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19 August 2019

Mr Peter Wood
Development Services Manager
Penrith City Council
via email

Dear Peter,

ASSESSMENT OF DA AGAINST CLAUSE 8.7 OF PENRITH LOCAL ENVIRONMENTAL PLAN 2010

Toga Developments Pty Ltd (the applicant) lodged development application (DA) DA18/0264 on 16 March 2018. At the time of the lodgement, *Penrith Local Environmental Plan 2010 (Amendment No. 25) (Amending LEP)* had not been gazetted. As per the transitional provisions contained in clause 1.8A of the Amending LEP and the advice provided by the Hon. Malcom Craig QC on 21 February 2019, the DA **must** be determined as if the Amending LEP had not commenced.

As such, we are of the view that clause 8.7 of the LEP cannot be given determinative weight in this DA. Notwithstanding, we understand that the Council and Panel have taken the view that regard to the provisions of clause 8.7 of the LEP must be given when determining the application. As such, the provisions of clause 8.7 of the LEP are addressed below. This letter is to be taken as an amendment to the Statement of Environmental Effects submitted with DA18/0264.

ASSESSMENT AGAINST CLAUSE 8.7 OF THE LEP

Clause 8.7(3) of the Amending LEP allows the consent authority to approve development on the site that would exceed the maximum height shown on the Height of Buildings Map if the proposed development includes community infrastructure.

For the purposes of clause 8.7 of the LEP, community infrastructure means “*development for the purposes of recreation areas, recreation facilities (indoor), recreation facilities (outdoor), recreation facilities (major), public car parks or public roads.*” (emphasis added)

As the proposed development includes a ‘public road’ the consent authority may grant consent to development on the site that exceeds the height of building standard under the terms of clause 8.7.

Clause 8.7(5) guides a consent authority to consider several matters when determining a development that exceeds the height of building standard under the clause. The proposed development satisfies each of the matters a consent authority is to have ‘regard’ to, as per clause 8.7(5) described within the following sections.

(a) Clause 8.7(5)(a) – Objectives of the clause

The proposed new road on the site satisfies the objectives of the clause as:

- Community infrastructure, as defined in the Amending LEP, is delivered on a 'key site' in the City Centre that includes community infrastructure as defined in clause 8.7(6).
- The proposed development facilitated through the exceedance of the height control reflects the desired character of the locality as it provides a built form transition, building separation and density envisaged for the area, introduces a mixed-use development that activates the streetscape, and achieves an overall design and materials that are sympathetic with the local character.
- The proposed development facilitated through the exceedance of the height control has minimised adverse impacts on the locality as it results in an acceptable amount of solar access to neighbouring sites, does not result in adverse traffic impacts, and has been assessed by the Council to not generate any significant issues of public interest.

As such the Panel can be satisfied that the proposed development satisfies the objectives of clause 8.7 and therefore clause 8.7(5)(a).

(b) Clause 8.7(5)(b) – Exhibits Design Excellence

In determining whether the proposed development exhibits design excellence as required by clause 8.7(5)(b), the Panel is guided to the correspondence from the design competition jury dated 15 February 2019, the Secretary's concurrence, and Council's assessment report which considers the achievement of design excellence.

As such, the Panel can be satisfied that the proposed development exhibits design excellence and therefore satisfies clause 8.7(5)(b).

(c) Clause 8.7(5)(c) – Nature and value of the infrastructure

When having regard to the nature and value of the community infrastructure to the City Centre as required by clause 8.7(5)(c), the Panel is directed to the Penrith City Council Community Infrastructure Policy (**the Policy**), dated 30 April 2018.

The Policy states that the Community Infrastructure Contribution Rate applies where developers access '**additional FSR**'. Page 9 of the Policy states:

The Community Infrastructure Contribution Rate is \$150/sqm of additional Gross Floor Area.

Additional Gross Floor Area is defined as any Gross Floor Area above the maximum total Floor Area identified on the Floor Space Ratio map within the Penrith LEP 2010.

This statement makes clear that the Contribution Rate of \$150/sqm is only relevant to FSR proposed **above the total Floor Area identified on the FSR map (clause 4.4)**. The proposed development

does not include additional floor area above that mapped in the LEP, and as such the 'Community Infrastructure Contribution Rate' is not applicable to the DA.

It is noted that Appendix 3 of the Policy does flag a contribution applicable to development that exceeds the prescribed height of building control, however this only applies to Staged DA where the additional FSR is not yet accessed.

While the DA is not a Staged DA as defined under Division 4.4 of the *Environmental Planning and Assessment Act 1979*, this methodology for offsetting the Community Infrastructure Contribution against future applications applying to the site has been adopted for the Public Benefit Offer submitted to Council on 12 August 2019.

In considering the 'nature and value' of community infrastructure to the City Centre in non-financial terms we direct the Panel to the Public Benefit Offer submitted to the Council on 12 August 2019, and further advise the Panel:

- The proposal includes additional street trees to contribute to the Council's Cooling the City Strategy;
- The proposal includes additional public domain landscaping, improving the amenity of streets within the City Centre;
- The proposed road facilitates additional pedestrian and vehicle movement through the site to alleviate congestion in other local roads;
- The proposal includes additional useability and passive surveillance at Union Lane;
- The proposal includes additional public car parking spaces through the inclusion of on-street parking;
- The proposal includes a pedestrian through-site link through the building which connects pedestrians from Union Lane to the west of the site and planned new public recreation (public plaza) west of the site;
- The proposed new road facilitates the closure of John Tipping Grove to vehicles and the conversion of that road to a public park/plaza (not the subject of this DA);
- The proposed new road will be dedicated to the Council for a public road that can be used by all members of the community; and
- The proposed new road is physically within the boundaries of the 'City Centre' and therefore will be to the benefit to the City Centre community (infrastructure is not provided off-site).

The 'nature and value' of the community infrastructure can be considered against the provisions of clause 8.7 of the Amending LEP, the Policy, and Council's infrastructure objectives, and the Panel can be satisfied that the community infrastructure proposed is appropriate when considering whether to grant consent pursuant to clause 8.7 of the Amending LEP.

CONCLUSION

As per the advice of Hon. Malcom Craig QC the DA must be determined as if the Amending LEP and clause 8.7 had not commenced. The Panel can nonetheless be satisfied that the extent of contributions offered within the DA satisfies the public benefit requirements of clause 8.7.

The new road proposed by the applicant is not required to service the development but has been designed to service the greater traffic network and is therefore to be offset against local developer contributions, which has been agreed with Council. The applicant has however offered a portion of payment of the road and dedication of land.

The comparison of financial contribution shows the monetary benefit delivered by the applicant far exceeds that which would be delivered under clause 8.7 if the DA was to be assessed under the Amending DA.

Yours sincerely,

A handwritten signature in black ink, appearing to read "John Wynne", written in a cursive style.

John Wynne
Group Director