

3 March
2022

High Street Reserve

TfNSW gives notice of intention to occupy green land below from 15 March 2022 to 31 December 2022 in High Street Reserve.

Notice: TfNSW reference no. A41756545 (High Street Notice)



TfNSW Notice
dated 3 March
2022 (High
Street) [9]

3 March
2022

Jeafferson Jackson Reserve

TfNSW gives notice of intention to occupy green land below from 15 March 2022 to 31 December 2022 in Jeafferson Jackson Reserve.

Notice: TfNSW reference no. A41756652 (Jeafferson Jackson Reserve Notice)

TfNSW Notice dated 3 March 2022 (Jeafferson Jackson) [10]



3 March
2022

McIntosh Lane Reserve

TfNSW gives notice of intention to occupy green land below from 15 March 2022 to 31 December 2022 in McIntosh Lane Reserve.

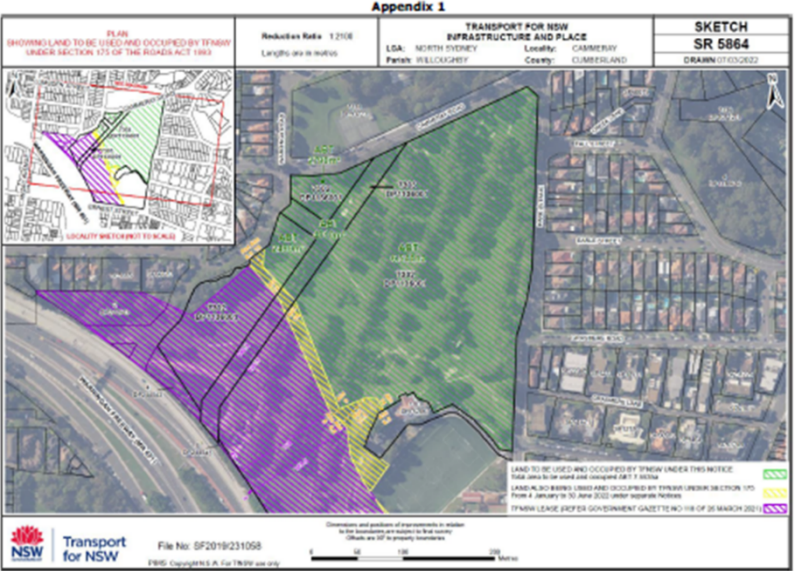
Notice: TfNSW reference no. A41756689 (McIntosh Lane Notice)

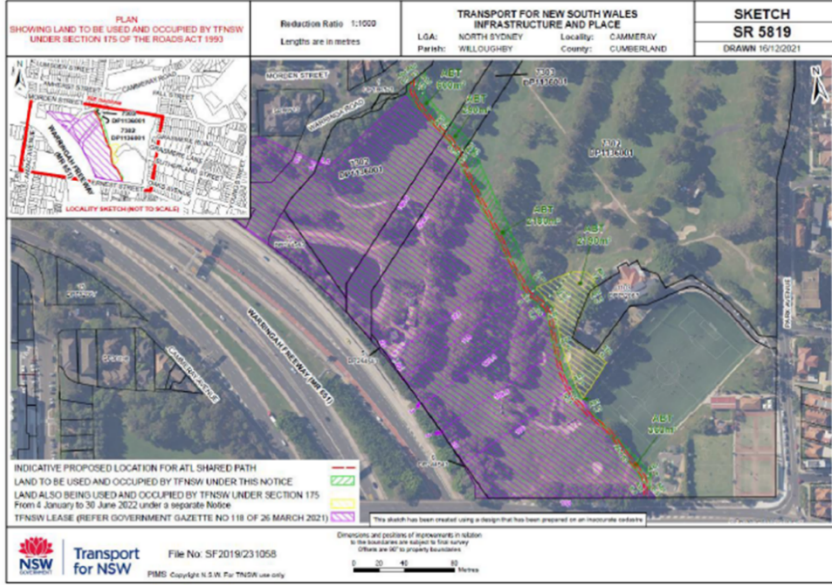
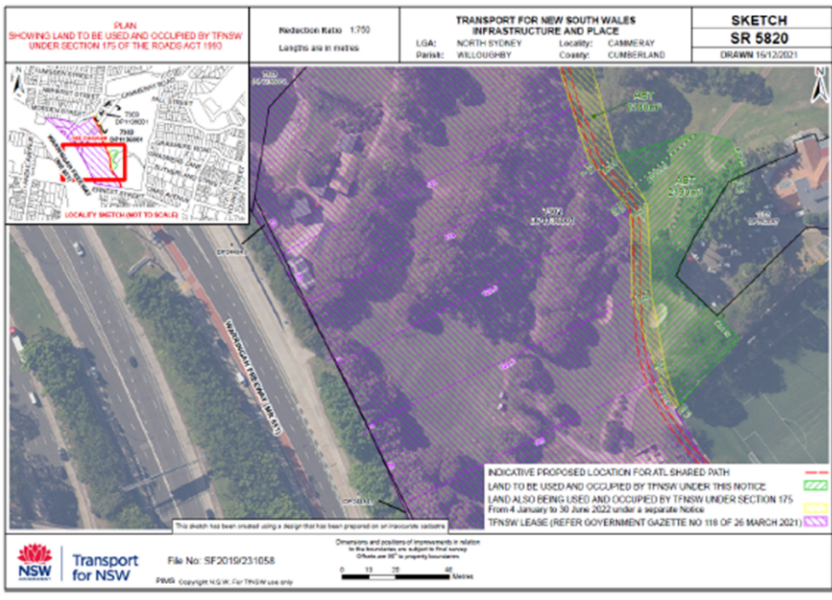
(Yellow is Merlin Street Notice)

TfNSW Notice dated 3 March 2022 (McIntosh Lane Reserve) [11]



<p>3 March 2022</p>	<p>Merlin Street Reserve TfNSW gives notice of intention to occupy green land below from 15 March 2022 to 31 December 2022 in Merlin Street Reserve Notice: TfNSW reference no. A41756720 (Merlin Street Notice) (Yellow is McIntosh Lane Notice)</p> <table border="1" data-bbox="363 365 1187 936"> <tr> <td data-bbox="363 365 608 416"> <small>PLAN</small> <small>SHOWING LAND TO BE USED AND OCCUPIED BY TfNSW UNDER SECTION 175 OF THE ROADS ACT 1993</small> </td> <td data-bbox="608 365 759 416"> <small>Reduction Ratio</small> 1:400 <small>Lengths are in metres</small> </td> <td data-bbox="759 365 1050 416"> <small>TRANSPORT FOR NSW</small> <small>INFRASTRUCTURE AND PLACE</small> <small>LGA: NORTH SYDNEY</small> <small>Locality: NEUTRAL BAY</small> <small>Parish: WILLOUGHBY</small> <small>County: CUMBERLAND</small> </td> <td data-bbox="1050 365 1187 416"> <small>SKETCH</small> <small>SR5848</small> <small>DRAWN 15/02/2022</small> </td> </tr> </table>  <p><small>This sketch has been drawn using a design that has been based on an inaccurate cadastre</small></p> <p><small>Dimensions and positions of improvements in relation to the boundaries are subject to final survey. Offers are 90% priority boundaries.</small></p> <p><small>LAND TO BE USED AND OCCUPIED BY TfNSW UNDER THIS NOTICE</small></p> <p><small>LAND ALSO BEING USED AND OCCUPIED BY TfNSW UNDER A SEPARATE NOTICE</small></p> <p><small>NSW Transport for NSW</small> <small>FIMS Copyright N.S.W. For TfNSW use only</small></p>	<small>PLAN</small> <small>SHOWING LAND TO BE USED AND OCCUPIED BY TfNSW UNDER SECTION 175 OF THE ROADS ACT 1993</small>	<small>Reduction Ratio</small> 1:400 <small>Lengths are in metres</small>	<small>TRANSPORT FOR NSW</small> <small>INFRASTRUCTURE AND PLACE</small> <small>LGA: NORTH SYDNEY</small> <small>Locality: NEUTRAL BAY</small> <small>Parish: WILLOUGHBY</small> <small>County: CUMBERLAND</small>	<small>SKETCH</small> <small>SR5848</small> <small>DRAWN 15/02/2022</small>	<p>TfNSW Notice dated 3 March 2022 (Merlin Street Reserve) [12]</p>
<small>PLAN</small> <small>SHOWING LAND TO BE USED AND OCCUPIED BY TfNSW UNDER SECTION 175 OF THE ROADS ACT 1993</small>	<small>Reduction Ratio</small> 1:400 <small>Lengths are in metres</small>	<small>TRANSPORT FOR NSW</small> <small>INFRASTRUCTURE AND PLACE</small> <small>LGA: NORTH SYDNEY</small> <small>Locality: NEUTRAL BAY</small> <small>Parish: WILLOUGHBY</small> <small>County: CUMBERLAND</small>	<small>SKETCH</small> <small>SR5848</small> <small>DRAWN 15/02/2022</small>			
<p>3 March 2022</p>	<p>Whaling Park TfNSW gives notice of intention to occupy green land below from 15 March 2022 to 31 December 2022 in Whaling Park Notice: TfNSW reference no. A41756745 (Whaling Park Notice)</p> <table border="1" data-bbox="363 1088 1187 1659"> <tr> <td data-bbox="363 1088 608 1140"> <small>PLAN</small> <small>SHOWING LAND TO BE USED AND OCCUPIED BY TfNSW UNDER SECTION 175 OF THE ROADS ACT 1993</small> </td> <td data-bbox="608 1088 759 1140"> <small>Reduction Ratio</small> 1:500 <small>Lengths are in metres</small> </td> <td data-bbox="759 1088 1050 1140"> <small>TRANSPORT FOR NSW</small> <small>INFRASTRUCTURE AND PLACE</small> <small>LGA: NORTH SYDNEY</small> <small>Locality: NORTH SYDNEY</small> <small>Parish: WILLOUGHBY</small> <small>County: CUMBERLAND</small> </td> <td data-bbox="1050 1088 1187 1140"> <small>SKETCH</small> <small>SR5851</small> <small>DRAWN 14/02/2022</small> </td> </tr> </table>  <p><small>This sketch has been drawn using a design that has been based on an inaccurate cadastre</small></p> <p><small>Dimensions and positions of improvements in relation to the boundaries are subject to final survey. Offers are 90% priority boundaries.</small></p> <p><small>LAND TO BE USED AND OCCUPIED BY TfNSW UNDER THIS NOTICE</small></p> <p><small>NSW Transport for NSW</small> <small>FIMS Copyright N.S.W. For TfNSW use only</small></p>	<small>PLAN</small> <small>SHOWING LAND TO BE USED AND OCCUPIED BY TfNSW UNDER SECTION 175 OF THE ROADS ACT 1993</small>	<small>Reduction Ratio</small> 1:500 <small>Lengths are in metres</small>	<small>TRANSPORT FOR NSW</small> <small>INFRASTRUCTURE AND PLACE</small> <small>LGA: NORTH SYDNEY</small> <small>Locality: NORTH SYDNEY</small> <small>Parish: WILLOUGHBY</small> <small>County: CUMBERLAND</small>	<small>SKETCH</small> <small>SR5851</small> <small>DRAWN 14/02/2022</small>	<p>TfNSW Notice dated 3 March 2022 (Whaling Park) [13]</p>
<small>PLAN</small> <small>SHOWING LAND TO BE USED AND OCCUPIED BY TfNSW UNDER SECTION 175 OF THE ROADS ACT 1993</small>	<small>Reduction Ratio</small> 1:500 <small>Lengths are in metres</small>	<small>TRANSPORT FOR NSW</small> <small>INFRASTRUCTURE AND PLACE</small> <small>LGA: NORTH SYDNEY</small> <small>Locality: NORTH SYDNEY</small> <small>Parish: WILLOUGHBY</small> <small>County: CUMBERLAND</small>	<small>SKETCH</small> <small>SR5851</small> <small>DRAWN 14/02/2022</small>			
<p>4 March 2022</p>	<p>McIntosh Lane Reserve, Merlin Street Reserve, Whaling Park, High Street Reserve, Jeafferson Jackson Reserve TfNSW seeks Council's agreement to revoke orders under s159 of the Roads Act (which orders had placed land owned by TfNSW under the control of Council). TfNSW states that if Council does not agree, TfNSW will:</p> <ul style="list-style-type: none"> - exercise its powers under the Roads Act to acquire Council's interest in the land under s177; and - until the acquisition is finalised, occupy the land under s175 for the purpose of carrying out the Warringah Freeway Upgrade Project. 	<p>Letter from TfNSW dated 4 March 2022 [14]</p>				

<p>25 March 2022</p>	<p>Cammeray Golf Course TfNSW gives notice of intention to occupy green land below from 1 April 2022 to 31 December 2022 in Cammeray Golf Course. Notice: TfNSW reference no. A42357646 (<i>Cammeray Notice 4</i>). Council has confirmed this is the first notice given in respect of this area.</p> 	<p>TfNSW Notice dated 25 March 2022 [15]</p>
<p>30 March 2022</p>	<p>Council appealed to the Minister for Metropolitan Roads against the Cammeray Notice 4 (ie. notice of intention to occupy green land above).</p>	<p>Source document not held. Appeal by Council referred to in determination letter from TfNSW dated 6 May 2022 [16]</p>
<p>21 April 2022</p>	<p>TfNSW makes submission to the Minister for Metropolitan Roads in response to Council's appeal. Reference number A42490911.</p>	<p>Letter from TfNSW dated 21 April 2022. [17]</p>
<p>26 April 2022</p>	<p>HWL Ebsworth issues advice to Council about whether Cammeray Notice 4 from TfNSW was a lawful exercise of the power under s175 of the Roads Act.</p>	<p>HWL advice dated 26 April 2022 [18]</p>
<p>6 May 2022</p>	<p>Minister acknowledged receipt of appeal.</p>	<p>Letter from Minister dated 6 May 2022 [16]</p>
<p>20 June 2022</p>	<p>The Minister refused Council's appeal against Cammeray Notice 4.</p>	<p>Letter from Minister dated 20 June 2022 [19]</p>

<p>23 June 2022</p>	<p>TfNSW wrote to Council, and gave notice of intention to extend occupation of Cammeray Notice 3 (A41013084) of green land below (otherwise due to expire on 30 June 2022) until 31 December 2022.</p> 	<p>Letter from TfNSW dated 23 June 2022 [20]</p>
<p>1 July 2022</p>	<p>TfNSW gave notice of intention to extend occupation of Cammeray Notice 2 (A41013126) of green land below (otherwise due to expire on 30 June 2022) until 31 December 2022.</p> 	<p>Letter from TfNSW dated 1 July 2022 [21]</p>
<p>3 August 2022</p>	<p>Letter from TfNSW to Council referring to a meeting between the parties on 8 June 2022. TfNSW intends to exercise its powers under s64(1A) of the Roads Act 1993 for carrying out road work for the Warringah Freeway Upgrade Project. Includes a number of roads from 8 August 2022 to 30 June 2026. Notice not attached</p>	<p>Letter from TfNSW dated 3 August 2022 [22]</p>

A site meeting was held on all three sites on Tuesday 20 September 2022

Council Staff and Council's solicitors including Senior Counsel visited the three sites that have had their leasehold interests compulsorily acquired by TFNSW on Tuesday 20 September 2022:

1. First Site – St Leonard's Park - 8.30am – 9am
2. Second Site – Anzac Park – 9.15am – 9.45am
3. Third Site – Cammeray Park and Golf Course – 10am – 11am

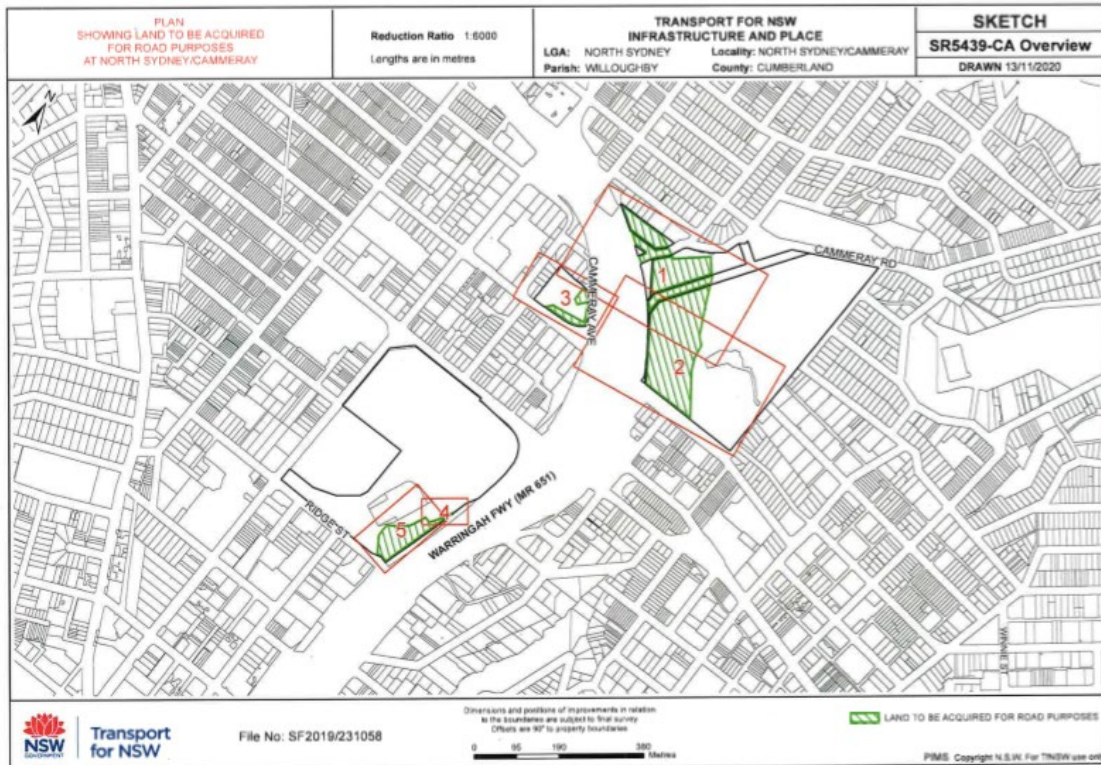


Figure 1. Gazettal Notice of Land that has been compulsorily Acquired by TfNSW for the purposes of upgrading the Warringah Freeway – November 2020.

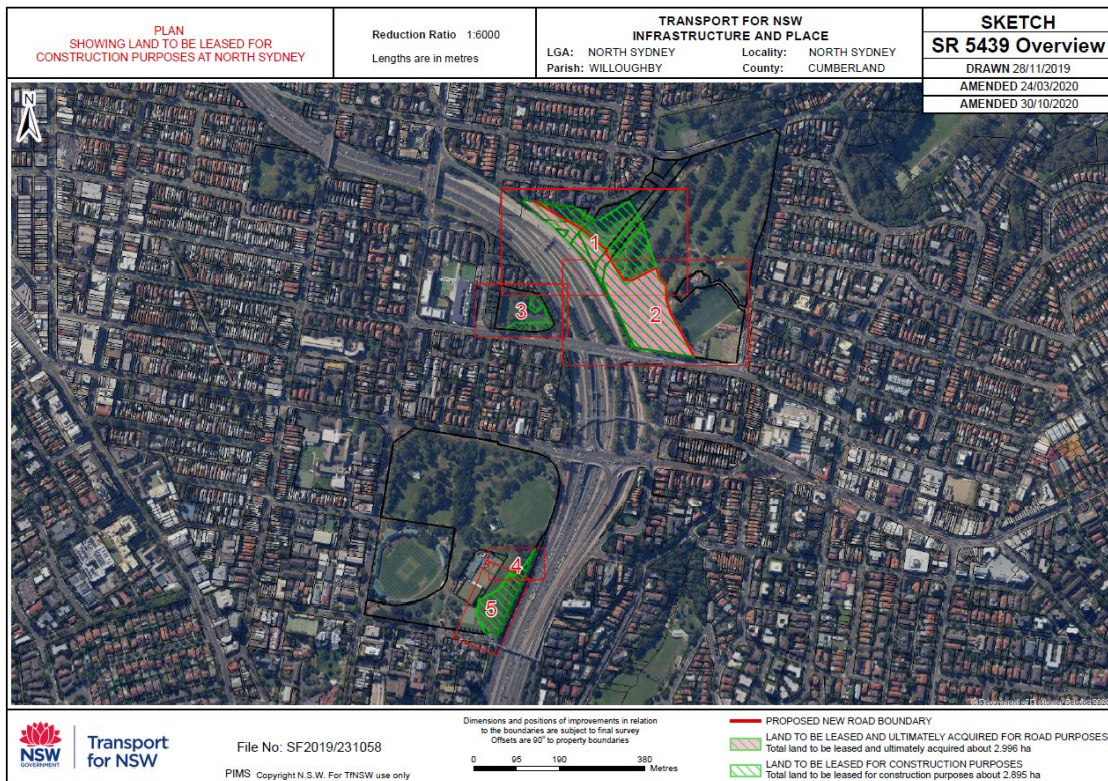


Figure 2. Plan prepared by TfNSW – October 2020 that shows areas to be utilised for the upgrade of the Warringah Freeway.