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By email: [redacted]

Attention: [redacted]

Dear [redacted]

Urban Apartments Pty Ltd v Penrith City Council, LEC proceedings 2021/355201: Community infrastructure under clause 8.7 of the LEP

We act for Urban Apartments Pty Ltd, the Applicant in the above proceedings (**the Applicant**)

This letter relates to contentions 3-5, and 7 in the Respondent's statement of facts and contentions, filed on 18 February 2022.

Summary

- Clause 8.7(3) of the *Penrith Local Environmental Plan 2010* (**LEP**) applies if the proposed development includes community infrastructure.
- Despite what the Council's 'Community Infrastructure Policy' claims, a planning agreement and/or a cash monetary contribution is not expected (merely to access the additional height and floor space ratio permitted under clause 8.7).
- The provision of cash, for example, is not 'development'. It is very clear that the application of clause 8.7 is not tied to any provision of a monetary contribution.
- The planning law makes it plain that any alleged failure by the Applicant to offer to enter into a planning agreement (or any deficiency in an offer that has been alleged to have been made) is not a lawful basis for the refusal of a development application.
- A proposed development that includes development for the purposes of a public road and a publicly accessible recreation area will satisfy clause 8.7(3).
- The proposed development in the present case does include community infrastructure (subdivision, works for a public road and a publicly accessible recreation area). This fact alone means that:
  - clause 8.7(3) is satisfied;
  - the maximum height limit is set aside;
  - the maximum floor space ratio is 6:1; and
  - the consent authority is obliged to consider the merit of matters set out in clause 8.7(5) of the LEP in deciding whether to grant development consent.

- Once the minimum legal pre-requisites for the provision of community infrastructure are satisfied, the Applicant is not entitled to a development consent 'as of right'. There is still a merit assessment to be made. Under clause 8.7(5) this requires consideration of:

  - the objectives of the clause (that is, to allow higher density development on certain land in the city centre where the development includes community infrastructure; to ensure that the greater densities reflect the desired character of the localities in which they are allowed; and to ensure that the greater densities minimise adverse impacts on those localities);

  - whether the development exhibits design excellence; and

  - the **nature and value** of the community infrastructure to the city centre.

- The building height maximum and the regular floor space ratio maximum is not in force in relation to this development application. This is because the normal maximums are automatically set aside once the threshold point under clause 8.7(3) is satisfied. It means that the merit evaluation occurs in the context that:

  - there is no height limit; and

  - the maximum floor space ratio is 6:1.

- Whether the nature and value of the community infrastructure that is included in the development is acceptable is a merit decision. A reasonable thing for the consent authority to consider is what the needs are for community infrastructure at the location of the site and whether the development adequately addresses those needs.

- A consent authority cannot have unreasonable expectations. Any expectation for the delivery of community infrastructure must be tempered by the terms of clause 8.7(3). This means any desired community infrastructure should be limited to community infrastructure that is capable of being part of the development proposal.

- The Penrith Development Control Plan 2014 (**DCP**) provides guidance on that nature of community infrastructure that has value to the city centre.

- The DCP seeks a pedestrian lane of minimum width of six metres on the western side of the site. This community infrastructure is included in the development application.

- The DCP seeks (of the neighbouring site) a new public street providing direct connections between High Street and Union Road. That neighbouring site is already the subject of a development consent (DA 18/0264, granted 21 October 2019). The Council has approved the new east-west link to be entirely located within that neighbouring site.

- The Council (by means of the Sydney Western City Planning Panel) has already applied clause 8.7 and granted development consent to Lot 300. To the extent that the replacement of the roundabout and the signalisation of the intersection was an expectation, this was a matter for consideration in the course of the assessment of DA 18/0264. The issue was resolved on the determination of that application.

- The Community Infrastructure Policy is, by its clear terms, contrary to clause 6.7 of the LEP.

- The Community Infrastructure Policy is also contrary to section 7.7 of the EP&A Act.

- Since the Community Infrastructure Policy was published the Department of Planning, Industry and Environment (the Department) has published the Planning agreement: Practice note — February 2021. The Community Infrastructure Policy is contrary to the practice note.

- The Community Infrastructure Policy should have no bearing in the evaluation of the subject development application or any proposed planning agreement.

Detail

1. Clause 8.7 of the LEP

1.1 The land that is the site of the development application (**the site**) is identified as a 'key site' number 10 on the 'Key Sites Map – Sheet KYS_006' under LEP. An extract from the map appears below:

1.2 Clause 8.7 of the LEP relevantly says:

Community infrastructure on certain key sites

(1) The objectives of this clause are—

(a) to allow higher density development on certain land in the City Centre where the development includes community infrastructure, and

(b) to ensure that the greater densities reflect the desired character of the localities in which they are allowed and minimise adverse impacts on those localities.

(2) This clause applies to land identified as a key site on the Key Sites Map.

(3) Despite clauses 4.3, 4.4 and 8.4(5), the consent authority may consent to development on land to which this clause applies (including the erection of a new building or external alteration to an existing building) that exceeds the maximum height shown for the land on the Height of Buildings Map or the floor space ratio for the land shown on the Floor Space Ratio Map, or both, if the proposed development includes community infrastructure.

(4) The consent authority must not consent to the erection of a building on land to which this clause applies if the floor space ratio for the building exceeds the following floor space ratio— ....

(b) in relation to development on land identified as "Key Site 3" or "Key Site 10"— 6:1 ...

(5) In deciding whether to grant development consent under this clause, the consent authority must have regard to the following—

(a) the objectives of this clause,

(b) whether the development exhibits design excellence,

(c) the nature and value of the community infrastructure to the City Centre.

(6) In this clause, ***community infrastructure*** means development for the purposes of

recreation areas, recreation facilities (indoor), recreation facilities (outdoor), recreation facilities (major), public car parks or public roads

1.3 Some key elements of the clause are as follows:

(a) The trigger for the application of the clause is that:

(i) the land the subject of a development application is an identified key site (clause 8.7(2)); and

(ii) the proposed development **includes** community infrastructure (as per clause 8.7(3) of the LEP).

(b) When it applies the clause:

(i) sets aside the maximum building height of 24 metres that would otherwise apply to the site under clause 4.3 'Height of buildings' under the LEP —meaning that there is no maximum building height; and

(ii) sets aside the maximum floor space ratio of 3:1 that would otherwise apply to the site under clause 4.4 'Floor space ratio' under the LEP — replacing it with a maximum floor space ratio of 6:1; and

(iii) sets aside the 10 per cent additional maximum height or floor space ratio that might otherwise be available under clause 8.4 'Design excellence'.

1.4 So, clause 8.7(3) says that the clause applies if:

> the proposed development includes community infrastructure

1.5 The key words are 'development' and 'community infrastructure'. The proposed development must **include** community infrastructure.

1.6 Unsurprisingly, given that it must be included as **part of** a proposed development, the definition of 'community infrastructure' makes it clear that it is, in fact, also 'development'. Clause 8.7(6) defines 'community infrastructure'. It is:

> **Development** for the purposes of **recreation areas**, recreation facilities (indoor), recreation facilities (outdoor), recreation facilities (major), public car parks or **public roads** (bold added).

1.7 Under section 1.5(1) of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**) 'development' (appearing in both clause 8.7(3) and 8.7(6) above) is defined as:

> any of the following—
>
> (a) the use of land
>
> (b) the subdivision of land
>
> (c) the use of land,
>
> (d) the subdivision of land,
>
> (e) the erection of a building,
>
> (f) the carrying out of a work,
>
> (g) the demolition of a building or work,
>
> (f) any other act, matter or thing that may be controlled by an environmental planning instrument.

1.8 Words that occur in an instrument made under an Act (such as the LEP) have the same meaning as they have in the instrument under which they are made (the EP&A Act, in the

case of the LEP): section 3 of the *Interpretation Act 1987*.

1.9 In our view, the provision of cash is not 'development'. The provision of cash is plainly not anything that could fall into (a)-(e).

1.10 The provision of cash also cannot come under (f). This is because an environmental planning instrument is unable to regulate monetary contributions. It is well-established that the only source of power authorising the imposition of a condition on a development consent requiring the payment of a monetary contribution is to be found in section 7.11 of the EP&A Act (*Maitland City Council v Ananbah Homes Pty Ltd* [2005] NSWCA 455 at [132]). An environmental planning instrument has no role to play under section 7.11. (A contributions plan is not an environmental planning instrument as it is not made under Part 3 of the EP&A Act: section 1.4(1) of the EP&A Act.)

1.11 Therefore, it is very clear that the application of clause 8.7 is **not** tied to any provision of a monetary contribution.

1.12 Consistent with the above, the Land and Environment Court considered a clause that was very similar to clause 8.7. It said that the consent authority does not have the power to impose a condition requiring the payment of money by reason of a bonus clause that is linked to a development's provision of community infrastructure (*L & G Management Pty Ltd v Council of the City of Sydney* [2021] NSWLEC 1084 at [137]).

1.13 In an appeal of that case, the Court also affirmed that a proposal to **require** the dedication of land or the payment of money by **condition** was unlawful (outside of a condition authorised by a contributions plan or a planning agreement): *L & G Management Pty Ltd v Council of the City of Sydney* [2021] NSWLEC 149 [29], [37]-[38], [40], [69]. (The Applicant does not propose that any condition be imposed on the development consent **requiring** the dedication of any land.)

1.14 The relevant triggers as to whether the proposed development itself **includes** development that is for the purposes of any of the following:

(a) **recreation areas**;

(b) recreation facilities (indoor);

(c) recreation facilities (outdoor);

(d) recreation facilities (major);

(e) public car parks; or

(f) **public roads.**

1.15 In short:

(a) Clause 8.7(3) only operates when the proposed development itself includes some development that is 'community infrastructure'.

(b) Despite what the Council's *Community Infrastructure Policy* claims, a planning agreement and/or a cash monetary contribution is not expected in order to access the additional height and floor space ratio permitted under clause 8.7.

(c) What is expected by the LEP is a development proposal that, in itself, provides for community infrastructure.

2. The development application — the proposed road

The dedication of the proposed road is a form of development

2.1 The development application is an application for subdivision (as well as an application for the erection of a building). The application includes a proposal to dedicate land for a

road reserve. This proposal is set out in drawing DA416, titled 'Draft plan of subdivision of Lot 10 DP1162271' (Revision B).

2.2 The category of 'development' under the EP&A Act that is 'subdivision of land' is distinct from the other categories — in that it concerns an activity that comprises the creation and the registration of documents. A proposal to dedicate land that is effected directly by the subdivision itself is 'development'. We will explain.

2.3 Section 1.4(1) of the EP&A Act relevantly says:

> In this Act, except in so far as the context or subject-matter otherwise indicates or requires-…
>
> ***subdivision of land***-see Part 6

2.4 Within part 6 of the EP&A Act sits section 6.2. It says:

2.5 Meaning of "subdivision" of land (cf previous s 4B)

> (1) For the purposes of this Act, ***subdivision*** of land means the division of land into 2 or more parts that, after the division, would be obviously adapted for separate occupation, use or disposition. The division may (but need not) be effected—
>
> (a) by conveyance, transfer or partition, or
>
> (b) by any agreement, dealing, plan or instrument rendering different parts of the land available for separate occupation, use or disposition.
>
> (2) Without limiting subsection (1), ***subdivision*** of land includes the procuring of the registration in the office of the Registrar-General of—
>
> (a) a plan of subdivision within the meaning of section 195 of the *Conveyancing Act 1919*, or
>
> (b) a strata plan or a strata plan of subdivision within the meaning of the *Strata Schemes Development Act 2015*.
>
> **Note—**
>
> The definition of ***plan of subdivision*** in section 195 of the *Conveyancing Act 1919* extends to plans of subdivision for lease purposes (within the meaning of section 23H of that Act) and to various kinds of plan under the *Community Land Development Act 2021*.
>
> (3) However, ***subdivision*** of land does not include—
>
> (a) a lease (of any duration) of a building or part of a building, or
>
> (b) the opening of a public road, or the dedication of land as a public road, by the Crown, a statutory body representing the Crown or a council, or
>
> (c) the acquisition of land, by agreement or compulsory process, under a provision of an Act (including a Commonwealth Act) that authorises the acquisition of land by compulsory process, or
>
> (d) a division of land effected by means of a transaction referred to in section 23G of the *Conveyancing Act 1919*, or
>
> (e) the procuring of the registration in the office of the Registrar-General of—
>
> (i) a plan of consolidation, a plan of identification or a miscellaneous plan within the meaning of section 195 of the *Conveyancing Act 1919*, or
>
> (ii) a strata plan of consolidation or a building alteration plan within the meaning of the *Strata Schemes Development Act 2015*.

2.6 **Firstly**, the proposed modified development is, in part, for the division of the public laneway land on the western part of the site from the balance of the land on the site. This

brings the proposal under the first part of the chapeau of section 6.2(1).

2.7 The land, after division, would obviously be adapted for separate occupation, use and disposition (when compared with adjacent land). This brings the proposal under the second part of the chapeau of section 6.2(1).

2.8 **Secondly**, the division is to be effected by an 'instrument' rendering different parts of the land available for separate occupation, use and/or disposition.

2.9 The instrument is the plan of subdivision, which, by virtue of its registration effects a change in the ownership of the subject land. We will explain why this is the case.

2.10 Section 9 of the *Roads Act 1993* (**the Roads Act**) says:

> **9 Public road created by registration of plan**
>
> (1) A person may open a public road by causing a plan of subdivision or other plan that bears a statement of intention to dedicate specified land as a public road (including a temporary public road) to be registered in the office of the Registrar-General.
>
> (2) On registration of the plan, the land is dedicated as a public road.

2.11 Section 9 of the Roads Act explicitly allows a private citizen ('a person') to open a public road by registration of a plan identifying the road and bearing a statement of intention that the road be dedicated as a public road.

2.12 Section 9 of the Roads Act is complemented by section 145 of the Roads Act:

> **145 Roads authorities own public roads**
>
> (1) All freeways are vested in fee simple in TfNSW.
>
> (2) All Crown roads are vested in fee simple in the Crown as Crown land.
>
> (3) **All public roads within a local government area (other than freeways and Crown roads) are vested in fee simple in the appropriate roads authority.**
>
> (4) All public roads outside a local government area (other than freeways and Crown roads) are vested in fee simple in the Crown as Crown land (bold added).

2.13 Section 7(4) of the Roads Act says:

> (4) **The council of a local government area is the roads authority for all public roads within the area, other than—**
>
> (a) any freeway or Crown road, and
>
> (b) any public road for which some other public authority is declared by the regulations to be the roads authority (bold added).

2.14 There could not be a clearer example of an instrument that renders the two relevant parts of the land available for separate occupation, use and/or disposition. This brings the proposal within section 6.2(1)(b).

2.15 **Thirdly**, section 6.2(2) expressly extends the definition to include the procuring of the registration of a plan of subdivision as an act of the 'subdivision of land'.

2.16 That is, a person who is procuring (bringing about) the registration of a plan of subdivision is carrying out development. This explicit inclusion means that:

(a) the acts of:

(i) marking a plan of subdivision with the words 'public reserve'; and

(ii) expressing an intention to dedicate land as a public road (in a plan of

subdivision and its associated deposited plan administration sheet); and

(b) taking formal steps to obtain the registration of that plan (such as apply for a subdivision certificate, lodging the plan of subdivision with land Registry Services, etc).

constitute the carrying out of development.

2.17 The result of the completion of that development is, in itself, the registration of the plan of subdivision (which automatically means a change in the ownership of the road).

2.18 Finally, section 6.2(3) includes various exclusions. None of the exclusions exclude what is proposed. However, one particular exclusion would not be necessary if the proposed dedication of the road land were not within the class captured by section 6.2(1)-(2). Namely, section 6.2(3)(b):

> the opening of a public road, or the dedication of land as a public road, **by the Crown, a statutory body representing the Crown or a council** (bold added)

2.19 This text plainly says that the dedication of land as a public road by the Crown, a statutory body representing the Crown or a council is not 'subdivision of land'. This text would be superfluous if the dedication of land as a public road was not (otherwise) 'subdivision of land'. The exclusion therefore supports a construction of section 6.2(1) that the dedication of land as a public road is (otherwise) 'subdivision of land'. That is, that the dedication of land as a public road by the Applicant (not being the Crown, a statutory body representing the Crown or a council) is a 'subdivision of land' and therefore 'development'.

2.20 In short, the dedication of land as a public road by a private citizen via the registration of a plan of subdivision (as is proposed in the application) is 'development'.

2.21 The conditions of the development consent that relate to the plan of subdivision are not themselves the source of power for property owners to:

(a) subdivide their land;

(b) have the subdivision registered with Land Registry Services; and

in doing so take advantage of statutory provisions that allow land to be gifted as a consequence of the chosen form of a subdivision.

2.22 That right exists under the common law, the *Real Property Act 1900* and the Conveyancing Act.

2.23 Instead, the role of conditions are to regulate how the 'development' (that is, in this case, the subdivision of land) is to be carried out. The source of power for this regulation come from various provisions of the EP&A Act.

2.24 For example:

(a) Section 4.17(1)(g) allows a condition that modifies the details of the proposed subdivision.

(b) Section 4.17(1)(a) allows a condition that relates to any matter arising from the likely impacts of the proposed subdivision, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

2.25 It is in this context that the decision in *Conquest Constructions (NSW) Pty Ltd v Sutherland Shire Council* [2011] NSWLEC 52 is relevant.

2.26 In *Conquest* the subject development consent approved a mixed commercial/residential development, with associated demolition and strata subdivision (at [6]).

2.27 The local council had imposed a condition of development consent in the following terms:

> **Dedication of Laneway**
>
> Prior to the issue of any Occupation Certificate or Subdivision Certificate the "9 metre wide dedication to Council" detailed on approved drawing No 2 Issue B adjacent to the southern boundary of the properties shall be dedicated to Council as a Road Reserve.
>
> (at [11]).

2.28 The local council contended (at [12]):

> That even that even without condition 71 the DC would oblige the applicant to construct and dedicate the public lane, as the DA specifically proposed it, and showed it on submitted plans.

2.29 Sheahan J said:

> [139] Under the general law (Lloyd v Robinson, Temwood) an approving authority can impose a condition requiring dedication of land for public purposes. In NSW that situation is tempered by legislation — ss 26 and 27 of the EPA Act, and the provisions of the JTC Act — **but the dedication required in this case is not mandated by a condition of consent.**
>
> [140] The applicant was persuaded **to propose it**, the DA and plans reflected it, and the DC accepted the proposal. **Condition 1 incorporates the proposing documents into the consent. Condition 71 requires the dedication process to be completed by a certain stage of the project. The other contested conditions deal with practical implementation of the dedication** (bold added).

2.30 To the extent that any conditions are imposed that relate to the plan of subdivision they should do no more than conditions 1 and 72 in *Conquest Constructions (NSW) Pty Ltd.* To the extent that *L & G Management Pty Ltd v Council of the City of Sydney* [2021] NSWLEC 149 appears to say something different (at [49]-[43]) we note that those comments are obiter (non-binding). This is because, on the facts of that matter, the Applicant had actually proposed a condition that **required** the dedication of the public road (at [69]). In any event, the above case law and statutory provisions were apparently not drawn to the attention of the Court (or considered by the Court).

2.31 A condition can be imposed on the development consent preventing the issue of an occupation certificate for the building unless the approved plan of subdivision has been registered.

The public domain works on the proposed road is a form of development

2.32 Furthermore, the proposed public domain works on the existing and intended public road reserve (as shown in public domain drawing C201) are also development ('the carrying out of a work') for the purposes of a public road. There is no requirement for a public road to necessarily provide for vehicular access. A public road may (and many do) merely provide for pedestrian traffic.

The proposed recreation area is a form of development

2.33 A 'recreation area' is defined under the LEP to mean:

> a place used for outdoor recreation that is normally open to the public, and includes—
>
> (a) a children's playground, or
>
> (b) an area used for community sporting activities, or
>
> (c) a public park, reserve or **garden** or the like (bold added)...

2.34 The amended development application includes — in drawings DA201 and DA416 — a proposed recreation area which would be open to the public (under an easement in gross benefiting the Council). The recreation area would be a 'garden'. There is no need for any 'recreation area' to be in public ownership, so long as it is normally open to the public.

The dedication of the road, the roadworks and the recreation area are community infrastructure

2.35 All three forms of development are 'community infrastructure' under clause 8.7. This means that:

(a) clause 8.7(3) is satisfied;

(b) the maximum height limit is set aside;

(c) the maximum floor space ratio is 6:1; and

(d) the consent authority is obliged to consider the matters set out in clause 8.7(5) — as explained in paragraph 4 above — in deciding whether to grant development consent.

3. Entry into a planning agreement

3.1 Section 7.7 of the EP&A Act relevantly says:

> 7.7 Circumstances in which planning agreements can or cannot be required to be made …
>
> (2) A consent authority cannot refuse to grant development consent on the ground that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.
>
> …
>
> (4) In this section, *planning agreement* includes any agreement (however described) containing provisions similar to those that are contained in an agreement referred to in section 7.4 (some bold added).

3.2 This plainly means that any alleged failure by the Applicant to offer to enter into a planning agreement is not a lawful basis for the refusal of a development application.

4. The nature and value of the community infrastructure to the city centre

4.1 The building height maximum and the regular floor space ratio maximum is not in force in relation to this development application. This is because the normal maximums are automatically set aside once the threshold point under clause 8.7(3) is satisfied. It means that the merit evaluation occurs in the context that:

(a) there is no height limit; and

(b) the maximum floor space ratio is 6:1.

4.2 However, once the minimum legal pre-requisites for the provision of community infrastructure are satisfied, the Applicant is not entitled to a development consent 'as of right'. There is still a merit evaluation to be made. Under clause 8.7(5) this requires consideration of:

(a) the objectives of the clause, that is:

(i) to allow higher density development on certain land in the city centre where the development includes community infrastructure;

(ii) to ensure that the greater densities reflect the desired character of the localities in which they are allowed; and

(iii) to ensure that the greater densities minimise adverse impacts on those localities);

(b) whether the development exhibits design excellence; and

(c) the nature and value of the community infrastructure to the city centre.

4.3 In terms of the last point, whether the nature and value of the community infrastructure that it is included in the development is acceptable is a merit decision.

4.4 A reasonable thing for the consent authority to consider is what the needs are for community infrastructure at the location of the site and whether the development adequately addresses those needs.

4.5 However, a consent authority cannot have unreasonable expectations. Any expectation for the delivery of community infrastructure must be tempered by the terms of clause 8.7(3). This means any desired community infrastructure should be limited to community infrastructure that is capable of being part of the development proposal.

4.6 For example, it would be unreasonable to refuse a development application because community infrastructure that could only be provided on neighbouring private land (owned by an unrelated developer) was not included in the development proposal.

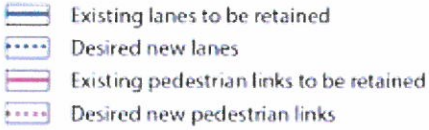
4.7 The *Penrith Development Control Plan 2014* (**the DCP**) provides guidance on that nature of community infrastructure that has value to the city centre.

4.8 Control C(1) of section 11.3.1 ('Permeability') of the DCP says:

> Through site links are to be provided as shown in Figure E11.18.

4.9 An extract from figure E11.18 of the DCP, focusing on the site appears below:

4.10 The western edge of the site is marked with a dashed blue line. The legend is as follows:



4.11 The dashed blue line identifies a 'desired new lane'.

4.12 Control C(8) sets out standards for 'Lanes'. This control says:

Lanes are to be designated pedestrian routes that are:

(a) accessible paths of travel, with a minimum width of 6m for its full length clear of all obstructions;

(b) designed, paved and lit in accordance with the lighting provisions of this Plan and any technical documents applying to the city centre. The Penrith City Centre Public Domain Masterplan should be referred to for further design details.

(c) appropriately signposted indicating the street(s) to which the lane connects (bold added).

4.13 It is plain that what is sought on the western side of the site is a pedestrian lane of minimum width of six metres. This is what is shown in the (amended) drawing DA201 and public domain drawing C201.

4.14 Section 11.7.1(A) says:

Due to their size and/or strategic importance in the City Centre, specific design principles and development outcomes have been identified for the sites identified in Figure E11.25. Redevelopment of these sites should implement design principles and outcomes expressed in the clauses and diagrams that follow.

4.15 The site is in an area where precinct controls apply. It is located within 'precinct 1'. Section 11.71.1(2) sets out the following design principle:

Relocate redundant public street to provide north-south connectivity and active 'eat street' adjoining the Civic and Cultural Precinct.

4.16 Section 11.71.1(1) envisages the following outcomes:

Streets and pedestrian connections:

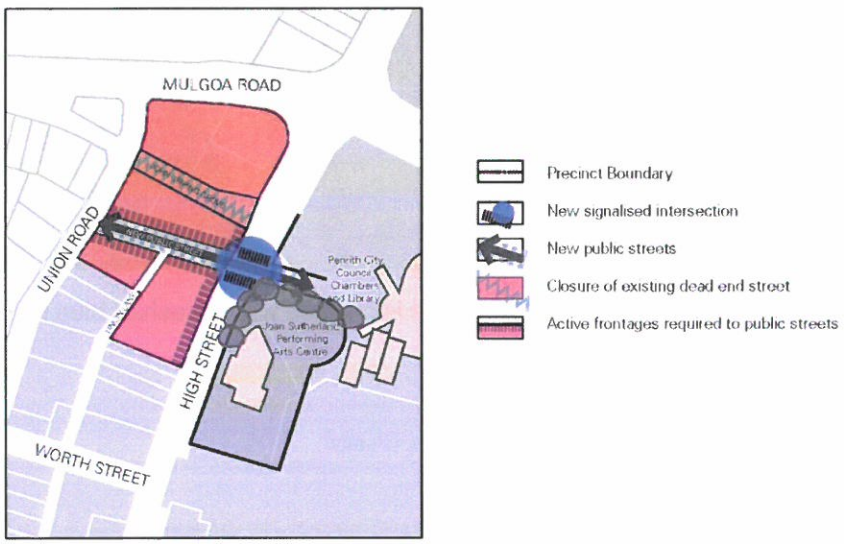
a) Closure John Tipping Grove between High Street and Union Road.

b) A new public street providing direct connections between High Street and Union Road.

c) Replace existing roundabout on High Street with a signalised intersection at junction of High Street and the new street.

d) Potential extension of Union Lane to the west to provide access and additional street frontage.

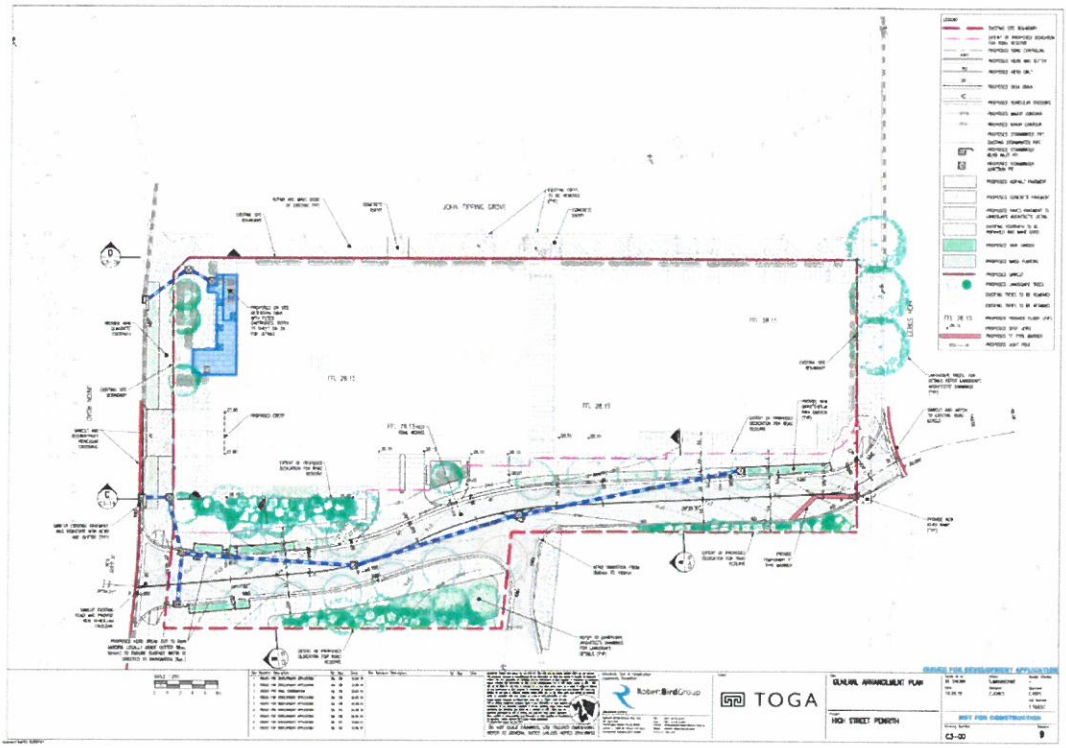
4.17 Figure 11.26 illustrates what is meant by this:



4.18 It can be observed that the redundant public street that must be relocated is not within the subject site. Instead, it is located in a neighbouring site, Lot 300 DP 1243401 (**Lot**

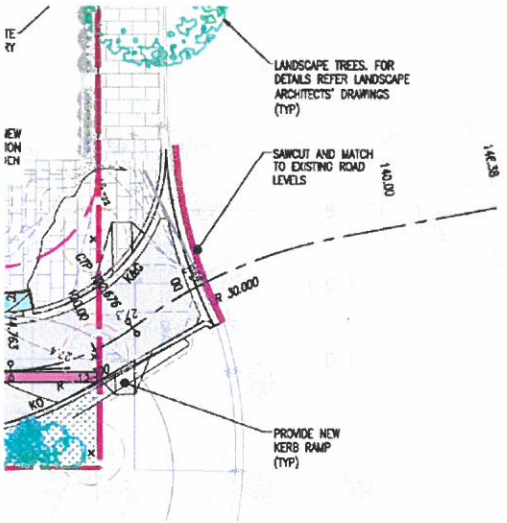
300) that is already the subject of a development consent (DA 18/0264, granted 21 October 2019).

4.19 Condition 77 of that consent approves the following engineering drawing (C3-00):



4.20 It can be seen that the Council has approved the new east-west and north-west vehicular links to be entirely located within Lot 300. There can be no suggestion that this new road needs to be created within the subject site, given this existing development consent. When the Sydney Western City Planning Panel made the decision to grant development consent, it did so on the basis that the public road met the community infrastructure requirements of clause 8.7 of the LEP (a copy of the panel's reasons are **enclosed** to this letter).

4.21 The 'signalised intersection at junction of High Street and the new street' is to replace an existing roundabout. The location of the existing roundabout is shown on the same drawing above. An extract of the relevant part of the drawing appears below:



4.22 It can be seen that the development consent granted by the Council has approved the

construction of a new north-south road to directly connect to this intersection, independent of the development of subject site.

4.23 In this context, it cannot be expected that the development of the subject site should be reasonably be expected to provide for the signalisation of intersection. The Council (by means of the Sydney Western City Planning Panel) has already applied clause 8.7 and granted development consent to Lot 300. To the extent that the replacement of the roundabout and the signalisation of the intersection was an expectation, this was a matter for consideration in the course of the assessment of DA 18/0264. The issue was resolved on the determination of that application.

5. Community Infrastructure Policy

5.1 The Council has adopted a *Community Infrastructure Policy* (30 April 2018).

5.2 The policy purports to establish a 'Community Infrastructure Contribution Rate'. According to the policy (on page 1), this rate:

> seeks a reasonable **share** of the **increase** in the residual **land value** arising from the additional floor area only (bold added).

5.3 The policy purports (on page 1) to apply to:

> development where clause 8.7 *Community Infrastructure* on certain key sites of Penrith Local Environmental Plan 2010 applies

5.4 The policy says (in section 1.1):

> The policy provides a means of valuing the additional floor area and requiring a contribution toward City Centre improvements, ensuring that the benefits of additional development are shared with the broader community.

5.5 The policy also says (in section 1.1):

> In order to access the additional floor area and make arrangements for the provision of Community Infrastructure, a developer will be required to enter into a Planning Agreement, which is the legal mechanism under the Environmental Planning and Assessment Act that enables this arrangement.

5.6 The policy says (in section 2.4):

> The Community Infrastructure Contribution Rate is $150/sqm of additional Gross Floor Area.

5.7 The policy is, by its clear terms, contrary to clause 6.7 of the LEP (see paragraph 1.10 above).

5.8 The policy is also contrary to section 7.7 of the EP&A Act (see paragraphs 3.1-3.2 above).

5.9 Additionally, since the policy was published the Department of Planning, Industry and Environment (**the Department**) has published a document titled *Planning agreement: Practice note — February 2021* (**the practice note**).

5.10 The practice note relevantly says (in section 2.1, page 4) the following:

> Planning authorities and developers that are parties to planning agreements should adhere to the following fundamental principles.
>
> - Planning authorities should always consider a development proposal on its merits, not on the basis of a planning agreement. …
> - Planning agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls. …
> - Value capture should not be the primary purpose of a planning agreement.

5.11 Section 2.2 of the practice note is titled 'Public interest **and probity considerations** (bold added)'.

5.12 Under this heading, the practice note says (on page 5):

> [B]est practice principles, policies and procedures should be implemented as safeguards to protect the public interest and the integrity of the planning process.

5.13 It also says (on page 5):

> If probity and public interest are not considered, planning agreements may produce undesirable outcomes, including where:
>
> - A planning authority seeks inappropriate benefits through a planning agreement because of opportunism or to overcome revenue-raising or spending limitations that exist elsewhere. …

5.14 Section 2.3 of the practice note is titled 'Value capture'.

5.15 Under this heading, the practice note says (on pages 5-6):

> The term value capture is widely used and covers several different practices. This practice note does not attempt to define or discuss them all. In general, **the use of planning agreements for the primary purpose of value capture is not supported as it leads to the perception that planning decisions can be bought and sold and that planning authorities may leverage their bargaining position based on their statutory powers**.
>
> **Planning agreements should not be used explicitly for value capture** in connection with the making of planning decisions. For example, **they should not be used to capture land value uplift resulting from rezoning or variations to planning controls**. Such agreements often express value capture as a monetary **contribution per square metre of increased floor area** or as a percentage of the increased value of the land. Usually the planning agreement would only commence operation as a result of the rezoning proposal or increased development potential being applied (bold added).

5.16 The relationship between the practice note and the policies of local councils is clearly explained (in section 2.6 on page 7):

> Policies and procedures prepared by planning authorities should incorporate the contents of this practice note …

5.17 The practice note is given formal legal status under the *Environmental Planning and Assessment Regulation 2021*(**the EP&A Regulation**).

5.18 Clause 203(7) of the EP&A Regulation says:

> A council that is negotiating or entering into a planning agreement **must** consider any relevant practice notes (bold added).

5.19 This is the only mandatory consideration that governs the discretion of planning authorities when negotiating planning agreements. This means that the practice note must be the 'focal point' or 'fundamental element' of the exercise of the Council's discretion. The practice note must be placed at the forefront of the decision-maker's consideration (cf *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105 at [217] and [231]).

5.20 Accordingly, the *Community Infrastructure Policy* should have no bearing in the evaluation of the subject development application or any proposed planning agreement

Please do not hesitate to contact Julide Ayas on (02) 8035 7918 or Aaron Gadiel on (02) 8035 7858 if you have any queries regarding this letter.

Yours sincerely

[redacted]

Aaron Gadiel
Partner
Accredited Specialist —Planning and Environment Law

[redacted]

Julide Ayas
Senior Associate

NSW GOVERNMENT Planning Panels

DETERMINATION AND STATEMENT OF REASONS

SYDNEY WESTERN CITY PLANNING PANEL

DATE OF DETERMINATION	Monday, 21 October 2019
PANEL MEMBERS	Justin Doyle (Chair), Bruce McDonald, Glenn McCarthy and Ross Fowler
APOLOGIES	Nicole Gurran
DECLARATIONS OF INTEREST	None

Public meeting held at Penrith Council, Passadena Room, 601 High Street, Penrith on 18 October 2019, opened at 3:00pm and closed at 3:10pm.

MATTER DETERMINED

2018SWT005 – Penrith – DA18/0264 at 87-93 Union Road, PENRITH NSW 2750 – Residential Apartments including Ground Level Retail Premises (as described in Schedule 1)

PANEL CONSIDERATION AND DECISION

The panel determined to approve the development application pursuant to section 4.16 of the *Environmental Planning and Assessment Act 1979*.

The decision was unanimous and was made for the reasons set out below.

This is the third public meeting convened by the Panel to consider this development application, the other two meetings being convened on 18 March 2019 and 6 May 2019. Specific matters raised in the written submissions from the public were given attention at the 18 March 2019 meeting.

The two deferrals of the Panel's determination related primarily to the particular height controls applying to this site under Penrith LEP 2010 which identifies land including the DA site to be Key Site 11. Specific height and FSR controls apply to that land as discussed below.

The panel considered the matters discussed at those meetings, the matters listed at item 6, the material listed at item 7 and the material presented at meetings and briefings and the matters observed at site inspections listed at item 8 in Schedule 1.

Height and FSR development standards

A key issues of assessment of the proposed development is height and FSR given the exceptional provisions applying to the land in that regard under clauses 8.4 and 8.7 of Penrith LEP with the site forming part of a Key Site.

Clause 4.3 imposes a height limit (with reference to the Height of Buildings Map forming part of the LEP) of 24 metres.

The proposed maximum height of the development is described in the assessment report as measuring 52.8 metres set by the height of the Building 2 element, with the Building 1 element measuring 43.25 m.

The DA proposes a building that is more than double the mapped height, which clause 4.3 would prohibit unless some other provision allows departure from its terms.

Clause 4.6 offers one means by which the clause 4.3 height standard can be 'contravened', but only if the Panel is satisfied (among other things) that "*the proposed development will be in the public interest because*

it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out".

The Applicant has made a written request under clause 4.6 that the height control be varied on various grounds including that "*... the objectives of the height control ... would be thwarted if not varied*".

Objectives of the clause 4.3 height control include "*to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes*". While the proposed building has been assessed by the Government Architect - Design Excellence Competition Jury to be of design excellence, its height will nonetheless disrupt some views, and increase its visual impact. The contravention of the mapped height of the building under clause 4.3 would be a substantial one. The Panel was not persuaded to allow the substantial contravention of the clause 4.3 height control on the basis of the clause 4.6 variation.

Because the land the subject of this DA is identified in the Key Sites Map, Clause 8.4(5) offers another means by which the height development standard nominated by clause 4.3 may be exceeded. It reads:

> (5) Development consent may not be granted for the erection or alteration of **a building to which this clause applies that has** a floor space ratio of up to 10% greater than that allowed by clause 4.4 or **a height of up to 10% greater than that allowed by clause 4.3**, unless—
> (a) the design of the building or alteration is the result of an architectural design competition, and
> (b) **the concurrence of the Director-General has been obtained to the development application.**

The DA proposal exceeds the clause 4.3 height control by more than 100% - far greater than the 10% allowed by clause 8.4(5). It is therefore of no assistance to this DA.

Clause 8.7 offers a third means by which the height development standard may be exceeded, where (as is the case here) the DA relates to land identified as a key site on the Key Sites Map.

Clause 8.7(3) therefore permits the Panel to approve a new building on the land even where clauses 4.3 and 8.4(5) might indicate that it should be refused, but only where the development includes community infrastructure. It reads:

> "8.7(3) Despite clauses 4.3, 4.4 and 8.4 (5), the consent authority may consent to development on land to which this clause applies (including the erection of a new building or external alteration to an existing building) that exceeds the maximum height shown for the land on the Height of Buildings Map or the floor space ratio for the land shown on the Floor Space Ratio Map, or both, **if the proposed development includes community infrastructure.**"

"Public roads" are expressly included as one type of "community infrastructure" in the definition recorded at clause 8.7(6). The development proposed by this DA includes a new public road, and therefore the Panel as the consent authority can approve it "despite" the height control in clause 4.3, but only if:

(a) The development does not exceed the maximum FSR of 5:1 which clause 8.7(4) imposes for Key Site 11; and

(b) (As required by clause 8.7(5) the Panel has regard to:

  (i) the objectives of clause 8.7,

  (ii) whether the development exhibits design excellence,

  (iii) the nature and value of the community infrastructure to the City Centre.

The FSR of the proposed building has been assessed by Council staff to be significantly less than maximum 5:1 set by clause 8.7(4), even if the land used in the FSR assessment is limited to the portion of the site upon which the buildings are built to the west of the new road proposed for dedication.

The objectives of clause 8.7 are expressly identified by clause 8.7(1) to be:

(a) to allow higher density development on certain land in the City Centre where the development includes community infrastructure, and

(b) to ensure that the greater densities reflect the desired character of the localities in which they are allowed and minimise adverse impacts on those localities.

As the development proposed in the DA includes community infrastructure (as already discussed) it would fulfil objective 8.7(1)(a).

The LEP does not identify a 'desired character for the locality of the site', but Penrith DCP 2014 places the site in the City West (Mixed Use) precinct. The proposed development will reflect the character identified as desirable for that precinct including assisting development of the area "primarily as a high density residential precinct that will complement and bring additional activity to the adjoining civic and cultural precinct". The embellishment of the public road proposed as part of the community infrastructure will assist in improving connections to the adjoining civic and cultural precinct. Good design and modifications made during the assessment process will minimise impacts on the locality.

The proposed building has been assessed by the NSW Government Architect's office to exhibit design excellence. The Panel accepts that the sophisticated design of the proposal responds sufficiently well to its context to warrant that assessment having regard to the matters listed at 8.4(2).

The review of the nature and value of the community infrastructure by the Council assessment staff advises that the value of the proposed community infrastructure will satisfy its Community Infrastructure Policy. Material was presented during the Panel briefing to the effect that the new road and embellishment work wold deliver a value to the community assessed at worth more than $1.5 million in excess of the contributions required under the Section 7.11 contributions plan.

Taking all of those matters into account, the Panel was satisfied that the matters identified at clause 8.7(5) were sufficiently addressed to justify the proposed height.

In coming to that conclusion, the Panel notes assertions made by the Applicant that clause 8.7 does not apply to the development based on the fact that the LEP did not contain clause 8.7 when the DA was lodged. It was argued that the effect of the savings provision at clause 1.8A is that the Panel must apply the LEP as it stood when the DA was lodged.

The Panel does not agree with that advice. The words used in the savings provision are:

> **1.8A Savings provision relating to development applications**
> If a development application has been made ***before the commencement of this Plan*** in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

"This Plan" is a reference to Penrith LEP 2010 which commenced long before this DA was lodged. Taking into account the reasoning of the Court of Appeal in *Wingecarribee Shire Council v De Angelis* [2016] NSWCA 189, the language of Clause 1.8A gives no encouragement to a reading which requires the consent authority to apply the particular amendment of the LEP which preceded lodgement of the DA. The present amendment of the LEP is to be applied.

Other s.4.15 considerations

1. The proposed development will provide additional housing supply and choice within Penrith City Centre at a location with ready access to the metropolitan transport services available from Penrith rail station and the wide range of services and amenities provided within the City Centre and on nearby lands. The proposal also provides a constructed, dedicated two lane road and intersection works linking Union Road and High Street.

2. The proposed development subject to the conditions imposed adequately satisfies the relevant State Environmental Planning Policies including SEPP 65 -Design Quality of Residential Apartment Development and its associated Urban Design Guidelines, SEPP 55 (Remediation of Land), SEPP (Infrastructure) 2007 and State and Regional Environmental Plan No20- Hawkesbury- Nepean River.

3. The proposal development, subject to the conditions imposed adequately satisfies the requirements and provisions of Penrith LEP 2010.

4. The Panel considers that Cl. 8.4 of the LEP relating to Design Excellence is a central provision in consideration of this proposal as consent must not be granted unless the consent authority considers the proposed development exhibits design excellence. The office of the Government Architect - Design Excellence Competition Jury have advised that the building design resulting from the design competition arrangement applied to this proposal;

    - Is of height and mass appropriately in response to the masterplan context
    - Appropriately considers the surrounding context and Demonstrates design excellence

    The Panel accepts that assessment taking into account the factors listed at clause 8.5(2)of the LEP .

5. Having regard to these factors the Panel has concluded that the proposal is reasonable in the circumstances of this case and consistent with the objectives of the B4 Mixed use Zone.

6. The Panel accepts the conclusions of the assessment report that the proposal adequately satisfies the provisions of Penrith Development Control Plan 2014.

7. The proposed development subject to the conditions imposed will have no unacceptable adverse impacts on the natural or built environments including the amenity of existing or proposed nearby premises including loss of views, the ground water system, the utility or safety of Union Lane or the operation of the local road system

8. In consideration of conclusions 1-7 above and the discussion of the applicable height standards in this report, the Panel considers the proposed development is a suitable use of the site and approval of the proposal is in the public interest.

CONDITIONS

The development application was approved subject to the conditions in the council assessment report as amended in the memorandum to the Panel dated 21 October 2019, and notes that when asked the Applicant's representatives indicated that they had no objection to those conditions.

CONSIDERATION OF COMMUNITY VIEWS

Prior to the meeting, the Panel considered written submissions made during public exhibition from three objectors and heard from those wishing to address the panel as listed at item 7 in Schedule 1.

Issues of concern raised in the objection letters included:

- The impact of the proposed development on view towards the Blue Mountains
- Solar access
- Traffic impacts
- Excessive heights.

The panel was advised by Council staff that the objection that had been made for the owners of High 618 Pty Ltd, the owner of Nos 614-632 High Street, Penrith, had been withdrawn.

The panel considers that concerns raised by the community have been adequately address in the assessment report and that no further new issues requiring assessment were raised during the public meeting, other than the matters identified above for comment from the applicant.

PANEL MEMBERS	
[redacted]	
Justin Doyle (Chair)	Bruce McDonald
[redacted]	
Ross Fowler	Glenn McCarthy

SCHEDULE 1		
1	**PANEL REF – LGA – DA NO.**	2018SWT005 – Penrith – DA18/0264
2	**PROPOSED DEVELOPMENT**	Construction of a Part Twelve (12) Storey & Part Fifteen (15) Storey Mixed Use Development including Basement, Podium Level 1 & Level 2 Car Parking, Ground Floor Business and Commercial Uses, 187 Residential Apartments & Construction and Dedication of a Public Road, Stormwater Drainage, Civil and Public Domain Works & Landscaping
3	**STREET ADDRESS**	87 – 93 Union Road, Penrith
4	**APPLICANT/OWNER**	Applicant: Toga Penrith Development c/-Urbis Owner: Toga Penrith Developments Pty Ltd
5	**TYPE OF REGIONAL DEVELOPMENT**	General development over $30 million

6	**RELEVANT MANDATORY CONSIDERATIONS**	• Environmental planning instruments:
		  ○ Penrith Local Environmental Plan 2010 (Amendment 4)
		  ○ State Environmental Planning Policy No. 55 – Remediation of Land
		  ○ State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development
		  ○ State Environmental Planning Policy (Infrastructure) 2007
		  ○ State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
		  ○ State Environmental Planning Policy (State and Regional Development) 2011
		  ○ Sydney Regional Environmental Plan No. 20 – Hawkesbury – Nepean River
		• Draft environmental planning instruments: Nil
		• Development control plans:
		  ○ Development Control Plan 2014
		• Planning agreements: Nil
		• Provisions of the *Environmental Planning and Assessment Regulation 2000*: Nil
		• Coastal zone management plan: Nil
		• The likely impacts of the development, including environmental impacts on the natural and built environment, the impacts of the proposed height of the building in terms of views and visual impact, the traffic impacts of the new road, as well as social and economic impacts in the locality
		• The suitability of the site for the development
		• Any submissions made in accordance with the *Environmental Planning and Assessment Act 1979* or regulations
		• The public interest, including the principles of ecologically sustainable development

7	**MATERIAL CONSIDERED BY THE PANEL**	• Council assessment report: 8 October 2019
		• Council memo dated 14 October 2019
		• Council memo dated 21 October 2019
		• Clause 4.6 Variation Request (Height of Building)
		• Written submissions during public exhibition: 3
		• Verbal submissions at the public meeting:
		  ○ In support – Nil
		  ○ In objection – Nil
		  ○ Council assessment officer - Nil

		○ On behalf of the applicant – John Wayne
8	**MEETINGS, BRIEFINGS AND SITE INSPECTIONS BY THE PANEL**	• Briefing: Monday, 25 June 2018 ○ Panel members: Justin Doyle (Chair), Bruce McDonald, Nicole Gurran, Karen McKeown and Glenn McCarthy ○ Council assessment staff: Kathryn Saunders, Peter Wood, Wayne Mitchell and Gavin Cherry • Briefing: Monday, 17 December 2018 ○ Panel members: Justin Doyle (Chair), Bruce McDonald, Nicole Gurran, Ross Fowler and Glenn McCarthy ○ Council assessment staff: Kathryn Saunders and Robert Craig • Briefing: Monday, 16 September 2019 ○ Panel members: Justin Doyle (Chair), Bruce McDonald, Nicole Gurran, Jeni Pollard and Glenn McCarthy ○ Council assessment staff: Kathryn Saunders, Peter Wood and Gavin Kerry • Site inspection: Monday, 18 March 2019 ○ Panel members: Justin Doyle (Chair), Bruce McDonald, Nicole Gurran, Ross Fowler and Glenn McCarthy ○ Council assessment staff: Kathryn Saunders, Peter Wood, Wayne Mitchell and Paul Anzellotti • Final briefing to discuss council's recommendation, Monday, 18 March 2019, 11:45am. Attendees: ○ Panel members: Justin Doyle (Chair), Bruce McDonald, Nicole Gurran, Ross Fowler and Glenn McCarthy ○ Council assessment staff: Kathryn Saunders, Peter Wood, Wayne Mitchell and Paul Anzellotti • Final briefing to discuss council's recommendation, Monday, 6 May 2019, 11:45am. Attendees: ○ Panel members: Justin Doyle (Chair), Bruce McDonald, Nicole Gurran, Ross Fowler and Glenn McCarthy ○ Council assessment staff: Kathryn Saunders, Peter Wood, Wayne Mitchell and Paul Anzellotti • Final briefing to discuss council's recommendation, Monday, 21 October 2019, 11:45am. Attendees: ○ Panel members: Justin Doyle (Chair), Bruce McDonald, Ross Fowler and Glenn McCarthy ○ Council assessment staff: Gavin Cherry and Peter Wood
9	**COUNCIL RECOMMENDATION**	Approval
10	**DRAFT CONDITIONS**	Attached to the council assessment report