

10.3. Land Negotiations

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ENDORSED BY: Ken Gouldthorp, General Manager

ATTACHMENTS: Memorandum of Understanding with TfNSW, 18 October 2021

PURPOSE:

The purpose of the report is to provide the Council with the proposed Memorandum of Understanding between Council and Transport for NSW (TfNSW) that establishes the key principles and framework for addressing several property matters related to the Western Harbour Tunnel and Warringah Expressway upgrade projects and in particular the proposed arrangements related to the land at Berrys Bay as an offset for the loss of existing public open space within the local government area.

EXECUTIVE SUMMARY:

The Warringah Expressway Upgrade and the Western Harbour Tunnel project are having a significant impact on the North Sydney community and the North Sydney local government area. One of the negative impacts caused by this State significant roads infrastructure project is the permanent loss of approximately 15,000m² of existing public open space.

A condition of development consent requires that the project must deliver an increase of usable open space and it has been the adopted position of the Council and the community that foreshore land controlled by the NSW Government at Berrys Bay should be made available as public open space to offset the current loss of open space within our local government area because of this project.

A previous Confidential Report *10.4 North Sydney – Compensation Claim submitted to NSW Valuer General – TfNSW Compulsory Acquisition – Council Parks and Reserves – Warringah Freeway Upgrade* was presented to the Ordinary Meeting of 26 July 2021 in respect to Council's compensation claim for the temporary use/lease of public domain during the construction phase.

This report provides a proposed Memorandum of Understanding negotiated between Council and TfNSW that establishes the key principles and framework for addressing several property matters related to the Western Harbour Tunnel and Warringah Expressway upgrade projects and in particular the proposed arrangements related to the land at Berrys Bay, as an offset for the permanent loss of existing public open space within the local government area.

Final formal approval is being sought within TfNSW in parallel with this approval being sought from Council. It is proposed to publicly announce the outcome and make the MOU publicly available upon both parties agreeing and executing it. In order to maintain trust between the

parties and conclude the negotiations, it is important that confidentiality is maintained until both parties have obtained the necessary approvals.

This report is confidential in accordance with Section 10A(2) of the Local Government Act and the Local Government (General) Regulation 2005 for the reasons listed below:

- (d) *Commercial information of a confidential nature that would if disclosed:*
 - (i) *prejudice the commercial position of the person who supplied it, or*
 - (ii) *confer a commercial advantage on a competitor of the Council, or*
 - (iii) *reveal a trade secret*

- (g) *Advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege*

Consideration of this matter in open Council would, on balance, be contrary to the public interest at it would affect Council's ability to manage legal matters effectively and to deliver an outcome which is in the best interests of the North Sydney community.

FINANCIAL IMPLICATIONS:

There are no immediate financial implications of executing this non-binding Memorandum of Understanding between Council and TfNSW.

If the Memorandum of Understanding ultimately progresses to a binding legal arrangement (as is its intent) for the offset of land lost as part of the Western Harbour Tunnel project, it will provide greater certainty on the quantum of public space retained by Council. Financial compensation rather than a land swap risks Council being left without a practicable option to replace lost public space or with insufficient funds to do so. This is particularly the case given the land being lost is around the Cammeray Golf Course and the proposed land to be acquired is harbourfront.

Council's claim to financial contribution for both the temporary use/lease, which will continue to progress independently of the MOU, and any financial claim rather than land exchange, is reliant on *an infrequently used and untested provision of the Crown Land Management Act* (Maddocks 24 June 2021). The right to financial compensation and quantum is contended by TfNSW. It must be understood that Council as the Crown Land manager has care and control of current public lands being given up to construct the WHTL, but it does not have freehold ownership.

Councillors are referred to the previous confidential report, Item 10.4 on the agenda for 26 July 2021, and the legal advice attached thereto, that address the financial compensation claim process.

RECOMMENDATION:

1. THAT the Council adopt the proposed Memorandum of Understanding for Berrys Bay.

2. THAT the General Manager be delegated authority to execute the Memorandum of Understanding on behalf of Council and continue to negotiate with Transport for NSW for the finalisation of the legally binding draft Interface Agreement for Council's consideration and adoption.

3. THAT this resolution remains confidential until both parties execute the Memorandum of Understanding at which time the Memorandum of Understanding is to be made publicly available.

4. THAT the report be treated as confidential and remain confidential until Council determines otherwise.

LINK TO COMMUNITY STRATEGIC PLAN

The relationship with the Community Strategic Plan is as follows:

1. Our Living Environment
- 2.1 Quality urban greenspaces

BACKGROUND

The Warringah Expressway Upgrade and the Western Harbour Tunnel project are having a significant impact on the North Sydney community and the North Sydney local government area. One of the impacts for the Council and the community is the permanent loss of approximately 15,000m² of existing public open space as a result of the construction of these approved State significant infrastructure projects.

CONSULTATION REQUIREMENTS

Community engagement on the proposed Memorandum of Understanding is not required. The public is aware of the prospective loss of existing public domain as a result of the construction of WHTL through its Environmental Impact Statement (EIS).

DETAIL

Community consultation will occur in respect to the Master Planning of Berrys Bay and the final form of the new harbour foreshore public domain through the Berrys Bay Community Stakeholder Working Group.

With the approval of the declared Critical State Significant Projects known as the Warringah Expressway Upgrade and the Western Harbour Tunnel in January 2021 and the subsequent commencement of the early construction works, the impact on the community's open space is now becoming clearly evident. Construction compounds being installed significantly reduce by approximately 48,187m² the community's precious and limited existing open space most obvious at the Cammeray Golf Course, St Leonards Park, Anzac Park and Alfred Street and High Street reserves.

Whilst a significant amount of the current loss of open space for the construction will be returned to the community upon completion of the projects in approximately 3 – 7 years, there is a permanent loss of open space within North Sydney associated with these road infrastructure projects of approximately 15,000m². Most of the permanent loss of open space will be from the Cammeray Golf Course resulting in a significantly smaller golf course and diminished open space facility.

On approval of the projects there are a range of conditions of consent relating to open space, however the most significant provision is condition E157:

The Critical State Significant Infrastructure must result in a net increase in usable open space. Replacement space must be in the general vicinity of the loss, unless agreed by the Planning Secretary.

To ensure that the provision of offset open space is provided for the needs of the North Sydney community there has been strong and positive negotiations led by the General Manager between the Council and TfNSW to ensure the replacement open space in accordance with condition E157 is both land located within the North Sydney Local Government area and the identified land has the appropriate attributes to become highly valued and well used public open space.

Negotiations have been ongoing since the project received approval and have advocated Council's resolved position that the 16,641m² of State Government foreshore land in Berry Bay, including the parcels of land in front of the Quarantine Boat Depot, land generally identified as the historic Woodleys site, and the land adjoining Carradah Park should all be transformed into significant public recreation space when they are no longer required for the construction of the Western Harbour Tunnel.

As an outcome of these negotiations, the attached draft Memorandum of Understanding has been developed that aims to establish key principles and a framework between the Council and TfNSW with regards to achieving mutually agreed outcomes relating to the offset of public open space that in summary include:

- The transfer of all State Government Land within Berrys Bay to Council's Care and Control, post construction.
- The development of a holistic strategic masterplan for the western arm of Berrys Bay (colloquially known as 'Woodleys Cove').
- A framework for the funding of improvements in accordance with the agreed Masterplan and conditions of development consent.
- The potential early access to land that may not be required for the duration of the Western Harbour Tunnel construction works.

Whilst the Memorandum of Understanding is not a legally binding document it is agreed that the key principles and framework within the Memorandum of Understanding will inform the development of the comprehensive and legally binding 'Interface Agreement' as it relates to Berrys Bay that is still under development.

The permanent loss of public open space primarily adjacent to the Warringah Expressway on Cammeray Golf course is a catastrophic loss for the community. However, the offset land on the foreshores of Berrys Bay when transformed into public open space will be of significant value to the local and broader community as recreational open space that will absolutely complement the excellent work that Council has already achieved in the creation of Carradah Park, the establishment of the Coal Loader precinct, the purchase of the Quarantine Boat Depot, and ongoing bushland restoration on the beautiful Balls Head Reserve.

In the event that the Memorandum of Understanding does not ultimately progress to a legally binding document and delivery of the proposed replacement land at Berrys Bay under Council's control, Council will revert to seeking financial compensation. As addressed briefly under Financial Implications, the financial compensation process is likely to deliver a poorer value outcome for Council. There is a significant risk in respect to any final financial quantum and the direct compensation of land for land provides greater surety on the ongoing supply of public space within the North Sydney Local Government Area.

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This document has been prepared to establish key principles and a framework between Transport for NSW (TfNSW) and North Sydney Council (Council) in relation to a number of matters related to property at Berrys Bay and improvements relating to WHT/WFU (defined below). The MOU assumes land at Berrys Bay currently owned by Property & Development NSW (part of the Department of Planning, Industry and Environment (DPIE)) will be transferred to TfNSW.

Transport for NSW and North Sydney Council acknowledges the lands of the Cammeraygal people and that modern New South Wales is an overlay on Aboriginal land and that many of the routes we use today follow songlines Aboriginal people have followed for tens of thousands of years.

Part A: Key terms

Council	North Sydney Council
TfNSW	Transport for NSW
Projects	Being: <ul style="list-style-type: none"> • Warringah Freeway Upgrade (WFU) • Western Harbour Tunnel (WHT)
Context	The Projects have a number of temporary and permanent impacts on public open space in the North Sydney LGA. The Projects provide opportunities for the creation of new public open space and, in the case of temporarily impacted public open space, opportunities for rehabilitation or improvement in and around the areas impacted.
Non-binding	This MOU is not legally binding. TfNSW and the Council will enter into a legally binding interface agreement in connection with the Projects.
Objectives	This MOU sets out a series of principles that TfNSW and Council will work towards in good faith to achieve mutually acceptable outcomes. It is intended that these arrangements will: <ol style="list-style-type: none"> (a) obviate the need for compensation negotiations or claims relating to property¹ impacts relating to the Projects (noting that this statement does not presuppose the outcomes of any such compensation negotiations or claims, should these be required); (b) seek to arrive at an outcome whereby the amount of public open space under the control of Council is, to the extent feasible and reasonable, maintained or increased, thereby providing the potential for a good community outcome.; and (c) identify an approach to consultation with Council in connection with TfNSW activities permitted under the Planning Consent for the projects. <p>Note 1: The Projects have temporary and permanent impacts. The acquisition process for temporary property access has commenced – it is not proposed to interrupt this process. The process for permanent property acquisitions is intended to be conducted in the future, when the final design (and therefore final project footprint) is</p>

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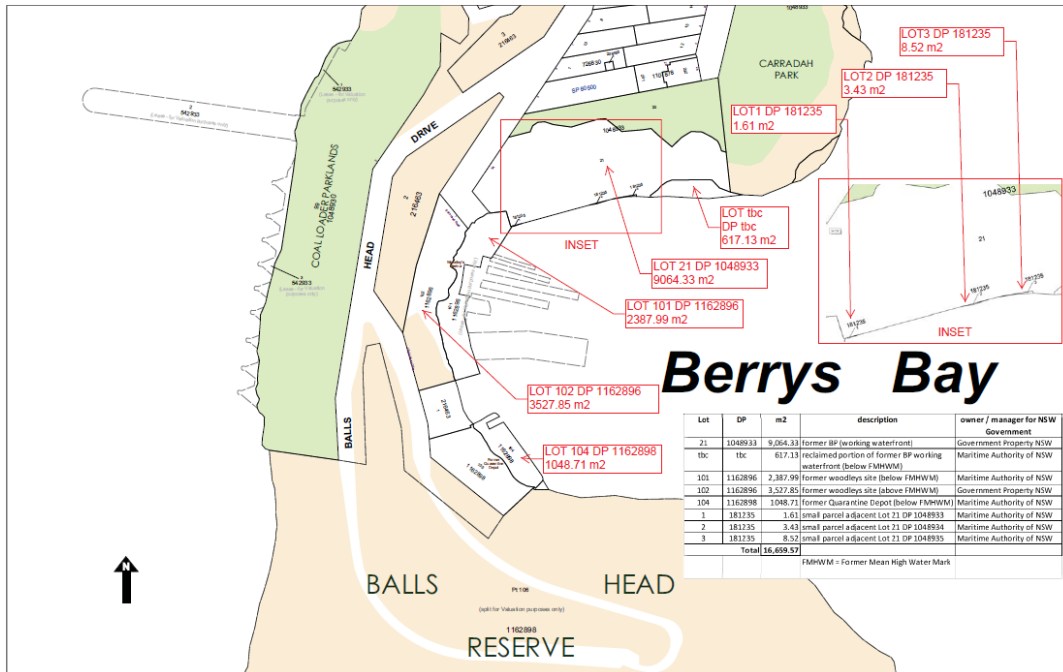
	known. Other access arrangements will be agreed between TfNSW and Council as and when required.
Place, Design and Landscape Plan	The Projects have a series of Conditions of Approval (CoA) relating to preparing a Place, Design and Landscape Plan (PDLP). Refer to CoA numbers E177 to E181 (noting these cross-refer to other CoA).
Berrys Bay	<p><u>Ownership</u></p> <p>TfNSW owns several lots at Berrys Bay and is in the process of acquiring other land at Berrys Bay from DPIE (together, the “TfNSW Land”). A plan of the TfNSW Land is set out in Attachment C.</p> <p>The land at the former Quarantine Boat Depot is (or will soon be) owned by Council.</p> <p>Attachment C shows the current and proposed future arrangements at Berrys Bay (subject to the various land transfers and the care and control arrangement, as outlined in this MOU).</p> <p><u>Project impact</u></p> <p>A portion of Berrys Bay will be temporarily required for use as a construction support site for the delivery of the Projects.</p> <p><u>Master Plan development</u></p> <ul style="list-style-type: none"> • Led by TfNSW, the parties will work together to develop a Master Plan for Berrys Bay, which will reflect the important cultural diversity and history of this site. • It is proposed Berrys Bay be planned as a single precinct, extending from Carradah Park to, and including, the Quarantine Boat Depot. • A Community and Stakeholder Working Group (CSW Group), representing the community and stakeholders, has been established, including representatives from TfNSW and Council, as well as the Metropolitan Local Aboriginal Land Council. The CSW Group will obtain community and stakeholder input and will oversee a community consultation process. • Feedback from the CSW Group will inform the development of the Master Plan. • The portion of land used as a construction support site for WHT will be returned as public facilities and open space to a standard similar to that of Carradah Park (as at the date of this MOU). • There are a number of planning conditions for WHT/WFU that will need to be met, including those relating to the PDLP and the Design Review Panel and these will be addressed through the development of the Concept Plan for the portion of land used as a construction support site. This Concept Plan will be developed based on the approved Master Plan. • The Master Plan will need to be approved by the Minister for Transport and Roads. It is the intention of the parties for the Master Plan to be an agreed position between Council and TfNSW. • Any public announcement of the Master Plan will be at the discretion of the Minister for Transport and Roads. • The Master Plan will need to take into account any respective financial/funding constraints of the parties. <p><u>Funding and delivery of the Master Plan</u></p> <p>During the development of the Master Plan, Council and TfNSW will work together to agree key matters (to be captured in the Master Plan) including:</p> <ul style="list-style-type: none"> ○ Scope of the Master Plan ○ Works to be funded and/or delivered by TfNSW ○ Works to be funded and/or delivered by Council

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	<ul style="list-style-type: none"> ○ Sequencing of works, including the potential for staged delivery ○ Future property arrangements (see below) <p><u>Future property arrangements</u></p> <p>As part of its obligation to meeting Condition E157, helping to ensure the Projects result in a net increase in usable open space, TfNSW is committed to ensuring the TfNSW Land can be used for that purpose. The parties intend that, subject to the matters set out below, following completion of the Projects, the parties will enter into an arrangement under which care, control and maintenance (CCM) of (but not the freehold interest in) the TfNSW Land will be transferred to the Council.</p> <p>The CCM arrangements will, among other things, address the following principles:</p> <ul style="list-style-type: none"> • Council to be responsible for all care and maintenance obligations in connection with the land; • Council to benefit from any commercial opportunities in connection with the land, to be developed by the Council in a manner consistent with the Master Plan; • TfNSW to retain access to Berrys Bay waters via the TfNSW Land on reasonable notice to the Council; • any other relevant terms identified through the process of developing the Master Plan; and • handover procedures (if any) to provide for a staged handover of the TfNSW Land to Council, with the objective that when individual parcels of land are no longer required for the construction of the WHT, the care, control and maintenance provisions transfers to Council <p>Entering into the CCM arrangements referred to above is subject to:</p> <ul style="list-style-type: none"> • TfNSW acquiring the relevant land from DPIE, a process which has commenced but which is subject to the resolution of any Aboriginal Land claims (if any) over that land; • TfNSW and Council agreeing the Master Plan; • Unless expressly agreed otherwise by TfNSW, Council waiving and releasing TfNSW from any and all claims and/or entitlements it has (or may have in the future), and agreeing not to make or bring any such claims in the future, arising out of or in any way in connection with the acquisition, use and/or occupation (by whatever means) of land within the Council's LGA by TfNSW (or any person authorised by TfNSW) for purposes in connection with the WHT and/or WFU Projects. <p>The Master Plan for the Berrys Bay area needs to allow for future potential TfNSW Maritime berthing requirements. North Sydney Council would be consulted regarding consideration of possible landside access requirements and any future opportunities associated with potential Maritime berthing. Other key stakeholders and the community would also be engaged as part of the consultation process to support planning approval processes.</p>
Future Agreements	It is proposed that more detailed arrangements will be progressively further developed and either incorporated in the Interface Agreement between TfNSW and Council, or be the subject of separate, bespoke agreements.

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Attachment A – Berrys Bay land ownership



Lot/DP	Area (m ²)	Current ownership	Current care and control	Proposed ownership	Proposed care and control
Lot 21/ DP1048933	9,064.33	DPIE	DPIE	TfNSW	Council
Lot 102/ DP1162896	3,527.85	DPIE	DPIE	TfNSW	Council
Lot 105/ DP1162898	2,332 ¹	DPIE	DPIE	Council	Council
Lot 101/ DP1162896	2,387.99	TfNSW	TfNSW	TfNSW	Council
Land portion of Maritime holding, based on High Water Mark ²	617.13	TfNSW	TfNSW	TfNSW	Council
Lot 1/ DP181235	1.61	TfNSW	TfNSW	TfNSW	Council
Lot 2/ DP181235	3.43	TfNSW	TfNSW	TfNSW	Council
Lot 3/ DP181235	8.52	TfNSW	TfNSW	TfNSW	Council
Lot 104/ DP1162898	1,048.71	TfNSW	TfNSW	TfNSW	Council
Lot 1/ DP216463	1,044 ¹	Council	Council	Council	Council

1 Approximate area

2 Lot labelled as "TBC"