

ITEM	479 Henry Lawson Drive, MILPERRA NSW 2214
	Construction of a 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
DATE OF LODGEMENT	2 September 2010
APPLICANT	GAT & Associates
OWNERS	Syesun Pty Limited
ESTIMATED VALUE	\$10.8million
SITE AREA	38,477.5m²
AUTHOR	City Planning and Environment

SUMMARY REPORT

This matter is reported to the Sydney West Regional Planning Panel for determination under State Environmental Planning Policy - Major Development, due to the value of works exceeding \$10million (cost of works is \$10.8million). At the time of lodgement (2 September 2010), the threshold for matters to be determined by the JRPP was \$10million. This has since risen to \$20million, under the *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011* (the Repeal Act), which commenced on 1 October 2011.

Development Application No. DA-840/2010 proposes the construction of a 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.

DA-840/2010 has been assessed against Section 79C of the *Environmental Planning and Assessment Act, 1979*, including the specific provisions of the Bankstown Local Environmental Plan 2001 (BLEP 2001) and Bankstown Development Control Plan 2005 (BDCP 2005). The proposed development is not

permissible under Clause 11 of the BLEP 2001, and the application fails to satisfactorily address the relevant provisions of Clause 12 of the BLEP 2001 (which may otherwise allow a prohibited use under Clause 11 to be approved). The conclusion of this assessment is that that application fails to satisfactorily address all of the relevant provisions of Clause 12 and, as such, the proposed development is prohibited under the BLEP 2001. The application also fails to satisfactorily address the relevant provisions of State Environmental Planning Policy (SEPP) No. 55 – Remediation of Land, and the Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment (deemed SEPP).

The application was 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, which raise concerns 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. Issues such as contamination, permissibility, flooding, drainage, and works in the rear lane have not been satisfactorily addressed, and without these matters being resolved, the application is recommended for refusal.

POLICY IMPACT

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.

RECOMMENDATION

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*].

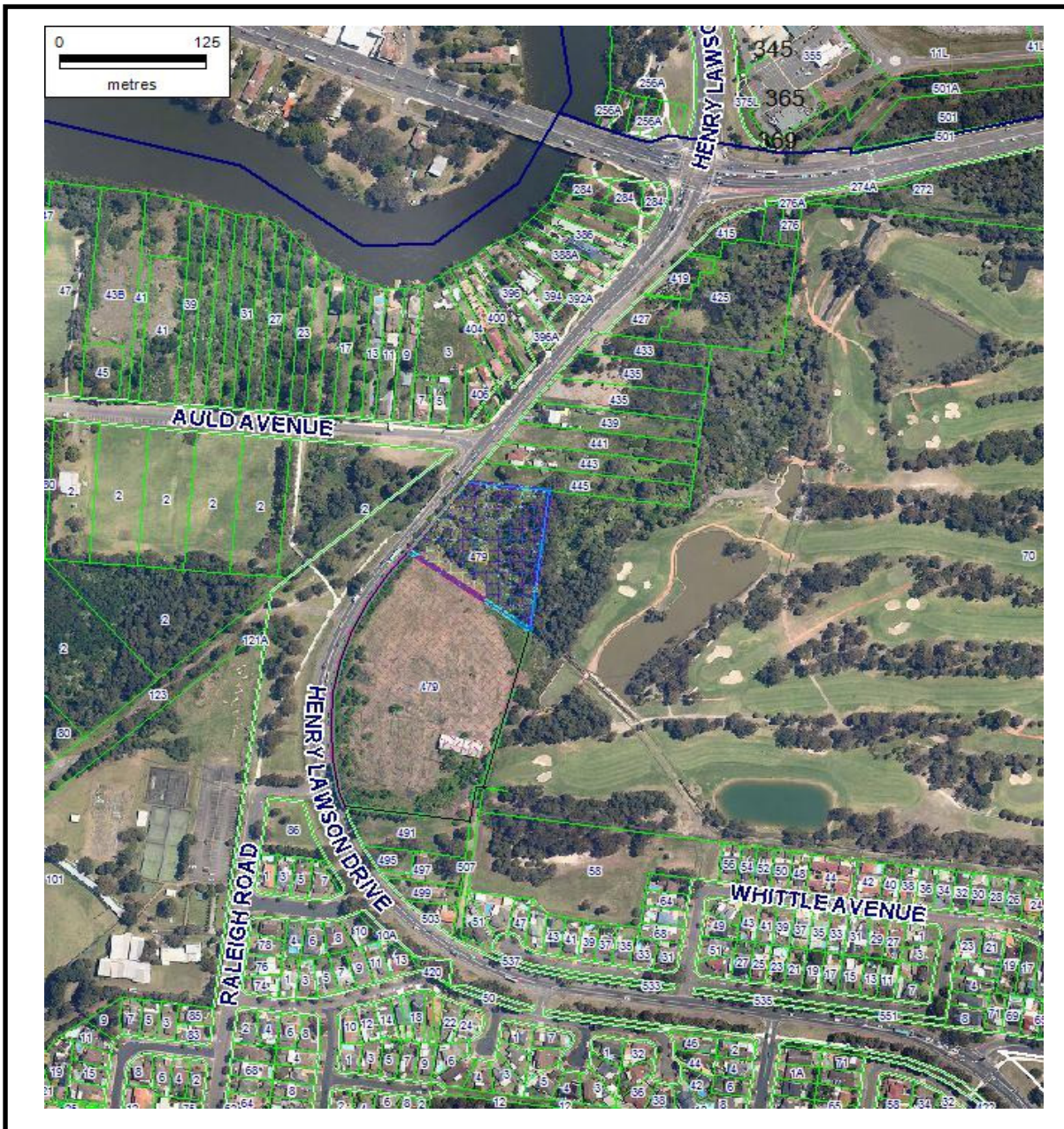
ATTACHMENTS

- A – Section 79C Assessment Report
- B – Locality Plan
- C – Site Plan
- D – Ground Floor Plan
- E – First Floor Plan
- F – Elevations

DA-840/2010 ASSESSMENT REPORT

SITE & LOCALITY DESCRIPTION

The subject site is known as 479 Henry Lawson Drive, Milperra. The site is an irregular-shaped allotment, located on the eastern side of Henry Lawson Drive, between Milperra Road and Whittle Avenue, that is currently zoned 6(a) - Open Space under the Bankstown Local Environmental Plan 2001. The site is predominately vacant with some existing vegetation in the northern part of the site, and along the sites western, southern and eastern boundaries. An old shed is located near the south-eastern corner of the site, and is the only existing structure on the site. The surrounding development consists of Bankstown Golf Course to the east, residential properties to the south, south-east and north, and land zoned for open space and rural to the west on the opposite side of Henry Lawson Drive.



PROPOSED DEVELOPMENT

The Development Application proposes the construction of a retail plant nursery including ancillary landscape shop, trade shop, café and offices, with a fitness centre at first floor level, and associated landscaping, vehicular access and car parking.

The subject site incorporates Lot 2 (28,838sq m) and Lot 3 (9639.5sq m) in DP 576251. The subject application proposes the development of Lot 2 only, with the potential for future development of Lot 3.

The proposed development seeks approval for the following:

Plant house and nursery display, including indoor and outdoor display areas, landscape shop, trade shop and cafe:	12293.69sq m (Ground Floor)
Flower Power Admin Offices:	1352.45sq m (First Floor)
Fitness centre:	1907.12sq m (First Floor)
Car Parking:	199 spaces
Overall expected staff:	100
Hours of Operation:	Mon-Fri 7am-9pm, Sat-Sun 8am-6pm (Fitness Centre 5.30am-10pm 7 days)

As the site is zoned 6(a) Open Space, the proposed uses are prohibited under Clause 11 of the Bankstown Local Environmental Plan 2001 (BLEP 2001), apart from the proposed fitness centre, which is permissible in the zone. As such, this application seeks approval of the development under the provisions of Clause 12 of the Bankstown Local Environmental Plan 2001. Clause 12 allows the consent authority to approve a form of development that is prohibited under Clause 11, only where compliance is achieved with the specific requirements contained in Clause 12 of the BLEP 2001.

SECTION 79C ASSESSMENT

The proposed development has been assessed pursuant to section 79C of the *Environmental Planning and Assessment Act, 1979*.

Environmental planning instruments [section 79C(1)(a)(i)]

State Environmental Planning Policy (Major Development) 2005 (MD SEPP)

The application was lodged on 2 September 2010 when 'Part 3 - Regional Development' of the MD SEPP was in force. Clause 13B of the SEPP provided that for development that had a capital investment value of more than \$10 million, the consent authority function was to be exercised by the Joint Regional Planning Panel.

Recent changes to the Act have repealed this provision from the SEPP. The Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011 (the Repeal Act) commenced on 1 October 2011. New classes of regional development are now set out in Schedule 4A, of the EP & A Act 1979. This schedule replaces the former classes of regional development set out in Part 3 of MD SEPP. Under the amended

provision, development that has a capital investment value of more than \$20 million is to be determined by the regional panel.

Clause 15(3) of Schedule 6A -Transitional arrangements of the Repeal Act provides that "... the applicable regional panel continues to exercise the consent authority functions of a Council for the following development applications ...

(a) a development application for development that has a capital investment value of more than \$10 million if the development application was made, but not determined by the panel, before the commencement of Schedule 4A".

Based on the transitional arrangements, the subject application is to be determined by the Sydney West Regional Planning Panel.

State Environmental Planning Policy No. 55 – Remediation of Land

The application has been assessed against the relevant provisions of State Environmental Planning Policy No. 55 – Remediation of Land (SEPP 55). The consent authority is required to consider the potential for site contamination and the possible extent of remediation when determining a development application. Relevantly, Clause 7 of SEPP 55 is reproduced as follows, and includes assessment comments:

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.*

Assessment: The subject site is known to be contaminated, having previously been used for landfill purposes.

- (2) *Before determining an application for consent to carry out development that would involve a change of use on any of the land specified in subclause (4), the consent authority must consider a report specifying the findings of a preliminary investigation of the land concerned carried out in accordance with the contaminated land planning guidelines.*
- (3) *The applicant for development consent must carry out the investigation required by subclause (2) and must provide a report on it to the consent authority. The consent authority may require the applicant to carry out, and provide a report on, a detailed investigation (as referred to in the contaminated land planning guidelines) if it considers that the findings of the preliminary investigation warrant such an investigation.*

Assessment: Based on the findings of the preliminary investigation carried out under subclause (2), a detailed investigation was considered to be warranted. The findings of the 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 is provided of what remediation works would be required to be carried out in order to ensure the site is suitable for the proposed use.

- (4) *The land concerned is:*
- (a) *land that is within an investigation area,*
 - (b) *land on which development for a purpose referred to in Table 1 to the contaminated land planning guidelines is being, or is known to have been, carried out,*
 - (c) *to the extent to which it is proposed to carry out development on it for residential, educational, recreational or child care purposes, or for the purposes of a hospital—land:*
 - (i) *in relation to which there is no knowledge (or incomplete knowledge) as to whether development for a purpose referred to in Table 1 to the contaminated land planning guidelines has been carried out, and*
 - (ii) *on which it would have been lawful to carry out such development during any period in respect of which there is no knowledge (or incomplete knowledge).*

Assessment: As noted above, the site has previously been used for landfill purposes, being a purpose referred to in Table 1 of the contaminated land planning guidelines.

Based on the above, it is considered that the application fails to satisfy Clause 7(1) of SEPP 55.

Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment (Deemed SEPP)

The site is located within land identified as being affected by Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment (GMREP No. 2 - Georges River Catchment), being a deemed SEPP under Clause 120 of Schedule 6 of the *EP&A Act 1979*. Under Clause 7 (b), Part 2 of the deemed SEPP applies when a consent authority determines a development application. In particular the general principles of the Plan must be taken into consideration when an application is determined, as well as the specific planning principles contained in Clause 9. In this instance, the application fails to comply with the following specific planning principles:

Clause 9 (1) Acid sulfate soils (reproduced below):

Disturbance of acid sulfate soil areas is to be avoided or minimised and those areas are to be protected in accordance with the requirements set out in the Acid Sulfate Soils Assessment and Management Guidelines prepared by the Acid Sulfate Soils Management Advisory Committee. Measures to minimise that disturbance are to take into account the following:

- (a) *verification of the existence, locations and extent of acid sulfate soils,*
- (b) *the capacity of land to sustain the proposed land uses, having regard to:*

- (i) potential impacts on surface and groundwater quality and quantity, and*
- (ii) potential impacts on ecosystems and on biodiversity, and*
- (iii) potential impacts on agricultural, fisheries and aquaculture productivity, and*
- (iv) any likely engineering constraints and impacts on infrastructure, and*
- (v) cumulative environmental impacts.*

Council originally asked for details in relation to acid sulphate soils on 3 February 2011. On 30 July 2012, Council received a letter from the applicants' contamination consultant, Geo-Logix, dated 19 July 2012, which made the following statement:

"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."

The above statement is not considered to satisfactorily address this provision of the GMREP No. 2 – Georges River Catchment. Despite the statement that no excavation will occur on site, the plans indicate that there are proposed works that will occur on the site that extend beyond 1m below the natural ground surface, which will also lead to a failure to satisfactorily address Clause 22 of the BLEP 2001 (see below). Furthermore, given the failure to satisfactorily address the requirements of SEPP 55 with regard to contamination, the possibility cannot be ignored that remedial works that may be required to address existing contamination issues on site may require works to occur beyond 1m below natural ground surface. As this would trigger the need for an Acid Sulfate Soils Management Plan under Clause 22 of the BLEP 2001, any such plan should address the requirements of the GMREP No. 2 – Georges River Catchment, and this has not been done.

Bankstown Local Environmental Plan 2001

The following clauses of the Bankstown Local Environmental Plan 2001 (BLEP 2001) were taken into consideration:

- Clause 2 Objectives of this Plan
- Clause 11 Development which is allowed or prohibited within a zone
- Clause 12 Additional discretion to grant consent
- Clause 17 General environmental considerations
- Clause 19 Ecologically sustainable development
- Clause 20 Trees
- Clause 22 Acid sulfate soils
- Clause 30 Floor space ratios
- Clause 32 Access for people with disabilities
- Clause 57 Objectives of the Open Space zones

An assessment of the Development Application revealed that the proposal fails to comply with the provisions of Bankstown Local Environmental Plan 2001 relating to Clauses 11, 12 and 22. The extent of the failure to comply is discussed as follows.

Clause 11 - Development which is allowed or prohibited within a zone

Under Clause 11 of the BLEP 2001, the following types of uses are permissible within the 6(a) Open Space zone:

Agriculture; Car Parks; Caravan Parks; Communications facilities; Community facilities; Dams; Helicopter landing sites; Landfilling; Marinas; Recreation areas; Recreation facilities; Sanctuaries; and Utility installations.

The proposed development meets the definition of 'retail plant nursery', which is separately defined under the BLEP 2001, as follows:

“retail plant nursery means a building or place used for growing plants and selling plants by retail, whether or not landscape supplies (including earth products) or other landscape and horticultural products are also sold there.”

This use is not included in the list of those developments permissible in the 6(a) Open Space zone.

The fitness centre component of the proposed development meets the definition of a 'recreation facility' under the BLEP 2001 and thus is a permissible use within the 6(a) zone.

Clause 12 - Additional discretion to grant consent

Given the above, the applicant has submitted the subject application seeking consideration of the proposal under Clause 12 of the BLEP 2001. Clause 12 is reproduced as follows:

12 Additional discretion to grant consent

- (1) *Despite clause 11, but otherwise subject to this plan, the consent authority may grant consent to development that:*
 - (a) *is not included in the Table to clause 11, or*
 - (b) *would be prohibited by the Table to clause 11 in the absence of this clause.*
- (2) *The consent authority may grant consent pursuant to this clause only where it is satisfied that the proposed development:*
 - (a) *is of a nature (whether by reason of its design, scale, manner of operation or otherwise) that would, in the absence of this clause, justify an amendment to this plan in order to permit the particular development, and*
 - (b) *is not inconsistent with the objectives of the zone in which the development site is situated, and*
 - (c) *is not inconsistent with the provisions of any other environmental planning instrument, and*
 - (d) *will not have an adverse effect on other land in the vicinity.*
- (3) *Development under this clause is advertised development within the meaning of the Act.*

In accordance with Clause 12(1)(b) of the BLEP 2001, a retail plant nursery is prohibited by the table in Clause 11 of the BLEP 2001. As such, the consent authority may grant development consent pursuant to Clause 12, but only where it is satisfied that the proposed development:

- (a) *is of a nature (whether by reason of its design, scale, manner of operation or otherwise) that would, in the absence of this clause, justify an amendment to this plan in order to permit the particular development, and*

Clause 12(2)(a) 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 a rezoning application or 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 has been 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's strategic planning unit considered whether the proposal was consistent with the provisions of any relevant EPI, being:

- *Threatened Species Conservation Act, 1995*
- State Environmental Planning Policy (Major Development) 2005 (MD SEPP)
- State Environmental Planning Policy No. 55 – Remediation of Land
- Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment (Deemed SEPP)

Assessment of the application with regard to these EPIs is detailed elsewhere in this report, and demonstrate the evidence of multiple non-compliances with the provisions of these relevant EPIs.

Further to the consideration of the proposed development against the provisions of relevant EPIs, the assessment also looked at the likelihood of the proposal being consistent with Ministerial directions issued under section 117 of the Act, being a relevant matter for consideration for planning proposals (i.e. a rezoning or additional use amendment to the BLEP 2001).

In its assessment, Council's Strategic Planning Unit considered the following ministerial directions:

Direction 2.1 (Environment Protection Zones) states that a planning proposal must include provisions that facilitate the protection and conservation of environmentally sensitive areas. Detailed reports have been provided in accordance with the *Threatened Species Conversation Act, 1995*, and it is considered that the provisions of this Act have been satisfactorily addressed.

Direction 4.1 (Acid sulfate soils) requires consideration to be given to acid sulfate soils. As noted elsewhere in this report, insufficient detail regarding acid sulfate soils has been provided with the application. As such, it cannot be considered that subject application satisfies Direction 4.1.

Direction 4.3 (Flood Prone Land) states that a planning proposal must be consistent with the NSW Flood Prone Land Policy, and must not permit a significant increase in the development of the land unless it is in accordance with a floodplain risk management plan.

The proposal will permit a significant increase in the development of vacant land to a retail plant nursery.

According to the Georges River Floodplain Risk Management Plan (2004), a retail plant nursery is in the 'recreation or non-urban uses' land use category. The risk management plan identifies 'recreation or non-urban uses' as a suitable land use in a high flood risk precinct. However, despite this consideration that retail plant nurseries may be suitable in high flood risk precincts, the subject application fails to satisfactorily address issues associated with flooding. As such, it is considered that the subject application cannot be considered to satisfy Direction 4.3.

Direction 4.4 (Planning for Bushfire Protection) states that a planning proposal must have regard to Planning for Bushfire Protection 2006, and introduce controls that avoid placing inappropriate developments in hazardous areas, as well as ensuring that bushfire hazard reduction is not prohibited within any Asset Protection Zone(s). As part of the subject site is bushfire prone land, an assessment against the provisions of Planning for Bushfire Protection, published by the Rural Fire Service of NSW (RFS), has been submitted with the application and referred to the RFS for consideration. The RFS has advised that were the subject application to be approved, conditions must be imposed in order for the application to be considered to satisfactorily address the relevant requirement of Planning for Bushfire Protection. As such, it is considered that the proposed development satisfies Direction 4.4.

Given the level of non-compliance or failure to address the provisions of relevant environmental planning instruments detailed in this assessment report, and relevant Ministerial directions for planning proposals under the *EP&A Act 1979*, it is considered that the proposed development is not of a nature that would, in the absence of Clause 12 of the BLEP 2001, justify an amendment to this plan in order to permit the particular development of the land as a retail plant nursery.

- (b) *is not inconsistent with the objectives of the zone in which the development site is situated, and*

Under Clause 57 of the BLEP 2001, the objectives of Zone 6(a) – Open Space are as follows:

- (1) *The objectives of Zone 6 (a) are:*

- (a) *to ensure that there is a sufficient and equitable distribution of open space to meet the recreational needs of residents and to enhance the environment of Bankstown City, and*
- (b) *to ensure preservation of significant landscape elements.*

The proposed development is not considered to be inconsistent with these objectives of the 6(a) open space zone under the BLEP 2001.

- (c) *is not inconsistent with the provisions of any other environmental planning instrument, and*

As noted above, the application is not considered to be consistent with the relevant provisions of both SEPP 55 – Remediation of Land and Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment. Therefore the application is considered to fail Clause 12(2)(c) of the BLEP 2001.

- (d) *will not have an adverse effect on other land in the vicinity.*

Given the shortcomings of the application as detailed above, it is considered that no level of certainty can be given to the prospect of the development not having an adverse effect on other land in the vicinity, especially with regard to contamination, acid sulphate soils, and the redirection of flood waters.

Given the above, the proposed development application is considered to fail to satisfactorily address the relevant provisions of Clause 12 of BLEP 2001, being of a nature that would not justify an amendment to the BLEP 2001 in order to permit the particular development; being inconsistent with the provisions of any other relevant environmental planning instrument; and, as a result, being unable to demonstrate that the development would not have an adverse effect on other land in the vicinity. As such, the consent authority may not grant consent to the proposed development under Clause 12, and the proposed development is therefore prohibited under Clause 11 of the BLEP 2001.

Clause 22 - Acid sulfate soils

The subject site is affected by Class 3 acid sulfate soils under the BLEP 2001. Clause 22 of the BLEP 2001 stipulates that any works beyond 1m below natural ground surface, or any works by which the watertable is likely to be lowered beyond 1m below natural ground surface, in an area classified as Class 3 acid sulfate soils, can only be carried out in accordance with an acid sulfate soils management plan.

As previously noted above, Council originally asked for details in relation to acid sulphate soils on 3 February 2011. On 30 July 2012, Council received a letter from the applicants' contamination consultant, Geo-Logix, dated 19 July 2012, which made the following statement:

"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.”

The above statement is not considered to satisfactorily address the requirements of Clause 22 of the BLEP 2001. Despite the statement that no excavation will occur on site, the plans indicate that there are proposed works that will occur on the site that 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.

As noted earlier in this report, 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.

As such, 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.

Given the above, the development is considered to fail to satisfactorily address the relevant provisions of the BLEP 2001.

Draft environmental planning instruments [section 79C(1)(a)(ii)]

There are no draft environmental planning instruments that are applicable to the proposed development.

Development control plans [section 79C(1)(a)(iii)]

The application has been assessed against the relevant controls contained in the Bankstown Development Control Plan 2005, in particularly the following Parts:

Part D7 – Sustainable Commercial/Industrial Development

Part D7 requires development applications to consider energy and water efficiency in new commercial and industrial development. The energy efficiency measures have largely been superseded by the requirements of Section J of the Building Code of Australia. However water efficiency remains a relevant consideration. Part D7 requires new development with a floor area in excess of 5000m² to incorporate water efficient fixtures and prepare a site water management plan. Water efficient fixtures can be covered through conditions of consent, and the applicant has submitted that other Flower Power developments enter into a licence agreement with Sydney Water regarding the management of water on site. It is considered that this approach satisfies the requirements of Part D7 of the BDCP 2005.

Part D8 – Parking

Part D8 of the BDCP 2005 requires a parking and traffic study to be undertaken for this type of development. The applicant has submitted a traffic report prepared by Transport & Traffic Planning and Associates to demonstrate that the 199 car parking spaces provided for in the application is an appropriate number of spaces.

The report indicates that the RTA Guidelines for Traffic Generating Development stipulate a rate of 0.5 spaces per 100m² of floor area for retail plant nurseries, which equates to 144 spaces for the subject development. At a rate of 1 space per 40m² of office space, as required under Part D8 of the BDCP 2005, the office component of the proposed development generates demand for 34 spaces. The report addresses the fitness centre by way of analysis of other similar sized gym or fitness centre operations. Based on the peak times of operation of the fitness centre and the other uses on site, it is determined that the 199 spaces is likely to be able to cater for parking demand associated with the development.

The application has been referred to the RTA (RMS) as 'integrated development', being traffic generating development under clause 104 of the Infrastructure SEPP. The RTA (RMS) have raised no objections to the proposal, subject to some conditions being imposed if approval is granted. As such, it is considered that the traffic generating and parking impacts of the development are acceptable, and can be considered to satisfactorily address the requirements of Part D8 of the BDCP 2005.

Part E3 – Flood Risk Management

The application is capable of satisfying some prescribed elements of Part E3 of the BDCP 2005. However, the application is not considered to satisfactorily address all of the relevant matters under Part E3, and this is discussed further under *Flooding and Stormwater* elsewhere in this report.

Planning agreements [section 79C(1)(a)(iia)]

There are no planning agreements applicable to the proposed development.

The regulations [section 79C(1)(a)(iv)]

The proposed development is not considered to be inconsistent with the relevant provisions of the Environmental Planning and Assessment Regulation, 2000.

The likely impacts of the development [section 79C(1)(b)]

Given the above assessment of the application against relevant Environmental Planning Instruments, and that the development fails to satisfactorily address the relevant provisions of many of these instruments, the following impacts are either considered to be unsatisfactory, or the level of impact is unable to be satisfactorily determined, as a result of the information submitted with the development application.

Contamination

Based on the information submitted with the application, the Detailed Site Investigation Report states that the site is currently not suitable for the proposed commercial use of the site. No further detail is provided in the report of what remediation works would be required in order to make the site suitable for the proposed use for which consent is being sought.

In order to determine whether the impacts of contamination on site can be appropriately managed, further contaminated land investigations and the preparation of a remedial action plan is required. Details of how contaminated land issues are to be addressed is also required (i.e. an outline of the additional investigative work that needs to be completed), along with details of what remediation/management is planned or required, and what type of long-term management of the site is required i.e. environmental/site management plan.

In the absence of sufficient information being submitted in order to determine the level of impact of contamination in association with the development, the level of impact must be assumed to be unsatisfactory.

Acid Sulfate Soils

As noted above, insufficient information has been provided with the development application regarding acid sulfate soils, despite being a relevant matter for consideration under both the Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment (Deemed SEPP), and the BLEP 2001.

The site is affected by Class 3 Acid Sulfate Soils. Works beyond 1m below natural ground surface, as are proposed in this development, trigger the requirement for an Acid Sulfate Soils Management Plan under the BLEP 2001. Any management plan must take into consideration those matters raised in the GMREP No. 2 - Georges River Catchment, which stipulates that disturbance of acid sulfate soil areas is to be avoided or minimised. Those areas that are affected must include measures to minimise disturbance in any acid sulfate soils management plan. These measures must take into account the verification of the existence, locations and extent of acid sulfate soils. They must then consider the capacity of land to sustain the proposed land uses, having regard to: potential impacts on surface and groundwater quality and quantity; potential impacts on ecosystems and on biodiversity; potential impacts on agricultural, fisheries and aquaculture productivity; any likely engineering constraints and impacts on infrastructure; and cumulative environmental impacts.

Such a document needs to be detailed and must address the above issues, allowing for an assessment of the cumulative impacts of any development on acid sulfate soils and their further potential for impact on other issues, including groundwater and ecosystems.

In the absence of sufficient information being submitted in order to determine the level of impact of the development on acid sulfate soils, the level of impact must be assumed to be unsatisfactory.

Flooding and Stormwater

Both the Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment (GMREP No. 2 – Georges River Catchment) and the BLEP 2001 require the impacts of flooding and stormwater in relation to the development to be considered. The GMREP No. 2 requires a catchment-based assessment of the impacts of development on floodprone land to be considered, while the BLEP 2001, through Council's Development Engineering Standards policy, requires the specific consideration of stormwater drainage associated with the development of the site, and its impacts on adjoining properties. In this regard, a number of impacts have not been satisfactorily addressed.

In its submission, the applicant has argued that stormwater and flooding matters can be addressed through conditions of consent. It is noted that Council recently considered an application under Clause 12 of the BLEP 2001 and all Georges River and Stormwater Flood related information was required to be provided at the DA stage. In the case of developments which have chosen to submit a planning proposal through the gateway process, the Minister for Planning has required similar riverine and stormwater flooding information to be provided as technical studies which are incorporated into the planning proposal prior to the gateway determination. As such, the flood related information should be provided now and cannot be conditioned.

The application incorporates the provision of a secondary evacuation access along an existing laneway that adjoins the south-eastern corner of the site. In order to ensure this access remains flood-free, a new road is required to be built, and raised above the flood level.

The raised road is located in the high flood risk precinct of the Milperra floodplain, an area which is a known flow path. It is also located in the high flood risk precinct of the Georges River, an area which is a known flow path. The construction of the raised roadway may pose potential flood effects on properties in the immediate locality and this needs to be investigated thoroughly.

The proposed site levels and rear emergency exit driveway will effectively cut-off the flowpath for the properties upstream (i.e. 491-503 Henry Lawson Drive) and these properties will experience ponding. The development fails to show design details of the emergency driveway and drainage construction through the site to allow the passage of stormwater runoff from upstream properties in a safe and controlled manner. Any such drainage solution will also require an easement to drain water/flowpath benefitting all upstream properties.

It is considered that the proposed secondary evacuation route will have an adverse impact on adjoining properties, particularly in relation to flooding and possibly overshadowing. The approval of this development relies heavily on the formulation of a suitable evacuation route that remains in perpetuity. No evidence has been provided of either of the following:

- A right of way in favour of the developer on the Certificate of the Title, or the Certificate of Title to 507 Henry Lawson Drive.

- A formal letter from Roads and Maritime Services which specifically consents to erection of the proposed raised road and provides an approval to undertake development dealings on their behalf.

The subject Development Application has been submitted for Lots 2 and 3 in DP 576251. However, the works associated with the filling of Lot 1 DP 563421 to establish the raised evacuation route occur outside of the site for which development consent is sought. No detailed elevations have been provided of the filling depths of the road. In support of these works, the consent authority need to view and assess plans of the road showing construction types and elevations, including any safety devices (guard rails) to be employed.

The application does not confirm that flood levels in the Georges River catchment are not increased, by modelling flood impacts of the development on the Georges River floodplain. No information on the flood levels in the Milperra catchment has been provided, in order to ensure they are not increased, through flood modelling for this stormwater catchment. As such, it is not possible to determine the impacts of the proposed development and whether other properties are adversely affected by the development, i.e. whether properties that are already flood prone are made more flood affected (either extent or depth), or whether any new properties are affected by flooding.

As such, the impacts of the development in regard to its flood effect have therefore not been satisfactorily addressed.

Suitability of the site [section 79C(1)(c)]

Based on the assessment of the application, it is considered that the subject site is not suitable for the proposed development.

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

The application was 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, which raise concerns 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. The following comments are offered in response to these concerns

1. Traffic Congestion

Henry Lawson Drive is a two-lane road that experiences very heavy traffic in the peak periods, many times traffic is at a virtual standstill. The proposed development will only make this situation worse. This particular stretch of Henry Lawson Drive has had a number of serious accidents including at least 5 fatalities in the last few years. If signalised access is proposed, this will cause all sorts of extra problems in conjunction with the lights at Milperra/Newbridge Road. The existing narrow bridge in Henry Lawson Drive next to the entrance will be unable to withstand the volume of trucks entering/exiting the site.

Comment: The application has been referred to the RTA (RMS), and no objection has been raised on traffic and road infrastructure grounds. Traffic signals will be required at a new intersection where the entry/exit point of the site connects with Henry Lawson Drive. Conditions have been provided by the RTA (RMS) should development consent be granted.

2. Noise Levels

Concern is raised over the noise levels associated with the development, given that surrounding properties are zoned residential, particularly associated with the proposed hours of operation. The proposal will result in impacts on existing residents' weekends becoming full of noise from cars opening/closing, setting alarms, horns all day long. Loaders, forklifts, trucks all emitting loud beeping every time they are put into reverse, operating all day everyday, adjacent to residential properties with bedrooms, living rooms and backyards. Will there be any noise barrier protection installed?

Comment: Were the application able to be approved, it is considered that noise impacts associated with the development would be acceptable, in the context of the location of the site and nearby land uses. Acoustic issues associated with plant and other operational matters could be dealt with through conditions of consent, requiring either acoustic treatment or limitations on the hours of operation of certain activities on site.

3. 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. 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 fails to satisfy the requirements of Clause 12 and remains prohibited under Clause 11 of the BLEP 2001.

4. 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 fails to satisfy the requirements of SEPP 55 – Remediation of Land in regards to contamination.

5. Property Values

Has any consideration been given to what impact the proposed development would have on nearby property values? The development of a huge business with all associated noise, traffic and environmental impacts/pollution will reduce the value of homes in this area.

Comment: No evidence exists of significant impacts on the value of surrounding properties as a result of this form of development.

6. 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: As detailed in this report, the application fails to satisfactorily consider numerous impacts associated with the proposed secondary flood evacuation route from the south-east corner of the site. The application fails to satisfactorily address the extent of works required to achieve flood free access in this location, and the impact of the extent of these works on issues such as stormwater drainage, flooding, privacy and possibly overshadowing on adjoining residential properties. The application makes no mention of the works in this location as forming part of the proposed development.

7. 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, the application fails to satisfactorily address issues related to flooding and stormwater drainage.

8. Biodiversity

The proposal involves the removal of a lot of existing flora, and the fauna that dwell within it will also be lost.

Comment: As detailed in this report, the application is considered to satisfactorily address the relevant provisions of the *Threatened Species Conservation Act, 1995*, with regard to biodiversity issues.

9. Chemicals and Fertilizers

A retail plant nursery will store and use significant quantities of fertilizer and chemicals, which may have impacts on pollution in the waterways of the local area.

Comment: The Floodplain Management Manual considers that retail plant nurseries may be suitable in high flood risk precincts. As such, it is considered that appropriate measures could be incorporated to ensure no impact on the catchment as a result of chemical and fertilizer storage, if development consent was to be granted.

As such, it is considered that the development application fails to satisfactorily address issues raised in the submissions, in particular issues such as contamination, permissibility, flooding, drainage, and works in the rear lane. The application is therefore considered to fail to comply with section 79C(1)(d) of the *Environmental Planning and Assessment Act, 1979*.

The public interest [section 79C(1)(e)]

Based on the assessment above, it is considered that approval of the proposed development is not in the public interest.

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, the proposed development application fails to satisfactorily address issues relating to contamination, stormwater drainage and flooding, and acid sulfate soils. As such, the application is therefore prohibited under Clause 11 of the BLEP and 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 and therefore cannot grant consent to the proposed development.

RECOMMENDATION

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*].