



Our reference: P-771905-Y6V1
Contact: Gavin Cherry
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10 October 2024

The Secretary of the Department of Planning, Housing and Infrastructure
Locked Bag 5022,
Parramatta, NSW, 2124

ATTN: Chris Eldred
Email: Christopher.Eldred@planning.nsw.gov.au

Dear Chris Eldred,

Council's Response to Notice of Exhibition – DA24/8535 – Modification to Approved Industrial Subdivision Development (Nepean Business Park) at Nos. 14 – 98 Old Castlereagh Road, Castlereagh, NSW, 2749

I refer to notification of the above modification application lodged with the Department for assessment and determination.

Thank you for providing Penrith City Council with the opportunity to comment on the abovementioned Notice of Exhibition.

The proposal is not considered supportable due to the resulting non-compliance with key statutory provisions that require the protection and retention of the vegetation along the frontage of Old Castlereagh Road.

The key concerns that the consent authority is requested to address in the assessment of the modification application are outlined below:

1. Compliance with State Environmental Planning Policy (Precincts—Western Parkland City) 2021

A) Zone Objectives

The proposal seeks approval to remove almost all the trees and vegetation located along the frontage of the site immediately adjacent (and appear to be in part within) Old Castlereagh Road. The suggested removal has insufficient regard to the zoning of the land in this location, which is "Environment" under the provisions of the SEPP instrument. The Environment zone runs parallel to and includes Old Castlereagh Road and specifically aligns with the vegetation corridor proposed for removal.

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The objectives of the Environment Zone are as follows:-

- *To protect, manage and restore areas of high ecological, scientific, cultural or aesthetic value.*
- *To prevent development that could destroy, damage or otherwise have an adverse effect on those values.*
- *To protect, manage, restore and enhance the ecology, hydrology and scenic values of riparian corridors and waterways, wetlands, groundwater resources, biodiversity corridors, areas of remnant indigenous vegetation and dependent ecosystems.*
- *To allow for low impact passive recreational and ancillary land uses that are consistent with the retention of the natural ecological significance.*

The proposed vegetation removal is directly in conflict with the above objectives, and the rationale that informed the zoning of the land along the frontage of the site.

The Environment Zone is different to the majority of the site and this separate zoning is assumed to have been established to recognise the aesthetic, environmental and biodiversity value of the existing established vegetation corridor along the frontage. This zoning exists as a separate zone to the employment zone, to ensure its continued protection and retention.

As a result, the proposal cannot be taken to compliant with the objectives of the zone being a key consideration within the SEPP instrument.

b) Land Use Definitions and Permissibility

In addition to the above non compliance with the objectives of the Environment Zone, the applicant seeks to suggest that the works are appropriately defined as Environmental Protection Works. The definition of Environmental Protection Works is as follows:

environmental protection works means works associated with the rehabilitation of land towards its natural state or any work to protect land from environmental degradation, and includes bush regeneration works, wetland protection works, erosion protection works, dune restoration works and the like, but does not include coastal protection works.

The application primarily seeks to remove the existing established vegetation, provide new stormwater drainage infrastructure and filling works to augment developable areas of the site. As a result, the proposal cannot be considered environmental protection works, and instead constitutes vegetation removal in conflict with the objectives of the zone.

It is therefore a key consideration in the assessment of the application, as to whether the works are then otherwise permissible or appropriate where they cannot be defined as environmental protection works.

c) View Corridors, Key Vistas and Heritage Conservation

The proposal is considered to be non-compliant with Clause 5.38A of the SEPP. This clause identifies key vistas and view corridors which expressly includes and references views from Castlereagh Road to the Nepean River and the escarpment of the Blue Mountains. The clause expressly requires the protection and enhancement of the Penrith Lakes precinct which includes the subject site and roadways within it. The clause also requires minimisation of impact to key view corridors.

The existing vegetation is a contributory feature to the significant view corridor along Old Castlereagh Road. As per the SEPP, this is a key vista that must be protected. The suggestion in the application that removal and replacement is sufficient, does not address or suitably comply with the objectives and critical considerations referenced in this Clause.

It is also important to note that Old Castlereagh Road is identified as a heritage listed item being No. 261 pursuant to the Penrith Local Environmental Plan 2010. The above statutory provisions specifically requires the protection of key vistas and view corridors and that proposals must minimise visual impact to items of heritage significance. The existing trees / vegetation and their contribution to the streetscape presentation is a key component of the heritage significance of the roadway.

When the heritage inventory statement of significance is reviewed, the significance of the item is determined to be as follows:-

The alignment of Castlereagh Road has historic and symbolic associations with the early settlement and subdivision of the Castlereagh and Upper Castlereagh areas. Of considerable historic significance for the part it played in the development of the Castlereagh area and as tangible evidence of the earliest phase of European settlement. (Lavelle and Bickford). The roadside trees enhance the scenic quality of Castlereagh Road and are remnant

native trees or reflect conscious planting schemes instigated by the former Castlereagh Council or local landowners.

As the trees subject of the current application are identified as fundamental to the significance of the listed heritage item, the proposed removal is considered unsupportable as it will have a detrimental impact upon the view corridor, the heritage significance of the roadway and the broader streetscape and locality.

2. Compliance with Section 3.4 of Penrith Lakes Development Control Plan

In addition to the above SEPP non compliances, the proposal is not considered to satisfy the requirements of Objective (b) of the Section 3.4 of the DCP which exists to *“protect existing trees and vegetation and ensure that any new development accounts for existing vegetation in the design and construction of the development”*.

Revegetation works cannot compensate for the removal of the existing established vegetation considering the time it will take for landscaping to grow to dimensions equivalent to what is on site. The proposal is therefore considered to be in conflict with the above provisions of the DCP.

3. Tree Management and Arboriculture Considerations

The vegetation proposed to be removed provides important connectivity with surrounding vegetation and provides a scenic benefit when travelling along the roadway. There is insufficient evidence submitted in the application or supporting arboriculture assessment, that confirms that the trees are in poor health to the extent that they warrant removal.

The Arborist Report recommends removal of trees on the basis that they have been harshly pruned to provide power line clearance, however this is not a basis for outright removal. The Arborist Inspection Report states that a number of trees have structural defects that require trees to be removed, however the suggestion of a defect does not necessarily equate to a reduction in structural strength, nor does it indicate a shorter expected lifespan of the tree. It is also noted that, the retention of the two habitat trees is unlikely to be beneficial for any fauna harboured due to the removal of surrounding vegetation.

The consent authority is requested to review evidence submitted / presented as part of the previous Court Appeal (Case No: 2021/00204069) with specific regard to the arboriculture evidence provided. It is Council's understanding that a Supplementary Joint Arboricultural Expert Report was prepared for the

Court where the experts agreed to the majority of trees being retained and a Vegetation Management Plan implemented for the site. The suggestions now reflected within the Modification Application directly contradicts the evidence presented in the Court Appeal and the resulting agreements that informed the determination by the Land and Environment Court to approve the development.

It is therefore requested that the determination of the Court be upheld, the existing trees reinstated for retention and protection and a vegetation management plan prepared and implemented as already approved.

4. Biodiversity Development Assessment Report (BDAR)

The BDAR submitted outlines that a Vegetation Management Plan (VMP) will be prepared, however the application does not provide a VMP in support.

The author of the BDAR has determined that the vegetation is to be planted as a consequence of the proposed removal however, report has not addressed if the vegetation sought to be removed is likely to accommodate, or already accommodates, a threatened ecological community as per NSW Scientific determinations for Cumberland Plain Woodland or River-flat Eucalypt Forest. The assessment has also not considered whether the vegetation conforms to the EPBC listed corresponding communities.

As a result, the proposal is not considered to have suitably address biodiversity conservation considerations that apply to the site and the proposed amended development.

5. Owners Consent, Road Authority and Implications of the Roads Act 1993

The proposal indicates the removal of trees which as surveyed, appear to traverse the property boundary within the Council's road reserve.

The works subject of this application cannot extend to land beyond the subject site as works within the road reserve are a matter for assessment and consideration by the Roads Authority, via the provisions contained within the Roads Act 1993.

As a result, the assessment of the modification application needs to be clear in differentiating between the land to which the actual application relates, the works that can be considered as part of this assessment process, and then exclude consideration of works that are required to be pursued via separate processes and determination functions afforded by the Roads Act.

6. Compliance Concerns and Complying Development Certification

It is understood that the development approval issued the NSW Land and Environment Court requires batters to the southern and eastern boundaries of the site, to address and mitigate the visual impact resulting from the considerable fill, earthworks and resulting elevated finished ground levels. It is also understood that these batters were required to be planted.

Despite the determination by the Court, and the considerations that informed the resulting required edge conditions, it is understood a privately certified complying development certificate (CDC) has been issued that allows for additional imported fill / amended earthworks, removing these critically important batter treatments and instead provides for retaining wall interface treatment on the boundaries of the site. The resulting walls are highly visible from both neighbouring properties and the public domain.

It is not clear how such a CDC can be taken to be lawful, where it explicitly contradicts the determination of the Land and Environment Court. Given the resulting changes in levels and boundary interface conditions directly impacts visual impact, stormwater management and also vegetation retention / planting (which are also key matters raised as part of this application), the consent authority is requested to investigate the lawfulness of the privately issued CDC and pursue action as deemed necessary to enforce the Court determination, if it is determined that the CDC has not been lawfully issued and cannot be taken to override the approval of the NSW Land and Environment Court.

Should you wish to discuss this matter further, please do not hesitate to contact me on (02) 4732 8125.

Yours sincerely,



Gavin Cherry
Development Assessment Coordinator