

DATE OF DETERMINATION	7 November 2023
DATE OF PANEL DECISION	7 November 2023
DATE OF PANEL MEETING	30 October 2023
PANEL MEMBERS	Justin Doyle (Chair), Brian Kirk, David Kitto, Carlie Ryan, Ross Fowler
APOLOGIES	None
DECLARATIONS OF INTEREST	Louise Camenzulli declared a conflict of interest as her company is providing legal advice to the Applicant

Public meeting held videoconference on 30 October 2023, opened at 1:00pm and closed at 3:20PM

MATTERS DETERMINED

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 DECISION

The Panel considered: the matters listed at item 6, the material listed at item 7 and the material presented at briefings and the matters listed at item 8 in Schedule 1.

The Panel determined unanimously to refuse the development applications pursuant to section 4.16 of the *Environmental Planning and Assessment Act 1979* for the following reasons:

1. DA22/0213 and DA22/0214 propose separate (although related) developments and each must include community infrastructure under clause 8.7(3) of Penrith LEP. The DA material presently submitted to the Panel does not contain a sufficiently resolved proposal for community infrastructure to satisfy that requirement.
2. Concurrence to the granting of consent is required by section 2.99(3) of SEPP (Transport and Infrastructure) 2021 before development consent can be granted, but it has not been obtained.
3. The Panel is not satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause 4.6(3) of Penrith LEP in relation to the variation of the requirements of clause 8.2 of the LEP.

CONSIDERATION

These development applications relate to a mixed use development proposed over adjoining allotments to the north of Penrith Station. The development the subject of each respective development application has been integrated within an overall design which will rely upon a single basement carpark proposed to be constructed in two stages, such that the success of the design proposed in each DA and particularly the public spaces proposed will require the ultimate construction of both.

The DAs were lodged together with Penrith Council on 11 March 2022. The first time that the Panel was briefed in relation to the DAs was more than one year later on Wednesday, 29 March 2023. At that briefing, the Panel raised a number of unresolved issues for consideration which would require resolution if the DAs were to be approved.

The key matters raised were:

- a) The relevance of the “North Penrith Concept Plan” approved by the Minister for Planning under the now repealed Part 3A of the *Environmental Planning and Assessment Act (EP&A Act)* on 4 November 2011, as subsequently modified. That concept plan applies to 40.1 hectares of land to the north of Penrith Station including the proposed sites for the subject development applications.
- b) The requirement that the development exhibit design excellence, noting that both DAs are situated on “Key Site 11” to which clause 8.4 “Design excellence” and clause 8.7 “Community infrastructure on certain key sites” have special application.
- c) The requirement for “community infrastructure” to be included in any development which is proposed to take advantage of the exception to the maximum height development standard allowed by clause 8.7 of Penrith LEP. A generous exception is allowed by that clause to the height standard that would otherwise apply under the LEP Height of Buildings Map to be exceeded, but only where the Panel as consent authority has considered “the nature and value of the community infrastructure (included in the development) to the City Centre” (under clause 8.7(5)).
- d) The operation of clause 8.2 of Penrith LEP which aims to protect public open space from overshadowing of development in the Penrith City Centre “to a greater degree than would result from adherence to the controls indicated for the land on the Height of Buildings Map”.

In response to questions raised by the Panel, the applicant has supplied additional information which has been partly successful in resolving those issues, but which also leaves important matters unresolved.

The Council staff Assessment Report advises that there remain “jurisdictional” matters which prevent the Panel from approving the development applications. Specifically, the Council staff report contends that:

- a) The proposed development is inconsistent with the Part 3A Concept Plan for North Penrith (now referred to as Thornton).
- b) The applicant’s “offer” for Community Infrastructure is unacceptable considering the increase in height thought to be achieved by reliance upon clause 8.7 of Penrith LEP.
- c) The shadow cast by the proposed built form over open space adjacent to Penrith Station would be greater than that cast by a height compliant scheme, so as to breach the strict requirements and intent of clause 8.2.
- d) While the requirement under clause 8.4 for the development to derive from an architectural design competition has been waived by the Planning Secretary, acting through a NSW Government Architect, the conditions on that waiver are unresolved.
- e) Concurrence to the granting of consent is required by section 2.99(3) of SEPP (Transport and Infrastructure) 2021 before development consent can be granted, but it has not been obtained.

The Council staff acknowledge that the applicant is continuing to work to address these matters, but predict that no resolution is likely for some time, and will require amendment of the development applications. On that basis the recommendation of the assessment report is that both DAs are now refused.

Ultimately, the Panel was unanimously of the opinion that the two DAs could not be approved based on the material presently before it, and that a sufficiently generous period had already been allowed to the applicant to resolve the matters of concern without a result. It is for that reason that the Panel unanimously agreed that the DAs should be refused.

It has been nearly 600 days since the DA was lodged. While progress had been made, the Panel was not confident that the outstanding matters would be addressed at any time soon, such that a further deferral of the Panel's determination was not appropriate.

When it was suggested to the applicant that the DAs might be withdrawn and relodged when the fundamental permissibility issues including the delivery of community infrastructure, the integration and staging of the two development applications, the concurrence of TfNSW, and the effects of overshadowing of public space had been better resolved, that suggestion was not taken up.

However, the Panel differed from the Council to some extent in its conclusions in relation to the key matters of design excellence and community infrastructure. In relation to each of the key considerations identified above, the Panel makes the following observations below:

A. Part 3A Concept Plan

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

The approved concept plan allowed:

- 1,000 residential dwellings
- 4,500m² retail space
- 10,625m² commercial space
- 7,000m² light industrial space
- 7.2 hectares open space and drainage

The approved concept plan importantly also adopted Design Guidelines for development to be carried out within the concept plan area, and required development contributions to be made for the provision of open space and community facilities. The concept plan has been partly implemented with a substantial portion of the anticipated development now complete.

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.

Clause 3B(1) and (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 (whether before or after the repeal of Part 3A):

3B Provisions applying with respect to approval of concept plans

- (1) This clause applies to development (other than an approved project) for which a concept plan has been approved under Part 3A, before or after the repeal of Part 3A, and so applies whether or not the project or any stage of the project is or was a transitional Part 3A project.
- (2) After the repeal of Part 3A, the following provisions apply to any such development (whether or not a determination was made under section 75P(1)(b) when the concept plan was approved)—
 - (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”

The applicant has supplied an advice from Adrian Galasso SC which is to the effect that these provisions do not prevent the grant of development consent to the present proposal because it is so substantially different to the approved part 3A concept that it is not “development ... for which a concept plan has been approved under part 3A” such that the savings provisions do not apply to it. Mr Galasso’s ultimate conclusion is that *“the development applications may proceed to be determined without constraint to or by reference to the Concept Plan Approval”*.

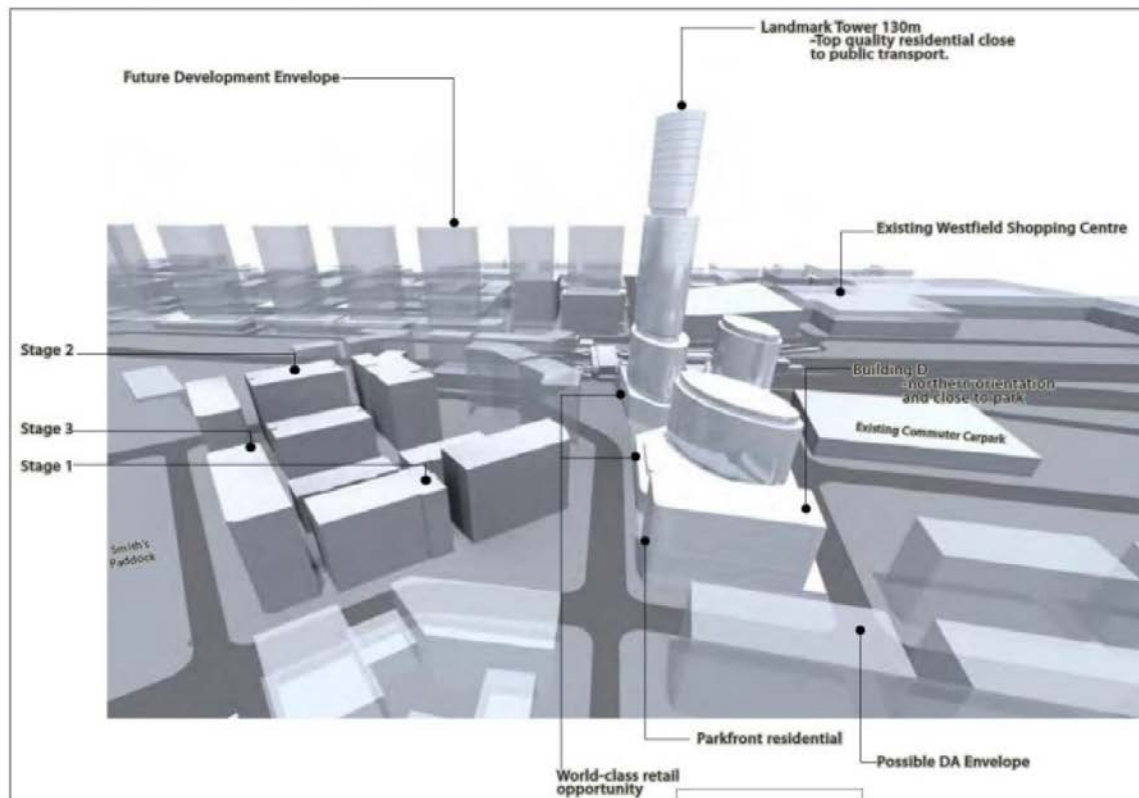
If that opinion is correct, it would leave unresolved the issue of any outstanding development contributions for the provision of open space and community facilities that were anticipated by the Design Guidelines associated with the Concept Plan.

Further, even if they have no statutory force, the Design Guidelines associated with the approved Concept Plan form part of the history of the development of the area because they defined the surrounding built form. In that context, they might retain some relevance in assessing the final form of the development, but should be read in the context of further planning for the site including the LEP changes identifying the land as a key site, the results of the design competition, and consideration by the Design Review Panel.

B. Design excellence

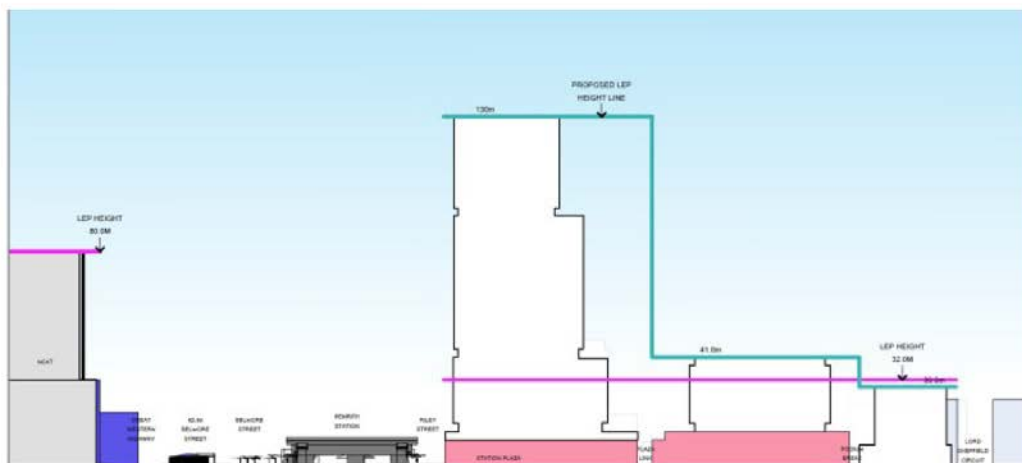
In its assessment of the appropriateness of the distribution of built form across the distinct development sites in the two DAs, the Council Assessment Report places significant weight upon documents which accompanied a planning proposal for that site which was a catalyst for the identification of the land as a “key site” to benefit from the development bonuses available under clauses 8.4 and 8.7 of the LEP.

In particular, the Council report referred to images associated with that planning proposal indicating that a building to be located adjacent to the northern boundary should be of the same scale as buildings on the opposite side of Lord Sheffield Circuit:



Source: DKO Architects

Image from page 17 of Urbis Planning Proposal Report Showing Four Building Masses

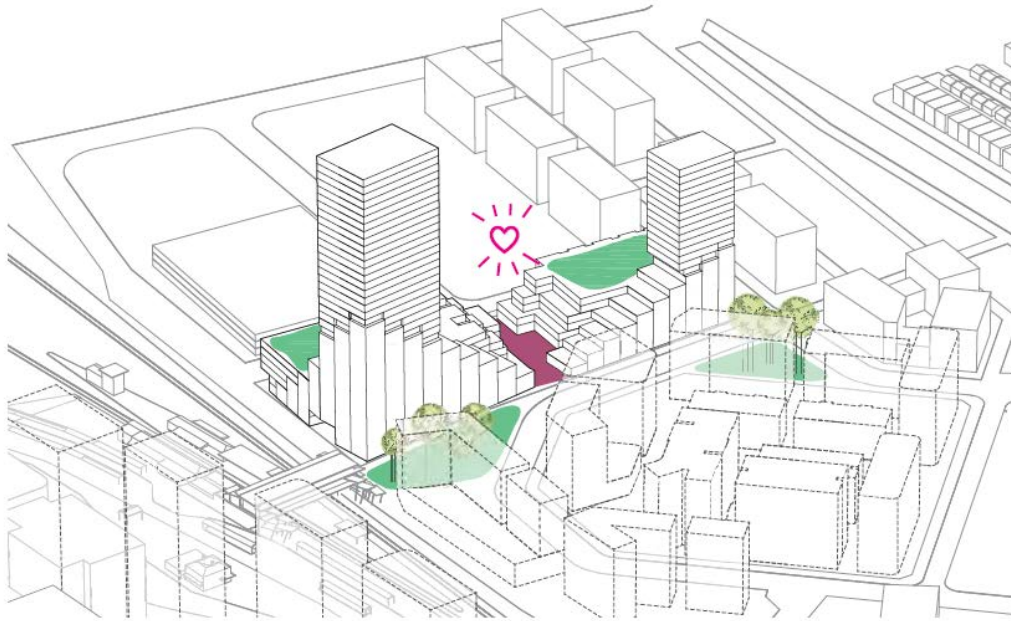


Source: DKO Architects

Image from page 18 of Urbis Planning Proposal Report Showing Side Elevation of Building Masses

However, the changes made to the LEP make no reference to those drawings, and they are not picked up by any adopted policy documents. They are superseded by the design competition held for the site which encouraged a different built form with tall towers at both ends of the consolidated site.

For comparison, these images are taken from the winner of the design competition, which show how a tower was proposed at both ends of the site (noting the role of the architectural design competition under clause 8.4 of the LEP):



The Panel was assisted at its meeting by the attendance of Mr Rory Toomey, architect from the NSW Governments Architect's Office, who is the chair of the Design Review Panel which has been considering the DA design proposal. It was Mr Toomey's assessment work that was relied upon by the Government Architect in issuing the waiver from the LEP requirements in relation to a design competition.

Mr Toomey reported that the Design Review Panel was of the opinion that the design of the proposal demonstrated design excellence, particularly in relation to the arrangement of built form across the site, and the use of an activated publicly accessible accessway through the centre of the site which would be augmented by public art and quality landscape design. He said the Design Review Panel was of the view that the present design proposal was an acceptable evolution of the competition winning design having regard to the site constraints and the permissible floor space ratio for the site.

He indicated that the conditions noted on the Government Architect's advice concerning design excellence and the design competition were not intended to indicate any failing of the design, but rather was an acknowledgement that matters of design excellence should be decided finally by this Panel.

This Panel accepts that assessment of design excellence as reported by Mr Toomey.

One additional matter discussed at the public meeting was the need for a staging plan which explained how the two components of the development which has been divided into two development applications could potentially be constructed separately. As an example, only one end of the basement carpark could be accessed from the public road system.

C. Community Infrastructure

The Panel is of the opinion that the requirements in relation to community infrastructure arising under clause 8.7 of the LEP must be satisfied by community infrastructure as defined in the clause being included within the proposed development. A contribution to the construction of community infrastructure off site (such as that anticipated by the Council's "Community Infrastructure Policy") would not satisfy that requirement.

The adequacy of the "*nature and value of the community infrastructure to the City Centre*" is an essential matter for the Panel to weigh up and assess under clause 8.7(5) of the LEP. The Panel agrees with the reasoning in the Council Policy that the public contribution of the infrastructure to be included in the proposal should be proportionate to the floor space uplift permitted by the bonus. However, the Panel does not consider itself bound by the rates specified by the Policy.

The Panel considers that (subject to consideration of a resolved proposal) the applicant's present proposition to include a community facility within the development proposed to be licensed to a suitable not for profit organisation at no cost would be an appropriate way to address the community infrastructure requirement.

However, as the applicant has chosen to divide the development into two separate sites, each the subject of a separate DA, the LEP would seem to require each respective development to include community infrastructure. Where both DAs are to rely upon the overall contribution across both sites, the legal mechanisms by which it would be acceptable for the developments to proceed separately would need to be articulated.

The DA does not include such a proposal resolved sufficiently that the Panel can now approve the DA.

It is possible that the overall contribution across both sides could be weighed together, but the LEP prerequisite must be met. Despite the Panel having raised the issue specifically as critical 9 months ago, no resolved proposal for the community infrastructure is available at present.

D. Overshadowing

The Panel is persuaded that the requirements of clause 8.2 of Penrith LEP in relation to shadow impacts on public open space are a development standard as defined in section 4 of the EP&A Act, such that they are amenable to variation through a properly made request under clause 4.6 of Penrith LEP (see *Urban Apartments Pty Ltd v Penrith City Council* [2023] NSWLEC 1094).

The clause 4.6 request to accompany the DAs should be prepared to address the usual requirements. The Panel accepts that there may be justification for the overshadowing of the northern forecourt adjacent to the station, but were not satisfied that the analysis of shadow impacts is presently sufficient. The proposed development will cast additional shadow over the public open space at Station Plaza compared to shadow that would be cast by a height compliant scheme. In order for the Panel to understand this properly, detailed drawings are needed clearly identifying the specific aspect of the development that causes the contravention of the development standard (and the extent of that contravention), as opposed to the development as a whole. In addition, further work is required by the

applicant to explain the quantitative and qualitative arguments whether the development would result in overshadowing of public open space to a “greater degree” as set out in clause 8.2(3) of the LEP.

E. Transport for NSW (Sydney Trains) Concurrence

Given that concurrence has been refused by Sydney Trains, the Panel cannot now lawfully approve the DAs.

As it is now almost two years since the DAs were lodged, and there is no convincing evidence that concurrence is imminent, the Panel cannot be satisfied that this essential matter will be soon addressed.

The Panel anticipates that the outstanding matters are capable of being resolved, but are not resolved in the present DA material.





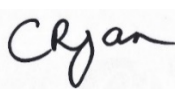
CONSIDERATION OF COMMUNITY VIEWS

In coming to its decision, the Panel considered written submissions made during public exhibition and heard from all those wishing to address the panel. The panel notes that issues of concern included:

- Support for additional housing and retail
- Inappropriate VPA and offer for community infrastructure
- Inadequate parking
- Traffic generation
- Inappropriate bulk and height
- Out of character
- Inadequate facilities and utilities in the area
- Construction impacts

The Panel was addressed by three members of the public at the determination meeting:

- Fred Landes, a real estate agent, spoke of the promise offered by the site to continue the transformation of the precinct that has occurred through recent development. He said that the proposed development will cater to a diverse population and will assist in the realisation of the vision for the area intended by the rezoning.
- David Lippman, also a real estate agent, said that approving the development would assist in increasing housing supply. He said Penrith needs development like that in Parramatta. In his view the retail and pedestrian link included in the proposal will activate the area.
- Shari Driver, a resident in Lord Sheffield Circuit, expressed her concerns about flood evacuation from the development and said that the community infrastructure in the development should be targeted to the local Thornton resident community. She said she supported what was recorded in the Council staff report.

PANEL MEMBERS	
Justin Doyle (Chair) 	Brian Kirk 
David Kitto 	Ross Fowler 
Carlie Ryan 	

SCHEDULE 1		
1	PANEL REF – LGA – DA NO.	PPSSWC-236 – Penrith – DA22/0213 & PPSSWC-237 – Penrith – DA22/0214
2	PROPOSED DEVELOPMENT	<p>PPSSWC-236 – Penrith – DA22/0213 - 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.</p> <p>PPSSWC-237 – Penrith – DA22/0214 - 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.</p>
3	STREET ADDRESS	184 Lord Sheffield Circuit, Penrith
4	APPLICANT/OWNER	<p>Applicant: The Trustee for the Thornton North Penrith Unit Trust/St Hilliers</p> <p>Owner: The Trustee for the Thornton North Penrith Unit Trust/St Hilliers</p>
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"> State Environmental Planning Policy (Biodiversity and Conservation) 2021 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development and Apartment Design Guide State Environmental Planning Policy (Planning Systems) 2021 State Environmental Planning Policy (Resilience and Hazards) 2021 State Environmental Planning Policy (Transport and Infrastructure) 2021 Penrith Local Environmental Plan 2010 Draft environmental planning instruments: Nil Development control plans: <ul style="list-style-type: none"> Penrith Development Control Plan 2014 Planning agreements: Nil Provisions of the <i>Environmental Planning and Assessment Regulation 2021</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 reports: 27 September 2023

		<ul style="list-style-type: none"> • Clause 4.6 requests to vary sun access control at clause 8.2 of the Penrith LEP on both development applications • Council memorandums: 4 October 2023 • Written submissions during public exhibition: 22 for PPSSWC-236 and 19 for PPSSWC-237 – 41 in total • Verbal submissions at the public meeting: <ul style="list-style-type: none"> ○ Fred Landes, David Lipman, Shari Driver ○ Council assessment officer – Sandra Fagan, Gavin Cherry ○ On behalf of the applicant – Andrew Harvey, Frank Katsanevas, Justyn Ng, Tim Casey, Julian Venning, Deb Landes, Mark Hovey, Christine Convington, Rory Toomey • Total number of unique submissions received by way of objection: 22 and 19 totaling 41.
8	MEETINGS, BRIEFINGS AND SITE INSPECTIONS BY THE PANEL	<ul style="list-style-type: none"> • Council Briefing: 29 March 2023 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), Louise Camenzuli, David Kitto, Carlie Ryan ○ <u>Council assessment staff</u>: Robert Craig, Sandra Fagan • Council/Applicant Briefing: 26 June 2023 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), Brian Kirk, David Kitto, Carlie Ryan, Ross Fowler ○ <u>Council assessment staff</u>: Robert Craig, Sandra Fagan ○ <u>Applicant representatives</u>: Andrew Harvey, Justyn Ng, Mark Hovey, Deborah Landes, Frank Katsanevas, Julian Venning • Council/Applicant Briefing: 7 August 2023 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), Brian Kirk, David Kitto, Carlie Ryan, Ross Fowler ○ <u>Council assessment staff</u>: Robert Craig, Sandra Fagan ○ <u>Applicant representatives</u>: Andrew Harvey, Justyn Ng, Mark Hovey, Deborah Landes, Frank Katsanevas, Julian Venning • Council/Applicant Briefing: 25 September 2023 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), David Kitto ○ <u>Council assessment staff</u>: Peter Wood, Sandra Fagan ○ <u>Applicant representatives</u>: Andrew Harvey, Justyn Ng, Mark Hovey, Deborah Landes, Frank Katsanevas • Final briefing to discuss council's recommendation: 30 October 2023 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Justin Doyle (Chair), Brian Kirk, David Kitto, Carlie Ryan, Ross Fowler ○ <u>Council assessment staff</u>: Robert Craig, Sandra Fagan, Gavin Cherry, Peter Wood
9	COUNCIL RECOMMENDATION	Refusal
10	DRAFT CONDITIONS	Not Applicable