

IDAP REPORT – SECTION 4.56 MODIFICATION

Property:	14-26 Telopea Avenue, Homebush West Lot: 100 DP: 1279440 DA2017.21.4
Proposal:	Section 4.56 Modification to amend condition 2 and change permitted hours of construction on Saturdays from 8:00am – 1:00pm to 8:00am – 5:00pm
Applicant:	AMH Subsidiary Pty Ltd
Owner:	AMH Subsidiary Pty Ltd
Date of lodgement:	17 May 2022
Notification period:	23 May 2022 to 23 June 2022
Submissions received:	Three (one outside notification period)
Assessment officer:	W van Wyk
Estimated cost of works:	\$7,600,000.00
Zoning:	R3-Medium Density Residential - SLEP 2012
Heritage:	No
Flood affected:	Yes
RECOMMENDATION OF OFFICER:	REFUSAL



Figure 1: Aerial View of the Subject Site (outlined in blue). Source: NearMaps 2022

EXECUTIVE SUMMARY

Proposal

Section 4.56 modification of development consent DA2017/21 to amend Condition 2 and change permitted hours of construction on Saturdays from 8:00am – 1:00pm to 8:00am – 5:00pm.

Site and Locality

The site is identified as 14-26 Telopea Avenue, Homebush West and has a legal description of Lot: 100 DP: 1279440. The site is a slightly irregular rectangular shaped parcel of land and is located on the eastern side of Telopea Avenue. The site has a width of 120m, a depth of 33-35m and an overall site area of 4,017m².

The surrounding streetscape is currently transitioning from low to medium density residential development.

Strathfield Local Environmental Plan (SLEP) 2012

The development site is subject to the Strathfield Local Environmental Plan (SLEP) 2012. As the application is only for an extension of the construction hours of the approved multi-dwelling housing, the provisions of the SLEP 2012 are not relevant in this instance.

Strathfield Consolidated Development Control Plan (SCDCP) 2005

The proposed construction hours are not consistent with the relevant provisions in the Strathfield Consolidated Development Control Plan (SCDCP) 2005. This is discussed in more detail in the body of the report.

Notification

The application was notified in accordance with Council's Community Participation Plan (CPP) 2020 from 23 May 2022 to 23 June 2022, where two submissions were received raising concerns over noise and traffic. A further late submission was also received.

Issues

- Acoustic Impacts;
- Traffic Impacts; and
- Enforcement.

Conclusion

Having regards to the heads of consideration under Section 4.15 of the Environmental Planning & Assessment Act 1979, Development Application 2017/21/4 is recommended for refusal.

REPORT IN FULL

Proposal

Section 4.56 modification of development consent DA2017/21 to amend Condition 2 and change permitted hours of construction on Saturdays from 8:00am – 1:00pm to 8:00am – 5:00pm.

The existing approval is for 22 part 2 part 3 storey town house developments. The approved Condition 2 states:

2. CONSTRUCTION HOURS (GC)

No construction or any other work related activities shall be carried out on the site outside the hours of 7.00 am to 5.00 pm Mondays to Fridays and 8am to 1pm Saturdays.

No building activities are to be carried out at any time on a Sunday or public holiday.

Where the development involves the use of jackhammers/ rock breakers and the like or other heavy machinery, such equipment may only be used between the hours of 7.00am - 5.00 pm Monday to Friday only.

(Reason: To maintain amenity to adjoining land owners.)

It is proposed to amend this condition as follows (changes in bold):

*No construction or any other work related activities shall be carried out on the site outside the hours of 7.00 am to 5.00 pm Mondays to Fridays and 8am to **5:00pm** Saturdays.*

No building activities are to be carried out at any time on a Sunday or public holiday.

Where the development involves the use of jackhammers/ rock breakers and the like or other heavy machinery, such equipment may only be used between the hours of 7.00am - 5.00 pm Monday to Friday only.

Where construction or other work related activities are carried out between 1.00pm and 5.00pm on Saturdays it shall be in accordance with the activity requirements in the letter dated 2 May 2022 from Rodney Stevens Acoustics submitted with modification application DA 2017/021/4."

The activity requirements referenced in the proposed condition are identified in the Acoustic Report as follows:

The activity requirement outlined below indicates the construction works to be undertaken between 1pm to 5pm on a Saturday at each phase of works:

- *Demolition: Heavy machinery are not to be used between the extended hours.*
- *Excavation: Loading of trucks with one excavator on the western boundary of the site is permitted. Minimise the movement of soil onsite. No other machinery should be used during the extended hours.*

- *Construction: The use of hand/power tools should be used away from the receivers located along the northern and eastern boundary. The hand/power tools should mainly be used on the west side of the site. In addition to this, the number of site personnel should be reduced during the extended hours to half when working outside. If the exterior of the building is complete, then power tools may be used inside for internal finishing works, provided the external windows and doors can be closed during the extended work hours.*
- *Throughout all these stages, any generator required to be used on site should ensure the generator is shielded and located on the west side of the site.*

The additional noise control measures outlined above are based on the Sound Power Level of the machinery and the established NML.

The Site and Locality

The subject site is legally described as Lots: 110-116 DP: 11427 and commonly known as 14-26 Telopea Avenue, Homebush West. It is located at the south eastern end of Telopea Avenue and encompasses the 90 degree bend in the road, sitting between Parramatta Road and Courallie Avenue.

The site is a slightly irregular rectangular shaped parcel of land with a main frontage of 120m to Telopea Avenue (eastern side), rear boundary of 120m along the open stormwater channel, a side boundary to the secondary street frontage of Telopea Street of 33m (southern end) and side boundary length of 35m adjoining the residential property to the north with an overall site area of 4,017m².

The site slopes from the south to the north, has a cross-fall of 1.72m and also has a slight fall across the site (west-east) from Telopea Avenue to the stormwater channel at the rear ranging from 1.0m to 0.65m.

The subject site was occupied by an industrial warehouse complex (recently demolished) which comprised of single and two storey buildings. Vehicular access is provided to the site via three existing driveways off the main Telopea Avenue frontage and an additional driveway off the secondary southern frontage to Telopea Avenue.

The subject site is surrounded by residential properties. The streetscape is currently transitioning from low to medium density residential development.

Background

- | | |
|-------------------------|---|
| 1 June 2017 | Strathfield IHAP refused Development Application 2017/21 for the demolition of existing site structures and construction of a part two storey and part three storey townhouse development at 14-26 Telopea Avenue, Homebush West. |
| 18 December 2017 | The Land and Environment Court of NSW approved DA 2017/21 (Case No. 2017/00193512) for the demolition of existing site structures and construction of a part two storey and part three storey townhouse development at 14-26 Telopea Avenue, Homebush West. As part of the court approval, the number of dwellings was reduced from 28 to 25. |

- 18 December 2018** An application to modify the approval under the provision of Section 4.56 of the EP&A Act 1979 was lodged with Council for the minor internal and external changes to the approved development.
- 7 February 2019** Approval of the Section 4.56 application by the Strathfield Internal Development Assessment Panel (IDAP).
- 1 February 2021** A second modification (DA 2017/21/3) was lodged under Section 4.56 for a reduction of dwellings from 25 to 22, changes to height, roof design, internal layout of dwellings and basement carpark, and alterations of external facade.
- 18 June 2021** Approval of the second Section 4.56 application by the IDAP.
- 17 May 2022** The current modification application (DA2017/21/4) was lodged.
- 23 May 2022** The application was placed on public exhibition until 7 June 2022. It was then renotified until 23 June 2022. No submissions were received.
- 23 May 2022** Council's Planner carried out a site visit.
- 23 May 2022** An additional information letter was issued via the NSW Planning Portal and raised the following concerns:

The application is to modify the construction hours and no changes are sought to the approved development itself. In light of the recent decision of the Chief Judge in Ku-ring-gai Council v Buyozo Pty Ltd [2021] NSWCA 177, it does not seem that Council has the power to approve this type of application under Section 4.56 of the Environmental Planning and Assessment Act 1979. Accordingly, you may wish to consider withdrawing the application.

- 26 May 2022** The applicant provided an additional letter via the NSW Planning Portal demonstrating that the application can be assessed. On this basis the assessment was continued.

Referrals – Internal and External

Compliance Officer

Council's Compliance Officer provided the following comments on the application:

I do not support the extension of the construction hours as enforcing the reduced amount of personnel on-site would present a challenge; the standard amount and reduced amount of personnel has not been documented.

Focusing all work and loading of trucks on the Western side of the site will still continue to be adjacent to residential properties. The acoustic letter has not specifically stated that the reduced works will ensure that noise generated from the site will be 5dBa below the background noise levels.

REFERRAL OFFICER'S DECISION

I do not support the application due to the following reasons:

- 1. The acoustic letter has not specifically stated that the reduced works will ensure that noise generated from the site will be 5dBa below the background noise levels***

2. *Focusing all work and loading of trucks on the Western side of the site between 1pm and 5pm on Saturday will still continue to be adjacent to residential properties.*
3. *The standard amount and reduced amount of personnel as listed in the noise control measures has not been documented – therefore will be difficult to regulate.*

The proposal is to tie the requirements of the Acoustic Report to the condition of consent (No. 2). However, as this cannot be effectively enforced, the application should be refused. As per the Guide to Writing Conditions of Consent (May 2021) by the NSW Department of Planning, Industry and Environment, “conditions on a development consent must be enforceable” (page 7).

Section 4.56 of the EP&A Act 1979

The application has been lodged under the provisions of Section 4.56 of the EPA Act. The application does not change the approved development, other than the construction hours, and is therefore considered substantially the same development for which consent was originally granted. This conclusion is reached absent a consideration of the acceptability of the environmental impacts, which will be assessed under Section 4.15 above. This approach is consistent with Talbot J’s in *Wolgan Action Group Incorporated v Lithgow City Council* [2001] NSWLEC 199 [43]:

*...No further works were proposed in the application for modification. Even if the present applicant is correct in that there will be a significant increase in the environmental impact of the haul road that, nevertheless, does not necessarily preclude a conclusion that the development, to which the consent as modified relates, is substantially the same development as that already permitted. The extension of the hours of operation alone does not change the inherent character of the development itself. **There may be some additional environmental impact but that is a matter to be considered as part of the deliberations on the merits...** (emphasis added)*

A letter from the applicant demonstrated that, although no changes are proposed to the development itself, Council still has the power to assess the application under Section 4.56. The application has also been notified in accordance with the provisions of Council’s CPP and no submissions were received.

Under the provisions of Section 4.56(1A), the reasons for the granting on the consent that sought to be modified are to be taken into consideration during the assessment of the application. In this instance, the reasons for granting the original consent are not impacted by the proposed modification and the proposal can therefore be considered consistent with Section 4.56.

Section 4.15 Assessment – EP&A Act 1979

The following is an assessment of the application with regard to Section 4.15(1) of the EP&A Act 1979.

(1) *Matters for consideration – general*

In determining an application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) the provision of:**
(i) any environmental planning instrument,

The only relevant environmental planning instrument is the Strathfield Local Environmental Plan (SLEP) 2012. As the application is only for an extension of the construction hours of the approved multi-dwelling housing, the provisions of the SLEP 2012 are not impacted by the proposal and is considered consistent in this regard.

- (ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority, and**

There are no draft planning instruments that are applicable to this site.

- (iii) any development control plan,**

The proposed development, as modified, is subject to the provisions of the Development Control Plan No. 20 – Parramatta Road Corridor, being located within the designated area. As the modification is for a change in the construction hours only, not all the provisions are relevant in this instance. Part 1.6 states that Part C of the Strathfield Consolidated Development Control Plan (SCDCP) 2005 should also be applied for town house development.

Objectives of Part C

Part C of the SCDCP 2005 relates to multi-unit housing and applies to the development on the subject site. Objective 5 of Part C is particularly relevant and states:

5. *To provide an acceptable acoustic environment for residents through appropriate design, layout and construction measures, which mitigate noise and vibration impacts from nearby road and rail transport activities.*

The approved construction hours are a standard condition that apply to all development throughout the LGA. The reason given for Condition 2 in the Condition of Consent is to:

To maintain amenity to adjoining land owners

The surrounding land owners are residential which can be considered sensitive receivers. As per the Acoustic Report provided by the applicant for the modification application, “a strong justification would typically be required for works outside the recommended standard hours.” The aural attenuation measures proposed include limiting the use and location of power tools, prohibiting heavy machinery and halving the number of site personnel. These measures are intended to bring the noise threshold below 5 dB(A).

As indicated, Council’s Environmental Health Officer has raised concerns over the enforceability of restrictions on the number of site personnel and tools given the standard number is unknown. In addition to this, it is not possible to constantly measure the noise level. As the attenuation measures cannot be effectively monitored, an acceptable acoustic environment for residents during the construction on Saturday afternoons cannot be guaranteed.

While it is recognised that extended construction hours were permitted under a State Government directive during Covid lockdowns, this reflected a unique scenario which is different from the environment in which this application is proposed. The construction benefited from the extended hours during the prescribed period however there is no obligation for these hours be continued now that lockdowns have been lifted.

In light of the above, the proposal fails to comply with the relevant objective of the SCDCP in that the aural amenity of surrounding residents during Saturday afternoons cannot be guaranteed. This forms a reason for refusal.

(iv) Any matters prescribed by the regulations, that apply to the land to which the development application relates,

The provisions of this clause are not relevant to the modification and have been addressed/considered as part of the original development consent.

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

The proposal relates to construction hours only and there will be no built form impacts. The proposal is not considered to have any negative social or economic impacts on the locality. However, as indicated above, the proposal has the potential to result in significant acoustic impacts and is therefore not supported.

In addition, continuing construction works into Saturday afternoons will result in additional vehicular movements on surrounding streets. The Acoustic Report makes allowance for the loading of trucks which will presumably also be able to leave the site. This will contribute to traffic and noise and is not supported.

(c) the suitability of the site for the development,

The site remains suitable for the approved development however its location within a residential setting makes it unsuitable for Saturday afternoon construction.

(d) any submissions made in accordance with this Act or the regulations,

In accordance with the provisions of Councils Community Participation Plan (CPP) 2020, the application was placed on neighbour notification for a period of fourteen (14) days where adjoining property owners were notified in writing of the proposal and invited to comment. Due to an inadvertent error on the notification form, the application was renotified for an additional fourteen (14) days. Two submissions were received in response raising issues of traffic, dust and noise. A further submission was received outside of the notification period raising the same issues.

It is considered that these concerns have been addressed throughout this report. Amenity impacts form a reason for the refusal of the application.

(e) the public interest.

The proposed extension of construction hours has the potential to result in additional acoustic, dust and traffic impacts which would not be in the public interest. It would also set an undesirable precedent for other developments under construction.

Local Infrastructure Contributions

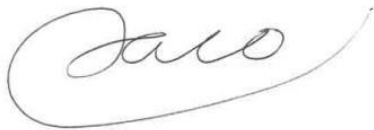
Section 7.13 of the EP&A Act 1979 relates to the collection of monetary contributions from applicants for use in developing key local infrastructure. A consent authority may impose a condition under Section 7.11 or 7.12 only if it is of a kind allowed by, and is determined in accordance with, a contributions plan (subject to any direction of the Minister under this Division).

The proposed modifications do not result in the increase or change to the contributions imposed on the original consent.

Conclusion/Recommendation

The application for modification has been assessed having regard to the Heads of Consideration under Section 4.15(1) of the EP&A Act 1979, the provisions of the SLEP 2012 and SCDCP 2005.

Pursuant to Section 4.56 of the EP&A Act 1979 and following detailed assessment of the proposed modification application DA 21/2017/4 for extended construction hours on Saturday afternoons, it is recommended that the application be refused.



Signed:

**W van Wyk
Planning Officer**

Date: 7 July 2022

- ☒ I confirm that I have determined the abovementioned development application with the delegations assigned to my position;
- ☒ I have reviewed the details of this modified development application and I also certify that Section 7.11/7.12 Contributions are not applicable to this modification application;

Report and recommendations have been peer reviewed and concurred with.



Signed:

**Joseph Gillies
Senior Planner**

Date: 1 July 2022

Refusal Reason – Impacts on the Environment

Pursuant to Section 4.15 (1)(b) of the [Environmental Planning and Assessment Act 1979](#), the proposed development is likely to have an adverse impact on the following aspects of the environment:

- (a) Built environment – the amenity of surrounding properties including acoustic, traffic and dust impacts.

(2) Refusal Reason - Development Control Plan

Pursuant to Section 4.15 (1)(a)(iii) of the [Environmental Planning and Assessment Act 1979](#), the proposed development is inconsistent with Objective 5 of Part C of the Strathfield Consolidated Development Control Plan 2005.

(3) Refusal Reason – Public Interest

Pursuant to Section 4.15 (1)(e) of the [Environmental Planning and Assessment Act 1979](#), the proposed development is not considered to be in the public interest and is likely to set an undesirable precedent.

(4) Refusal Reason – Enforceability

The proposed operating conditions are not supported as they cannot be readily enforced.