

DATE OF DETERMINATION	Monday, 21 October 2019
PANEL MEMBERS	Justin Doyle (Chair), Bruce McDonald, Glenn McCarthy and Ross Fowler
APOLOGIES	Nicole Gurran
DECLARATIONS OF INTEREST	None

Public meeting held at Penrith Council, Pasadena Room, 601 High Street, Penrith on 18 October 2019, opened at 3:00pm and closed at 3:10pm.

MATTER DETERMINED

2018SWT005 – Penrith – DA18/0264 at 87-93 Union Road, PENRITH NSW 2750 – Residential Apartments including Ground Level Retail Premises (as described in Schedule 1)

PANEL CONSIDERATION AND DECISION

The panel determined to approve the development application pursuant to section 4.16 of the *Environmental Planning and Assessment Act 1979*.

The decision was unanimous and was made for the reasons set out below.

This is the third public meeting convened by the Panel to consider this development application, the other two meetings being convened on 18 March 2019 and 6 May 2019. Specific matters raised in the written submissions from the public were given attention at the 18 March 2019 meeting.

The two deferrals of the Panel’s determination related primarily to the particular height controls applying to this site under Penrith LEP 2010 which identifies land including the DA site to be Key Site 11. Specific height and FSR controls apply to that land as discussed below.

The panel considered the matters discussed at those meetings, the matters listed at item 6, the material listed at item 7 and the material presented at meetings and briefings and the matters observed at site inspections listed at item 8 in Schedule 1.

Height and FSR development standards

A key issues of assessment of the proposed development is height and FSR given the exceptional provisions applying to the land in that regard under clauses 8.4 and 8.7 of Penrith LEP with the site forming part of a Key Site.

Clause 4.3 imposes a height limit (with reference to the Height of Buildings Map forming part of the LEP) of 24 metres.

The proposed maximum height of the development is described in the assessment report as measuring 52.8 metres set by the height of the Building 2 element, with the Building 1 element measuring 43.25 m.

The DA proposes a building that is more than double the mapped height, which clause 4.3 would prohibit unless some other provision allows departure from its terms.

Clause 4.6 offers one means by which the clause 4.3 height standard can be ‘contravened’, but only if the Panel is satisfied (among other things) that *“the proposed development will be in the public interest because*

it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out”.

The Applicant has made a written request under clause 4.6 that the height control be varied on various grounds including that “... *the objectives of the height control ... would be thwarted if not varied*”.

Objectives of the clause 4.3 height control include “*to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes*”. While the proposed building has been assessed by the Government Architect - Design Excellence Competition Jury to be of design excellence, its height will nonetheless disrupt some views, and increase its visual impact. The contravention of the mapped height of the building under clause 4.3 would be a substantial one. The Panel was not persuaded to allow the substantial contravention of the clause 4.3 height control on the basis of the clause 4.6 variation.

Because the land the subject of this DA is identified in the Key Sites Map, Clause 8.4(5) offers another means by which the height development standard nominated by clause 4.3 may be exceeded. It reads:

- (5) 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.**

The DA proposal exceeds the clause 4.3 height control by more than 100% - far greater than the 10% allowed by clause 8.4(5). It is therefore of no assistance to this DA.

Clause 8.7 offers a third means by which the height development standard may be exceeded, where (as is the case here) the DA relates to land identified as a key site on the Key Sites Map.

Clause 8.7(3) therefore permits the Panel to approve a new building on the land even where clauses 4.3 and 8.4(5) might indicate that it should be refused, but only where the development includes community infrastructure. It reads:

“8.7(3) Despite clauses 4.3, 4.4 and 8.4 (5), the consent authority may consent to development on land to which this clause applies (including the erection of a new building or external alteration to an existing building) that exceeds the maximum height shown for the land on the Height of Buildings Map or the floor space ratio for the land shown on the Floor Space Ratio Map, or both, **if the proposed development includes community infrastructure.**”

“Public roads” are expressly included as one type of “community infrastructure” in the definition recorded at clause 8.7(6). The development proposed by this DA includes a new public road, and therefore the Panel as the consent authority can approve it “despite” the height control in clause 4.3, but only if:

- (a) The development does not exceed the maximum FSR of 5:1 which clause 8.7(4) imposes for Key Site 11; and
- (b) (As required by clause 8.7(5) the Panel has regard to:
 - (i) the objectives of clause 8.7,
 - (ii) whether the development exhibits design excellence,
 - (iii) the nature and value of the community infrastructure to the City Centre.

The FSR of the proposed building has been assessed by Council staff to be significantly less than maximum 5:1 set by clause 8.7(4), even if the land used in the FSR assessment is limited to the portion of the site upon which the buildings are built to the west of the new road proposed for dedication.

The objectives of clause 8.7 are expressly identified by clause 8.7(1) to be:

- (a) to allow higher density development on certain land in the City Centre where the development includes community infrastructure, and
- (b) to ensure that the greater densities reflect the desired character of the localities in which they are allowed and minimise adverse impacts on those localities.

As the development proposed in the DA includes community infrastructure (as already discussed) it would fulfil objective 8.7(1)(a).

The LEP does not identify a 'desired character for the locality of the site', but Penrith DCP 2014 places the site in the City West (Mixed Use) precinct. The proposed development will reflect the character identified as desirable for that precinct including assisting development of the area "primarily as a high density residential precinct that will complement and bring additional activity to the adjoining civic and cultural precinct". The embellishment of the public road proposed as part of the community infrastructure will assist in improving connections to the adjoining civic and cultural precinct. Good design and modifications made during the assessment process will minimise impacts on the locality.

The proposed building has been assessed by the NSW Government Architect's office to exhibit design excellence. The Panel accepts that the sophisticated design of the proposal responds sufficiently well to its context to warrant that assessment having regard to the matters listed at 8.4(2).

The review of the nature and value of the community infrastructure by the Council assessment staff advises that the value of the proposed community infrastructure will satisfy its Community Infrastructure Policy. Material was presented during the Panel briefing to the effect that the new road and embellishment work would deliver a value to the community assessed at worth more than \$1.5 million in excess of the contributions required under the Section 7.11 contributions plan.

Taking all of those matters into account, the Panel was satisfied that the matters identified at clause 8.7(5) were sufficiently addressed to justify the proposed height.

In coming to that conclusion, the Panel notes assertions made by the Applicant that clause 8.7 does not apply to the development based on the fact that the LEP did not contain clause 8.7 when the DA was lodged. It was argued that the effect of the savings provision at clause 1.8A is that the Panel must apply the LEP as it stood when the DA was lodged.

The Panel does not agree with that advice. The words used in the savings provision are:

1.8A Savings provision relating to development applications

If a development application has been made ***before the commencement of this Plan*** in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

"This Plan" is a reference to Penrith LEP 2010 which commenced long before this DA was lodged. Taking into account the reasoning of the Court of Appeal in *Wingecarribee Shire Council v De Angelis* [2016] NSWCA 189, the language of Clause 1.8A gives no encouragement to a reading which requires the consent authority to apply the particular amendment of the LEP which preceded lodgement of the DA. The present amendment of the LEP is to be applied.

Other s.4.15 considerations

1. The proposed development will provide additional housing supply and choice within Penrith City Centre at a location with ready access to the metropolitan transport services available from Penrith rail station and the wide range of services and amenities provided within the City Centre and on nearby lands. The proposal also provides a constructed, dedicated two lane road and intersection works linking Union Road and High Street.
2. The proposed development subject to the conditions imposed adequately satisfies the relevant State Environmental Planning Policies including SEPP 65 -Design Quality of Residential Apartment Development and its associated Urban Design Guidelines, SEPP 55 (Remediation of Land), SEPP (Infrastructure) 2007 and State and Regional Environmental Plan No20- Hawkesbury- Nepean River.
3. The proposal development, subject to the conditions imposed adequately satisfies the requirements and provisions of Penrith LEP 2010.
4. The Panel considers that Cl. 8.4 of the LEP relating to Design Excellence is a central provision in consideration of this proposal as consent must not be granted unless the consent authority considers the proposed development exhibits design excellence. The office of the Government Architect - Design Excellence Competition Jury have advised that the building design resulting from the design competition arrangement applied to this proposal;
 - Is of height and mass appropriately in response to the masterplan context
 - Appropriately considers the surrounding context and Demonstrates design excellence

The Panel accepts that assessment taking into account the factors listed at clause 8.5(2) of the LEP .

5. Having regard to these factors the Panel has concluded that the proposal is reasonable in the circumstances of this case and consistent with the objectives of the B4 Mixed use Zone.
6. The Panel accepts the conclusions of the assessment report that the proposal adequately satisfies the provisions of Penrith Development Control Plan 2014.
7. The proposed development subject to the conditions imposed will have no unacceptable adverse impacts on the natural or built environments including the amenity of existing or proposed nearby premises including loss of views, the ground water system, the utility or safety of Union Lane or the operation of the local road system
8. In consideration of conclusions 1-7 above and the discussion of the applicable height standards in this report, the Panel considers the proposed development is a suitable use of the site and approval of the proposal is in the public interest.

CONDITIONS

The development application was approved subject to the conditions in the council assessment report as amended in the memorandum to the Panel dated 21 October 2019, and notes that when asked the Applicant's representatives indicated that they had no objection to those conditions.

CONSIDERATION OF COMMUNITY VIEWS





Prior to the meeting, the Panel considered written submissions made during public exhibition from three objectors and heard from those wishing to address the panel as listed at item 7 in Schedule 1.

Issues of concern raised in the objection letters included:

- The impact of the proposed development on view towards the Blue Mountains
- Solar access
- Traffic impacts
- Excessive heights.

The panel was advised by Council staff that the objection that had been made for the owners of High 618 Pty Ltd, the owner of Nos 614-632 High Street, Penrith, had been withdrawn.

The panel considers that concerns raised by the community have been adequately address in the assessment report and that no further new issues requiring assessment were raised during the public meeting, other than the matters identified above for comment from the applicant.

PANEL MEMBERS	
 Justin Doyle (Chair)	 Bruce McDonald
 Ross Fowler	 Glenn McCarthy

SCHEDULE 1		
1	PANEL REF – LGA – DA NO.	2018SWT005 – Penrith – DA18/0264
2	PROPOSED DEVELOPMENT	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
3	STREET ADDRESS	87 – 93 Union Road, Penrith
4	APPLICANT/OWNER	Applicant: Toga Penrith Development c/-Urbis Owner: Toga Penrith Developments Pty Ltd
5	TYPE OF REGIONAL DEVELOPMENT	General development over \$30 million
6	RELEVANT MANDATORY CONSIDERATIONS	<ul style="list-style-type: none"> Environmental planning instruments: <ul style="list-style-type: none"> Penrith Local Environmental Plan 2010 (Amendment 4) State Environmental Planning Policy No. 55 – Remediation of Land State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development State Environmental Planning Policy (Infrastructure) 2007 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (State and Regional Development) 2011 Sydney Regional Environmental Plan No. 20 – Hawkesbury – Nepean River Draft environmental planning instruments: Nil Development control plans: <ul style="list-style-type: none"> Development Control Plan 2014 Planning agreements: Nil Provisions of the <i>Environmental Planning and Assessment Regulation 2000</i>: Nil Coastal zone management plan: Nil The likely impacts of the development, including environmental impacts on the natural and built environment, the impacts of the proposed height of the building in terms of views and visual impact, the traffic impacts of the new road, as well as social and economic impacts in the locality The suitability of the site for the development Any submissions made in accordance with the <i>Environmental Planning and Assessment Act 1979</i> or regulations The public interest, including the principles of ecologically sustainable development
7	MATERIAL CONSIDERED BY THE PANEL	<ul style="list-style-type: none"> Council assessment report: 8 October 2019 Council memo dated 14 October 2019 Council memo dated 21 October 2019 Clause 4.6 Variation Request (Height of Building) Written submissions during public exhibition: 3 Verbal submissions at the public meeting: <ul style="list-style-type: none"> In support – Nil In objection – Nil Council assessment officer - Nil

		<ul style="list-style-type: none"> ○ On behalf of the applicant – John Wayne
8	MEETINGS, BRIEFINGS AND SITE INSPECTIONS BY THE PANEL	<ul style="list-style-type: none"> • Briefing: Monday, 25 June 2018 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), Bruce McDonald, Nicole Gurran, Karen McKeown and Glenn McCarthy ○ <u>Council assessment staff</u>: Kathryn Saunders, Peter Wood, Wayne Mitchell and Gavin Cherry • Briefing: Monday, 17 December 2018 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), Bruce McDonald, Nicole Gurran, Ross Fowler and Glenn McCarthy ○ <u>Council assessment staff</u>: Kathryn Saunders and Robert Craig • Briefing: Monday, 16 September 2019 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), Bruce McDonald, Nicole Gurran, Jeni Pollard and Glenn McCarthy ○ <u>Council assessment staff</u>: Kathryn Saunders, Peter Wood and Gavin Kerry • Site inspection: Monday, 18 March 2019 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), Bruce McDonald, Nicole Gurran, Ross Fowler and Glenn McCarthy ○ <u>Council assessment staff</u>: Kathryn Saunders, Peter Wood, Wayne Mitchell and Paul Anzellotti • Final briefing to discuss council's recommendation, Monday, 18 March 2019, 11:45am. Attendees: <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), Bruce McDonald, Nicole Gurran, Ross Fowler and Glenn McCarthy ○ <u>Council assessment staff</u>: Kathryn Saunders, Peter Wood, Wayne Mitchell and Paul Anzellotti • Final briefing to discuss council's recommendation, Monday, 6 May 2019, 11:45am. Attendees: <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), Bruce McDonald, Nicole Gurran, Ross Fowler and Glenn McCarthy ○ <u>Council assessment staff</u>: Kathryn Saunders, Peter Wood, Wayne Mitchell and Paul Anzellotti • Final briefing to discuss council's recommendation, Monday, 21 October 2019, 11:45am. Attendees: <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), Bruce McDonald, Ross Fowler and Glenn McCarthy ○ <u>Council assessment staff</u>: Gavin Cherry and Peter Wood
9	COUNCIL RECOMMENDATION	Approval
10	DRAFT CONDITIONS	Attached to the council assessment report