



Land and Environment Court New South Wales

Medium Neutral Citation:	Catholic Metropolitan Cemeteries Trust v Penrith City Council [2021] NSWLEC 1225
Hearing dates:	17-18 March and 21 March 2021
Date of orders:	11 May 2021
Decision date:	11 May 2021
Jurisdiction:	Class 1
Before:	Bish C
Decision:	See Orders at [151]
Catchwords:	DEVELOPMENT APPLICATION – new cemetery with parkland – change of use of an existing golf course – social impact assessment relating to village character – landscaping
Legislation Cited:	Biodiversity Conservation Act 2016, Pt 6 Cemeteries and Crematoria Act 2013 Environmental Planning and Assessment Act 1979, ss 4.14, 4.15, 4.16, 4.33, 4.47, 4.66, 8.7, 8.15 Environmental Planning and Assessment Regulation 2000, cl 49 Land and Environment Court Act 1979, s 34D Penrith Local Environmental Plan 2010, cll 2.3, 4.10, 7.2, 7.3, 7.5 Roads Act 1993, s 138 Rural Fires Act 1997, s 100 State Environmental Policy No 55—Remediation of Land, cl 7 State Environmental Planning Policy (State and Regional Development) 2011, Schedule 7 Sydney Regional Environmental Plan No 9— Extractive Industry (No 2—1995) Sydney Regional Environmental Plan No 20— Hawkesbury–Nepean River (No 2—1997) Water Management Act 2000, s 91
Cases Cited:	Broad v Brisbane City Council (1986) 59 LGRA 296; [1986] 2 Qd R 317 Telstra Corporation Ltd v Hornsby Shire Council (2006) 67 NSWLR 256; [2006] NSWLEC 133 HP Subsidiary Pty Ltd v City of Parramatta Council [2020] NSWLEC 135
Texts Cited:	Greater Sydney Regional Plan 'A metropolis of Three Cities' Local Character and Place Guideline Mulgoa and Wallacia Rural Villages Strategy Penrith Development Control Plan 2014, Parts D5, E9 and Clause 5.8 Penrith Scenic & Cultural Landscape Study

Planning Circular PS 18-001 'Stepping up planning and designing better places: respecting and enhancing local character'

Rural Fire Service's 'Planning for Bushfire Protection' 2006

Western Sydney City District Plan 'Connecting Communities'

Category:

Principal judgment

Parties:

Catholic Metropolitan Cemeteries Trust (Applicant)

Penrith City Council (Respondent)

Representation:

Counsel:

A Galasso SC (Applicant)

A Pickles SC (Respondent)

Solicitors:

Mills Oakley (Applicant)

Sparke Helmore (Respondent)

File Number(s):

2019/364850

Publication restriction:

No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against refusal of Development Application (DA) 17/1092 by the Penrith City Council (hereafter the Council) which, as amended, seeks to change the use of an existing 18-hole golf course to a new cemetery with parkland, construct a chapel and other associated buildings, tree removal, landscaping and engineering works on Lots 1 and 2 DP 1254545, and Lots 3 and 4 DP 18701, also known as 13, 17, 19 and 37 Park Road, Wallacia (hereafter the site).

Background and process of DA under appeal

- 2 The DA was submitted to Council on 3 November 2017 and registered with the Sydney Western City Planning Panel (SWCPP) on 21 November 2017.
- 3 The DA was referred, by the applicant, to the Minister of Planning on 9 January 2018, pursuant to s 4.33 of the EPA Act, on the basis that the SWCPP had not yet determined the (Crown development) application, within the approval timeframe.
- 4 On 8 June 2018, the assessment of the DA was delegated to the Independent Planning Commission (IPC), whom sought advice from the Department of Planning and Environment (DPE), before providing its assessment to the SWCPP. On the 7 January 2019, the DPE provided its advice to the IPC (in Exhibit 4).
- 5 On 12 July 2019, the IPC, after review of the available information and community consultation, advised the SWCPP to refuse the application, based on its assessment that the proposed development is not consistent with the local character and would create unacceptable social impact to the community of Wallacia. The proposed development was therefore not in the public interest. It is noted that the IPC reviewed the amended DA with the crematorium deleted from the original application.
- 6 On 18 July 2019, the SWCPP determined to refuse the DA with reasons consistent with the IPC advice. The Council issued the notice of refusal to the applicant on 19 July 2019.
- 7 The applicant subsequently appealed against the refusal of the DA, pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 8 On 18 December 2019 and 29 January 2021, the Court granted leave for the applicant to amend the DA, without opposition by the respondent.

- 9 The respondent subsequently amended their Statement of Facts and Contentions (SoFC) on 22 February 2021, which was further supplemented on 26 February 2021, to add a contention relating to groundwater impact.
- 10 Pursuant to s 34D of the *Land and Environment Court Act 1979* (the Court Act), and by agreement of the parties, the hearing commenced with a site view, and then proceeded remotely using Microsoft Teams software.
- 11 On 12 March 2021, the applicant filed a Notice of Motion (NoM) to further amend documents and plans that support the DA, and which relate to contentions of contamination, Aboriginal and heritage assessment, traffic and landscape. The NoM also sought to further amend the DA with the deletion of the golf club modification from the application.
- 12 The Court heard from the parties on the NoM at the start of the hearing. The respondent did not oppose the NoM after review of all the relevant documents, and the Court hereby grants leave for the applicant to rely on these documents, tendered as Exhibit E.
- 13 The respondent however sought costs associated with the most recent amendments to the DA, specifically the deletion of the already assessed modification to the golf club from the application, pursuant to s 8.15(3) of the EPA Act. The applicant did not oppose a costs order. The cost order is therefore upheld by the Court, pursuant to s 8.15(3).
- 14 By agreement of the parties, the applicant filed, on 24 March 2021, amended detailed landscape plans that reflect the agreement of the experts, which amends Exhibit A.
- 15 The parties filed conditions of consent, on 14 and 20 April 2021, for the applicant and respondent, respectively, tendered at the reopening of the hearing on 21 April 2021. These conditions become Exhibits 18 and P. These conditions were further amended by the respondent address recent communication from the Rural Fire Service, by agreement of the applicant.

Public consultation and concurrence process

- 16 The Council referred the original DA internally to the relevant sections for their assessment. These referrals and their responses are described in Exhibit 4.
- 17 The Council also externally referred the original DA to several authorities for concurrence (as part of an integrated development), and which specifically sought to address: the area mapped as bush fire prone; works proposed within 40m of a waterway; and works proposed on Park Road. The authorities that issued concurrence, subject to General Terms of Approval (GTA) include: Roads and Maritime Service (RMS); NSW Rural Fire Service (RFS); the National Resource Access Regulator (NRAR); and Sydney Water. Authority referral requests and their respective responses are provided in Exhibit 4.
- 18 The original DA was notified to residents on 24 November 2017, and in response 94 submissions were received by Council, including a petition with 158 signatures and submission from six agencies. Of the 88 general public submissions received, 64 were in objection and 24 were in support. These submissions are collated in Exhibit 12 and summarised in Exhibit 15. Issues raised in (objection) submissions include: impact to local character; social and economic impacts; traffic and noise impact; incompatible size and scale; water impacts; and biodiversity impacts. Submissions in support reflected the need to reinvigorate the golf club.
- 19 The IPC held a public meeting on 27 March 2019 to hear from residents on the amended DA (without the crematorium), which attracted 27 speakers. The issues raised, as described in Exhibit 3, are consistent with those made in previous objector and supporter submissions.

- 20 The Court remotely heard from six residents in objection at the start of the hearing. Their issues are summarised in Exhibit 15, and are considered consistent with previous submissions made in objection.
- 21 It is noted that all public submissions are based on the original or a previously amended version of the DA. The amended DA before the Court under appeal has not generally been reviewed by relevant authorities or residents. The concurrence provided by these authorities is not expected to be substantially changed based on the amendments made, and the amendments to the DA positively respond to residents/authorities concerns. The GTA's provided by the relevant authorities are still deemed relevant by the parties and are described in the draft conditions of consent.

The development proposal before the Court for consideration

- 22 It is recognised that the proposed development has been amended several times since the original DA was submitted to Council, and prior to the hearing of the appeal.
- 23 The most recent amendments to the DA include the: deletion of the works associated with the existing golf club; creation of public parkland in the western portion of the site; and a reduction in the overall number of burial plots, limited to 40,000.
- 24 It is understood that based on the amended DA before the Court for consideration, the proposed development can be described as:
- change in use of the existing golf course to a cemetery with parkland;
 - construction of a new cemetery for a total of 40,000 burial plots in the eastern portion of the site;
 - construction of associated cemetery administration building, service building, and chapel, also in the eastern portion of the site;
 - use of an existing workshop;
 - construction of related civil works, internal roads and paving, earthworks, dam dewatering and stormwater works, with landscaping and tree removal, across the entire site;
 - construction of a road alignment and intersection works to Park Road (and closure of vehicular entry from Mulgoa Road); and
 - rehabilitation of the remaining golf course area to a parkland, in the western portion of the site.
- 25 It is proposed to undertake the works associated with the amended DA in a series of time-based phases, being:
- Phase 1, between 2021 and 2023, relates to the continued use of the 18-hole existing golf course, and planting of perimeter buffer landscaping;
 - Phase 2, between 2023 and 2050, relates to, in the eastern portion of the site, the provision of 27,000 burial plots, construction of buildings, associated roads and paths, including access to Park Road, and associated landscaping; and in the western portion of the site, refurbish the remaining land to a 9-hole golf course; and
 - Phase 3, from 2050 onwards – relates to the provision of 13,000 burial plots (circa 40,000), and construction/modification of associated roads in the eastern portion of the site; landscaping across the site; and in the western portion of the site, rehabilitation of the remaining golf course area, including the riparian zone of Jerry's Creek, as a parkland.

It is understood that the final phase of the development will result in a development that is described as being for a 40,000 burial plot cemetery with associated built structures across approximately 22 hectares (ha), with approximately 18.5 ha of (publicly accessible) parkland, a road network across the cemetery area, as well as paths and landscaping traversing the entire extent of the site.

27 Based on the amended DA before the Court, the Council contends the following issues are still pressed:

- (a) unacceptable social impacts, which results in a development incompatible with the local character of Wallacia,
- (b) negative impacts to the aesthetic values of Wallacia, that do not satisfy the objectives of the E3 zone and adjoining RU5 zone (of Wallacia Village), and
- (c) development is therefore not in the public interest.

The site

- 28 The site is currently operating as an 18-hole golf course, known as the Panthers Wallacia Golf and Country Club. The DA, for the purposes of the application before the Court for consideration, does not include works to the existing golf club.
- 29 The site is an irregular, rectangular shape, fronting to Park Road for 1km, which forms the southern boundary. The western boundary of the site adjoins to residences of the village of Wallacia. Along the northern and eastern boundaries, are agricultural lands and larger lot residential developments.
- 30 The total area of the site is 44.4 ha, elongated in an east-west direction. The depth of the site is variable, ranging from 380m in the eastern portion, and increasing to 548m in the western portion.
- 31 The village of Wallacia, which adjoins the western boundary of the site, is described as a (peri-)rural village, extending in a north-south direction along the eastern bank of the Nepean River, with low density residential development of less than 600 houses, on variable lot sizes.
- 32 The site slopes variably across its areal extent due to the existing golf course undulations, although there is general a slope towards Jerry's Creek, located in the west of the site. Jerry's Creek and its riparian zone is contained within the western portion of the site, as described in this judgement. Jerry's Creek is a tributary of the Nepean River. There are also several smaller perennial creeks and dams found along the northern and southern boundaries of the site.
- 33 There are isolated strands of native and introduced species of trees and shrubs across the site. The remainder of the site is covered by grass that forms the fairways and greens of the golf course.

Relevant planning controls

- 34 The requirements of s 4.15 of the EPA Act are relevant for the Court's consideration to grant consent to the DA under appeal.
- 35 The site is mapped as bushfire prone in Council's Bushfire Prone Land Map. Therefore, s 4.14 of the EPA Act and the requirements of the *Rural Fires Act 1997* (RF Act) are relevant for consideration by the Court in assessment of the DA.
- 36 Although the site has historically been cleared as part of its use as a golf course, it is acknowledged that there remain discrete pockets of remnant vegetation that belong to the Cumberland Plain Woodland (critically endangered) across the site, which includes flora that is mapped as being a threatened species. The parties agree that the portions

of the site that contain species relating to the Cumberland Plain Woodland, are mapped as having biodiversity values. They accept that the proposed development does not trigger consideration under the biodiversity offset scheme, as provided for Part 6 of the *Biodiversity Conservation Act 2016* (BC Act). The applicant relies on the Vegetation Management Plan (VMP) and landscape plans, provided in Exhibits A, D and L, to satisfy the requirements of the BC Act.

- 37 Pursuant to cl 49 of the Environmental Planning and Assessment Regulation 2000 (EPA Reg), written consent from the current landowner is provided (in Exhibit J) which relate to the works proposed on the site.
- 38 The applicant is described as a 'Crown Cemetery Operator', and therefore subject to the provisions of the *Cemeteries and Crematoria Act 2013*. The parties agree that the relevant requirements of this Act are achieved by the proposed development, and not in contention.
- 39 The site is located adjacent to and seeks access from Park Road, which is a classified road, pursuant to the *Roads Act 1993*. Any works associated with Park Road require approval, pursuant to s 138. Proposed road works associated with Park Road are described in Exhibit K, and are also considered in the conditions of consent, which address concurrence advice from RMS.
- 40 According to the advice of the NRAR, the proposed works associated with the riparian zone of Jerry's Creek require a Controlled Activity Approval, pursuant to s 91 of the *Water Management Act 2000* (WMA). The GTA's of NRAR are described in the conditions of consent.
- 41 The proposed development was identified as a regionally significant development, pursuant to cl 4 in Schedule 7 of the State Environmental Planning Policy (State and Regional Development) 2011 (SEPP S&RD), due to the development being carried out on behalf of the Crown, with a capital investment value above \$5 million.
- 42 Pursuant to cl 7 of the State Environmental Planning Policy No 55—Remediation of Land (SEPP 55), the site must be deemed suitable by the consent authority for the purpose of the proposed development. The applicant has provided evidence of (detailed) contamination assessment reports and a remedial action plan (in Exhibits D and E), which together with the conditions of consent, address the requirements of cl 7.
- 43 The site is located on lands considered by the Sydney Regional Environmental Plan No 20—Hawkesbury-Nepean River (No 2—1997) (SREP 20). As expressed in the assessment report provided by DPE, it is accepted that there is adequate provision of services, including water and sewage to the site, and that the relevant requirements of SREP 20 are achieved by the proposed development.
- 44 The site is located within 1.5km of an extractive industry, therefore the requirements of Sydney Regional Environmental Plan No 9—Extractive Industry (No 2—1995) (SREP) are of consideration. It is accepted that the proposed amenity of the site and operation of nearby extractive industry are protected by the proposed development, thereby satisfying the relevant requirements of the SREP.
- 45 The site, which is the subject of the appeal, is zoned E3 Environmental Management, pursuant to cl 2.3 of the Penrith Local Environmental Plan 2010 (PLEP). The proposed development, described as a cemetery and recreational area (outdoor), is permissible with consent in the E3 zone, pursuant to cl 2.3 of the PLEP. The objectives of the E3 zone are described below and relevant for consideration of the Court:

Zone E3 Environmental Management

1 Objectives of zone

- To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.

- To provide for a limited range of development that does not have an adverse effect on those values.
- To minimise conflict between land uses within the zone and land uses within adjoining zones.
- To ensure development is compatible with the environmental capabilities of the land and does not unreasonably increase the demand for public services or public facilities.
- To preserve and improve natural resources through appropriate land management practices.

- 46 In consideration and satisfaction of cl 5.10 of the PLEP, the applicant relies on the Aboriginal cultural and archaeological assessments, provided in Exhibit E.
- 47 Further to this, the site (specifically the western portion and northern margin) is mapped as being flood prone, therefore the requirements of cl 7.2 are relevant for consideration. The applicant relies on hydrological reports in Exhibits A, C and E, and the proposed design of the site (cemetery and parkland), which is accepted to satisfy the requirements of cl 7.2 of the PLEP.
- 48 The site is located on land that is identified on the 'Scenic and Landscape Values Map', and Jerry's Creek is also mapped on the 'Natural Resources Sensitivity Map' in the PLEP. Therefore, the requirements of cll 7.3 and 7.5 of the PLEP, are for consideration. It is accepted that cl 7.3 is satisfied by the proposed works along Jerry's Creek, and that cl 7.5 is a matter that remains in contention, as assessed below.
- 49 The parties refer to Court to the Penrith Development Control Plan 2014 (PDCP), and specifically to Parts: B, Principles; and E, Key Precincts, as the site is located within E9 Mulgoa Valley.
- 50 The parties refer the Court to the following strategies, policies and plans in assessment of the DA under appeal: Local Character and Place Guideline (LC&PG), prepared by the DPE, February 2019; Planning Circular PS 18-001 'Stepping up planning and designing better places: respecting and enhancing local character', 16 January 2018 (PS18-001); the Greater Sydney Regional Plan 'A metropolis of Three Cities' and the Western Sydney City District Plan 'Connecting Communities', by the Greater Sydney Commission; Mulgoa and Wallacia Rural Villages Strategy For Exhibition, dated December 1993; and the Penrith Scenic & Cultural Landscape Study, by Envisage Consulting, dated 3 September 2019.

Experts

- 51 The Court was provided evidence from the following experts:
- (1) Planning – Mr David Hoy for the applicant; and Ms Kathryn Saunders for the respondent. The Court refers to their joint expert report, tendered as Exhibit 9.
 - (2) Landscape – Mss Florence Jaquet and Narelle Sonter for the applicant; and Ms Catriona MacKenzie for the respondent. The Court refers to their joint expert report, tendered as Exhibit 6.
 - (3) Social Impact – Dr Rachel Trigg for the applicant; and Professor Roberta Ryan for the respondent. The Court refers to their joint expert report, tendered as Exhibit 8.
 - (4) Visual Impact – Mr Peter Haack for the applicant; and Ms Catriona MacKenzie for the respondent. The Court refers to their joint expert report, tendered as Exhibit 11.
 - (5) Traffic – Mr Ken Hollyoak for the applicant; and Mr Graham Greene for the respondent. The Court refers to their joint expert report, tendered as Exhibit 7.
 - (6) Environmental – Dr Daniel Martens for the applicant; and Mr Paul Reynolds for the respondent. The Court refers to their joint expert report, tendered as Exhibit 5.

(7) Engineering – Mr Michael Cahalane for the applicant; and Mr Stephen Masters for the respondent. The Court refers to their joint expert report, tendered as Exhibit 10.

- 52 Oral evidence was provided in the hearing by the planning, social impact and landscape experts. By agreement of the parties, the other experts were not required to give oral evidence because the contentions relevant to their expertise had been resolved based on their joint conference/reports, amended DA's supporting documents and agreed conditions of consent.
- 53 The acoustic evidence was not tendered as it relates to the modification of the golf club, that was deleted from the amended DA before the Court under appeal.

Does the proposed development pose unacceptable social impacts to the village of Wallacia?

- 54 The Council contends that the proposed development is not compatible with the character of the local area because it will have significant and detrimental social impacts on the community of Wallacia, including their sense of place.
- 55 Wallacia is described by the parties as a village with a population of 1627 persons residing in 590 dwellings, that are located within a rural context.
- 56 The parties agree that the existing golf course is not a permissible use, pursuant to cl 2.3 of the PLEP, although is entitled to continue operation under existing use rights, pursuant to s 4.66 of the EPA Act.
- 57 The experts agree that the golf course has operated on the site and has been a feature of the community landscape of Wallacia, since 1932. The experts also agree that the golf course, as it currently functions, is not financially viable. The golf course is a privately-run operation, which serves the general public, on private lands.
- 58 It is agreed by the experts that the proposed development of the site as a cemetery will service a much larger, regional population base than that connected to the village.
- 59 The issue between the parties relates to whether the negative social impact perceived by the community is significant because the proposed development substantially changes the character of the village of Wallacia.
- 60 I accept the evidence of Dr Trigg and Mr Hoy, that the proposed cemetery on the site will not cause significant or detrimental social impact to the community of Wallacia. I explain my reasoning below.
- 61 The IPC placed considerable weight on the potential for negative social impact in its assessment of the DA's incompatibility with the local character. The grounds of its advice for refusal, as explained by the IPC, were primarily based on the perceived social impacts as expressed by the community, rather than any specific data derived from social impact evidence. It is assessed that the IPC and subsequently Council's decision to refuse the DA does not relate to any environmental or economic impacts, as they generally agree with the findings of the DPE, that these can be mitigated (by condition).
- 62 The IPC accepted, after community consultation, the communities 'preferred' position for a golf course to remain on the site, rather than be developed as a cemetery. Also accepted, was the perception of negative social impact to the community of Wallacia. This view is also supported and advocated by Professor Ryan and Ms Saunders.
- 63 The parties and their experts agree that the amended DA currently before the Court is substantially different than that assessed by the IPC. Whilst the land area of the site is unchanged, in comparison, the number of burial plots has been reduced by 55%, the

cemetery is now confined to the eastern portion of the site and surrounded by a 15m vegetated buffer, the golf club renovation is removed from consideration, and the western portion of the site is proposed as a publicly accessible parkland.

- 64 This change in cemetery/parkland design, and the reduction in land area occupied by burial plots has however not changed the opinion of the respondent's experts. They continue to hold the view that there will be detrimental social impact as a result of the proposed development, specifically the cemetery, on the site.
- 65 Professor Ryan expressed her concern in oral evidence that the community of Wallacia would be detrimentally and socially impacted by the proposed development due to: the loss of open space that provides for active recreational use (currently as a golf course); the influx of persons not associated with the local community; and the close proximity of a cemetery that is not related to the activities of the village. She agreed that her views are consistent with those expressed by the community, as raised in their submissions. She considers the proposed cemetery is the 'antithesis' of a rural village.
- 66 Professor Ryan was also concerned by the size and scale of the proposed cemetery development located adjacent to residences, which she says is out of context with the small village of Wallacia. She did not expand on the factors that lead to her 'size and scale' assessment.
- 67 Ms Saunders also expressed concern regarding the proposed 'scale' of the development, relative to the adjacent rural village of Wallacia, and that it was out of context for the surrounding rural environment. When pressed by the Court, she explained that in terms of 'scale', she was referring to the significant change in land use, potential for public view impacts to burial plots, and the fact that the cemetery was providing a regional service, rather than being related to the smaller village requirements. She agreed that there are no standards or controls in either the PLEP or the PDCP, apart from a minimum cemetery area requirement of 10 ha (which the DA complies, as described below), to inform her assessment. She agrees her perceptions are consistent with those strongly held by the local community.
- 68 Dr Trigg accepts that the proposed change of land use from a long established golf course to a new cemetery could trigger some negative emotions within the community of Wallacia, particularly as it proposes to service the broader, regional community. However, she considers that the provision of a publicly accessible parkland in the future and continuation of golfing on the site up to 2050, will provide an opportunity for the community to adapt and directly benefit in the longer term from the proposed development. This, she believes, would negate any short term perceived social impact. She accepts there will be a period in the short term, that negative community perceptions of the cemetery could cloud their view of the benefits of the proposed development.
- 69 Dr Trigg maintains that the ease of access to the proposed parkland, together with accessibility through the pathways within a more compact cemetery in an enhanced natural landscape, provides future opportunity for both active (ie walking) and passive use by a broader range of people within the community of Wallacia.
- 70 My assessment of the potential for social impacts from the proposed development must fundamentally be based on fact and evidence, not solely on the community perceptions. These perceptions are generally more intangible and subjective, although I do recognise are very real to the community, and therefore should not be negated.
- 71 I however find that the social impact issues as raised to the Court, being the perceived scale, size and an unsympathetic use adjacent to the village, are not validated for the proposed development. There is no quantitative or qualitative evidence to support a detrimental social impact.

- 72 I accept that intangibility and subjectivity in themselves are not to be dismissed as factors that must be excluded from the Courts assessment, as posed in *Broad v Brisbane City Council* (1986) 59 LGRA 296; [1986] 2 Qd R 317 (Broad judgment). I have not sort to do so.
- 73 The number of (objector) submissions reflects that there is a large segment of the community that holds a negative view regarding the proposed development. It is recognised that these submissions are based on the original or earlier amended development, which had a larger number of burial plots over a greater area of cemetery, than is currently before the Court for assessment.
- 74 I am satisfied that the changes made to the proposed development, including a reduced number of burial plots, which are constrained to the eastern portion of the site, and provision of a parkland, positively responds to the issues raised by many residents of Wallacia, and will likely minimise their perception of social impact from the proposed development.
- 75 The negative perceptions held by the community generally relate to having a cemetery near their village, particularly one that serves regional populations. I accept Dr Trigg's assessment that the potential for social impact to the local community is sufficiently mitigated by the amended design of the cemetery, which now relies on a parkland and significant retention of native vegetation. These changes ultimately provide a public benefit to the community of Wallacia, that is not currently available from the golf course, thereby minimising negative social impact.
- 76 The experts agree that the issues relating to traffic, noise, amenity and visual impact are resolved by the amended DA and agreed conditions of consent before the Court. There are no direct or assessable amenity impacts due to the proposed development.
- 77 I find it is reasonable to assess that the proposed development will not have a detrimental social impact to the village of Wallacia, based on the evidence before the Court. I am not satisfied that there will be adverse impact to the village of Wallacia because of this application. I consider that the proposed development is designed and intended to provide a pleasant, landscaped environment that is not inconsistent with the rural environment expected by the residents of the village of Wallacia. The proposed parkland is an area that will benefit a larger demographic of the community of Wallacia, than currently that which benefits from the golf course.
- 78 My assessment of social impact, balancing perceptions against fact and evidence is consistent with the decision of Preston CJ in *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; [2006] NSWLEC 133 (Telstra judgment), as explained at [196], [197], [198] and [199], below:

"[196] In this case, the residents' perceptions of an adverse effect on the health and safety of residents and on the environment by exposure to radiofrequency electromagnetic energy emitted from the proposed base station are without justification in objective, observable, likely consequences. The claimed effects are unsubstantiated and without reasonable evidentiary foundation.

[197] The concerns expressed by the residents as to radiofrequency electromagnetic energy emitted from the proposed base station do not relate to intangible matters. Rather, the concerns relate to matters which are capable of measurement and testing against established standards to see whether the concerns are justified or not: *Telstra Corporation Ltd v Pine Rivers Shire Council* (at 364). Testing against the relevant Australian Standard RPS3 proves that concerns are not justified.

[198] In these circumstances, little, if any, weight can be given to the residents' perceptions. This has been the consistent conclusion of other courts and tribunals which have determined other cases involving unsubstantiated community perceptions of adverse effects on amenity from exposure to radiofrequency electromagnetic energy from a proposed development: see *McIntyre v Christchurch City Council* (at 314–315); *Optus Communications Pty Ltd v Corporation of the City of Kensington and Norwood* (at 6); *Shirley Primary School v Telecom Mobile Communications Ltd* (at 140 [241]); *Hyett R v Corangamite Shire Council* [1999] VCAT 794; *Vertical Telecoms Pty Ltd v Hornsby Shire Council* (at [69]–[70]); *Telstra Corporation Ltd v Pine Rivers Shire Council* (at 364 [60]); *Lucent Technologies v Maribyrnong City Council* (at [56]); *Blake Dawson Waldron on behalf of Telstra Corporation v West Tamar Council* (at [46]).

[199] There is also a broader policy reason for the Court making its determination on the basis of reason and substantiated evidence. As Galligan notes (D J Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1990) Oxford, Clarendon Press at 314 and 316): "A basic aspect of rational action is that facts on which decisions are founded should be supported by good evidence unless there is a substratum of objective evidence for the reasons and policies acted on, discretionary decisions are liable to the charge of arbitrariness."

- 79 I understand that the existing golf course provides a benefit to some members of the community. I also appreciate the concerns of the residents of Wallacia that the proposed cemetery is not responding directly to the needs of the local community, but serves a greater regional need. I recognise that a segment of the community do not want this type of land use so close to their village, which they perceive with negative connotations.
- 80 I accept the applicant's expert assessment that the proposed development will be viewed from the public domain as a low impact development with limited built form, established within landscaped open space and connected to a publicly accessible parkland. This is consistent with the rural environments surrounding the site.
- 81 The Council's contention of negative social impact from the proposed development, appears to be strongly informed by the communities' resistance to the cemetery, as evidenced by the submissions of their experts. The residents have not had the opportunity to respond to the inclusion of the parkland and reduction in cemetery space in their submissions.
- 82 I find that the arguments relied on by Council's experts are primarily emotive and intangible in substance, not supported by the evidence before the Court. For example, the concept of the (cemetery) scale incompatibility, I find is not based on any physical or tangible attributes, such as bulk/scale but is more one of perception of area. Additionally, the conceptual loss of 'active' recreational space neglects to consider the fact that the parkland and the pathways through the cemetery also provide for active (walking etc.) use. These spaces also provide more contemplative (passive) uses, which is not currently available on the golf course. To sit too long or amble on a golf course is at your peril, and it is certainly not a use that all members of the Wallacia community, such as children can partake in safely. The parkland suits more demographic groups of Wallacia, than the existing golf course. The proposed parkland presents a positive social outcome.
- 83 Mr Pickles suggested that the area of the site is substantial in comparison to the village of Wallacia, therefore the development is of a scale not compatible to the village. I disagree that the site area contributes to a 'large scale' and incompatibly sized development. The area of the proposed cemetery use, which is posed as the causing the social impact, is substantially less than the area of the existing golf course area, which could also be considered to dominate the village due to its areal extent.
- 84 There is no evidence before that Court that suggests that the proposed development is not environmentally, including ecologically and hydraulically, sustainable. The proposed retention of ecologically significant trees across the site and management of the riparian zone as vegetated parkland, are accepted by the landscape experts and the Court as an environmentally sustainable approach to the management of the site.
- 85 It is considered that the proposed development, providing a more financially viable use in the longer term could, hypothetically, provide an increased economic benefit to the community of Wallacia, with more people seeking to use local businesses. Economic impact is not contested and not explored further in this judgment.
- 86 The proposed development ultimately provides an opportunity, that does not currently exist on the site, for the broader community of Wallacia, including children and the elderly, to explore and connect with the natural elements that define and characterise the rural landscape of Wallacia. The provision of the parkland, that connects to a well

managed riparian area, associated with Jerry's Creek, is an easily accessible asset to the wider population of Wallacia. Currently, the native vegetation around the Creek is not well maintained, and access across the site is not safely available during golfing times.

87 Mr Galasso observed that a quarter of the resident submissions were in support of the proposed development. It is accepted that there are segments of the community of Wallacia that consider the proposed development may provide other opportunities beyond the use as a golf course.

88 The proposed development provides for the continuation of the golf course into the (short term) future, which I consider should ease the concerns of those residents that seek to take the opportunity to use these facilities, and also assists to minimise any perceived social impact due to change in use. The creation of large open spaces, as proposed in this development, that is accessible for the broader community is overall a positive benefit to the community.

89 Therefore, I find that the proposed development will not significantly or negatively impact the social values on the community of Wallacia and its surrounds.

Is the proposed development compatible with the local character and consistent with the relevant zone objectives?

90 The Council contends that the proposed development is not compatible with the character of the local area because: it will have significant and detrimental social impacts on the community of Wallacia, including their sense of place; it does not achieve the objectives of the relevant zones; and the cemetery is not consistent with the strategic vision for the local area.

91 The Council accepts that the issue of visual impact was addressed by the experts and is resolved, as described in Exhibit 11.

92 The Council explains that the character of Wallacia will be detrimentally changed as a result of the proposed development in an essentially small rural community that services its own needs, to one that seeks to support the needs of Greater Sydney.

93 The character of Wallacia and its surrounds are described in numerous strategic policies and plans that the parties referred the Court, provided in Exhibits 3 and 4. These documents range from the district/regional level through to the local level of planning. The Court has specifically considered the sections that relate to the village of Wallacia and its immediate surrounds.

94 As required in consideration of s 4.15 of the EPA Act, I must rely on the relevant legislative/regulatory provisions and controls to inform my decision, with guidance provided by the relevant various strategies and plans, and the submissions of experts/authorities/residents.

95 The Council contends that the objectives of both the E3 and adjoining RU5 Village zones, as described in clause 2.3 of the PLEP, are not satisfied by the proposed development, due to the conflict with the character objectives established in the RU5 zone, which relates to Wallacia Village.

96 The Council also contends that the proposed development does not comply with the objectives in clause 5.8 in D5 of the PDCP, described below:

"5.8 Cemeteries, Crematoria and Funeral Homes

A. Background

Cemeteries and crematoria can require large sites, and can have an impact on the amenity of the surrounding area, primarily due to traffic generation.

B. Objectives

a) To ensure the operation of cemeteries, crematoria and funeral homes does not have a significant negative impact on the surrounding area, including properties used for agriculture;

b) To ensure sufficient buffer zones are provided around the edge of sites to minimise impact on adjoining land uses; and

c) To ensure that uses locate on roads with sufficient capacity to accommodate likely traffic generation.

C. Controls

1) Cemeteries, crematoria and funeral homes may not locate immediately adjacent to properties used primarily for residential development only (including rural residential/rural living or seniors housing) unless a sufficient separation can be obtained between any buildings on the site and any adjacent dwellings. The extent of the separation needed will vary with the scale of the proposed development.

2) Sufficient separation should also be provided to minimise potential conflicts between cemeteries and crematoria and properties used for agriculture in rural areas.

3) Cemeteries and crematoria must locate on a site with a minimum area of 10 hectares.

4) A landscaped buffer zone 15m wide must be provided to the side and rear boundaries of the site."

97 I have already assessed and determined that the proposed development will not cause negative social impact to the community of Wallacia. I have also addressed the issue of scale, and found that the proposed development is of a scale that is not incompatible with the village of Wallacia or out of context for the local area.

98 The LC&PG describes three key features that assist in identifying the area's character, being: social; environmental; and economic. As explained in Exhibit 4, the IPC accepted the DPE's assessment and recommendations with regards to the DA satisfying the environmental and economic requirements. The key issue of incompatibility for character, as expressed by the IPC and Council decisions, arises from the social elements that inform the local area character.

99 I however find that all the relevant social elements that inform the local character assessment of the village of Wallacia are supported by the proposed development, for the following reasons.

100 The amended DA before the Court is a development that provides accessible, safe and appropriate public space, suitable for leisure and community. The public can visit the landscaped gardens easily, and more readily than currently as a golf course. The passive surveillance to ensure safety of the public is not raised as a concern of Council. The pathways linking across the site provide accessibility and are open for use to the local community. The site will provide physical/active leisure uses, and the opportunity for passive and serene leisure through the landscaped grounds.

101 The parties and their experts agree that there is sufficient public transport to/from the site to service the site and by condition of consent, a minibus will be provided to augment this service. It is understood that the proposed users of the development will not necessarily rely heavily on this (public) mode of transport, and the traffic experts agree that any potential increase in traffic volume on local roads resulting from the proposed development will not detrimentally impact Wallacia Village.

102 I am satisfied that the proposed development achieves the controls and objectives of the PDCP, and specifically clause 5.8 as contended, because the site (cemetery) area: exceeds 10 ha; provides a minimum 15m vegetated buffer around the cemetery (eastern portion) for privacy and amenity; and does not conflict with existing agriculture or residences in the local area. The traffic experts agree that the roads have sufficient capacity to meet the needs of users of the site, and the landscape experts agree that the vegetated buffer is appropriate to protect and enhance the amenity of adjoining residents.

103 Further to this, I am satisfied that the proposed development achieves the general objectives that relate to the Mulgoa Valley, described in E9 of the PDCP. The rural and natural landscape of the Mulgoa Valley is conserved.

104 I find that there is no detrimental impact on the surrounding area, environmentally, economically or socially from the proposed development.

- 105 I accept that the local character of Wallacia is a rural village with limited potential for expansion, based on the RU5 zoning requirements as provided in the PLEP. This is consistent with the vision expressed in the various strategic plans and policies that relate to protecting the rural character of Wallacia.
- 106 I am satisfied that the local character of Wallacia will not be adversely impacted by the proposed development. The proposed cemetery is focused on the eastern portion of the site, furthest away from the residences of the Village, and the burial plots will be screened by a vegetated buffer from public vantage points outside of the cemetery, including when viewed from the road and residences. This is agreed by the landscape experts as acceptable.
- 107 The proposed parkland is accessible for the public, and located in the western portion of the site, in closer proximity to the Village, providing an added buffer from the cemetery.
- 108 The differentiation of the site into a cemetery (eastern portion) and parkland (western portion) is appropriate, and in context with the site's relationship to Wallacia Village and the surrounding rural landscape. The proposed design has the effect to minimise any potential impact to the local character of Wallacia, including social aspects.
- 109 I am satisfied that the objectives of cl 7.5 of the PLEP are achieved by the proposed development, as described in the amended plans and supporting documents to the amended DA under appeal. The scenic values are protected, and as agreed by the visual impact experts, any visual impact from the proposed development is minimised by design, and can be further mitigated by conditions of consent.
- 110 The proposed development is not inconsistent with the relevant strategic regional/district/local plans and policies that describe the existing and future desired character of the local area, which includes Wallacia Village.
- 111 I accept that it is a preference of a portion of the community to maintain the site as a golf course, in its current form, however this is inconsistent with the desired, future land use permitted in the E3 zone. It is agreed that the E3 zone, described in cl 2.3 of the PLEP, permits by consent a cemetery and recreational (outdoor) use, as proposed on the site.
- 112 I am satisfied that the objectives of the E3 zone, as described in cl 2.3 of the PLEP, are achieved by the proposed development. The proposed development does not conflict with the objectives of the adjoining zones, including the adjacent RU5 zone, as described in cl 2.3. There is no determined impact to the local character or land use of the village of Wallacia. I am satisfied that the proposed development is compatible with the local character of the area, including that associated with the village of Wallacia and its sense of place.
- 113 I accept that the cemetery is a different use and context than the adjacent village (of Wallacia). However, I consider that the proposed (rural) landscaped design of the cemetery is sympathetic with the rural environment surrounding Wallacia, and therefore can exist in harmony with its surrounds.
- 114 As explained above, the values, including ecological, scientific, aesthetic and cultural, of the E3 zone are adequately protected by the proposed development. There are no assessed adverse environmental, social or visual impacts derived from the proposed cemetery or the parkland.
- 115 The assessed demand for services and facilities are agreed by the experts as available to provide for the proposed development. The improved management of the riparian zone and protection of native vegetation species through implementation of the VMP, I accept results in an improved environmental outcome for the natural resources associated and around the site.

116 I find that the proposed development achieves the relevant provisions of the PLEP and PDCP. Upon consideration of the evidence before me, I am satisfied that s 4.15(1)(a), (b) and (c) of the EPA Act are addressed by the proposed development to grant consent to the amended DA under appeal.

Is the proposed development in the public interest?

117 There were numerous submissions in objection and fewer in support of the DA under appeal, which the Court has taken the time to review and consider in its assessment.

118 Council contends that due to the potential for social impact and change to the local character of Wallacia, the proposed development is not in the public interest.

119 I recognise that several of the issues raised in the objector submissions, both resident and government authority, have been addressed by the more recent amendments to the DA under consideration by the Court.

120 I consider that the changes to the design and size of the cemetery, and provision of a publicly accessible parkland across the riparian zone, are positive contributions to the application before the Court, and have addressed many of the primary concerns of objectors.

121 I recognise that the proposed use will take some time for the community to adapt to. However, I consider that any perceived social impact will be limited due to the continuance of the golf course for a further 29 years, the establishment of parkland on the site and the effective screening of the burial plots from public vantage points.

122 Overall, the proposed development has considered and responded to the concerns of the community in a positive manner, which generally resolve their expressed concerns.

123 As described above, I find that the proposed development does not pose a negative social impact on the community of Wallacia and there is no adverse change to the local character.

124 I am satisfied that the proposed development is in the public interest, and s 4.15(1)(e) of the EPA Act is addressed.

Assessment of other relevant jurisdictional requirements not in contention?

125 Pursuant to s 4.15(1) of the EPA Act, to grant consent to a DA, the Court is required to consider all matters of relevance to the DA under appeal. A recent decision by Preston CJ in *HP Subsidiary Pty Ltd v City of Parramatta Council* [2020] NSWLEC 135 at [16] explains that the Court must be satisfied irrespective of whether jurisdictional issues were raised in contention.

126 Further to the description of jurisdictional requirements provided in the judgment above, and in consideration of the relevant matters that relate to the environmental planning provisions, both gazetted and proposed, as required in s 4.15(1)(a) of the EPA Act, I address any outstanding requirements below.

127 The traffic experts agree that the proposed access to and from Park Road is adequately described in the amended plans, in Exhibit K. The experts agree there is no other vehicular access locations proposed to/from the site, and that the issues raised by RMS relating to this development have been considered in the plans relied upon and the agreed conditions of consent respond to concurrence given. The Court accepts that the relevant requirements of the *Roads Act 1993* are thereby satisfied by the amended plans and conditions of consent that relate to the DA under appeal.

128 Concurrence was sought and provided from the NSW Rural Fire Service, with GTA's in a letters dated 3 January 2018 (Exhibit 17) and 21 April 2021 (received by Council after the hearing), pursuant to s 100 of the RF Act. The proposed development is not for a

rural or residential purpose, nor for a special fire protection purpose. The application relies on the bushfire protection assessment provided in Exhibit D, and the amended landscape/VMPs in Exhibits A and L. It is agreed that the proposed development is considered consistent with the Rural Fire Service's 'Planning for Bushfire Protection' 2006, which satisfies the relevant legislative requirements of the RF Act. The landscape experts agree that the proposed location and content of the landscaping around the perimeter of the site is consistent with the requirements for bushfire management in bushfire prone land to create an Asset Protection Zone (APZ), consistent with 'Planning for Bush Fire Protection'. It is noted that there are no structures proposed in the areas mapped as bushfire prone. The GTA's provided by RFS in concurrence are described and accepted in the conditions of consent.

- 129 Pursuant to s 4.47(5)(a) of the EPA Act, the Court has power to determine that it can be satisfied that the requirements of s 4.14 of the EPA Act and the relevant requirements of the RF Act are achieved to grant consent to the DA under appeal.
- 130 The NRAR have provided concurrence with GTA's, as required under the WMA. The Court is satisfied that these GTA's are considered and accepted in the conditions of consent.
- 131 Further to satisfaction of cl 7 of SEPP 55 described above, it is noted that the proposed development relies on groundwater monitoring wells that are strategically located around the cemetery to protect the surrounding groundwaters and receiving waters. The location of the monitoring wells is shown in Exhibit L and are described and agreed in the conditions of consent. This was a concern raised by objectors, which I consider is now resolved by the proposed monitoring system, as described to the Court.
- 132 I find that other relevant requirements of the PLEP for the Courts consideration, and not described above, are achieved by the proposed development.
- 133 The Court has assessed the proposed development, pursuant to the relevant objectives and controls described in the PDCP. Further to the controls of the PDCP addressed above, I am satisfied that any other relevant controls of the PDCP are achieved by the proposed development.
- 134 I am therefore satisfied that the amended DA before the Court addresses the relevant matters of consideration required for s 4.15(1)(a)(i), (ii) (iii) of the EPA Act.
- 135 I accept that s 4.15(1)(a)(iiia) of the EPA Act is not relevant to the amended DA under appeal. With regards to s 4.15(1)(a)(iv), I accept where relevant, the requirements are addressed by documents supporting the amended application and the agreed conditions of consent.
- 136 I am satisfied that the proposed development will not have adverse environmental, social or economic impact, and that the site is suitable for the proposed development. Therefore, subss 4.15(1)(b) and (c) of the EPA Act are addressed to my satisfaction.
- 137 I accept that the amended DA under appeal was notified to residents, consistent with the requirements of the PDCP. There were numerous submissions received in response, which the Court has reviewed and assessed. I am satisfied that s 4.15(1)(d) of the EPA Act is addressed.
- 138 The Court is advised by the parties that the existing Telstra tower located on the site will not be adversely affected by the proposed development. The area above, beneath and associated with the telecommunications tower forms part of a private lease agreement, which the parties have advised the Court is not a subject of the Courts consideration.

Conditions of consent relating to DA 17/1092

139

The parties have agreed to the conditions on which the consent should be granted. The parties agreed and disputed conditions (in track changes) are provided in Exhibits 18 and P, and subsequent agreed communication with the Court amend the conditions relating to RFS.

- 140 I accept the conditions in full as agreed between the parties, which become Annexure A to consent of DA 17/1092.
- 141 Further to these agreed conditions, those that remain in dispute, are resolved by the Court below, and are described in Annexure A.
- 142 The Court accepts the applicants' proposed deletion of deferred commencement conditions 1(a)(ii), (iii) and (iv), described in Exhibit P. The Court has assessed the landscape plans that were tendered in evidence, which have directly informed the Court's decision. Any further amendments to the landscape and burial plans, and the memorial park design response should reflect what the Court has already considered and respond directly to the final Tree Removal and Retention Plan (deferred commencement condition 1(a)(i)). The experts in oral evidence agreed to the preparation of the Tree Removal and Retention Plan to better reflect and respond to the current vegetation conditions on the site.
- 143 For the same reasons provided above, the Court accepts the applicants' proposed operational conditions 1 and 2A, described in Exhibit P. The landscape and burial plans, and memorial design response, as assessed by the Court, should be relied on and amended based on the final Tree Removal and Retention Plan. The certifier is obligated to ensure these plans/design reflect the intent of the application, as assessed by the Court and described in the conditions of consent.
- 144 The Court accepts the agreed condition relating to RFS GTA's (operational condition 5 and 4, in Exhibits 18 and P, respectively). By agreement of the parties, the RFS GTA's were amended to reflect the most recent advice from RFS dated 21 April 2021.
- 145 The Court accepts the applicant's proposed operational conditions 4 and 97 (Exhibit P), because it reflects the deletion of the golf club from the application that is under consideration by the Court.
- 146 The Court accepts the applicant's proposed operational conditions 9 and 25 (Exhibit P), because it reflects the Courts decision regarding the deferred commencement conditions (1(a)) and operational conditions (1 and 2A), as explained above.
- 147 The Court accepts the agreed deletion of condition 27.

Conclusion

- 148 The proposed development has been assessed, based on the evidence before me, including the amended DA's supporting plans, documents, agreed conditions of consent, expert reports and submissions.
- 149 After consideration of the evidence before me, I am satisfied that the amended DA under appeal addresses the relevant matters established in ss 4.14 and 4.15 of the EPA Act to grant consent. As assessed above, the relevant requirements of the RF Act, BC Act, WM Act, *Roads Act 1993*, and *Cemeteries and Crematoria Act 2013* are also achieved by the amended DA before the Court.
- 150 Therefore, the appeal for DA 17/1092 is approved with conditions of consent, pursuant to s 4.16(1)(a) of the EPA Act.

Orders

- 151 Consequently, the orders of the Court are as follows:
- (1) Leave is granted to rely on:

- (a) documents provided in NoM filed on 11 March 2021, Exhibit E;
 - (b) and amended detailed landscape plans filed on 24 March 2021, amending Exhibit A.
- (2) The Applicant is to pay the costs of the Respondent thrown away as a result of the amendments of the application for development consent, as agreed or assessed, pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*.
- (3) The appeal is upheld.
- (4) Development Application 17/1092 which, as amended, seeks to continue use for a period as a golf course, construct a cemetery with parkland, a chapel and associated buildings, tree removal, landscaping and engineering works on Lots 1 and 2 DP 1254545, and Lots 3 and 4 DP 18701, also known as 13, 17, 19 and 37 Park Road, Wallacia is approved subject to conditions of consent, provided in Annexure A.
- (5) The exhibits are returned, except Exhibits 1, 2, 8, 9, D, L and O.

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Sarah Bish

Commissioner of the Court

[Annexure A \(484796,.pdf\)](#)

[Landscape Plans \(9039422,.pdf\)](#)

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Decision last updated: 11 May 2021