

BRIEFING DETAILS

BRIEFING DATE / TIME	Monday, 7 August 2023, 11:30am to 12:30pm
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), Brian Kirk, David Kitto, Carlie Ryan, Ross Fowler
APOLOGIES	Nil
DECLARATIONS OF INTEREST	Louise Camenzulli declared a conflict of interest as her firm is providing legal advice to the Applicant

OTHER ATTENDEES

COUNCIL ASSESSMENT STAFF	Robert Craig, Sandra Fagan
APPLICANT	Andrew Harvey, Justyn Ng, Mark Hovey, Deborah Landes, Frank Katsanevas, Julian Venning
RSDA	Sharon Edwards, Kate McKinnon, Tim Mahoney

KEY ISSUES DISCUSSED

- Following a briefing by the Council and the Applicant on Wednesday, 29 March 2023 the Panel posted a briefing note which posed a number of questions identified to be important to the assessment of the development application including on the subjects. In relation to the matters raised in that note:

North Penrith Concept Plan

- Consistency of the development with North Penrith Concept Plan - a Part 3A Concept Plan approved by the Minister for Planning in November 2011 – was discussed

Planning Panels Secretariat

3. Irrespective of its merits, the present DA is not consistent with the adopted Concept Plan and Design Guidelines which (having regard to Clause 3B(2)(d)&(f) of schedule 2 of the *Environmental Planning (Savings, Transitional & Other Provisions) Regulation 2017 (Stop Regulation)*) limits the power of the Panel to determine the DA while that Concept Plan remains current. Modifying the concept plan will be problematic due to the fact that part of the land to which the concept plan relates has been subdivided and sold to retail purchasers, thereby raising consequent owners consent issues.
4. Prior to the meeting, the Applicant supplied a letter of advice from its solicitors Corrs Chambers Westgarth dated 27 June 2023 that proposed for consideration a partial surrender of the concept plan. An example of a surrender of a development consent was alluded to in the decision of *Meriton Property Services Pty Ltd v Council of the City of Sydney* [2012] NSWLEC 1308 (**Meriton Property**). That case however was a consent judgment which did not contain any analysis from the Court as to how a partial surrender of a consent was thought to operate. It did not grapple with the operation of the concept plan provisions of the EP&A Act, or the issue of owners consent.
5. Notably, under the Stop Regulation in respect of the Pt 3A Concept Plan:
 - a) The consent authority for subsequent DAs for land to which a Concept Plan applies must not grant consent unless it is satisfied that the development is generally consistent with the terms of the Concept Approval (cl 3B(2)(d)), and
 - b) The provisions of an environmental planning instrument (such as cl 8.7 of the Penrith Local Environmental Plan 2010 (Penrith LEP)) do not have effect for the purposes of assessment of a subsequent DA if they are inconsistent with the terms of the Concept Approval (cl 3B(2)(f)).
6. Prior to the repeal of Part 3A of the EP&A Act, S 75YA of the EP&A Act addressed “*Surrender of approvals and consents*” granted under that Part. It referred to surrender of “*an approval*”, not part of an approval. It is relevant that the height and/or density of one part of a Part 3A concept approval might have been raised in consideration of lowering heights in another, and development consent conditions and infrastructure contributions are often conceived with reference to an entire development.
7. The Panel would therefore be cautious before accepting that a voluntary partial surrender of a concept plan approval is possible, particularly without owners consent.
8. The Panel notes in relation to the requirement for owners consent for a modification application with respect to a Part 3A approval, that Clause 8F(1)(e) of the Stop Regulation provides:

8F Owner’s consent or notification

- (1) The consent of the owner of land on which a project is to be carried out is required for a project application or modification application unless—
 - ...
 - (e) the application relates to a project on land with multiple owners designated by the Secretary for the purposes of this clause.

Given that the site of the Concept Plan now has multiple owners, an approach might be made to the Department to inquire as to whether the Clause could be invoked.

Design Excellence - Community Infrastructure on Key Sites

9. The proper application of clauses 8.4(3) and (5) and 8.7(3) were discussed.
10. In April 2023, the Government Architect waived the requirement for an architectural design competition for the development proposal under Clause 8.4(3) of the LEP subject to conditions, including a requirement that the Applicant obtain the endorsement of the Design Excellence Panel for the revised plans. The Applicant has not complied with these conditions yet.
11. The Applicant said that it relied principally on clause 8.7(3) which allows for a height exceedance “*if the proposed development includes community infrastructure*”.

12. The Panel doubted whether the clause would allow for reliance upon community infrastructure on High Street in Penrith on the other side of the railway, which would not seem to be relevantly *“included in the development”*.
13. The Panel said it was open to the relevant community infrastructure being created on land adjoining or adjacent to the site owned by Council, but noted that if it was to be *“included in the development”* the Council’s consent as land owner would be required. The Panel could not approve community infrastructure on land owned by Council against the opposition of Council.
14. The Council’s position is that a formal community infrastructure offer should be made to Council via the Planning Portal so it could be considered in the assessment of the merits of the DA. It also indicated that it is likely to renotify the DA once the formal offer is made.
15. The Panel encouraged the incorporation of community infrastructure within the development and said it was not bound to follow the Council’s community infrastructure policy strictly if the Panel was otherwise satisfied that the objectives of clause 8.7(3) were satisfied, although the Panel would take Council’s policy and views into account.
16. The Panel encouraged further discussions between the Council and the Applicant in an attempt to resolve that issue.

Clause 8.2 Solar Access

17. The Council has previously raised as a consideration the apparent prohibition applying under clause 8.2 to development in the Penrith Town Centre (as mapped) *“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”*.
18. The Panel agreed that the relevant inquiry as to whether *“overshadowing of public open space to a greater degree”* involved qualitative and quantitative assessment of the nature and duration of shadowing.
19. The Panel was therefore open to an argument that a building with some additional overshadowing might still not give rise to a *“greater degree of overshadowing”* overall if there were countervailing aspects of the design which opened up public open space to additional sun during the day.

Delay

20. The Panel raised again its concern about ongoing delay with the determination of this DA, where it seems that further major changes to the design might be forthcoming.
21. While noting advice that the Applicant has been seeking feedback from the Department in relation to issues raised above, the Panel cannot defer determining the DA indefinitely. If a path to final determination of a DA by the granting of an approval cannot be demonstrated, the DA will have to either be withdrawn or refused.
22. The Panel Secretariat will facilitate a meeting to consider whether the DA should be determined on the basis of the material now available, or whether any further deferral is warranted.