RECORD OF BRIEFING

SYDNEY WESTERN CITY PLANNING PANEL

BRIEFING DETAILS

BRIEFING DATE / TIME	Wednesday, 29 March 2023, 1:30pm to 2:30pm
LOCATION	Videoconference

BRIEFING MATTERS

PPSSWC-236 – Penrith – DA22/0213 – 184 Lord Sheffield Circuit, Penrith - Construction of Part 13 Storey & Part 31 Storey Mixed Use Commercial & Residential Development including One (1) Level of Basement Car Parking, Five (5) Storey Podium including Ground Floor Supermarket & Retail Tenancies, First Floor Child Care Centre & Medical Facility & Four (4) Levels of Car Parking, Two (2) Residential Towers (Tower A - 241 Residential Apartments; Tower B - 75 Residential Apartments), Rooftop Plant Rooms, Through-Site Pedestrian Link & Associated Site Works.

PPSSWC-237 – Penrith – DA22/0214 – 184 Lord Sheffield Circuit, Penrith - Construction of Part 13 Storey & Part 25 Storey Mixed Use Commercial & Residential Development including One (1) Level of Basement Car Parking, Five (5) Storey Podium including Ground Floor Retail Tenancies, First Floor Commercial Tenancy & Five (5) Levels of Car Parking, Two (2) Residential Towers (Tower C - 74 Residential Apartments; Tower D - 163 Residential Apartments), Rooftop Plant Rooms & Associated Site Works.

PANEL MEMBERS

IN ATTENDANCE	Justin Doyle (Chair), Louise Camenzuli, David Kitto, Carlie Ryan
APOLOGIES	Nil
DECLARATIONS OF INTEREST	Nil

OTHER ATTENDEES

COUNCIL ASSESSMENT STAFF	Robert Craig, Sandra Fagan
RSDA	Sharon Edwards. Kate McKinnon

KEY ISSUES DISCUSSED

The Panel discussed both DAs with Council and considered a number of issues relating to the statutory assessment of the proposal, including matters raised in the Council's briefing paper.

Given that the issues go to the permissibility of the development, and the long time that has passed since the DA was lodged (notably without ever having been briefed to the Panel), the Panel requests clarification of the respective positions of both the Council and the Applicant in relation to those matters so that the Panel can consider whether further deferral of final assessment of the DA is warranted.

The Council indicated that it would consider a partial refund of DA fees if the Applicant resolves to withdraw the DA upon consideration of those matters that to allow for a fresh application which takes the issues raised at the meeting into account to be prepared.

If the DA is not to be withdrawn, the Panel intends to make directions to ensure the timely assessment of the DA, which might include a preliminary decision as to its power to approve the DA as lodged in advance of detailed consideration of its merits under s 7.15 of the EP&A Act.

Approved Modified North Penrith Concept Plan

1. On 4 November 2011, the Minister for Planning approved the North Penrith Concept Plan under the then Part 3A of the Environmental Planning & Assessment Act 1979 (EP&A Act)

2. The approved concept plan was subsequently modified on 11 & 23 January 2013. The Panel has not been informed of further modifications.

3. The final modified iteration of the approved concept plan should be posted to the Planning Portal for both DA's for ease of reference, together with the Director-General's Environ mental Assessment Report under what was s 75I of the EP&A Act 1979 October 2011. The reports on the modifications should also be posted to the Portal.

4. The concept plan applies to 40.1 hectares of land to the north of Penrith Station, including the proposed sites for PPSSWC-236 & 237

5. The approved concept plan allows:
   - 1,000 residential dwellings
   - 4,500m^2 retail space
   - 10,625m^2 commercial space
   - 7,000m2 light industrial space
   - 7.2 hectares open space and drainage

6. The approved concept plan also adopts Design Guidelines for development to be carried out within the concept plan area, and requires development contributions to be made for the provision of open space and community facilities

7. Under Schedule 2 of the *Environmental Planning (Savings, Transitional & Other Provisions) Regulation 2017* (the ***Transitional Provisions***), the approved concept plan would seem to the Panel to remain a transitional Part 3A project

8. Clause 3B(2)(d)&(f) of schedule 2 of the Transitional Provisions provides as follows in relation to development yet to be granted consent for which a concept plan has been approved under Part 3A, before or after the repeal of Part 3A. Notably, s 3B is stated to apply "whether or not the project or any stage of the project is or was a transitional Part 3A project". S. 3.2(2)(d) reads:

   "*3.2(2)(d) a consent authority must not grant consent under Part 4 for the development unless it is satisfied that the development is generally consistent with the terms of the approval of the concept plan;*

(f) the provisions of any environmental planning instrument or any development control plan do not have effect to the extent to which they are inconsistent with the terms of the approval of the concept plan"

9. While the DAs for PPSSWC-236 & 237 refer to the approved concept plan, they contain no assessment of the consistency of the proposed development with the approved North Penrith Concept Plan which would appear to be a critical consideration.

10. Issues of consistency of the proposed developments with the concept plan which appear to the Panel to require assessment include:

    a) Will the development comply with the limits imposed on the approved uses in condition A1 of the concept plan?

    b) Are those uses consistent with the development scheme envisaged in the plans and documents referred to in condition A2?

    c) Will the development be consistent with the adopted Design Guidelines in conditions B2 & B3?

    d) Will the proposed development significantly increase the intensity of development in the concept plan area and demand for infrastructure and services (as relevant to the required development contributions in condition B8)?

    e) To what extent does the concept plan limit the scale of development that might otherwise be permissible under *Penrith Local Environmental Plan 2010* (LEP) having particular regard to the available application of the bonus provisions of clauses 8.4 and 8.7?

Design Excellence

11. Part 8 of the LEP regulates the consideration of DA's for land identified as "Penrith City Centre" on the Clause Application Map imposing important essential considerations and requirements, including bonus provisions enabled only if essential preconditions are met.

12. Under clause 8.4(3) development consent must not be granted for development comprising a building on Key Site 11 (which covers the land to which the DAs for PPSSWC-236 & 237 relate) that is, or will be higher than 24 metres or 6 storeys (or both) unless an architectural design competition has been held in relation to the development. The design competition is defined to be "*a competitive process conducted in accordance with procedures approved by the Director-General from time to time*".

13. The height of the development in the DA for PPSSWC-236 is 107.4 metres and the height of the development in the DA for PPSSWC-237 is 87 metres which would seem to attract the requirement for a design competition. Preston CJ has considered the requirements of that clause in *Toga Penrith Developments Pty Limited v Penrith City Council [2022] NSWLEC 117*. Preston J held that for a development proposed in a DA to satisfy the design competition requirement, the development the subject of the DA must be "*the same or substantially the same*" as the competition winner. That same formulation of words is used in s.4.55 of the Act, which has been extensively considered by the Court.

14. A second cumulative requirement for a design competition is imposed by clause 8.4(5), which prohibits the grant of consent unless "the design of the building or alteration is the result of an architectural design competition) where:

    (i) a height is proposed of up to 10% greater than that allowed by clause 4.3,

(ii) a floor space ratio is proposed of up to 10% greater than that allowed by clause 4.4.

Again, that requirement is triggered by these developments. Both triggers for the requirement of a design competition must be considered.

15. Interestingly, while Clause 8.4(4) allows for a waiver of the requirement under clause 8.4(3) of the LEP from the Director-General (and presumably the duly authorised delegate), the requirement under clause 8.4(5) is not expressly subject to the waiver. If a waiver is obtained from the Director-General to the requirement under 8.4(3), the separate potential trigger for a design competition under 8.4(5) will still need to be addressed.

16. Notably, clause 8.4(5) prohibits the grant of development consent for development unless it is "*the result of an architectural design competition*", whereas clause 8.4(3) only requires the competition to have been held "*in relation to the development*". It is possible that the different formulation of words is significant.

17. The requirements of clause 8.4 must be satisfied for each of the two DA's.

18. Taking into account those observations, the Panel sees the following additional questions of power as arising in addition to the specific merit based assessment prerequisites under s 8.4.

f) For the purposes of clause 8.4, has the requirements for a design competition been satisfied for each DA as raised under:

(i) 8.4 (3); and

(ii) 8.4 (5)?

g) Is the proposed development "*substantially the same*" as the development which emerged from a architectural design competition?

Community Infrastructure on Key Sites

19. Clause 8.7 regulates land identified as a key site on the Key Sites Map of the LEP. The properties the subject of the two DA's are together identified as Site 11.

20. Clause 8.7(3) provides:

> 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***.

21. Clause 8.7(5) sets a maximum FSR of 5:1 (noting the decision of Pain J in *Karimbla Constructions Services (NSW) Pty Ltd v Pittwater Council [2015] NSWLEC 83* as to the availability of clause 4.6. in the circumstances with some similarities in the wording).

22. The words in subsection 8.7(3) firstly emboldened above can be read to override the requirement of clause 8.4(5) for a design competition, but apparently not the requirement for a competition imposed by 8.4(3) which is not mentioned in clause 8.7.

23. Given the requirement in subclause 8.7(3) that "***the proposed development includes community infrastructure***" before the special provisions of clause 8.7 can apply, the Panel would stand to be convinced that the provision can be met by funding community infrastructure outside the DA site. Specifically, a proposal to pay money to be spent on a nearby Council Park or to upgrade a nearby intersection would not seem to be included in the proposed development.

24. The Panel is aware that parts of Council's "*Community Infrastructure Policy*" Amendment 1 refers to a "*Community Infrastructure Contribution Rate*" and for "*monetary contributions*" which can be "*pooled and progressively applied towards the provision of Community Infrastructure*", but the Panel is obliged to apply the LEP as gazetted. For the bonus under clause 8.7 to apply "*community infrastructure*" as defined by subclause 8.7(6) ("*development for the purposes of recreation areas, recreation facilities (indoor), recreation facilities (outdoor), recreation facilities (major), public car parks or public roads*") would need to be part of the development proposed in each DA..

25. The further question to be answered having regard to those observations is:

    h) Does the development proposed respectively in each of the two DA's include "*community infrastructure*" as defined by subclause 8.7(6) of Penrith LEP?

    i) If not, can the DA be approved?

Clause 8.2 Sun Access

26. Clause 8.2 states that development consent cannot be granted if the development would result in overshadowing of public open space to a greater degree than would result from adherence to the controls indicated for the land on the Height of Buildings map (being the mapped height at clause 4.3 of the PLEP). Council has advised "*The shadow analysis shows that one or two of the proposed towers will cast an additional shadow onto public open space near the site, around midday*".

27. The control reads:

    > 8.2(3) Despite clauses 4.3, 5.6 and 8.4, development consent may not be granted to development on land to which this Part applies ***if the development would result in overshadowing of public open space to a greater degree than would result from adherence to the controls indicated for the land on the Height of Buildings Map***.

28. To address that issue, the Panel would be assisted by answers to the following:

    j) What open space need relevantly be considered in relation to clause 8.2?
    k) Can the control be read as requiring no greater degree of overshadowing in aggregate across the day or does it require that there be no greater degree of exceedance at any one point during the day?

Next steps

The Panel proposed that a further joint briefing be convened (preferably by 15 May 2023) to which the Applicant is to be invited. At that meeting, the Panel would expect to discuss

A. The questions (a) to (k) above?
B. A suitable timetable for completion of the assessment by Council staff?
C. Whether any amendment of the DA should be permitted, and if so what timetable should be applied to ensure the timely assessment of the DA?