

## FURTHER REPORT TO SYDNEY WEST JRPP

<b>JRPP No</b>	2013SYW109
<b>DA Number</b>	DA/805/2013
<b>Local Government Area</b>	Parramatta City Council
<b>Proposed Development</b>	Demolition of existing buildings, tree removal, removal of bowling greens and construction of a part two storey club and 3 levels of basement car parking
<b>Street Address</b>	2 Macquarie Street – Parramatta Lot 362 in DP752058
<b>Applicant/Owner</b>	<b>APPLICANT:</b> Paynter Dixon Constructions Pty Limited  <b>OWNER:</b> Castle Hill RSL Club Ltd
<b>Recommendation</b>	<b>Approval subject to conditions</b>

### Background

The above application was considered by the Sydney West JRPP on 13 November 2014.

The Panel deferred the determination of the application and resolved the following at that meeting:

*The Panel resolved to defer the application noting it is minded to approve the application based on its consideration of the assessment undertaken by the Parramatta Design Excellence Assessment Panel, NSW Office of Environment and Heritage response, Council's Urban Designers' response, National Parks and Wildlife Services consideration and the Council staff town planning report.*

*The Panel, however, considers that number of technical issues requires further information and assessment by Council with a report back to the Panel namely:*

- *Clarification of any legal requirement to meet the provisions of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) prior to approval of this development application;*
- *A response by Parramatta Council to applicant's request made at the Panel meeting to forego Section 94A Contributions or to reduce the amount required to be paid as a condition of the development;*
- *A response from Parramatta City Council Assessment Staff in relation to Mr Clive Lucas' submission provided at the meeting on behalf of the National Trust.*

*The Panel seeks the response to these matters as soon as is practical.*

These matters are addressed below.

## **Environment Protection and Biodiversity Conservation Act 1999**

**Clarification of any legal requirement to meet the provisions of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) prior to approval of this development application.**

The proposed development adjoins Old Government House and Domain (OGHD), which has been declared a World Heritage property. The proposed development is also within The Park Edge (High Sensitive) Area, which has been identified as an area where development is "likely to have a significant impact" on the world and national heritage values of OGHD, unless it is designed to reduce any impact to a level below a significant impact threshold.

The Environment Protection and Biodiversity Conservation Act, 1999 (Cth) (the Act) provides that development that is likely to have "a significant impact" on the world and national heritage values of OGHD, must be referred to the appropriate Commonwealth department for approval.

Council has been working with the Commonwealth and State Governments to enter into a Conservation Agreement. The Agreement removes the need for applications to be referred to the Commonwealth within the Park Edge (Highly Sensitive Area), provided that the development complies with specified planning controls within the Agreement. It is noted that this Agreement is still in draft form.

Council has sought legal opinion from in-house Counsel as to when a referral to the Commonwealth should occur and which party has that responsibility.

Section 12(1) of the Act provides that a "person" must not take an "action", which has, or will, or is likely to have, a "significant impact" on the world heritage values of a declared World Heritage property (ie. the OGHD in this instance). This provision places the liability upon the "person" who is to carry out "the action". To breach this provision, is to commit an offence under the Act.

Section 523 of the Act defines "actions" by listing the following:

- (a) a project
- (b) a development
- (c) an undertaking
- (d) an activity or series of activities
- (e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).

In this regard, the granting of a development consent is not included as an "action".

In addition, it is considered that Council and the JRPP have an advisory role only in this matter. Commonwealth matters do not fall within the Section 79C heads of consideration under the Environmental Planning and Assessment Act, 1979 in the assessment of the development application.

The Act requires ministerial approval before a controlled action may be undertaken. There appears to be no provision which requires the applicant to obtain ministerial approval, prior to development consent being granted. However consent is

recommended to be sought prior to the action being carried out to remove the possibility of a breach by the applicant, and penalties being imposed. In this regard, the applicant has been advised to make application to the Minister. The revised list of consent conditions at **Attachment 1** contains an advisory note to reflect the above requirements.

The applicant has advised Council that the development application has been forwarded to the Australian Department of Sustainability, Environment, Water, Population, being the appropriate Commonwealth department. No formal response has been received to date.

It is therefore considered that there are no further legal requirements to consider to meet the provisions of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) prior to approval of this development application.

Notwithstanding the above, Council officers have considered the application in accordance with the draft Conservation Agreement which sets out specific development controls to determine whether there will be a significant impact upon the adjoining World Heritage property. As a result of the assessment, Council officers are of the opinion that the proposal is consistent with these provisions and will not have a significant impact on the world heritage values of OGHD.

## **Section 94A Contributions**

**A response by Parramatta Council to the applicant's request made at the Panel meeting to forego Section 94A Contributions or to reduce the amount required to be paid as a condition of the development.**

Council does not agree to the waiving or reduction of the Section 94A contributions for this development application as it would be inconsistent with the *Parramatta City Council Section 94A Development Contributions Plan – Parramatta City Centre (Amendment 3)* and contrary to the Council's consistent approach to levying development within the City centre.

The City Centre LEP 2007 and the Section 94A Contributions Plan are read in conjunction and the clear intention is to include development such as this in the levying of a 3% financial contribution payment. It is reiterated that Council has consistently applied this levy in circumstances such as this without challenge to date.

Council's Land Use section have provided a comprehensive response to this issue below. The response discusses various aspects of the contributions plan and includes the following discussion:

### ***Application of the CIP***

*The development site at 2 Macquarie Street, Parramatta is subject to the provisions of Parramatta City Council Section 94A Development Contributions Plan – Parramatta City Centre (Amendment 3) also known as Parramatta Civic Improvement Plan (Amendment 3) (the CIP).*

Section 2 of the CIP details the application of the plan, viz:

*2. Where does this plan apply?*

*This plan applies to all development applications and complying development certificates that increases the gross floor area (GFA) of a building and has a cost of more than \$250,000 on land in the Parramatta city centre, as detailed on the Land Application Map at Appendix 1.*

*Note:- Where an application includes demolition of whole or part of a building, the demolished floor area cannot be used as an offset credit in the calculation of the increase in GFA.*

*Council has undertaken a consistent approach to the application of the CIP and has applied the levy to all applications with a value greater than \$250,000 which includes the construction of new floor area. The Note in Part 2 of the CIP explicitly states that no credit is given to any demolished floor area (whole or part) in the calculation of the increase in GFA.*

*Council has also consistently not levied those developments such as internal fit outs that will not alter the amount of floor area within an existing building, and includes no new floor area. The intent of this was not to impact upon small scale developments such as shop fit outs or other retrofits.*

*The above approach describes the original intent of the CIP when it was created by the Cities Taskforce in 2007, in consultation with Parramatta City Council, along with the Parramatta City Centre Local Environmental Plan, Development Control Plan and Vision document.*

*The intention of the CIP is to levy all new development. Had the proposed development been undertaken as two separate applications i.e. one being for demolition, and the second being for construction of a new building, then s94A contributions would have been applied to the application for the new building irrespective of the volume of gross floor area of the building compared to the previously demolished building. The same logic should then apply to the development even though the subject application combines both the demolition and construction in one application.*

*It is noted that Section 25K(1)(b) of the Environmental Planning and Assessment Regulation omits the reference to GFA increases with respect to application of the levy and only includes maximum percentage levy rates applicable to the land covered by the Parramatta City Centre LEP 2007 as follows:*

*25K Section 94A levy—maximum percentage*

*(1) The maximum percentage of the proposed cost of carrying out development that may be imposed by a levy under section 94A of the Act is:*

*(b) in the case of development on land specified in the Table to this paragraph—the percentage specified in Column 2 of the Table opposite*

*the relevant proposed cost of carrying out the development listed in Column 1 of the Table.*

*Land identified on the Land Application Map under Parramatta City Centre Local Environmental Plan 2007*

<i>Up to and including \$250,000</i>	<i>Nil</i>
<i>More than \$250,000</i>	<i>3 per cent</i>

## **Nexus**

*The S94A levy criterion removes the need to demonstrate nexus, nor to apply apportionment, and is charged as a percentage levy across all types of developments to fund a range of community facilities. This enables all development to contribute toward new infrastructure. Section 94A (4) of the Environmental Planning & Assessment Act states:*

- (4) A condition imposed under this section is not invalid by reason only that there is no connection between the development the subject of the development consent and the object of expenditure of any money required to be paid by the condition.*

*Having regard to numerical changes in GFA on a development site is contrary to the intent of Section 94A of the Act. Had the nexus relationship been considered critical to redevelopment of Parramatta City Centre, then a traditional Section 94 Plan would have been applied in 2007 at the time the City Centre LEP was being prepared. The reference to the 'increase in GFA' in the CIP was intended as to minimise impact on small scale developments in the CBD such as shop fit outs. As such the consistency of Council's approach to applying the levy is of greater significance than the interpretation of the wording in Part 2 the CIP.*

## **Exemptions & Discounts**

### **EXEMPTIONS**

*Practice Notes prepared by the former Department of Planning, Infrastructure and Natural Resources in 2005, provides advice in relation to exemptions of development contributions and states:*

*A council may elect to exempt particular types of development or class of development from the payment of development contributions on the basis of strategic planning, economic or social purposes.*

*The types of development which have been granted exemptions by councils in the past include:*

- low income (affordable) housing*
- works undertaken for charitable purposes or by a registered charity*
- places of worship, public hospitals, police stations and fire stations*
- childcare facilities*
- libraries*

- other community or educational facilities.

*This is not to promote exemption for these types of facilities. Rather, it demonstrates that some councils do exempt certain types of developments where nexus may be difficult to demonstrate or for some other purpose (such as a public good).*

*Council's policy on exemptions must be stated in the development contributions plan* and, as far as possible, be specific about the types of facilities to be exempted. Alternatively, a council may state the criteria that will be used to determine an exemption or exclusion.

*The CIP does not include any specific exemptions to the S94A levy.*

*Possible exemptions (or reduction) to development contributions may apply specifically to Crown development applications for an 'essential community service' such as a hospital. In these circumstances the applicable development contribution would be reviewed having regard to Circular D6 prepared by the former Department of Urban Affairs and Planning. The subject application is not for an 'essential community service' and therefore not subject to consideration under the Circular.*

## **DISCOUNTS**

*Practice Notes prepared by the former Department of Planning, Infrastructure and Natural Resources in 2005, also provides advice in relation to discounting contributions as follows:*

*Discounting means reducing the calculated contribution rate in order to achieve a specific planning, social, economic or environmental purpose. It is extremely important for a council to consider the implications which discounting, and the consequent reduction in contributions, may have for the existing and/or the new community.*

*Implications could include the delay in the provision of an identified facility or the provision of a facility of a lesser standard or capacity. Another implication is the creation of precedent. Where discounting has been actively employed, perhaps to encourage development, it is often difficult to shift the policy or defend a new policy in the face of past actions.*

*Discounting should be used judiciously as it effectively means that existing ratepayers are subsidising future development. Council and the community must be made fully aware of the financial implications of discounting practices.*

*Council does not have an adopted policy position relating to discounting development contributions and has consistently applied the full levy relating to development contributions.*

## **Alternatives to the Levy**

*Section 10 of the CIP provides for alternatives to the levy, viz:*

#### 10. Will Council accept alternatives to a levy?

*The Council may at its discretion accept the dedication of land or provision of a material public benefit or works-in-kind in part or full satisfaction of a Section 94A levy under this plan.*

*As a general rule, only land or works directly associated with the public domain projects or special city centre projects may be considered as a material public benefit or work-in-kind in satisfaction of the contributions levy.*

*If Council agrees to an alternative to the levy, it will accept it under the terms of a voluntary planning agreement.*

*Council has previously considered Voluntary Planning Agreement (VPA) offers from developers in lieu of payment of development contributions, where the public deliverable of the VPA offer would be equal to or greater than the value of the applicable s94a contribution.*

*A VPA would be subject to agreement between both Council and the developer; would provide for a public purpose; and be prepared subject to Section 93F of the Environmental Planning and Assessment Act and Council's VPA Policy.*

### **Response to National Trust Submission**

**A response from Parramatta City Council Assessment Staff in relation to Mr Clive Lucas' submission provided at the meeting on behalf of the National Trust.**

The matters raised within the submission provided at the previous JRPP meeting on behalf of the National Trust is addressed in the table below.

<b>Concern raised in submission</b>	<b>Council response</b>
The National Trust (The Trust) has looked after Old Government House for the past 50 years and should have been specifically consulted on the assessment report and recommendations.	<p>Noted. The Parramatta Park Trust as the owners of the site were advised of the proposed development as part of the notification process.</p> <p>The National Trust lodged a submission (received by Council on 24 January 2014) and were advised of the assessment report and recommendations prior to the JRPP meeting in November 2014.</p>
Parramatta Park (aka the Domain) is part of a World Heritage site (only of only a small number in this country).	Noted. The heritage significance of Old Government House and Domain has been acknowledged and addressed in detail within the assessment of this application.

World Heritage listing indicates it is one of the most precious sites in Australasia.	Noted. As above.
The subject site directly adjoins the World Heritage Listed area.	Noted. As above.
The RSL club was allowed to build on its corner site 50 years ago. This had previously been the site of a minor zoological garden.	Noted. This has been identified within the Heritage Assessment Report submitted with the application.
When the Trust first heard of this proposal, it recommended that the Clubhouse be rebuilt on the Club owned land on the other side of Macquarie Street. Why this sensible solution was not adopted we do not know.	<p>Noted. An application was not submitted for the site at 7 Macquarie Street.</p> <p>The proposed development at 2 Macquarie Street proposes the redevelopment of the existing site for the same purpose.</p>
If the building has to be rebuilt on its present site it should be on the footprint of the existing c1960 Clubhouse. It should appear as a pavilion in the park.	The proposed relocation of the building to the eastern section of the site is seen to be beneficial as it provides for a greater separation to Old Government House than the existing location. The proposed building envelope complies with the DCP requirements for this site, which also form part of the draft Conservation Agreement with the Commonwealth Government.
The act of Parliament originally permitted a memorial hall with bowling greens. The later transfer of the land title to the RSL was conditional on the land being used as a war memorial. The scale and purpose of the development as a hospitality and gambling venue make it questionable that the land is in fact primarily being used as a war memorial and that the development complies with the constraint on the title.	There is no change in the nature or use of the current site. It will remain as a club facility. War memorial features will be retained such as the eternal flame, and additional public art encompassing the war history will be incorporated within the new design.
The open land on the Macquarie and O'Connell Streets' corner should be landscaped to respect the historic Domain.	The open land on the corner of Macquarie Street and O'Connell Street currently contains bowling greens. There are no requirements under the DCP or draft Conservation Agreement to provide landscaping on this corner. The application has been considered by the Heritage Office, Council's Heritage



	Advisor and the Design Excellence Advisory Panel who raise no concerns with the proposed development in regards to landscaping.
The car parking should be retained in the current RSL car park on the other side of Macquarie Street.	<p>The application proposes to retain the car parking at 7 Macquarie Street during the construction of the proposed new building.</p> <p>The subject application does not incorporate the future use of the existing RSL car park on the opposite side of Macquarie Street. The application proposes sufficient car parking for the proposed development and the retention of additional parking at 7 Macquarie Street is not warranted as part of this application.</p>
If car parking is provided on the site it should be under the rebuilt Clubhouse.	Part of the car parking is to be provided under the proposed new building, however there is insufficient parking available for the use of the premises purely under this section of the site.
The rebuilt Clubhouse should be within the envelope of the existing building (where the site is already disturbed) and appear as a pavilion. It should be of a simple form. This will also preserve the archaeological remains. The landscaping of the Macquarie Street frontage should reinforce the concept that historically, the site is part of the Domain.	As previously mentioned, the proposed relocation of the building to the eastern section of the site is seen to be beneficial as it provides for a greater separation to Old Government House than the existing location. The proposed building envelope complies with the DCP requirements for this site, which also form part of the draft Conservation Agreement with the Commonwealth Government. The application has been reviewed by both the NSW Heritage Office and Council's Heritage Advisor who raise no significant concerns with the location or landscaping of the site.
Any archaeological remains of Pre Macquarie 'town' should be safe guarded and interpreted and building design modified if required to protect those remains.	The application has been reviewed by the NSW Heritage Council and all of their recommended conditions have been included within the draft conditions of consent. It is also noted that an excavation permit under Section 140 of the NSW Heritage Act must be submitted to the NSW Heritage Council prior to any

	below ground works commencing. This application must be accompanied by the Archaeological Assessment and an appropriate Archaeological Methodology and Research Design for the site.
On such a site adjacent to a World Heritage Area and historically part of the Government Domain, any major new building should be the work of a distinguished architect.	The proposed development has been reviewed by a variety of referral bodies, including the NSW Heritage Office and the Design Excellence Advisory Panel. No significant concerns were raised with the quality of the proposed development.
The historic 1880s boundary fences should be carefully preserved in situ.	The boundary fences will largely remain intact. Council's Heritage Advisor has raised no objection to the works proposed on the boundary fence, landscaping or the location of the access entry. A condition is included within the Recommendation section of this report requiring the submission of details of the fence modification and restoration (including details of the treatment to avoid impacts of humidity) before the issue of a Construction Certificate.

## Additional Matters

### Condition 13 – OEH Requirements

Council's original report considered by the JRPP recommended the following condition be imposed based upon the correspondence received from the Office of Environment and Heritage:

13. *The following requirements of the Heritage Division of the Office of Environment and Heritage are to be complied with prior to the issue of any Construction Certificate:*
  - (a) *An excavation permit under Section 140 of the NSW Heritage Act must be submitted to the NSW Heritage Council prior to any below ground works commencing. This application must be accompanied by the Archaeological Assessment and an appropriate Archaeological Methodology and Research Design for the site.*
  - (b) *Where substantially intact State Significant relics are encountered consideration must be given to amending the development plans to allow for this archaeology to be kept in situ.*
  - (c) *The Applicant must ensure that at the completion of archaeological works, the results of the archaeological programme are interpreted within the completed redevelopment of the site. This interpretation should help the public understand the history and significance of the site.*

- (d) *Throughout on site development works the Applicant must ensure that appropriate signage to explain the history and significance of the site is placed at the site.*

**Reason:** *To comply with the requirements of the Heritage Division of the Office of Environment and Heritage.*

The Panel considered the re-wording of part of the condition to provide additional certainty and enable Council (in consultation with OEH) to determine whether the plans needed to be amended, rather than leaving that consideration with the applicant. In this regard, the Panel suggested this condition be amended to read as follows:

*13(b). Where substantially intact State significant archaeological relics are encountered, excavation works must cease. An assessment of the heritage value of the relics is then to be undertaken to determine the physical extent of the relics deemed State significant. An appropriately qualified structural or civil engineer is then to be retained to prepare a report on the feasibility of retaining the State significant relics. The engineer's report is to be provided to Council's Manager, Development and Traffic Services, who will determine whether the approved development plans are to be amended. Prior to this determination being made, the engineer's report is to be provided to the Office of Environment & Heritage, and the Office of Environment & Heritage's advice is to be taken into account in the determination.*

This matter was referred to the Heritage Division of the OEH who responded on 18 November 2014 as follows:

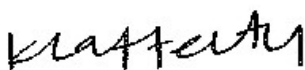
*After consideration of the recommended amendment to Condition 13(b) by the JRPP I am recommending the following amendments (in red & bold) to ensure that the condition would be consistent with any approval that the Heritage Council may issue regarding in situ retention of state significant archaeology:*

*Where substantially intact State significant archaeological relics are encountered, excavation works must cease. An assessment of the heritage value of the relics is then to be undertaken to determine the physical extent of the relics deemed State significant. An appropriately qualified structural or civil engineer is then to be retained to prepare a report **in consultation with the Archaeological Excavation Director** on the feasibility of retaining the State significant relics. The engineer's report is to be provided to Council's Manager, Development and Traffic Services, who will determine whether the approved development plans are to be amended. Prior to this determination being made, the engineer's report is to be provided **to the NSW Heritage Council (or its Delegate)**, and the **NSW Heritage Council (or its Delegate's) recommendations** are to be taken into account in the determination.*

The recommended conditions of consent have been revised to incorporate the above amendment to Condition 13(b). These revised conditions are at **Attachment 1**.

## **Recommendation**

That the Sydney West Joint Regional Planning Panel approve the application as recommended within the Section 79C report considered at the previous meeting held on 13 November 2014 and the revised conditions of consent at **Attachment 1**.



**Kate Lafferty**  
**Senior Development Assessment Officer**  
**Parramatta Council**  
**25 February 2015**

### **Attachments:**

Attachment 1      Revised Recommended Conditions of Consent