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24 October 2023

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Via email

Dear Kate,

PPSSWC-236 & PPSSWC-237: 184 LORD SHEFFIELD CIRCUIT, PENRITH: **RESPONSE TO COUNCIL ASSESSMENT REPORT**

On behalf of the applicant, Thornton North Penrith Pty Ltd, we are writing in response to the 'Council Assessment Report' which recommends refusal of the abovementioned development applications. For a range of reasons, the applicant is disappointed with this proposed action by the Council, given that there has been significant progress and work made following the recent briefings with the Planning Panel.

A separate response has been provided to the Planning Panel on 10 October 2023 in response to Council's 'Memorandum' which requested that the Panel accept no further amendments to the applications. This request made by the Council is despite the Panel separately requesting that applicant do so.

Further, on 12 October 2023, Urbis have sent an email to the Panel Secretariat requesting that under Section 11.8 of the Sydney District & Regional Planning Panel's Operational Procedures that a request be made to the Panel Chair to request that the Council provide without prejudice draft conditions of consent to assist with the Panel's determination of the application. We strongly believe that draft conditions would be warranted here, given that the applicant has been working through each of the threshold planning issues in this letter.

The 'Executive Summary' in the Assessment Report notes that principally four 'threshold' matters raised by the Council and Planning Panel remain "*unresolved although the applicant has been working through them*". The Council purport these to be:

- **Concept Plan Inconsistency:** The development is inconsistent with the Part 3A Concept Plan approval granted by the Minister for Planning for North Penrith.
- **Community Infrastructure:** The proposed current offer for Community Infrastructure is unacceptable considering the nature of the offer against the uplift in height and floor space sought by the development.
- **Solar Access:** The proposed development will cast shadow over public open space beyond the shadow that would be cast by a height compliant scheme.

- **Design Excellence:** The condition of the waiver to carry out an architectural design competition for the proposed development requires the applicant to fulfil certain matters relating to design integrity.

Further, other items noted beyond the above issues include lack of concurrence from Sydney Trains, concerns with the height of 'Tower D' not being acceptable, and references to the perceived "inordinate amount of time" required to resolve these issues.

While the applicant acknowledges the complexity with the assessment of these applications, the proposed action to recommend refusal of these applications goes directly against one of the express 'aims' of Penrith LEP 2010 to "*promote development that is consistent with the Council's vision for Penrith*". This is particularly the case whereby the proposal is directly consistent with the vision that the Council created for this 'key site'; the proposal exhibits 'design excellence' and provides community infrastructure for Penrith City Centre.

We note that should this application be refused, it would be the third recent significant development proposal on a 'key site' that has not been supported by Council Officers, despite the significant strategic planning work undertaken by the Council in their Planning Proposal (December 2015) which had the following key objectives and intended outcomes:

- *Encourage investment in Penrith's City Centre*
- *Activate the City Centre by providing for residential development at a higher density than currently permitted*
- *Increase the development capacity of Key Sites whilst protecting the development potential of adjacent sites*
- *Provide an opportunity for proponents to access bonus FSR in return for a public benefit, to deliver improvements to the City Centre and across Penrith more broadly.*
- *Respond to demand for residential development in key locations and provide a fast-track process for current proponents and future proponents.*
- *Ensure Penrith remains a competitive Regional City to other comparative LGAs*

These objectives will continue to be thwarted where applications are refused. There remains a unique opportunity for these outcomes to be achieved should the application be approved. In summary, in response to the Council's key reasons for refusal we recommend that the development applications can (and should be) supported and approved as:

- **Inconsistency with Part 3A Concept Plan:** The applicant has provided a legal opinion from Mr Adrian Galasso (SC) which confirms that the application(s) can be determined and that the inconsistency with the Concept Plan is not a barrier to consent being granted by the Planning Panel.
- **Community Infrastructure:** As requested by the Planning Panel, the applicant has submitted an on-site CI Offer aligned with Clause 8.7 of Penrith LEP 2010. Specifically, the proposed CI is consistent with the objectives of Clause 8.7, the development exhibits design excellence, and is generous in nature and value to the City Centre.
- **Solar Access:** The proposed Clause 4.6 variation in relation to Clause 8.2 of Penrith LEP 2010 ('Sun Access') demonstrates that despite a negligible additional degree of overshadowing of public open space that the variation is well founded and that there are sufficient environmental planning grounds to warrant the variation in the circumstances of the case.

- **Design Excellence:** The condition of the waiver has been fully addressed as per recent correspondence from GANSW and design excellence (subject to the endorsement of the Planning Panel) has been achieved.

While we note that a range of documents are lodged on the NSW Planning Portal, we wanted to specifically re-attach the following ones which will be relevant to how we address the Sydney Planning Panel:

- Legal Opinion by Adrian Galasso (SC) in relation to Issue 1 below.
- Recent Community Infrastructure Offer made to Penrith City Council (including CI Plans) & Alternative Community Infrastructure Plans & Costings (which includes the recreation facility in DA1) in relation to Issue 2 below.
- Clause 4.6 Variation in relation to Clause 8.2 of Penrith LEP 2010 (including Solar access diagrams and information prepared by Crone Architects) in relation to Issue 3 below.
- Design Excellence Waiver Correspondence (GANSW) & Endorsed Minutes from Design Integrity Panel in relation to Issue 4 below.

1. INCONSISTENCY WITH PART 3A CONCEPT PLAN FOR NORTH PENRITH

The conclusion of Page 21 of the Assessment Report notes that the applicant has recently provided a legal opinion that the Department of Planning and Environment are considering and “as the contemplation of any of the possible avenues for dealing with this issue have not yet reached an acceptable solution” the consent authority “must not grant consent” given the inconsistency with the Concept Plan.

The applicant has separately provided a recent response to the ‘threshold’ planning issues and issued a legal opinion from Adrian Galasso (SC) on 21 September 2023 in relation to the perceived inconsistency with the Part 3A Concept Plan for North Penrith.

The legal opinion (based on a very detailed examination of the background to the Concept Approval) advises that there is no barrier to the Planning Panel granting consent to the development applications, or any dependence upon the Part 3A Concept Approval.

We understand that the Planning Panel is discussing this matter in further detail with DPEs Legal Team and an update will be provided prior to the Determination Meeting on 30 October 2023.

2. NATURE AND VALUE OF OFFER FOR COMMUNITY INFRASTRUCTURE

It is important to note that a large part of the Assessment Report by Council comments on a previous community infrastructure offer (for Penrith High Street works) that has now been superseded based on the recent advice and concerns from the Planning Panel. However, the Council’s ‘Memorandum’ to the Assessment Report dated 3 October 2023 does provide short commentary and notes further ongoing concerns with the latest offer (on-site works).

We are deeply concerned by the Council’s actions and assertions on community infrastructure whereby Council officers have recommended the applicant propose off-site works (i.e. Penrith High Street and Penrith City Park including their permutations) which they have then separately criticised (and rejected) in their Assessment Report. The applicant has committed significant time and cost

exploring **multiple** community infrastructure options, initiated by Council, despite there now being clear differences of opinion between differing officers at the Council.

Accordingly, it is firstly important to establish what appears to be the common ground between the applicant and the Council on this matter. Firstly, there is acceptance that community infrastructure is provided on-site. Secondly, that it forms part of both development applications. Thirdly, that the timing of the community infrastructure needs to be clear.

What appears to not be common ground is the 'value and nature' of the offer according to Council, as well as the proposed space being *"fit for purpose to allow a range of sporting uses; ensuring public access; ongoing ownership and management responsibilities; ongoing maintenance costs; and how the value is determined for the purpose of the community infrastructure offer"*.

The applicant has provided a response to Council's 'Memorandum' which provides clarifications to these concerns noting that the most recent VPA offer can deal with each of the Council's contentions quite simply.

However, what continues to be an ongoing barrier is the lack of willingness from the Council to accept any community infrastructure offer made, and in our view almost a defeatist attitude that this can actually be resolved, apart from unhelpful comments such as *"community infrastructure should inform the design of the development"* and *"community infrastructure could include additional open space within the development"*.

On 23 October 2023 the Council held a meeting with the applicant to discuss the updated VPA offer for on-site works (despite the fact that they have separately recommended refusal of the application). At the meeting, Council Officers identified concerns with the proposed offer, and noted that this offer would be unlikely to be accepted for various reasons.

While there were initial comments related to the physical scale of the proposed 'recreation facility' and the types of recreation uses this could accommodate, the key concern expressed continued to be the 'nature and value' of the community infrastructure. Specifically, the Council Officers discussed that an application of this scale needing items such as new larger areas of public open space, larger scale recreation facilities and the like. These suggestions are obviously quite different to those put forward by the applicant, and would require substantial changes to the form of the development applications lodged – and in our view are not aligned with the nature and value of community infrastructure for various reasons.

On this basis, while the current offer lodged on the Planning Portal offers one solution, we are concerned that the Council will be unlikely to agree with this. Therefore, the applicant has an 'alternative' mechanism to implement the proposed community infrastructure which seeks to respond to Clause 8.7 without the need for the Council to be involved and/or accept a Voluntary Planning Agreement. Specifically, this is as follows:

- An alternative Community infrastructure space is located on the first floor in Stage 1 (DA22/0213). This counters council's questioning the value and nature of the CI as it relates to stage 1, though either tenancy would be acceptable to the applicant.
- The proposed 'on-site' community infrastructure in the form of an on-site recreation facility (indoor) restricted in title and held in the ongoing ownership of the applicant and provided to a non-for-profit operator under a Management Agreement, free of charge.
- It is recommended that the Planning Panel impose a condition of consent that requires the applicant, prior to the issue of an occupation certificate for the first development application

(‘DA1’), that a restriction on title is placed on the site (tenancy) the subject of the applications, which requires this arrangement. The following draft condition is suggested:

“Prior to the issue of an occupation certificate for the first development application, a Restriction on Title must be placed on the site (tenancy) the subject of the development applications for the provision of an on-site Recreation facility (indoor) and pedestrian through-site link embellishments (as shown in the ‘Community Infrastructure’ drawings) as described under the definition of Penrith LEP 2010”.

- The condition and/or title arrangements would require (at a minimum) that:
 - The use of the space would have to be for those described under the definition of ‘Recreation facility (indoor)’ in the Dictionary of Penrith LEP 2010.
 - The use of the space would be open to the general public and/or residents of Penrith Local Government Area.
 - Ongoing ownership and management would remain with the building owner but under a Management Agreement at no cost to a non-for-profit (such as Thornton Community Group, PCYC or the like).
 - Maintenance and outgoings of the facility would be by the building owner in consultation with the future tenant and kept to a high-standard.
 - The hours of operation and a plan of management would be agreed by the applicant in consultation with the future operator. This could be provided to Council for their feedback if required.

3. SUN ACCESS

The applicant has submitted a Clause 4.6 variation in relation to Clause 8.2 of Penrith LEP 2010. The Council Officers Report provides a range of comments on this which we have addressed below.

In summary, and before responding to the specific commentary from the Council Assessment Report, we hold the view that proposed sun access to the public open space is reasonable and supportable as:

- Clause 8.2 of Penrith LEP 2010 has the stated objective “to protect open space from overshadowing”. The numeric standard at Clause 8.2(3) does not reference a specific time of this protection and seeks to limit development which would “result in overshadowing of public open space to a greater degree than adherence to the controls indicated on the Height of Buildings Map”.
- We note that in the Panel Briefing Minutes (7 August 2023) the following was noted by the Panel:

The Panel agreed that the relevant inquiry as to whether “overshadowing of public open space to a greater degree” involved qualitative and quantitative assessment of the nature and duration of shadowing.

The Panel was therefore open to an argument that a building with some additional overshadowing might still not give rise to a “greater degree of

overshadowing” overall if there were countervailing aspects of the design which opened up public open space to additional sun during the day.

- In response to the above, a Clause 4.6 variation has been prepared for both applications, which outlines specific circumstances that warrant a variation to the standard. Given that the recent NSW Land and Environment Court decisions for the TOGA and Urban Apartments site, it is important to distinguish why this proposal differs. Namely:
 - Firstly, we are not seeking to challenge whether the public open space being impacted is within Penrith City Centre. We acknowledge and accept the recent LEC judgements with respect to this point.
 - Secondly, the Clause 4.6 is not advancing a view, or relying on other parts of the Penrith LEP that would be thwarted if strict compliance with Clause 8.2 was achieved as relevant to the grounds being advanced.
 - Thirdly, we are not seeking to argue that improved solar access to surrounding developments justify additional overshadowing of public open space.
 - Fourthly, the shadow impacts of the Urban Apartments proposal affected different times of the year – where arguably there is more reliance on solar access to public open space. Whereas, the proposed development’s minor impact is for a small part of the summer period, and with improvements in the winter, spring and autumn periods.
 - Lastly, while the grounds advanced in our Clause 4.6 variation are not reliant on the views of the Design Integrity Panel, a key difference to the Urban Apartments Judgement, is that the Design Integrity Panel have now actually turned their mind to the overshadowing (as part of their assessment of Design Excellence under Clause 8.4 of Penrith LEP) and the majority position supports the solar analysis and arguments advanced by the applicant in relation to Clause 8.2.
- Ultimately, the view expressed by Commissioner Horton in the Urban Apartments LEC Decision was that that application didn’t demonstrate that compliance with Clause 8.2 was unreasonable and unnecessary in the circumstances of the case, nor were there sufficient environmental planning grounds to justify the non-compliance. Further, there was also concern that there was not satisfaction that the “form and external appearance of the development will improve the quality and amenity of the public domain” which was critical to determining whether the development exhibits ‘Design Excellence’ under Clause 8.4(2) of PLEP 2010.
- In response to the Panel’s recent feedback the Clause 4.6 variation has sought to examine the objective and control of Clause 8.2 from both a quantitative and qualitative perspective, specifically as it relates to the public open space relevant to the application, and its unique qualities.
- There is an inherent notion of ‘protection’ in the objective of the Clause, and our strong view is that protection from overshadowing at different times of the year should be a valid consideration in applying where differing degrees of protection from overshadowing may be warranted.
- Importantly, the proposed development (compared to a height compliant scheme), will create additional solar access to the public open space all year round, with the exception of a very negligible amount of shadow in a few hours in the hottest time of the day, in the hottest time of the year in summer.

- While there will be a very minor increase in shadow (quantitatively) in a small period of the summer solstice (on aggregate), qualitatively the shade provided by the proposed development at this very small portion of the year will assist at the hottest time of the year and conversely seek to 'protect' the public open space given the extreme heat climates in Penrith.
- As discussed below, there is limited existing trees and landscaping within the public open space itself, and since Clause 8.2 of PLEP 2010 was gazetted, the inclusion of Clause 7.30 ('Urban Heat') there is an overt focus on ensuring that outdoor spaces are "thermally comfortable for people living and working in Penrith, particularly during summer". Accordingly, we see the protection of the space with shade at a small time of the year being a reasonable proposition within the context of the heat island effect in Penrith LGA.
- A proposal which required strict compliance with the standard, would be likely to conversely increase shadowing at other times of the year, and minimise cooling of the public open space in the summer period – which in our view would not seek to protect the public open space – continue to expose it to extreme heats with limited relief.

A response to the Council's specific commentary in the Council Assessment Report is provided below.

Council Comment	Response
<i>There is a current lack of information about the overshadowing impact. The submitted shadow diagrams to date are not comprehensive. It is unclear which parts of which proposed buildings will create the additional overshadowing.</i>	<p>Council Officers were provided with a copy of the solar studies by Crone on 7 March 2023 (i.e. over 8 months ago) and there has been no commentary to date on the adequacy of the solar analysis undertaken by the applicant's team.</p> <p>Notwithstanding, the solar studies show a 'base case' position (i.e. 32m height compliant) and then a 'DA proposal' to which consent is being sought for. The base case and DA proposal are presented for comparative analysis on the same page in the shadow set, and in our view it is quite simple to deduce where the additional shadow impact occurs.</p> <p>As with SEPP 65 shadow analysis to communal space, the shadow on the groundplane is indicated as an assessment of overall building mass and does not attribute specific building components to shadow.</p>
<i>It is also unclear what massing form was used for the 32m height compliant scheme. Is this a solid massing (block form) across the entire site? Would the expectation be that the building block would have a combination of solid/void (cut-outs to be ADG compliant or provide modulation)?</i>	<p>There is no specific guidance in either Penrith LEP 2010 or Penrith DCP 2014 with respect to the specific massing form that needs to accompany solar analysis for comparative analysis.</p> <p>The only wording in Clause 8.2 of LEP 2010 in relation to a form of comparison is the words "<i>adherence to the controls indicated for the land on the Height of Buildings Map</i>".</p> <p>Accordingly, the solar analysis by Crone has adopted a 'base' case massing which adheres to a 32m height for the basis of comparison. The 'base case' is in a block form, and while not relevant in our view, could very easily comply with the ADG. However, our strong view is that the LEP wording does not require the applicant to work up a fully</p>

	<p>resolved compliant built form with respect to every control – only the height standard of 32m.</p> <p>It is important to note that Council's independent urban design consultant (Conybeare Morrison) adopted a similar block form massing 'base case' for the purpose of analysis for the preparation of the 'key site' controls in 2015.</p>
<p><i>Is a shadow analysis across four days of the year the most appropriate representation of the impact?</i></p>	<p>Penrith LEP 2010 and Penrith DCP 2014 does not have any guidance on shadow/solar analysis of public open space, nor what specific days or time periods are required for analysis.</p> <p>However, we are surprised that Council's comments raise concern with the analysis examining the solar access at key days of the specific equinox and solstices when separate references in the DCP (i.e. in relation to the shadowing of private open space) refers specifically to the 'winter solstice' at 21 June.</p> <p>Our view is that the key days provide an indication of the shadowing at that point in time and are adequate for the purposes of the analysis.</p>
<p><i>Are the autumn and spring equinox days really the worst-case scenario that represent the three months in each of those seasons?</i></p>	<p>The Spring/Autumn Equinox are the mid transition point between the bookends of the Summer/Winter Solstices. Obviously, there are 365 days of the year where these analyses can be undertaken, however, these key 4 dates are the industry accepted times of the year to best gauge the Solar impacts.</p> <p>The equinoxes indicate when day and night are of equal length relative to the extremes of day/night of summer and winter. These days do not articulate either worst of best case scenarios.</p>
<p><i>Although summer in Penrith is hot, the assessing officer does not agree that the proposed loss of solar access to an existing and well-functioning public open space area, to the extent proposed by the development, is acceptable. Nor is it acceptable that the somewhat slight increases in solar access on the three other days (March, June and September) counterbalance the larger loss on 21 December. Nor, are the increases on 21 June (3.1% increase), 23 September (1.7% increase) and 20 March (1.7% increase) significant in their own right. Therefore, the loss of solar access in</i></p>	<p>The commentary from the Council implies that a loss of solar access to the public open space (even at the hottest time of the year or season) would be likely to have an unacceptable impact to the functionality of the public open space. However, there is no discussion by the Council as to the type of amenity that is impacted in relation the loss of solar access at this specific time of the year.</p> <p>The Clause 4.6 variation identifies that as the objective of Clause 8.2 is to 'protect' public open space from overshadowing, but the development standard is silent on the period to assess that impact, that a qualitative assessment of the shadow impact should be based on an understanding of 'what' is being protected, and 'why' we are protecting it.</p> <p>In our view, the use of the space by the workforce, visitors and the wider community, and also how and when it is used is critical to defining the potential impact.</p>

<p><i>December is greater than the gains made in March, June and September.</i></p>	<p>The public open space is not an active recreation space or 'park'; is largely paved; faces north, and is predominantly a pedestrian thorough-fare. The exception to this is a small number of seats that are predominantly wrapped around the planters and trees to provide shade protection from the sun. So, where there is passive spaces to sit, these are 'protected' from the sun with shade. i.e. this being the clear intent in providing shade to protect the space from the weather.</p> <p>Accordingly, for the majority of the year where temperatures are cooler and heat-gain is sought (winter, autumn and spring), the proposed development enhances the solar access to assist with the amenity of the space. While a small amount, it is still an improvement and seeks to 'protect' (and enhance) the public open space from overshadowing.</p> <p>In our strong view, the protection of public open space by the provision of additional shading of that space at time of typical extreme heat (Penrith identified as the hottest place on the planet in Jan 2020 at 48.9 degrees Celsius) is a reasonable proposition – particular where there is a gain in solar access at the coolest times of the year.</p> <p>Design of the urban realm can contribute to mitigate the 'heat island' effect of public domain hardscape with appropriate planting to provide shade or using canopies and shade structures. The shade cast by the proposed buildings can provide positive contribution to reduction of 'heat island' effect to the Railway Plaza. This is offset by the positive contributions of additional sunlight access in winter and at the equinoxes.</p>
<p><i>Further, the applicants shadow analysis references the measured heat in Penrith (48.9 degrees Celsius) in 2022 and Council's policies relating to 'urban heat' and the 'Cooling the City Planning for Heat Issues Paper. These policies do not suggest the solution to urban heat is building taller buildings to cast shadows as a means of reducing the urban heat island effect.</i></p>	<p>The applicant is simply acknowledging that an express objective of Clause 7.30 of Penrith LEP 2010 is to ensure that .. "<u>outdoor spaces are thermally comfortable for people living and working in Penrith, particularly during summer</u>".</p> <p>From our observation, the areas of the public open space that contain seating are directly adjacent to shading provided by the limited trees in the square. Regardless of how the shading occurs (or from what) the point goes to the summer period being consistently very high to extreme temperatures that are often not thermally comfortable given their current exposure to the sun and with no shading in large parts of the space.</p> <p>While the proposed buildings are not designed to specifically provide shade to the Railway Plaza, the contribution to reducing the 'heat island' of this hardscape at the hottest time of the year can contribute</p>

	positively to the public use of the space and reduce the accumulation of radiant heat prior to sunset.
<p><i>One of the objectives of the E1 Local Centre zone is to “To create opportunities to improve the public domain and encourage the integration of centres with public transport and pedestrian networks”.</i></p> <p><i>Notwithstanding the applicant’s argument for solar gain to Station Plaza, it is considered that the resulting overshadowing impact does not meet this zone objective.</i></p>	<p>We strongly disagree with this comment. Conversely, the proposed development will provide a range of public domain improvements that will greatly enhance the North Penrith precinct.</p> <p>Firstly, the proposal will provide a series of improvements and a pedestrian through-site link that connects the public square through to the commuter car park. The current VPA offer seeks to further embellish this to enhance its contribution to the City Centre.</p> <p>Secondly, the proposed development will provide important activation along the entire length of the north-south axis of the public open space and ensure that there is activation, passive surveillance and the ability for a much safer space during the day and also after-hours.</p> <p>The proposal provides a village square and meeting location within walking distance of surrounding housing density without having to traverse the bridge over the railway to connect to the city centre retail. The public benefit of walking access to grocery basics, retail and entertainment is achieved with this contribution of public domain. Activation of the public doamin for a thriving village centre is enhanced by density of residential accommodation on the site and surrounds.</p> <p>Thirdly, the applicant proposed in a previous VPA offer to significantly enhance the public square (i.e. circa \$5.2 million in works) to provide a much more cohesive community square. However, this offer was also not supported by the Council Officers.</p> <p>In summary, the solar gain that occurs in the cooler times of the year will benefit the City Centre, and the negligible loss in summer is reasonably and will also protect (and benefit) the amenity of the space more in these extreme weather events.</p>
<p><i>At the DIP Meeting on 21 September 2023, the DIP asked the applicant to provide more detailed information about the overshadowing impact, to allow the DIP to provide further commentary to assist Council’s planning assessment.</i></p>	<p>The applicant provided the solar analysis to the DIP members. The majority (quorum) view held was that the solar access information was adequate, and the concluding position was that the negligible overshadowing was supported.</p> <p>We note that this point differs to the recent LEC judgements for TOGA and Urban Apartments, as the DIP have considered this information in coming to their decision of support of the proposal.</p>

4. DESIGN EXCELLENCE

Page 26-27 of Council's Assessment Report acknowledge that the applicant has sought a competition waiver for the development from GANSW (notwithstanding that a competition was originally held in 2016), confirmed that the Design Integrity Panel (DIP) had met on numerous occasions to review the design, and advised that the development "is capable of achieving design excellence".

It also notes that the DIP supported the proposed on-site community infrastructure and that this would add to the design excellence and contribution of the proposed development.

However, the Report notes that:

"While this is a positive step forward, outstanding threshold issues remain and further time would be needed to resolve matters comprehensively, including timeframes for further amendments to be received and reviewed by Council, the DIP, and external referral authorities"

We disagree with this comment, and it is important to note that following has occurred following the issue of the Council Assessment Report:

- GANSW have issued correspondence confirming that the terms of the competition waiver have been fully addressed.
- Minutes from the DIP process confirm that the proposed development is capable of achieving design excellence (noting that the Planning Panel need to ultimately determine this with the information before them).
- The application does not require any amendments with respect to the design and/or the proposed community infrastructure (noting that this forms part of the current design in the form of existing tenancies) and information has been provided to Council detailing the proposal.

In our strong view, the Planning Panel can be confident on this basis that the development achieves design excellence.

Notwithstanding the views of the DIP, we note that the Council Assessment Report then goes on to identify other concerns in relation to Design Excellence (which have not been identified by the DIP). These are addressed below:

"Given that the recommendation of this planning assessment report is to refuse consent, based on the unresolved threshold issues, a detailed assessment relating to design excellence is not required at this time. There are many aspects of the proposal which are satisfactory in terms of design excellence. These include the proposed architectural language, façade detailing, materials, location and design of communal open space for residents, as well as the retail and commercial uses proposed."

However, there are other aspects of the proposed development within both development applications, for which the assessing officer is of the view do not exhibit design excellence. This primarily relates to the bulk and massing of Tower D and the additional overshadowing of Station Plaza. Further, the current offer for community infrastructure, being upgrade works to High Street, is not considered to contribute to the design excellence of the proposed development".

Further, we note that there are additional comments on Page 18 of the Assessment Report in relation to Tower D:

However, the assessing officer is of the view that the massing and scale of Tower D is not appropriate for its position on the site, being located on the northern boundary fronting Lord Sheffield Circuit.

The context in which Tower D is positioned is different to that of Tower A. Tower D sits within the physical and visual urban catchment of existing developments in Thornton, most of which are approximately 8 to 10 storeys in scale. Therefore, the existing urban form near Tower D has a medium-density scale, with 8-10 storeys closer to the mapped LEP height of 32m. The massing of Tower D, combined with the common podium to Towers C and D which occupies the whole of that site, results in excessive building mass which is not relieved by open space voids. Therefore, although the site can accommodate greater densities through additional height and floor space in recognition that it is Key Site 11, the resulting scale and mass of Tower D does not reflect the desired character of the locality and will have an adverse impact on the area.

The Design Integrity Panel have not raised any concerns with the massing and scale of Tower D.

In summary, we find this commentary quite unfounded (in fact) for a range of reasons:

- The overall massing and positioning of Tower D has not fundamentally changed for close to 3 years since the DIP was first presented with the alternative massing (DIP Session 1 occurred on 14 December 2020).
- No previous correspondence from the Council since early 2021 (when the scheme was presented to Council Officers) has identified any concerns with the massing or positioning of Tower D. To date, the Council officers have deferred to the DIP for advice relating to the tower design.
- The massing of Tower D has been the result of very careful analysis of a range of matters including street wall and tower setbacks, building separation/privacy, solar access/shadowing, pedestrian wind impacts, and maximising views. These have been reviewed in detailed by the DIP who are supportive of the massing arrangement.
- The commentary regarding the surrounding context and scale being 8-10 storeys and the proposed development not reflecting the 'desired character of the locality' and having 'an adverse impact on the area' is not well founded. The subject site is one of the largest, consolidated land parcels directly adjacent to Penrith Railway Station and Penrith City Centre, that has been specifically identified as a 'key site' and earmarked to "allow higher density development in the City Centre where the development includes community infrastructure".
- The proposal therefore seeks to respond positively to the desired character, by providing a lower scale podium (at 5 levels is half the height of a 'compliant scheme') around the boundaries of the site, and with taller forms setback and in a form which provides a very high amenity, and the inclusion of community infrastructure as part of the proposed development. As discussed elsewhere, the proposal minimises unreasonable impacts and is capable of achieving design excellence as noted by the Design Integrity Panel (DIP).
- Although the applicant appreciates the Planning Assessment Officer's personal opinion on Architecture and Urban Design concepts, the Design Integrity Panel, being made up of preeminent Architects (from Government and private industry) is entrusted in regulation to arbitrate on

Architectural and Urban Design matters. A quorum of these experts have determined that this proposal (incl Tower D) satisfies Siting, Massing and Scale requirement sufficient to achieve Design Excellence.

5. OTHER KEY ITEMS

A number of other items have been identified in Council's Assessment Report, which we address below briefly.

5.1. CONCURRENCE FROM TRANSPORT FOR NSW (SYDNEY TRAINS)

Council's Assessment Report notes that concurrence from Sydney Trains has not been obtained and consent cannot be granted without this. Given that the development application had effectively been held in abeyance by the Council given the other 'threshold' planning issues, engagement with Sydney Trains had ceased.

However, the applicant has recently provided Sydney Trains with a suite of information in response to their correspondence from 15 September 2022. This includes:

- Structural Impact Assessment Report (Northrop)
- Sydney Trains HV Survey (Rygate)
- Sydney Trains HV Cabling Letter (S4B)
- Preliminary Materials Handling Plan (Thornton Operations)

In response to this information, Sydney Trains have provided confirmation on 19 October 2023 that their concurrence and draft conditions of consent will be issued imminently (and in advance of the Planning Panel Determination Meeting).

Accordingly, we are of the view that this issue in the Council's Assessment Report has been adequately dealt with and addressed.

5.2. APARTMENT DESIGN GUIDE CONSISTENCY

The Council Assessment Report acknowledges that "the development would meet most of the these objectives [of the ADG]". However, the Report states that the proposed development 'borrows' amenity from the concurrent development application DA22/0213 and vice versa, specifically for solar access and cross ventilation.

Specifically, Council refer to natural cross ventilation being 59% in DA22/0213 and negligibly below the 60% guidance and solar access being 68% which is negligibly below the 70% guidance in the ADG.

We note that the Council have not raised this very minor numeric variation in any recent correspondence or RFI, as the development applications (lodged concurrently) were the subject of a Design Integrity Process (DIP) which examined each development application on their individual merits and came to a view that the overall the solar access and cross-ventilation are acceptable and will provide a high-amenity outcome.

In our experience, it is common (and there are many approved developments) in larger scale redevelopments which may have very negligible quantitative variations to the ADG in one stage of part of a development site on the basis that the proposal(s) are consistent with the ADG in other stages.

While we agree that ‘borrowing’ amenity in a manner which results in a significant variation to the ADG may require more detailed examination, this is not the case here. This is a numerically negligible scenario which has been supported and endorsed by the Design Integrity Panel.

More recently, in the NSW Land and Environment Court judgement *Construction Development Management Services Pty Ltd v City of Sydney [2023] NSWLEC 1620* Commissioner Horton noted that that a qualitative consideration of the objectives of the Design Criteria needed to be examined, not just a quantitative one:

Clause 28 of SEPP 65 requires the consent authority, or the Court on appeal, to consider the design quality principles in the following ways:

...

- (2) *In determining a development application for consent to carry out development to which this Policy applies, a consent authority is to take into consideration (in addition to any other matters that are required to be, or may be, taken into consideration)—*

(a) the advice (if any) obtained from the design review panel, and

(b) the design quality of the development when evaluated in accordance with the design quality principles, and

(c) the Apartment Design Guide.

...

Clause 30 of SEPP 65 also requires the design quality principles and the objectives of the ADG, to be considered prior to the grant of consent, as follows:

...

- (2) *Development consent must not be granted if, in the opinion of the consent authority, the development or modification does not demonstrate that adequate regard has been given to—*

(a) the design quality principles, and

(b) the objectives specified in the Apartment Design Guide for the relevant design criteria.

...

I note here that it is the objectives of Parts 3 and 4 of the ADG that are the focus of s 29(2)(b)(ii) of the EPA Regulation, and not the design criteria or the design guidance.

However, it is the ADG that must be taken into consideration by the Court according to cl 28(2)(c) of SEPP 65.

Accordingly, apart from the exception of the minor numerical variation to the Design Criteria in the ADG noted by the Assessment Report, there is no other discussion in the Assessment Report which relates specifically to the objectives of the Design Criteria. In our view, and as confirmed by the Design Integrity Panel who have considered the ADG, the proposed development is consistent with the objectives of Objective 4A-1 of the ADG to “optimise the number of apartments receiving sunlight to habitable rooms, primary windows and private open space”, as well as Objective 4B-3 that the “number of apartments with natural cross ventilation is maximised to create a comfortable indoor environment for residents”.

Therefore, the concern that a very negligible variation to both these Design Criteria’s, in our view is not well founded and the proposed development responds positively to the objectives of the ADG.

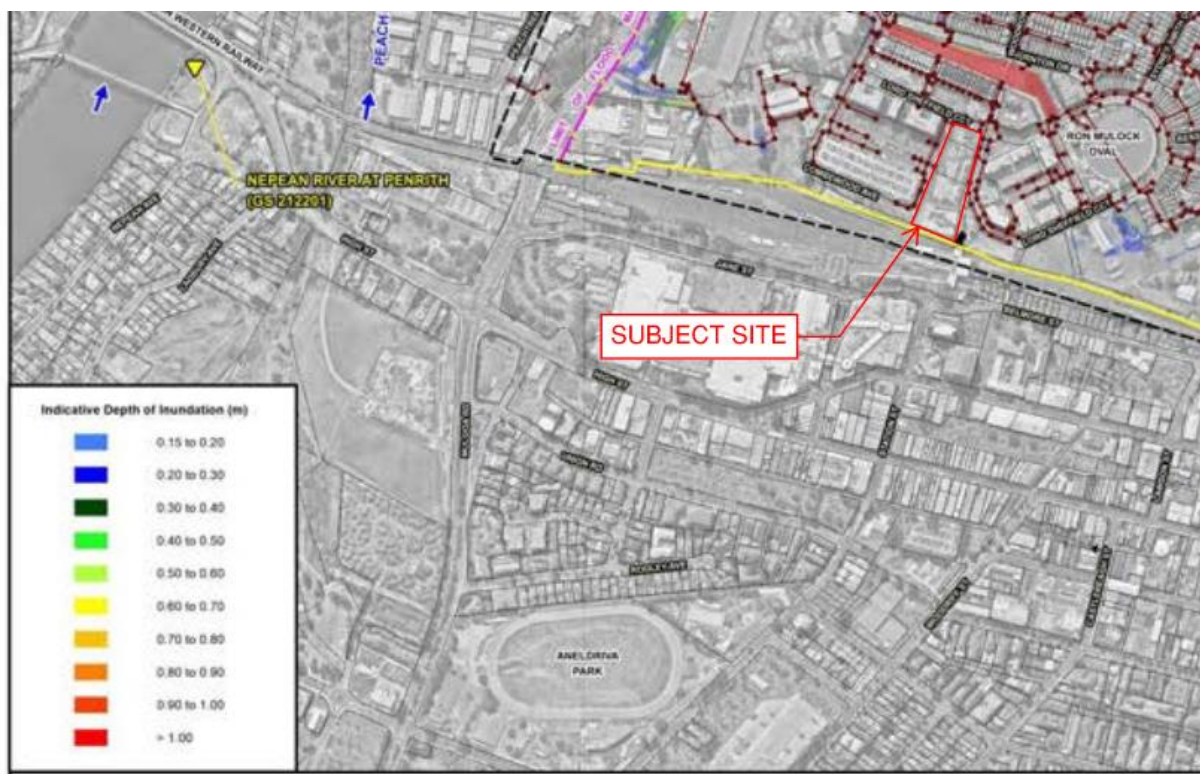
5.3. FLOOD IMPACTS

Page 34 of Council’s Assessment Report notes comments from Council’s Development Engineer relating to concerns in relation to flood planning, and specifically that the proposed bund wall does not protect potential flows coming down the adjoining lot of paved seating area, which slopes towards the subject site. Further, Council note that floor levels are to be at least 0.5m above the 1% AEP or the building flood-proofed to this level.

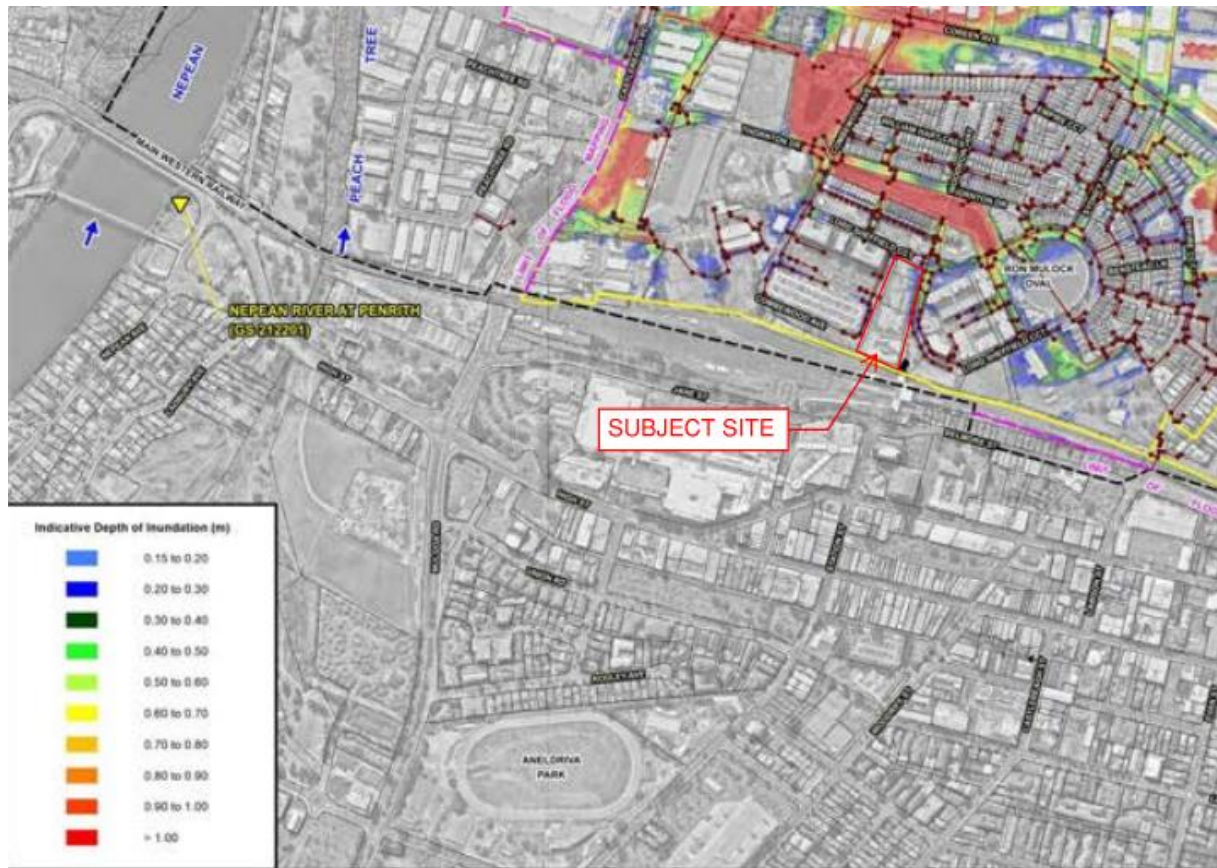
The applicant’s flood engineer (Northrop) have reviewed this and note the following:

- The Cranebrook Floody - <https://yoursaypenrith.com.au/cranebrookfs> has been reviewed. This is currently on exhibition and not ‘formally’ accepted yet by Council, however it does now include the subject site in the model extents.
- Upon reviewing the maps presented in what is proposed to be the final version, the site is shown to be not flood impacted in either the 1% AEP local catchment flooding. Only minor flood depths are observed even in the PMF event on the northeastern extent.

1% AEP Local Flooding:



PMF Local Flooding:



- The comments regarding the eastern boundary of the site being below the 1% AEP are inconsistent with the information presented above.
- It is noted that there was previous discussions regarding the 1% AEP flood extent shown within the rail corridor to the south, however it was previously discussed with Council that these flows were not represented accurately, as the 1D-Network /culverts did not appear to be represented in the 2D model geometry presented within the CBD flood study.
- Regardless, to alleviate Council's concerns it was proposed that a low height flood wall or earth bund would otherwise protect the development from the potential of surface flows, if they should overtop the drainage channel and flow towards the north.
- It is anticipated that any surface flows would be contained within the road reserves and present a low risk of flooding in this case.
- In Northrop's opinion, the Flood Planning Level of 27.40m as suggested by Council is not valid for the full site, as the subject site sits beyond the flood model extents from the CBD flood study, and the more recent Flood Study that includes the site (as discussed above) does not indicate the site is impacted by the 1% AEP, or show any inundation up to and including the 0.2% AEP – 1in500 year event). Even in the PMF event, minor flooding is shown only in the North Eastern Corner.

Accordingly, our view is that the flood planning and assessment undertaken is supportable.

5.4. TRAFFIC

The Council's Assessment Report notes concerns about the number of car parking spaces proposed. This is despite the fact that the planning controls for the site are a 'maximum' **and the proposed development is fully compliant with these controls.**

While the Council's transport officer identifies concerns with the lack of on-street parking, in our view this should not be a basis to not support a development which is fully compliant.

If there are inherent issues with on-street parking, the Council should ensure that the planning controls are amended to address this issue. However, the fact that the site is located directly adjacent to Penrith Railway Station should (in our view) strongly support less, rather than more parking in the local area.

Albeit contradictory to the concerns raised about the perceived lack of car parking, the Council Assessment Report then goes on to raise concerns about traffic generation more broadly in the precinct. Separately, TNSW (Roads) state that they raise "no objection to the development proposal as it is unlikely to have a significant traffic impact on the classified road network".

Council's Traffic Engineer has identified concerns with the method for calculating traffic generation. However, the applicant's traffic consultant, have advised that the methodology is aligned with the feedback provided by the Council during the pre-lodgement discussions.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "A. Harvey".

Andrew Harvey
Director
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