

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 & Environment

SUMMARY REPORT

This matter has previously been reported to the Sydney West Regional Planning Panel on 23 August 2012 and 8 November 2012.

At the first meeting, on 23 August 2012, the Panel resolved to defer determination of the application to allow for 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.

At the Panel Meeting of 8 November 2012, the above issues were considered, with a report presented to the panel detailing that the above matters had been satisfactorily addressed. However, the report further detailed that matters relating to contamination, acid sulfate soils and the application of Clause 12 of the BLEP 2001 remained outstanding. The Panel sought legal advice regarding the application of Clause 12, and ultimately were of the view that the application failed to satisfactorily address the relevant provisions of SEPP 55 and therefore could not approve the application. It was resolved that the applicant be given more time to address the requirements of SEPP

55, with a view to the matter being reported back to the Panel once these matters had been satisfactorily addressed. At the conclusion of the meeting, it was noted that the application satisfactorily addresses the majority of matters for consideration under Section 79C of the *Environmental Planning and Assessment Act, 1979*, with the only exceptions being the outstanding matters identified above.

Details addressing the outstanding issues were submitted to Council on 29 October 2013. The following report details whether the information submitted satisfactorily addresses the outstanding matters from the Panel Meeting of 8 November 2012.

DISCUSSION OF OUTSTANDING MATTERS FOLLOWING THE PANEL MEETING OF 8 NOVEMBER 2012

Contamination

As previously discussed in Council's previous reports to the Panel, 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.**

As previously raised, the consideration as to whether the development application satisfactorily addresses the requirements of Clause 7(1)(c) is of particular importance at this time, and 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 applicant has submitted a Targeted Site Investigation, prepared by Environmental Earth Sciences and dated 28 June 2013, which is considered to have satisfactorily identified the extent of contamination on site. From this, a Remedial Action Plan (RAP) has been prepared, identifying the extent of works required to be carried out in order to remediate the site to an extent where it can be considered suitable for the proposed use of the site. The RAP includes a 'preferred remedial option' which reads as follows:

"The preferred remedial method for passive venting of landfill gases includes:

- installation of a leachate interception/collection trench to capture leachate along the northern site boundary, to protect Golf Course Creek and monitored natural attenuation along the western boundary;*

- *installation of a passive gas ventilation system beneath any site structures that are roofed;*
- *encapsulation of asbestos, petroleum hydrocarbon and PCB impacted material onsite. The location of these will need to be surveyed and included in a long term management plan for the site;*
- *undertake validation testing by monitoring the vent emissions and leachate migration at key locations onsite and offsite; and*
- *present the final design and monitoring/validation results in a final validation report.*

It is considered that the preferred remedial option will allow the proposed commercial landuse of the site.”

The accredited site auditor has concluded that the site can be made suitable for the purposes of the proposed development as a retail plant nursery and associated land uses, if the site is remediated in accordance with the submitted Remedial Action Plan. Conditions will be imposed requiring the RAP to be implemented prior to the issue of a construction certificate for any of the proposed building works.

As such, it is considered that the consent authority can now be satisfied, in accordance with Clause 7(1)(c) of SEPP 55, that the land will be remediated before it is used for the proposed retail plant nursery.

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 was not considered to satisfactorily address the requirements of Clause 22 of the BLEP 2001, and the failure to address acid sulphate soils also failed to satisfactorily address the provisions of Clause 9(1) of the Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment (Deemed SEPP).

As noted in the previous reports to the Panel, given the failure to satisfactorily address the requirements of SEPP 55 with regard to contamination, the possibility could not 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, triggering the need for an Acid Sulfate Soils Management Plan under Clause 22 of the BLEP 2001.

The applicant has submitted a Targeted Site Investigation, prepared by Environmental Earth Sciences and dated 28 June 2013, which now provides clear acknowledgement of the issue of Acid Sulfate Soils (ASS) and Potential Acid Sulfate Soils (PASS) on the site. The following comment in the Targeted Site Investigation is of relevance and is reproduced as follows:

“In regards to acid sulfate soils, the acid generating process only occurs in the presence of oxygen such as when the PASS is exposed to the atmosphere or the groundwater level is reduced. The proposed works on site do not include excavation to the depth of the water bearing zone. If the potential acid sulfate soil remains undisturbed and within the water bearing zone (potential ASS was detected at depths of 3.0-3.5 mbgl in MW11 and MW12, Table 27) the risk of acid sulfate soils on site is considered low and no further action is warranted. Safe handling and management of ASS will be included in the RAP as a contingency measure. The presence of potential ASS does not preclude the proposed redevelopment works as these will not be disturbing natural materials at depth.”

The submitted Remedial Action Plan (RAP) makes reference to detailed works required to be undertaken, in order to ensure the site can be appropriately remediated. One aspect of these works that is relevant to acid sulfate soils is the construction of a groundwater monitoring interception trench, required to be installed along the northern site boundary. The Remedial Action Plan includes the following statement addressing these required remedial works:

“The potential risk around ASS is associated with the interception trench only. No other piling, construction or drainage works should be affected as they are shallow and will not reach the depth of PASS.”

It is considered that the Targeted Site Investigation has appropriately identified the likelihood of acid sulfate soils and potential acid sulfate soils on the site, and the Remedial Action Plan makes appropriate provision for the management of acid sulfate soils should they be encountered on site. As previously anticipated by Council in its reports to the JRPP in 2012, given that the matter of contamination has now been satisfactorily addressed, it can be determined that the proposed works are able to satisfactorily address the requirements of Clause 22 of the BLEP 2001, meaning that the proposal can also now satisfy Clause 9(1) of the Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment (Deemed SEPP).

Clause 12 of the BLEP 2001

As noted in Council's previous reports to the Panel, 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 of Council's previous reports, the application was 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. In this report, it has been demonstrated that the proposed development now satisfactorily addresses the requirements of both these EPIs and, as such, it is considered that the proposal now satisfactorily addresses the relevant requirements of Clause 12 of the BLEP 2001.

Submissions [section 79C(1)(d)]

The application was originally advertised and notified for two periods of twenty-one (21) days, from 15 September 2010 to 6 October 2010, and again from 7 September 2011 to 27 September 2011. Nine (9) submissions were received during these periods. Concerns were raised relating to Traffic Congestion, Noise Levels, Zoning and Permissibility, Contamination, Property Values, Back Lane – Impacts of Filling and Privacy, Flooding/Drainage/Filling, Biodiversity, Chemicals and Fertilizers.

In the report to the JRPP on 23 August 2012, it was considered that the issues of Traffic Congestion, Noise Levels, Property Values, Biodiversity, and Chemicals and Fertilizers had been satisfactorily addressed. The issues of Zoning and Permissibility, Contamination, Back Lane – Impacts of Filling and Privacy, and Flooding/Drainage/Filling had not been satisfactorily addressed.

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 the earlier advertising and notification periods. The issues raised in these most recent submissions re-iterated matters that have been previously raised. Based on the additional information submitted by the applicant, the issues relating to Back Lane – Impacts of Filling and Privacy, and Flooding/Drainage/Filling were appropriately addressed. The issues of Zoning and Permissibility, and Contamination remained outstanding, and are addressed in detail below:

1. Zoning and Permissibility

How can this development be proposed on a site zoned for open space? Milperra is primarily a residential area with existing industrial/commercial premises restricted to Horsley Rd and Ashford Ave.

Comment: The proposed development is not permitted on the subject site, given that retail plant nurseries are a prohibited use in the 6(a) Open Space zone under Clause 11 of the BLEP 2001. The applicant has asked Council to invoke Clause 12 of the BLEP 2001 to allow the prohibited use in the zone. As detailed in this report, the application now satisfies the requirements of Clause 12 and can be approved, despite being prohibited under Clause 11 of the BLEP 2001. The application is considered to

have satisfactorily addressed all relevant requirements of Council's policies, and is considered to be appropriate in the context of the locality, subject to adherence to the proposed conditions of consent.

2. Contamination of Site

The site has a long history of previous use that involve contaminants being brought to the site. What measures will be taken to ensure that all contaminants are removed thoroughly and legally without causing harm to existing creeks and waterways nearby, or releasing them into the atmosphere? There needs to be environmental studies undertaken to determine the level of contamination and the measures required to remediate the site, with particular consideration given to nearby residents and also local flora and fauna.

Comment: As detailed in this report, the application now satisfies the requirements of SEPP 55 – Remediation of Land in regards to contamination and the remediation of the site. Detailed studies of the extent of contaminants on site have been completed and a remedial action plan prepared that, if implemented, can ensure the site is remediated and be made suitable for the proposed use.

As such, it is considered that the development application now satisfactorily addresses all of the issues raised in the submissions, in particular issues such as contamination, permissibility, flooding, drainage, and works in the rear lane that had not originally been satisfactorily addressed when the application was first reported to the Panel on 23 August 2012. The report now provides for a complete assessment against the provisions contained in Section 79C(1)(d) of the *Environmental Planning and Assessment Act, 1979*.

POLICY IMPACT

The proposed development is considered to satisfactorily address the relevant provisions of Clause 12 of the BLEP 2001, in order to permit a land use that is otherwise prohibited under the zoning. As such, it is considered that the approval of the proposed development would not have an unsatisfactory impact on the application of Council's policies, particularly the application of the BLEP 2001.

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 under Clause 11 of the BLEP 2001, 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.

The report considered at the Panel Meeting of 8 November 2012 detailed that matters

relating to contamination, acid sulfate soils and the application of Clause 12 of the BLEP 2001 remained outstanding. The Panel sought legal advice regarding the application of Clause 12, and ultimately were of the view that the application failed to satisfactorily address the relevant provisions of SEPP 55 and therefore could not approve the application. It was resolved that the applicant be given more time to address the requirements of SEPP 55, with a view to the matter being reported back to the Panel once these matters had been satisfactorily addressed. At the conclusion of the meeting, it was noted that the application satisfactorily addresses the majority of matters for consideration under Section 79C of the *Environmental Planning and Assessment Act, 1979*, with the only exceptions being the outstanding matters identified above.

Following the submission of a targeted site investigation and detailed remedial action plan with regard to the remediation of contamination on the site, it is considered that the proposed development application now satisfactorily addresses issues relating to contamination and acid sulfate soils. As such, the application is considered to have satisfactorily addressed the specific requirements of Clause 12 of the BLEP 2001, and is considered to have satisfactorily addressed all other matters relevant to the proposal under Section 79C of the *Environmental Planning and Assessment Act, 1979*.

It is considered that the consent authority can now exercise the discretion permitted under Clause 12 of the BLEP 2001, and grant development consent for the proposed development.

RECOMMENDATION

Based on the above assessment, and the assessment undertaken in the previous reports considered by the Panel at its meetings on 23 August 2012 and 8 November 2012, it is recommended that the application be approved subject to the attached conditions.

ATTACHMENTS

- A – Report to the Sydney West Regional Planning Panel of 8 November 2012
- B – Report to the Sydney West Regional Planning Panel of 23 August 2012
- C – Conditions of Consent
- D – Locality Plan
- E – Site Plan (Sheet 1 of 4 Issue B)
- F – Partial Site Plan Showing Updated Emergency Evacuation Route (Sheet 1 of 4 2nd instance, Issue C)
- G – Ground Floor plan (Sheet 2 of 4 Issue B)
- H – First Floor Plan (Sheet 3 of 4 Issue B)
- I – Elevations & Sections (Sheet 4 of 4 Issue B)
- J – Letter from RMS regarding Landowners Consent for 507 Henry Lawson Drive