

ITEM	479 & 507 Henry Lawson Drive, MILPERRA Retail Plant Nursery including ancillary Landscape Shop, Trade Shop, Cafe and Offices, with Fitness Centre at first floor level, and associated Landscaping, Vehicular Access and Car Parking. This application seeks approval of the development under the provisions of Clause 12 of the Bankstown Local Environmental Plan 2001
FILE	DA-840/2010 - West Ward
ZONING	6(a) - Open Space, 2(a) - Residential A
DATE OF LODGEMENT	2 September 2010
APPLICANT	GAT & Associates
OWNERS	Syesun Pty Limited
ESTIMATED VALUE	\$10.8million
AUTHOR	City Planning and Environment

SUMMARY REPORT

This matter was reported to the Sydney West Regional Planning Panel on 23 August 2012. At the meeting, the Panel resolved to defer determination of the application to allow a further report to be submitted to the Panel addressing outstanding matters relating to amended plans submitted by the applicant on 21 August 2012, and the following specific matters:

- Conceptual design of the required flood flow conveyance works;
- Assessment of measures to mitigate impacts arising from the operations on the amenity of adjoining properties;
- Clear advice on whether appropriate land owners consent has been received from the Roads and Maritime Services is to be provided.

It was resolved that such a report was to be provided to the Panel within 2 months of that decision. Any technical material or reports were to be provided by the applicant to Council no later than 13 September 2012. The Panel further noted that, given the time the application has been under consideration, if the assessment report recommends refusal of the application, without prejudice conditions of approval are to be included with the report to enable the Panel to make a final decision either for or against the proposal at its next meeting.

With regard to the Panel Minutes of 23 August 2012, the applicant submitted additional plans and details regarding outstanding matters to Council on 13 September 2012. Without prejudice conditions of consent are contained at Attachment B to this report. The following parts of the report address the outstanding matters requested to be addressed in the report, and matters arising from the submission of additional information.

SITE & LOCALITY DESCRIPTION

It is noted that following the Panel Meeting of 23 August 2012, the development site has been expanded to formally include No. 507 Henry Lawson Drive, being the access handle from the south-east corner of the site. As such, an update of the site description is warranted. The majority of the site is currently zoned 6(a) - Open Space under the Bankstown Local Environmental Plan 2001, with a small section of the access handle, known as 507 Henry Lawson Drive, being zoned 2(a) Residential under the BLEP 2001. Otherwise, the site description in Council's previous report to the Panel on 23 August 2012 remains relevant.



Aerial Photo showing subject site – 479 and 507 Henry Lawson Drive

ISSUES RAISED AT THE PANEL MEETING OF 23 AUGUST 2012

An assessment has been completed of the information submitted by the applicant both on 21 August 2012 and on 13 September 2012. With regard to the three specific matters referred to in the Panel minutes of 23 August 2012, the following items are discussed:

1. Conceptual design of the required flood flow conveyance works

The applicant has submitted further details of the proposed stormwater drainage and flood flow conveyance works, particularly with regard to the works proposed within the access corridor known as 507 Henry Lawson drive, and with regard to the drainage across the south-east corner of the site. Council development engineer has assessed the additional information submitted on 13 September 2012, and advises that the applicant has addressed Council's concerns with regard to providing the following details:

The amended plans propose the provision of ground level 375mm diameter piped drainage for the property to the east as well as 450mm diameter piped ramp drainage for the developed ramp level for the emergency exit route for the development in the event of a flood in the Georges River.

The amended plans propose the installation of twin 1200mm wide by 600mm high Box Culverts in the location of the existing swale which allows stormwater to flow between the public land on the south of the development and the golf course on the north east side of the development. It is noted that further design should be investigated as to which direction the flow should go in the minor event, however, this is not a concern in the major event, and could be addressed through conditions of consent.

As such, it is considered that the proposal now satisfactorily addresses stormwater drainage and flooding issues, particularly with regard to the passage of floodwater through the site and in association with the proposed works within the access corridor.

2. Assessment of measures to mitigate impacts arising from the operations on the amenity of adjoining properties

In response to the requirements of the Panel, an Environmental Management Plan has been submitted by the applicant covering operational issues such as hours of operation and noise generation, site security, dust suppression, waste storage, and chemical and fertilizer storage.

As stated by Council at the Panel Meeting of 23 August 2012, it is considered that issues associated with the mitigation of impacts arising from the operation of the site on the amenity of adjoining properties could be covered by conditions of consent, should the Panel resolve to approve the application. As such, conditions relating to mitigation of impacts on amenity have been included in the without prejudice conditions of consent at Attachment B to this report, and it is therefore considered that this matter has been satisfactorily addressed.

3. *Clear advice on whether appropriate land owners consent has been received from the Roads and Maritime Services is to be provided to the Panel*

The applicant has submitted a letter from Roads and Maritime Services dated 5 September 2012 (see Attachment I to this report). Of particular relevance, the following paragraph from this letter is reproduced below, and is considered to satisfactorily address the issue of landowners consent:

“RMS wishes to advise that no objection is raised with regard to the placing of fill and construction of a retaining wall on Lot 1 DP 563421 and RMS grants owners consent to these works provided that there is no adverse impact on adjoining properties and the developer agrees to fully maintain the retaining wall and access road.”

As such, it is considered that each of the three specific matters referred to in minutes of the Panel’s previous motion to defer determination of the subject application have now been satisfactorily addressed.

OTHER MATTERS

ASSESSMENT OF AMENDED PLANS AND INFORMATION SUBMITTED ON 21 AUGUST 2012

Prior to the Panel meeting held on 23 August 2012, the applicant submitted additional plans and details to the Panel Secretariat and Council, attempting to address issues raised in the report to be considered by the Panel at the 23 August 2012 meeting. The information submitted on 21 August 2012 addressed the following items, and an assessment of these matters follows below:

- Contamination
- Acid Sulfate Soils
- Flooding and Emergency Evacuation
- Legal Advice on the Use of Clause 12 of the BLEP 2001.

Contamination

As previously discussed in Council’s report to the Panel on 23 August 2012, the consent authority is required to consider the requirements of SEPP 55 - Remediation of Land, regarding contamination and the possible need to remediate contaminated sites when undertaking assessment of development applications. Specifically, the provisions of clause 7(1) of SEPP 55 are relevant, and this clause is reproduced below:

7 *Contamination and remediation to be considered in determining development application*

- (1) *A consent authority must not consent to the carrying out of any development on land unless:***
- (a) *it has considered whether the land is contaminated, and***

- (b) *if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and*
- (c) *if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.*

Council's report to the Panel on 23 August 2012 noted that the findings of a detailed investigation provided by the applicant indicate that the site is contaminated and "is considered unsuitable for commercial development in its current state". No detail was provided of what remediation works would be required to be carried out in order to ensure the site is suitable for the proposed use. As such, it was considered that the proposal failed to satisfactorily address the requirements of SEPP 55.

On 21 August 2012, the applicant submitted a document to the Panel Secretariat and Council, which contained the following statement regarding contamination:

"It has always been our intention to seek a Deferred Commencement Consent with this application. The reason for this has always been the cost of undertaking the necessary contamination investigations and reports, which my client Flower Power has always been prepared to outlay provided that they had a level of certainty that all other issues associated with the site were resolved.

Our contamination consultant has confirmed that this site is developable. Accordingly, the Council and the Panel can be satisfied that the appropriate investigations and works still required would be undertaken through the imposition of conditions under a Deferred Commencement Consent, and that the consent is not operational until there is a formal sign off. This request is not unusual."

Council has consistently advised the applicant, since prior to the lodgment of the application on 2 September 2010, that contamination issues would need to be dealt with appropriately, and that the issuing of a consent on a deferred commencement basis with regard to contamination issues was unlikely to be granted, given the complexities of the contamination matters on this site.

Further to this, earlier advice from the previous NSW EPA accredited site auditor indicated that the applicant may have an obligation to notify the NSW Environment Protection Authority (EPA) in accordance with section 60 of the *Contaminated Land Management Act 1997*. This obligation refers to an owner of land that has been contaminated (whether before or during the owner's ownership of the land), and in this instance relates to the concentration of several contaminants in the groundwater. This matter should be addressed by the applicant and an appropriate assessment undertaken to determine if the site is considered to be "significantly contaminated."

Specific contaminated land documentation that was submitted more recently include the 'Site Conceptual Model' (SCM) and 'Sampling and Analysis Quality Plan' (SAQP).

The SCM is described as "*a summary of known environmental conditions of the site*

which are relevant in understanding the processes that determine the transport of contaminants from contaminant sources, through environmental media, to human and/or environmental receptors within a system. The model also defines potential impacts to human health and environment presented by site contamination.”

Specifically, the SCM identified a number of potential contaminant transport mechanisms and exposure routes requiring additional assessment. The SCM has emphasised this by specifying 8 existing data gaps and an additional 11 separate investigations that are required for the site.

Further to this, a NSW EPA accredited site auditor, Graeme Nyland of Environ, prepared an advice letter dated 8 October 2012 with respect to the contaminated land matters still to be addressed. The auditor’s advice indicates that:

“Construction on a landfill for beneficial uses can be achieved with adequate investigations and management. The proposed investigations will ensure characterisation so that the site can be remediated/ managed for the proposed uses. Subject to these investigations and preparation of site-specific Remedial Action Plan, a Section B Site Audit Statement can be issued certifying that the site can be made suitable for the proposed uses by implementing that Remedial Action Plan.”

The Auditor advice clearly indicates that the ability to certify that the site can be made suitable for the proposed use is contingent upon additional investigations being undertaken. This does not meet the requirements of Clause 7 of the SEPP 55.

Of particular importance at this time is the consideration as to whether the development application satisfactorily addresses the requirements of Clause 7(1)(c), which requires that the consent authority must be satisfied that where land requires remediation to be made suitable for the proposed development, that the land will be remediated before that land is used for that purpose.

The assessment undertaken by Council of contamination matters in relation to this site and the proposed development has identified a number of significant items that remain unsatisfactory with regard to contamination, particularly the identification of significant data gaps that need to be addressed before a remedial action plan can be prepared, and the previous auditors own advice that the site could be considered “significantly contaminated”. At this stage, it is considered that Council cannot be satisfied as the consent authority that the land would be remediated before the land is used for the proposed development, particularly as at no time has any person been able to state that the site can be considered suitable for the proposed use, given the data gaps that exist and the inability to prepare an RAP on that basis.

It is not considered that a simple statement on behalf of the applicant that “the site will be remediated”, and an equally generic statement from the applicant’s environmental consultant that “any site can be remediated” is the intention of Clause 7(1)(c) of SEPP 55, and that some level of certainty must be provided that remediation is actually capable of being achieved, and that all potential contamination on site has been identified and can be addressed in the remedial action plan.

As such, it is considered that the proposed development still fails to satisfactorily address the requirements of SEPP 55.

Acid Sulfate Soils

The previous report to the Panel of 23 August 2012 indicated that there was not adequate detail with respect to the management of potential Acid Sulfate Soils. Information submitted by the applicant on 21 August 2012 re-iterated the submission to Council, on 30 July 2012, of a letter dated 19 July 2012 from the applicant's environmental consultant, which stated the following:

"In respect of acid sulphate soils, Geo-Logix subsurface investigations to date have not identified the typical sediments that contain Sulphides which can lead to acid leaching if disturbed. The proposed development exists at an elevation approximately 3m above natural ground therefore no excavations into natural topography is expected and therefore risk of bulk excavations and possible disturbance of sulphidic soils (if they did exist) is removed."

As previously discussed in the report considered by the Panel on 23 August 2012, the above statement is not considered to satisfactorily address the requirements of Clause 22 of the BLEP 2001, and the failure to address acid sulphate soils also fails to satisfactorily address the provisions of Clause 9(1) of the Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment (Deemed SEPP).

Despite the statement that no excavation is "expected" to occur on site below natural ground surface, only into the legal fill that has been placed on the site, the plans appear to indicate that there are proposed works that will occur on the site that may extend beyond 1m below the natural ground surface. In accordance with Clause 22 of the BLEP, an Acid Sulfate Soils Management Plan must be submitted with any application where works beyond 1m below natural ground surface are proposed, as is the case in this instance. No clear and definite indication has been provided to Council of where the proposed works will end and the distance of these proposed works from where the applicant claims 'natural ground level' begins.

As noted in the previous report to the Panel, given the failure to satisfactorily address the requirements of SEPP 55 with regard to contamination, the possibility cannot be ignored that remediation works may be required to address existing contamination issues on site and may require works to occur beyond 1m below natural ground surface. This possibility also remains for structural elements of the development, and whilst ever the only attempt to address the issue of acid sulphate soils states that no excavation is "expected" to occur below natural ground surface.

As such, Council remains of the view that the applicant has failed to provide details satisfactorily addressing acid sulfate soils, and therefore the application fails to satisfactorily address Clause 22 of the BLEP 2001, and Clause 9(1) of the Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment (Deemed SEPP).

Flooding and Emergency Evacuation

As noted above, the details provided on 13 September 2012 regarding the flood conveyance works have been assessed and found to be satisfactory. The Emergency Evacuation Plan prepared by Dr Stephen Yeo and submitted on 21 August 2012 is considered to be satisfactory, and the remaining matters with regard to stormwater drainage and flooding affectations can be addressed through conditions of consent (see Attachment B to this report).

Furthermore, the most recent set of amended plans now shows sufficient detail of the works proposed within 507 Henry Lawson Drive, both in relation to heights above existing ground levels and the stormwater drainage and flooding implications of the proposed works.

Legal Advice on the Use of Clause 12 of the BLEP 2001

The applicant provided a copy of legal advice prepared by John Robson SC, stating that the information submitted to Council with the application by the applicant satisfies the tests under Clause 12 of the BLEP 2001, and therefore the application can be determined under this clause.

As noted in Council's previous report to the Panel on 23 August 2012, Clause 12(2)(a) of the BLEP 2001 is considered to offer the consent authority the ability to assess the proposed development in the same way as a planning proposal under section 55 of the *Environmental Planning and Assessment Act, 1979*, that is, as a rezoning application or as an amendment to the BLEP 2001 to permit an additional use on the site under Schedule 2 of the BLEP 2001.

As such, an assessment was completed by Council's Strategic Planning Unit to determine whether an application to rezone the subject site and/or to include "retail plant nursery" as an additional use on the subject site under Schedule 2 would be worthy of support.

In its assessment, Council has considered whether the proposal was consistent with the provisions of any relevant EPI. As evidenced in both this report and Council's previous report, the application is considered to fail to satisfactorily address the provisions of SEPP 55 – Remediation of Land in relation to contamination, and both the Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment (Deemed SEPP) and the BLEP 2001, in relation to Acid Sulfate Soils.

Contamination is considered to be a significant issue on this site, and were it not for Clause 12, the applicant would be required to submit a planning proposal in order for the site to be rezoned or to have the proposed use added as an additional use, in order for the subject development to be able to be considered for approval. The issues of contamination and the remediation of the site would be required to be satisfactorily addressed before the rezoning of the site, or the additional use on the site, would be supported. As such, Council believes that in order to satisfactorily address Clause 12 of the BLEP 2001, the issue of site remediation must be satisfactorily addressed prior to development consent being able to be granted, in addition to the need to satisfactorily address acid sulphate soils. In the absence of

such, it is considered that the proposal fails to satisfactorily address the relevant requirements of Clause 12 of the BLEP 2001.

SUBMISSIONS

Following the addition of Lot 1 DP 563421, 507 Henry Lawson Drive to the description of the development site, the application was re-advertised and notified for a period of twenty-one (21) days, from 7 to 27 September 2012. Seven (7) further submissions were received during this period, all from persons who had previously provided submissions during earlier advertising and notification periods.

The issues raised in these most recent submissions re-iterate matters that have been previously raised, and have been assessed in detail in the report to the Panel on 23 August 2012 (see Attachment A to this report). However, based on the additional information submitted by the applicant, the following issues raised require further consideration:

1. Back Lane – Filling/Privacy

The proposed filling of the back lane for emergency access will have significant impacts on nearby residential properties, particularly in terms of flooding associated with the change in levels, as well as privacy impacts of the change in levels allowing views over the fence, and the impact of trucks using the land and generating dust, etc. What guarantees will be provided that the lane will only be used for emergency access, and not day-to-day access for trucks to and from the site, discharging at a blind corner on Henry Lawson Drive?

Comment: In its most recent submission (21 August 2012), the applicant has now submitted sufficient details of the proposed works within the existing laneway known as 507 Henry Lawson Drive to allow Council to assess the impact of these proposed works. These works form the proposed secondary flood evacuation route from the south-east corner of the site.

Council's engineer has assessed the plans and details associated with the proposal, and has advised that the proposed works within 507 Henry Lawson Drive satisfactorily address concerns relating to stormwater and flooding. The height of the proposed roadway will vary from existing ground level at the southern end where it joins Henry Lawson Drive, to 1.4m above existing ground level near the south-east corner of the site. The plans indicate landscaping along either side of the single laneway to be constructed, and the impact of such is considered to be appropriate, given that it exists only to provide fail-safe emergency flood access. Were the application to be approved, a condition is recommended requiring that the emergency flood access could only ever be used for this purpose, and not form any part of the day-to-day operations on the site.

2. Flooding/Drainage/Filling

What impact will all the proposed works have on the existing flood levels? The construction of such large new buildings, and the significant levels of filling proposed

are likely to change the flooding impacts on neighbouring residential properties, which is unacceptable.

Comment: As detailed in this report, Council's engineer has assessed the plans and details associated with the proposal, and has advised that the proposed development now satisfactorily addresses concerns relating to stormwater and flooding.

POLICY IMPACT

Council continues to hold the view that the proposal fails to satisfy the provisions of Clause 12 of the BLEP 2001. As such, as the development is otherwise prohibited under Clause 11 of the BLEP 2001, any decision to refuse the application will have no policy impact.

CONCLUSION

The Development Application has been assessed in accordance with the provisions of Section 79C of the *Environmental Planning and Assessment Act 1979*, requiring, amongst other things, an assessment against the relevant provisions contained in Bankstown Local Environmental Plan 2001 and Bankstown Development Control Plan 2005.

The development is not permissible within the 6(a) Open Space zone, and the applicant has requested that the application be considered for approval under Clause 12 of the BLEP 2001, which allows the consent authority additional discretion to grant consent where development is otherwise prohibited, subject to demonstrating compliance with certain provisions.

In this instance, it is considered that the proposed development application fails to satisfactorily address issues relating to contamination and acid sulfate soils. As such, the application fails to satisfactorily address the specific requirements of Clause 12 of the BLEP 2001, meaning the consent authority cannot exercise the discretion permitted under Clause 12 of the BLEP 2001. The proposed development is therefore prohibited under Clause 11 of the BLEP 2001 and development consent cannot be granted.

RECOMMENDATION

Based on the above assessment, and the assessment undertaken in the previous report considered by the Panel at its meeting on 23 August 2012, it is recommended that the application be refused, for the following reasons:

1. The proposed development fails to satisfactorily address the relevant provisions of State Environmental Planning Policy No. 55 – Remediation of Land, with regard to contamination [Pursuant to Section 79C(1)(a)(i) and (b) of the *Environmental Planning and Assessment Act, 1979*].

2. The proposed development fails to satisfactorily address the relevant provisions of Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment (Deemed SEPP) and Clause 22 of the Bankstown Local Environmental Plan 2001, with regards to acid sulfate soils [Pursuant to Section 79C(1)(a)(i) and (b) of the *Environmental Planning and Assessment Act, 1979*].
3. The proposed development of the site for the purposes of a retail plant nursery, associated commercial uses, offices and a café is prohibited under the Bankstown Local Environmental Plan 2001 [Pursuant to Section 79C(1)(a)(i) of the *Environmental Planning and Assessment Act, 1979*].
4. The site is not considered suitable for the proposed development [Pursuant to Section 79C(1)(b) and (c) of the *Environmental Planning and Assessment Act, 1979*].
5. The proposed development fails to satisfactorily address issues raised in submission following public notification of the development application [Pursuant to Section 79C(1)(b) and (d) of the *Environmental Planning and Assessment Act, 1979*].
6. Based on the reasons for refusal above, approval of the proposed development is not considered to be in the wider public interest [Pursuant to Section 79C(1)(e) of the *Environmental Planning and Assessment Act, 1979*].

ATTACHMENTS

- A – Report to the Sydney West Regional Planning Panel of 23 August 2012
- B – Without Prejudice Conditions of Consent
- C – Locality Plan
- D – Site Plan (Sheet 1 of 4 Issue B)
- E – Partial Site Plan Showing Updated Emergency Evacuation Route (Sheet 1 of 4 2nd instance, Issue C)
- F – Ground Floor plan (Sheet 2 of 4 Issue B)
- G – First Floor Plan (Sheet 3 of 4 Issue B)
- H – Elevations & Sections (Sheet 4 of 4 Issue B)
- I – Letter from RMS regarding Landowners Consent for 507 Henry Lawson Drive