

## COUNCIL ASSESSMENT REPORT

<b>Panel Reference</b>	2018SWT005
<b>DA Number</b>	DA18/0264
<b>LGA</b>	Penrith
<b>Proposed Development</b>	Construction of a Part Twelve (12) Storey & Part Fifteen (15) Storey Mixed Use Development including Basement, Podium Level 1 & Level 2 Car Parking, Ground Floor Business and Commercial Uses, 187 Residential Apartments & Construction and Dedication of a Public Road, Stormwater Drainage, Civil and Public Domain Works & Landscaping
<b>Street Address</b>	87-93 Union Road Penrith
<b>Applicant</b>	Toga Penrith Developments C/- Urbis
<b>Owner</b>	Silver Star Investments (Aust) Pty Ltd
<b>Date of DA lodgement</b>	16 March 2018
<b>Number of Submissions</b>	3 (A fourth submission was received but formally withdrawn)
<b>Recommendation</b>	Approval
<b>Regional Development Criteria (Schedule 4A of the EP&amp;A Act)</b>	Over 30million CIV
<b>List of all relevant s4.15(1)(a) matters</b>	<ul style="list-style-type: none"> <li>• Penrith Local Environmental Plan 2010 (Amendment 4)</li> <li>• Penrith Development Control Plan 2014</li> <li>• State Environmental Planning Policy No. 55 – Remediation of Land</li> <li>• State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development</li> <li>• State Environmental Planning Policy (Infrastructure) 2007</li> <li>• State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004</li> <li>• State Environmental Planning Policy (State and Regional Development) 2011</li> <li>• Sydney Regional Environmental Plan No. 20 – Hawkesbury-Nepean River</li> </ul>
<b>List all documents submitted with this report for the Panel's consideration</b>	Attachment 1 - Amended Architectural Plans Attachment 2 – Concurrence GA NSW – 12 Apr 2019 Attachment 3 – Design Integrity Review endorsement – 15 Feb 2019 Attachment 4 – Applicant's Legal Advice from Addisons – 16 Apr 2019 Attachment 5 – SWCPP Record of Deferral dated 18 Mar 2018 Attachment 6 – Amended recommended conditions set Attachment 7 – Design Excellence endorsement letter – 14 Mar 2018 Attachment 8 – Penrith City Council – Community Infrastructure Policy
<b>Report prepared by</b>	Kathryn Saunders, Senior Development Assessment Planner
<b>Report date</b>	Assessment Report Addendum 23 April 2019

### Summary of s79C matters

Have all recommendations in relation to relevant s79C matters been summarised in the Executive Summary of the assessment report?

**Yes – where appropriate**

### Legislative clauses requiring consent authority satisfaction

Have relevant clauses in all applicable environmental planning instruments where the consent authority must be satisfied about a particular matter been listed, and relevant recommendations summarized, in the Executive Summary of the assessment report?

**Yes**

*e.g. Clause 7 of SEPP 55 - Remediation of Land, Clause 4.6(4) of the relevant LEP*

### Clause 4.6 Exceptions to development standards

If a written request for a contravention to a development standard (clause 4.6 of the LEP) has been received, has it been attached to the assessment report?

**Yes**

**Special Infrastructure Contributions**

Does the DA require Special Infrastructure Contributions conditions (S94EF)?

**No**

*Note: Certain DAs in the Western Sydney Growth Areas Special Contributions Area may require specific Special Infrastructure Contributions (SIC) conditions*

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**Conditions**

Have draft conditions been provided to the applicant for comment?

**Yes**

*Note: in order to reduce delays in determinations, the Panel prefer that draft conditions, notwithstanding Council's recommendation, be provided to the applicant to enable any comments to be considered as part of the assessment report*

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<b>Owner</b>	Silver Star Investments (Aust) Pty Ltd
<b>Date of DA Lodgement</b>	16 March 2018
<b>Regional Development Criteria</b>	Capital Investment Value > \$30M
<b>Addendum Report Author</b>	Kathryn Saunders, Senior Development Assessment Planner, Penrith City Council
<b>Addendum Report Date</b>	16 April 2019

## Assessment Report Addendum

This report provides an addendum to the Council assessment report which was presented to the Panel at the public meeting held 18 March 2019 in relation to the subject development proposal. The Panel's decision was to defer the determination of the matter to a further meeting after the Director General advises whether it gives concurrence to the development application as required by clause 8.4 of Penrith LEP.

This report also aims to address various matters raised by the Panel in the public meeting and the preceding Council briefing held 18 March 2019 and is accompanied by correspondence confirming that the concurrence of the Director General is granted.

There are seven attachments to this report, as detailed below.

- Attachment 1 – Amended set of architectural plans
- Attachment 2 – Concurrence from Government Architect NSW – 12 April 2019
- Attachment 3 – Design Integrity Review endorsement – 15 February 2019
- Attachment 4 – Applicant's Legal Advice from Addisons – 16 April 2019
- Attachment 5 – SWCPP Record of Deferral dated 18 March 2018
- Attachment 6 – Amended recommended conditions set
- Attachment 7 – Design Excellence endorsement letter – 14 March 2018
- Attachment 8 – Penrith City Council Community Infrastructure Policy

### 1. Consent conditions related to design amendments

The Panel requested that the applicant attempt to incorporate the design amendments sought by the recommended conditions of consent some of which included the requirements

of the Design Integrity Review Panel (Design Excellence Jury) as listed in their correspondence at Attachment 3.

The applicant has submitted an amended set of architectural plans at Attachment 1, which has had regard to the design amendments sought within the Design Integrity Review endorsement letter dated 15 February 2019, and by various recommended conditions of consent attached to Council's Assessment Report provided to the Panel on 18 March 2018.

A review of these amended plans has been undertaken and the recommended conditions of consent have been amended and effected conditions have been altered or deleted.

The Panel noted during the Briefing meeting that it was appropriate to add a condition of consent requiring that the applicant seek a further review(s) by the Design Integrity Review Panel (DIRP), as was requested in the Government Architect NSW Design Excellence Competition endorsement correspondence dated 14 March 2018.

A relevant condition of consent has been recommended which requires the proponent to seek the endorsement of the Construction Certificate set of plans from the DIRP.

The amended recommended conditions of consent are provided at Attachment 6.

## **2. NSW Government Architect's Concurrence to the making of the application**

The Panel requested that the concurrence of the Director General be obtained to the Development Application in accordance with the requirements of Clause 8.4(5) of PLEP.

Clause 8.4(5) Design Excellence of Penrith LEP 2010 provides for the following:

*Development consent may not be granted for the erection or alteration of a building to which this clause applies that has a floor space ratio of up to 10% greater than that allowed by clause 4.4 or a height of up to 10% greater than that allowed by clause 4.3, unless:*

*(a) the design of the building or alteration is the result of an architectural design competition, and*

*(b) the concurrence of the Director-General has been obtained to the development application.*

In relation to sub-clause (a), the design for the site is the result of an architectural design competition and the modified plans have also been endorsed by the Design Integrity Review Panel (DIRP) in correspondence dated 15 February 2019. In addition, the applicant has provided at Attachment 1, a further set of amended plans which have incorporated the design requirements outlined in the DIRP endorsement letter.

In relation to sub-clause (b), concurrence to the development application has been sought from the Director General and was granted and is detailed in the correspondence received from the NSW Government Architect at Attachment 2.

## **3. Amending LEP**

As detailed in the Record of Deferral dated 18 March 2019, the Panel invited the applicant to submit through Council, for consideration in the Panel's determination a note as to:

1. Clarity as to the applicant's understanding of how the savings provision at clause

1.8A of Penrith LEP may be applied to the development application which is, that the amending LEP should be considered as a Draft instrument, and

2. If so, how the Applicant says the Panel is to consider (in the assessment of the proposed development generally) the inclusion in clause 8.7 of a requirement relevantly that:

*“...the consent authority may consent to development on land to which this clause applies (including the erection of a new building ...) that exceeds the maximum floor height shown for the land on the Height of Buildings Map of the floor space ratio for the land shown on the Floor Space Ratio Map, or both, if the proposed development includes community infrastructure.”*

3. In particular, what (if any) consideration should the Panel give to any community infrastructure (within the meaning of clause 8.7) included in the development, including “...the nature and value if such community infrastructure to the City Centre” (see clause 8.7(5)(c)), as well as any value of that same infrastructure to the development.

The applicant has responded to the Panel’s questions in their response dated 16 April 2019, prepared by Addisons at Attachment 4.

With regard to **Item 1** above, the advice confirms that under clause 1.8A of the PLEP, as the Development Application had not been determined at the time of the LEP amendment on 21 December 2018, the Panel must determine the Application as if the PLEP Amendment has not been gazetted.

The advice states that clause 1.8A of PLEP ‘does not provide any guidance as to what weight a draft or proposed instrument should be given in these circumstances’ although provides at section 2.3, that ‘we are of the view that if clause 8.7 were to apply to the Application, the Panel can be satisfied that Toga is providing sufficient community infrastructure as required by clause 8.7’.

With regard to **Item 2 and Item 3**, the applicant’s legal advice states at section 2.4 that there is no certainty that the LEP Amendment has the status of a draft instrument and iterates (section 2.5) that ‘Toga has offered to provide a substantial amount of contributions by way of road works and dedication of land to Council for the purposes of a public road which, in our view, would constitute sufficient community infrastructure to satisfy clause 8.7 if it were to apply to the Application’.

The advice clarifies the extent of works proposed by the applicant which is summarised as comprising of land dedication, construction of a new road spanning between Union Road and High Street inclusive of verge, pedestrian pavement and landscaping, on-street car parking, intersection and drainage work.

It is noted in that the applicant’s advice at section 2.16 that the value of the land to be dedicated as a new road, as required by part E11 clause 11.7.1.1 of the Penrith DCP, is \$3.3 million.

Although no detailed costings are provided with regard to the value of the land or with regard to the roadway construction costings, it is calculated that the value of the land to be dedicated, combined with an apportionment of roadway construction costs, is comparable to the monetary value of Gross Floor Area above the maximum height of 26.4m (HOB plus 10% bonus under cl8.4), when calculated utilising the Community Infrastructure Contribution Rate of \$150 per square metre, as provided by Council’s Community Infrastructure Policy 2018.

The Panel can be satisfied that should it be of a mind to consider the status of the LEP Amendment to be that of a draft instrument, that the comparative community infrastructure contribution which includes the new roadway could be considered as reasonable having regard to clause 8.7 of the LEP and Council's Community Infrastructure Policy.

With regard to **Item 3** in particular, the applicant has provided in section 2.15 of the Addisons advice, details as to how the proposal would satisfy the requirements of clause 8.7 and in particular addressed 'the nature and value if such community infrastructure to the City Centre'.

In addition to the applicant response Council's Community Infrastructure Policy outlines to the principles of community infrastructure under clause 2 and states that:

*'To determine if an offer of Community Infrastructure will be considered acceptable by Council, the following Principles of Community Infrastructure must be met:*

- 1. Community Infrastructure must be in the public interest and to the satisfaction of Council*
- 2. Community Infrastructure must be over and above current development standards and Council policies*
- 3. Community Infrastructure must contribute to the City Centre or to nearby locations and facilities likely to be used by City Centre occupants*
- 4. Community Infrastructure must be achievable, measurable, economically viable and socially and environmentally sustainable*
- 5. Community Infrastructure must be consistent with the themes within Council's Strategic Planning framework*

It is considered that the proposal to construct the roadway and dedicate land could be accepted given the above principles (and as expended upon within the Policy) having regard to the LEP Amendment.

Further, the proposal is considered to align itself with the preferred community infrastructure items listed under clause 2.5 of the Policy. Relevant items include public roads, additional street trees in priority areas, improved pedestrian links from city west to the river, pedestrian lighting of footpaths and places within the city centre, creative lighting of objects, buildings, spaces and places within the city centre and works outside of the contributions plans within the public domain master plan.

#### **4. Proposal to Construct and Dedicate a Road v Voluntary Planning Agreement (VPA)**

The Panel sought additional information related to the applicant's proposal to construct and dedicate a new road and stated that the applicant provide a response *'To the extent that the dedication of a new road is proposed by the applicant as part of the development, or as a condition of the approved development, is a voluntary planning agreement appropriate in relation to that development?'*

The applicant has provided legal advice from Addisons dated 16 April 2019 to address the Panel's enquiry. Refer to Reason 4, page 4, section 2.19 - 2.22.

Whilst it is a VPA could be entered into, related for the roadway construction and dedication, the applicant has not proposed to enter into a VPA.

Notwithstanding the above, no objections are raised to the Addisons advice related to the ability of the consent authority to consent to the development which includes the applicant's proposal to construct and dedicate a new road. Adequate conditions of consent are included to ensure its construction and dedication.

It is however raised for the Panel's consideration, that Council does not agree with the advice at section 2.22.

Section 2.22 states that *'the offer to undertake roadworks and dedicate land to Council for the purposes of the road is contingent [emphasis added] on Toga being able to offset the value of the road works against its obligations to pay monetary contributions to Council under section 7.11 of the Act, which should be reflected in the relevant conditions of consent and under a works in kind agreement.'*

A works in kind agreement has not be made in accordance with Penrith City Council's Works in Kind / Material Public Benefit Policy although it is acknowledged that documentation has been received confirming the applicant's offer to enter into a works in kind agreement, to which Council has provided feedback regarding process.

It is not agreed that the *'offer to undertake roadworks and dedicate land to Council for the purposes of a road be contingent on Council's acceptance of a WIK offer'*.

Should the applicant seek to offset applicable contributions by entering into a works in kind (WIK) agreement with Council, this works in kind offer will be considered on its merits and in accordance with Council's Works in Kind / Material Public Benefit Policy, at the time the offer is made. The acceptance of an offer for works in kind is at the sole discretion of Council.

The recommend conditions of consent include all applicable contributions levied under section 7.11 of the Act and in accordance with Council's contributions plans, this does not prohibit any future WIK agreement being entered into and applicable contributions offset.

## **5. Integrated development**

The Panel requested further clarity as to whether the development application was integrated development under the *Water Management Act 2000*.

As noted in the assessment report provided to the Panel for their consideration 18 March 2019, information contained within the Geotechnical Report stated *'...that the basement excavation for a single level will be above the water table'*. The report also noted that there is potential for groundwater levels to rise during prolonged heavy rainfall.

The applicant has confirmed that as the development application was not lodged as Integrated Development under Division 4.8 of the Act, and based in the advice of the Geotechnical consultant, a Controlled Activity Approval (CAA) under the *Water Management Act 2000* is not required.

On review, the applicant's position is accepted having regard to the submitted Geotechnical Report. It is agreed that the extent of basement excavation will not impact on the water table based on the investigations undertaken thus far.

The existing recommended condition requires that written confirmation is to be sought from the Department of Primary Industries confirming that a Controlled Activity Approval (CAA) is not required.

Notwithstanding the above, it is recommended that Condition 34 be amended to clarify that, in the case where site conditions vary from that identified within the Geotechnical Report as a result of further investigations or during the construction works, the advice of the Department of Primary Industries is to be sought as to whether a CAA is required and if so, the necessary approvals are obtained and complied with throughout the works.

The Panel can be satisfied that the Development Application as lodged is not Integrated Development and that an adequate condition of consent has been recommended to require the advice of the Department of Primary Industries (formerly Office of Water) prior to the issue of a Construction Certificate, and if unexpected finds occur thereafter.