

DATE OF DEFERRAL	Tuesday, 3 May 2022
PANEL MEMBERS	Justin Doyle (Chair), Nicole Gurran and Louise Camenzuli
APOLOGIES	Carlie Ryan
DECLARATIONS OF INTEREST	Tricia Hitchen & Ross Fowler: Continuing conflict of interest in matters relating to Wallacia Golf Course.

Public meeting held by teleconference on 26 April 2022, opened at 3:07pm and closed at 4:11pm.

MATTER DEFERRED

PPSSWC-144 – Penrith – DA21/0130 at 13 Park Road, Wallacia – Alterations & Additions to Wallacia Country Club (as described in Schedule 1).

REASONS FOR DEFERRAL

The Panel agreed to defer the determination of the matter until required information and assessment has completed.

This development application DA21/0130 concerns land located in Park Road, Wallacia which for many decades has been used as a golf course with associated club house facilities.

The DA does not however propose any necessary continuation of the golf course. Instead, Mr Hoy who presented to the Panel for the Applicant made it clear, when making his submissions contesting proposed draft condition of consent number 7 (cessation of use) that the clubhouse was not proposed as ancillary to the golf course, but rather as a separate facility which may operate in its own right, noting that the Applicant 'St John's Bowling Club' intends no commitment to operate any part of the golf course (even a cut down version) in the medium to long term.

That is inconsistent with the basis upon which permissibility has been considered by the Council staff, whose determination report includes this discussion in relation to the question of zoning and permissibility that emphasises that the Council relied upon a commitment to continuation of the golf course in their assessment:

"The use of the land for the purposes of a golf course and ancillary golf clubhouse are prohibited in the C3 zone, however, the existing Golf Course use and ancillary Golf Clubhouse building benefit from an existing use right as defined under the Act. There is evidence to suggest that the Golf Course and ancillary Golf Clubhouse have operated since around 1932, with Council records indicating the use was in operation prior to 1987, and therefore the alterations to the existing ancillary Golf Clubhouse and Golf Course can be supported having regard to the ability to alter an existing use as detailed in the Regulations.

The expansion of the ancillary Golf Clubhouse is regarded as an intensification of the existing use, and the extension is located on land in which the existing use right applies. Furthermore, it is considered that the existing car park is also associated with the existing use right and therefore, the land upon which both the car park and proposed car park extension to the north of the Golf Clubhouse is located also benefits from the existing use rights.

The proposed formalisation of the carpark south of the existing golf clubhouse, located on two (2) separate lots from the golf clubhouse, is situated on RU5 zoned land. 'Car parks' are permissible in the RU5 zone under the PLEP.

The applicant asserts that the proposed pool and gymnasium building is best defined as a 'community facility' which is a permissible use in the C3 zone. The applicant has confirmed that the complex will be owned, controlled and operated by St John's Park Bowling Club which is a non-profit community organisation, and the facility will be open to the general public and non-members. This satisfies the definition of a 'community facility' as prescribed in the PLEP and therefore, the pool and gymnasium component of the development is permissible, subject to consent.

The proposed bowling green has been assessed within the broader context of the existing Golf Course, the proposed lawn bowls use is considered an outdoor passive sport and recreational activity carried out on grass, that patrons of the Golf Course can partake in, and it is not too dissimilar to the activity of golf and the adjoining existing putting green. The bowling green is therefore considered to be an alteration to the present existing use (i.e. golf course and ancillary golf clubhouse) which does not relatively change that dominant use and is subservient to the primary use of the land as a golf course, thus benefiting from the existing use rights of the golf course on the same parcel of land.

To ensure that the ancillary Golf Course remains ancillary and thus benefits from existing use rights, a condition of consent is recommended to require the cessation of the use of the golf clubhouse at any time the broader site ceases to be used as a golf course for a time period greater than 3 months."

It is not clear what was there intended to be meant by "*To ensure that the ancillary Golf Course remains ancillary*". That would seem to suggest that the Council staff considered that the eighteen-hole golf course was ancillary to the club house, in the sense that the golf course supported the clubhouse. That may however be an error of expression given that a club house would ordinarily be expected to support the club members in their primary dominant purpose of playing golf on the expansive course.

As background to the permissibility issue, in 2017 Development Application (DA) 17/1092 was made by the Catholic Metropolitan Cemeteries Trust to Penrith City Council to change the use of an existing eighteen-hole golf course to a new cemetery with parkland, construct a chapel and other associated buildings, tree removal, landscaping and engineering works. At the time of lodgement, the DA sought to preserve the use of the club house.

The DA as lodged was refused by this Panel under direction of the IPC. A substantially amended DA was approved by the Land & Environment Court by judgment of 11 May 2021. One important amendment was to delete any proposal for continuation of the club house from the DA.

A second DA19/0875 was determined by this Panel for development described as a "Change of Use of Part of Existing Golf Course to Cemetery". Included in the proposed development was "Reconfiguration of Golf Course to 9 Holes, New Pool, Gym, Putting & Bowling Greens, and Alterations and Additions to Wallacia Golf Club", a proposal for which was retained in the DA when approved.

That DA was approved by determination of 31 August 2021. One issue explicitly considered by the Panel when approving that DA was "Permissibility of the component parts of the development including the new pool, gym and the new bowling green". The reason an issue of permissibility arose is because (according to the Council staff assessment report) the use of the land for the purposes of a Golf Course (and presumably therefore also a bowling green) and Clubhouse are prohibited in the C3 zone. The staff report also notes that the portion of the proposed car park south of the existing Clubhouse along the Park Road frontage and proposed terrace for outdoor gaming are located within the RU5 zone where different issues of permissibility might arise. The Panel notes that the dictionary to the LEP includes the use of "*registered club*" which is not included in the list of permissible uses for either the RU5 or C3 zones.

When approving the DA the determination report included the following:

“Another matter the Panel sees as central to the DA now being considered is that the upgrade and proposed use of the clubhouse has been proposed at all stages as closely associated with a functioning golf course which yields its character for planning purposes. The continuation of a recreation use over the area of the retained portion of the golf course, and its association with the clubhouse, is seen as important to the merits of this DA. The Panel is pleased to see that is proposed as part of this DA, and a condition is imposed requiring that link to be continued.”

At an earlier stage in the assessment of that earlier DA19/0875, when deferring its determination for further reporting, the Panel included the following in its report:

EXISTING USE RIGHTS

24. *The panel notes the advice in the Council assessment report that the use of the golf course dates back to the 1930s. That historical use was supported by an oral report from one of the members of the public who addressed the public meeting.*
25. *To the extent that any part of that use commenced prior to the commencement of any planning instrument which would prohibit it with or without development consent, it may well attract the existing use provisions of the Environmental Planning & Assessment Act. Those provisions allow (subject to restrictions including those set out at clause 41 of the Environmental Planning & Assessment Regulation 2000) for the continuation, alteration and extension of an existing use, and (with limitations) change of an existing use to another existing use.*
26. *From the information available the panel would agree with the characterisation of any such existing use as recorded in the staff assessment report, and specifically where it records:*

“... the existing use rights are most appropriately characterised as a golf course and clubhouse (associated with the use of the golf course)”
27. *The panel understands that there have been a series of development consents granted for the golf club over the years. They could potentially affect the characterization of the use (see Botany Bay City Council v Workmate Abrasives Pty Ltd (2004) 138 LGERA 120). However, for present purposes, and without advice on the subject, the panel will assume that is not the case and the existing use can be interpreted more broadly as the Council has concluded.*
28. *In coming to that view the panel has taken into account the applicable principles identified by the High Court in Perth Shire v Keefe, Parramatta City Council v Brickworks (1972) 128 CLR 1, as digested by Kirby P (Samuels and Priestly JJA concurring) in **North Sydney Municipal Council v Boyts Radio & Electrical Pty Ltd** (1989) 16 NSWLR 50, 67 LGRA 344 (at 59; 353), with three key considerations as follows*
29.
 1. *Defining the “existing use” depends upon a detailed examination of the facts of each case. Inevitably there will be borderline cases where the characterization of the use which is protected will be controversial and upon which minds may differ.*
 2. *Nevertheless, the general approach to be taken is one of construing the “use” broadly. It is to be construed liberally such that confining the user to precise activity is not required. What is required is the determination of the appropriate genus which best describes the activities in question.*
 3. *In determining that genus, attention should be focused on the purpose for which the determination is being made. This is a town planning purpose. It therefore considers the use from the perspective of the impact of the use on the neighbourhood. This is because the regulation of the use within the neighbourhood is the general purpose for which planning law is provided.*

30. Kirby P said further (at 64-65; 358):

"I approach the task of classification of the existing use rights for this purpose in the way that the High Court has laid down in Perth Shire v Keefe, Parramatta City Council v Brickworks [(1972) 128 CLR 1; 26 LGRA 437], Woollahra Municipal Council v Banool [(1973) 129 CLR 138; 28 LGRA 410] and as this Court recently elaborated in the Royal Agricultural Society case. They are not to be narrowly defined, restricting such use only to the precise activities shown by the evidence. They are to be broadly and liberally construed, keeping in mind the town planning context in which the classification is ventured. ... Equally erroneous is it to confine the use, adopting the definitions used in the NSPSO (North Sydney Planning Scheme Ordinance), years after the existing use rights had first been established."

31. When Kirby P refers to Parramatta City Council v Brickworks Ltd (1972) 128 CLR 1, 26 LGRA 437, he draws attention to the following principle from the judgment of Gibbs J Parramatta City Council v Brickworks Ltd at 25; 455:

"Those clauses are designed to preserve and protect existing rights and ought to be liberally construed and not restricted by dubious implications drawn from words used in other clauses directed to a different subject matter."

32. Applying those principles, the panel would not agree with a categorisation so expansive as to be defined as a "recreation facility". Reference to current LEP definitions is not called up by the authorities, noting that the relevant date is the date the planning instruments changed to first prohibit the use without consent. There would seem to be many recreation facilities (assessed at the level encouraged by the authorities) which would be quite different to a golf club and associated golf course.

33. Not all of the golf course and associated club activities constitute an "existing use" within the meaning of the EPA& Act, because that use is relevantly currently permissible on parts of the DA site. However, the part of the site where the present use would fit within one of the prohibited uses nominated in the planning instruments for that portion would seem likely to meet the statutory tests.

34. The relevant permissibility issue as the panel understands it is summarised in this portion of a legal advice from the Applicant dated 25 September 2020:

"... the Site is largely zone E3 –Environmental Management under the PLEP. DA19/0875 proposes a new bowling green in the PLEPE3 Zone. The new bowling green is to be operated as part of the existing Wallacia Country Club together with the existing golf course.

The PLEP definition of 'recreation facility (outdoor)' includes both golf courses and bowling greens. The land use table for the PLEPE3 Zone does not expressly permit or prohibit recreation facilities (outdoor). Accordingly, recreation facilities (outdoor), including golf courses and bowling greens, are innominate prohibited uses in the PLEPE3 zone."

35. If the bowling green is considered within the context of the larger golf club and associated golf course, it may well be viewed as a permissible ancillary use, or alternatively it may be permissible as an alteration to the present existing use which does not relevantly change that use. Lawn bowls is an outdoor passive sport activity carried out on grass that seems sufficiently close to golf to justify that consideration.

36. No final view has been taken on these matters by the panel, but the panel would expect further consideration of the DA to address the comments outlined above.

The Council report concludes that the club house now proposed is in substantive merit terms the same as that approved as part of or ancillary to the golf course with its existing use rights. It is unlikely to generate significant additional impacts, and relies upon substantially the same traffic and parking arrangements. It is on that basis that it is recommended for approval, but notably with the condition requiring it to continue to be used in association with the golf course as discussed above.

The Panel accepts that assessment, while taking into account the public submissions made to the public meeting recounted below.

While the Applicant proposes to continue an association of the club with recreation facilities such as a new bowling green, it will undoubtedly be an association that is at least altered (if not significantly changed) from that which currently exists with the golf club.

In the circumstances, the Panel resolved to defer determination of the DA to allow the Applicant an opportunity to make a more considered submission on the issue of permissibility under the split zoning affecting the operation, noting that the nature of the facility and its association with the golf club were issues raised by the public addresses to the determination meeting.

The Applicant also raised concerns with the proposed draft conditions of consent 3 (operating hours) and 6 (surrender of consent) and advised that it would include in its proposed submission its position in relation to each of these conditions for the Panel's further consideration.

In the circumstances, the Panel unanimously resolved to defer its determination for a short period to allow more time for the foreshadowed submission to be provided to the Panel through the Council (which has now occurred), with the expectation that the DA is likely to be determined electronically after that submission is duly considered.

It may be that Court authorities which have considered the relationship of clubhouses and associated sporting facilities (such as *Peters v Manly Municipal Council* [2007] NSWCA 343 (Special Leave refused by *Peters v Manly Municipal Council* [2008] HCA 51 276 and the decision at first instance by Lloyd J) and the earlier decision of *Berowra RSL Community and Bowling Club Ltd v Hornsby Shire Council* [2000] NSWLEC 243; (200) 114 LGERA 345) may be of assistance in resolving the legal position.

Lastly, the Panel notes that Council's Heritage Advisor does not support the proposal as the submitted Heritage Impact Statement recommends archaeological test excavations be undertaken post consent, rather than be undertaken as part of the assessment process of the application and prior to its determination. The difficulty may be (as often encountered) that an AHIP would be necessary for the excavation necessary for the archaeological testing. The Panel relies on the Council staff's assessment that the proposed condition adequately addresses this issue.

Issues raised by the Panel in its assessment of the DA including landscape buffering along the Park Road frontage, concerns of sustainability including the potential incorporation of solar panels, battery storage, renewable source of energy used for pool heating, and the potential of the car park operating as a heat sink due to extensive hardstand with limited canopy trees have been adequately addressed in the assessment report and proposed conditions.

Community submissions




In addition to considering the 22 written submissions summarised in the Council staff report (many concerned with the approved cemetery rather than the more limited development now proposed), the following persons addressed the public meeting:

- Jane McLuckie addressed the Panel on behalf of the Wallacia Progress Committee as its Vice President to record its objection. She stressed the importance of the community facility to the Wallacia area which has traditionally included the golf course since 1932. She said that the present clubhouse was not offering anything like the past service, noting there have recently been no

kitchen meals. She said the decline of the club has been and will be associated with loss of social interactions and recreational opportunities. She noted that the land had been mapped as rural recreational space in Council's planning documents and raised a concern about the appropriateness of the proposed fencing.

- James Murray who said he lived at the 'back of Jerry's Creek' was concerned about the depths of potential flooding on Greendale Road and the associated evacuation risk. He saw the DA as a 'disingenuous application' and felt that there were circumstances associated with the transfer of relevant property rights that warranted referral to ICAC.
- Bernadeta Cansdell said she lived 500 m from club on Greendale Road. She said she understood the site to be Crown Land. She questioned whether the proposed club would be ancillary to the golf course as had long been the case. She said views across the golf course were important to the community, which were presently unfenced.
- Heather Davies of 8 Montelimar Place Wallacia, said she had lived 30 years in Wallacia and 45 years in the wider area. She said that background made her concerned about the impacts that floods might have on the proposal which she felt had not been adequately considered.

The decision to defer the matter was unanimous.

PANEL MEMBERS	
 Justin Doyle (Chair)	 Nicole Gurran
 Louise Camenzuli	

SCHEDULE 1		
1	PANEL REF – LGA – DA NO.	PPSSWC-144 – Penrith – DA21/0130
2	PROPOSED DEVELOPMENT	Alterations and Additions to Wallacia Country Club, Construction of Indoor Swimming Pool and Gymnasium Building, Bowling Green, Putting Green, Modification and Extension to Car Park, Road Works, Tree Removal, Landscaping Works, Stormwater Drainage Works and Site Servicing Works.
3	STREET ADDRESS	13 -17 Park Road, Wallacia
4	APPLICANT/OWNER	St John's Park Bowling Club Ltd
5	TYPE OF REGIONAL DEVELOPMENT	Private infrastructure and community facilities over \$5 million
6	RELEVANT MANDATORY CONSIDERATIONS	<ul style="list-style-type: none"> • Environmental planning instruments: <ul style="list-style-type: none"> ○ State Environmental Planning Policy (Biodiversity and Conservation) 2021 ○ State Environmental Planning Policy (Planning Systems) 2021 ○ State Environmental Planning Policy (Precincts—Western Parkland City) 2021 ○ State Environmental Planning Policy (Resilience and Hazards) 2021 ○ State Environmental Planning Policy (Transport and Infrastructure) ○ Local Environmental Plan 2010 • 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 and 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: 14 April 2022 • Applicant submission: 29 April 2022 • Written submissions during public exhibition: 22 • Verbal submissions at the public meeting: <ul style="list-style-type: none"> ○ Jane McLuckie, James Murray, Bernadeta Cansdell, Heather Davies ○ On behalf of the applicant – David Hoy, Peter O'Meara, Ben Salon, David Marsh • Total number of unique submissions received by way of objection: 22
8	MEETINGS, BRIEFINGS AND SITE INSPECTIONS BY THE PANEL	<ul style="list-style-type: none"> • Briefing: Friday, 12 November 2021 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), Nicole Gurran and Louise Camenzuli ○ <u>Council assessment staff</u>: Kathryn Saunders, Jacqueline Klincke, Robert Walker, Jill Williams

		<ul style="list-style-type: none"> • Final briefing to discuss council's recommendation: Tuesday, 26 April 2022 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), Nicole Gurran and Louise Camenzuli ○ <u>Council assessment staff</u>: Gavin Cherry, Kathryn Saunders
9	COUNCIL RECOMMENDATION	Approval
10	DRAFT CONDITIONS	Attached to the Council Assessment Report