

MEMORANDUM

Reference:	DA22/0318
To:	Sydney Western City Planning Panel
From:	Donna Clarke – Landmark Planning, Consultant Planner on behalf of Penrith City Council
Date:	26 February 2024
Owner:	Penrith City Council
Applicant:	GLN Planning
Subject:	PPSSWC-243 - DA22/0318 - Torrens Title Subdivision into 37 Industrial Lots, 1 Stormwater Management Infrastructure Lot & Public Roads including Earthworks, Civil Engineering Works, Tree Removal & Public Domain Landscaping - 158 - 164 Old Bathurst Road, Emu Plains

I refer to the above development application which is being considered by the Sydney Western City Planning Panel (SWCPP) on Monday 26 February 2024 and the letter provided by the Applicant to the SWCPP dated 23 February 2024 in response to the Assessment Report and recommended conditions of consent, undertaken by myself as an independent planning consultant on behalf of Penrith City Council.

I note that the letter from the Applicant is supportive of the recommendation for approval within the report, however, has raised concerns regarding part of the assessment and recommended conditions of consent. I provide the following comments in response to key comments within the letter:

1. Incorrect application of Clause 7.5 and 7.30 of the Penrith Local Environmental Plan 2010 (PLEP)

The Assessment Report details my consideration of both Clause 7.5 and 7.30 of PLEP against the provisions of each clause. The Applicant may have a different interpretation of the Clauses, however based on my knowledge of the implementation of the clauses by Council's Development Assessment Section and the intent of Council's Strategic Planners in preparing the clauses, my view as outlined within the report remains unchanged.

The Applicant states:

"The Assessment Report takes a rigid and intractable approach to the application of Clause 7.5 and 7.30 asserting that without the retention of the mound and associated vegetation, the Consent Authority are unable to grant consent. We disagree with this assertion and believe that this is an incorrect application of these clauses. The Assessment Report fails to acknowledge the wording of the relevant clauses and the measures applied by the proposal."

The area in question is a portion along David Rd which currently contains a vegetated mound running north-south, and particularly the area between the corner of the site with Old Bathurst Rd heading south until the proposed road (MC02). The mound extends further and curves into the site, however removal of a large part of this southern portion to facilitate the new road has been supported.

Further, the Applicant has indicated that *"The Assessment Report fails to acknowledge the significant number of measures that have been applied to the proposal that minimise visual impact and reduce the urban heat island effect"* and continues on to reference Retention of Trees, Removal of existing vehicle access of Old Bathurst Road and Provision of Extensive Landscaping. These three areas have been addressed

at various points throughout the Assessment Report and it was concluded in the assessment that the proposal and measures proposed by the applicant were insufficient on their own and the area of mounding with mature trees along David Rd must be retained, in conjunction with the measures proposed, in order to achieve compliance with both Clause 7.5 and 7.30 of PLEP.

Importantly, the Applicant provided a commitment to retention of the trees and associated mounding and trees in the area in question via a letter dated 14 July 2023 (Attachment 23.4). This written commitment allows for additional necessary tree retention including canopy trees. This change is critical to provide mature perimeter canopy trees for instant urban heat and shading benefits for the future users of the site, as well as ensure the view of the entire site from adjoining public roads, railway, industrial development and further afield is of a tree canopy to reduce the visual impact of the future industrial development of 37 lots. It is important to acknowledge that the area in question will form the rear of Lots 32 and 33 which have no frontage or vehicular access to David Rd. The rear of any future industrial development on Lots 32 and 33 requires a larger amount of screening from the public domain as it is the back of the future development based on usual industrial built form and will most likely comprise open external storage and operations areas and blank facades. Reliance upon full tree removal and only new landscaping is inappropriate to achieve the necessary visual and urban heat outcomes due to the length of time required for the landscaping to establish and grow.

The Applicant states:

“The language within the Assessment Report infers that the Panel is not empowered to grant consent for the removal of the mound and associated vegetation. That is not the case, the intent of the clauses should not be seen as a prohibition to granting consent.”

I have discussed this point with respect to both clauses identified, noting that the assessment position remains that consent must not be granted by the consent authority without retention of the trees and associated mounding.

a) Clause 7.5 Protection of scenic character and landscape values

This clause states:

“7.5 Protection of scenic character and landscape values

(1) The objectives of this clause are as follows—

(a) to identify and protect areas that have particular scenic value either from major roads, identified heritage items or other public places,

(b) to ensure development in these areas is located and designed to minimise its visual impact.

(2) This clause applies to land identified as “Land with scenic and landscape values” on the Scenic and Landscape Values Map.

(3) Development consent must not be granted for any development on land to which this clause applies unless the consent authority is satisfied that measures will be taken, including in relation to the location and design of the development, to minimise the visual impact of the development from major roads and other public places.”

Subclause (3) includes the words “development consent must not be granted”. The Assessment Report provides detailed explanation as to the conclusion that was reached regarding scenic character and landscape values and that without retention of the existing trees along David Rd and associated mounding below, that this clause is not satisfied. The applicant’s commitment to retention of the trees and associated mounding below, in association with the other measures proposed such as landscaping, allows the clause to be satisfied. Whilst it is preferred that the plans be updated to show the trees and associated mounding below being retained, the recommended conditions of consent allow for the plans and documentation to

be updated prior to issue of an operational consent and provides the certainty that Clause 7.5 will be satisfied and consent may be granted should the SWCPP wish to do so.

Further, the Applicant has questioned the correct application of Clause 7.5 and states:

“We also note that in relation to correct application of Clause 7.5, consideration of the suitability of the development should be formed based on the impact of the development on the view of the item of scenic amenity (the Blue Mountains as detailed in Section 1.12 of Part C1 of the PDCP 2012) when viewed from a public place (Old Bathurst Road) – and not the view into the site from Old Bathurst Road.”

I disagree with the statement made by the applicant and it appears that select portions of Section 1.12 of Part C1 of Penrith DCP 2014 have been identified in isolation, which does not allow for the appropriate application and consideration of the whole control. Section 1.12 of Part C1 of Penrith DCP 2014 states:

“1.1.2. Key Areas with Scenic and Landscape Values

A. Background

This Section focuses on particular locations in the City of Penrith that are visible from major roads and other public places and have important scenic and landscape values. These locations are identified on the Penrith LEP 2010 Scenic and Landscape Values Map.

Key to the site analysis and planning process is minimising likely visual impact as a result of new development. This section identifies the key principles that should be addressed in a visual impact assessment and when such an assessment is required.

The locations identified on the Penrith LEP 2010 Scenic and Landscape Values Map include, but are not limited to:

- Land along the Blue Mountains escarpment;*
- Land which has views to and from the Nepean River;*
- Land within the riverine corridors of South and Ropes Creek;*
- Land along major roads, including the M4 Motorway;*
- Land that can be viewed from the Main Western Railway Line;*
- Land within the Mulgoa Valley precinct, including vistas from major heritage items in the valley (see the Mulgoa Valley Section of this Plan);*
- Land within Industrial Precincts 4 and 8 which have views to and from the Nepean River and the Blue Mountains escarpment, and within Industrial Precincts 7 and 9 which can be viewed from elevated locations elsewhere in the City (see the Industrial Development Section of this Plan); and*
- Land at important gateways. Table C1.1 and Figure C1.1 below identify gateways in the City of Penrith. The design of new development at these locations requires a special response given their visual sensitivity.*

Gateways are distinctive sites or spatial sequences which denote a change in a spatial or visual experience. They have a variety of configurations and scales from regional significance to neighbourhood scale. They can be marked by changes such as land use, density of development, vegetation, topography and space. Some are site specific places of environmental identity and others provide a sense of transition. They can be entrances and destinations. Gateways may also be located at sites such as significant community congregation areas, public art installations, municipal buildings and ceremonial places.

Types of gateways in Penrith City providing a sense of arrival or transition may include crossings, village bookends, land use interfaces, intersections and cultural gateways.

See the Technical Information Appendix for a more detailed definition of gateways.

B. Principles

The following key principles should be addressed in a visual impact assessment to minimise the visual impact of the development and protect areas with high scenic and landscape values:

- *Protect and enhance the visual diversity and scenic quality of gateways and view sheds within the City of Penrith, including detailed, mid and long range views;*
- *Protect and enhance the key regional natural features that contribute to the character of Penrith as a City, including the Blue Mountains escarpment, the Nepean River, other riparian corridors and bushland reserves;*
- *Protect, maintain and enhance other important natural features, including ridgelines, hillsides, watercourses and riparian corridors, vegetation and landform;*
- *Protect, maintain and enhance backdrops and settings that contribute to the local identity;*
- *Protect, maintain and enhance views and vistas from vantage points, including main road corridors and other public places;*
- *Conserve and enhance historic landscapes, properties and their curtilages;*
- *Plan and site new development to enhance local identity. Development is to effectively integrate with the surrounding landscape so that any change as a result of the new development does not compromise the character of the landscape. Issues such as context, scale, size, built form and height, setbacks/buffers, landform, structural space (private and public), streetscape, vegetation and infrastructure are to be addressed;*
- *Strengthen local identity through consistency and/or compatibility of design. Design development to take into account issues such as scale, form, line, colour, texture, lighting, existing vegetation, open space and landscaping;*
- *Use vegetation to frame scenic views, provide interest or change, define new space, provide backdrops and visually connect all other elements within the setting; and*
- *At gateways, reinforce the distinct experience of arrival or passing from one landscape character type to the next, through legible site planning and design."*

As can be seen from the extract above, 'A. Background' requires that consideration must be given with respect to the proposal on the subject site to the visual impact as follows:

- Visibility from major roads and other public places.
- Minimise likely visual impact as result of new development.
- Requires consideration of, but not limited to, the following:
 - Views to/from Blue Mountains escarpment,
 - Land along major roads,
 - Land that can be viewed from the Main Western Railway Line.

Based on this, the assessment of visual impact of the proposed new development from places other than just the Blue Mountains escarpment is correct and necessary, including from the western railway line which runs along the eastern portion of the site, Old Bathurst Rd which is a major road and public place and David Rd which is also a public place.

In addition, 'B. Principles' above have been ignored by the Applicant in the response, which require:

- Protect and enhance other important natural features, including vegetation and landform.
- Protect, maintain and enhance backdrops and settings that contribute to the local identity.
- Plan new development that does not compromise character of the landscape, including buffers, landform, streetscape and vegetation.
- Use vegetation to provide backdrops and connect elements of the setting.

The proposal does not achieve these principles without retention of the trees and mounding along David Rd.

The position put forward within the assessment report with respect to Clause 7.5 Protection of scenic character and landscape values is not altered and is strengthened by Section 1.12 of Part C1 of Penrith DCP 2014.

b) Clause 7.30 Urban Heat

This clause states:

“7.30 Urban heat

(1) The objectives of this clause are to—

- (a) ensure development incorporates planning and design measures to reduce the urban heat island effect in Penrith, and*
- (b) ensure buildings and outdoor spaces are thermally comfortable for people living and working in Penrith, particularly during summer, and*
- (c) promote the cooling benefits of green infrastructure and water in the landscape.*

(2) This clause applies to land in the following zones—

- (a) Zone RU5 Village,*
- (b) a residential zone,*
- (c) an employment zone,*
- (d) a mixed use zone,*
- (e) a special purpose zone,*
- (f) a recreation zone,*
- (g) Zone C4 Environmental Living.*

(3) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that planning and design measures are incorporated to reduce the urban heat island effect that—

- (a) maximise green infrastructure, and*
- (b) retain water in the landscape, and*
- (c) use design measures to ensure the thermal performance of the development achieves a high degree of passive cooling, and*
- (d) use building, paving and other materials that minimise heat impacts, and*
- (e) reduce reliance on mechanical ventilation and cooling systems, to conserve energy and to minimise heat sources.*

(4) In this clause—

green infrastructure means the network of green spaces, natural systems and semi-natural systems including waterways, bushland, tree canopy, green ground cover, parks and open spaces, that—

- (a) supports sustainable communities, and*
- (b) is strategically designed and managed to support a good quality of life in an urban environment.*

urban heat island effect is a result of conditions that contribute to higher temperatures in urban areas, including—

- (a) use of roads, car parks, pavements, roofs, walls and other hard and dark surfaces, and*
- (b) activities that generate heat, including waste air from mechanical cooling systems, and*
- (c) reduction in green infrastructure.”*

Similarly to Clause 7.5 above, Subclause (3) of Clause 7.30 includes the words *“development consent must not be granted”*. The Assessment Report provides detailed explanation as to the conclusion that was reached regarding urban heat and that without retention of the existing trees along David Rd and associated mounding below, that this clause is not satisfied. The applicant’s commitment to retention of the trees and associated mounding allows the clause to be satisfied by maximising green infrastructure. Whilst it is preferred that the plans be updated to show the trees and associated mounding being retained, the recommended conditions of consent allow for the plans and documentation to be updated prior to issue of an operational consent and provides the certainty that Clause 7.30 will be satisfied and consent may be granted should the SWCPP wish to do so.

The Applicant’s position within the letter appears to be that protecting trees in this area is not important as 326 trees have been retained elsewhere on the site. This is not considered to be a good planning outcome and retention of existing vegetation around the periphery of the site is necessary, including the area in question. In addition, the tree retention is key in this area to assist with instant shading from the harsh western sun as well as a positive streetscape contribution, which will not be achieved for a long timeframe

should the vegetation be removed as proposed and replaced with new landscaping which needs to establish. When considering the proposed subdivision and future development on each of the industrial lots, the internal roads and future car parking and buildings will all contribute to the heat island effect as described in Clause 7.30 above. The retention of the mounding and trees in this remaining portion of the periphery allows for additional green infrastructure to satisfy Subclause (3) through planning and design measures to reduce the heat island effect.

Importantly, Penrith City Council added Clause 7.30 and associated DCP provisions in 2022 as an acknowledgement of the issue of urban heat and the urgent need to address the issue within all planning matters. In addition to adding to the Planning Controls which Penrith City Council has won awards for from the Planning Institute of Australia, these controls were recently (December 2023) upheld by the Land and Environment Court on a separate development application matter and the importance of retaining canopy trees to reduce the urban heat effect was highlighted and the urban heat LEP controls and associated tree retention provisions were given great emphasis.

It is considered reasonable that a development proposed by Penrith City Council as the landowner would suitably apply their own planning controls and be held to the same standard as other private developers, and lead by example in this regard.

It is also important to acknowledge that the land opposite the site on the corner of David Rd and Old Bathurst Rd has development consent issued under DA20/0090 for a self-storage facility which requires mounding to be created on the corner and the proposed dense landscaping strips to continue along both David Rd and Old Bathurst Rd. This site was clear of all vegetation so there was no opportunity to retain trees, as such the new landscaping included extensive planting, including canopy trees, in that area. Conditions of consent were imposed on that consent which increased the tree planting and landscaping from proposed. This application was granted consent prior to Clause 7.30 and associated DCP provisions being added and should this application be considered under the current legislation, it would reasonably be expected that additional planting requirements would be imposed, or the size of the development reduced to provide additional green infrastructure, in order to satisfy the legislative controls, similarly to the subject recommendations.

In summary, it is my opinion that without the recommended retention of the trees and mounding via conditions of consent, that the development cannot be approved due to the wording of Clauses 7.5 and 7.30 of PLEP.

2. Application not Formally Amended

The Applicant has re-iterated that *“at no point have we formally amended the application to remove the mound”*, which is correct and has resulted in the Assessment Report indicating that the application is unsatisfactory with respect to some legislative controls. The plans from the Portal under assessment show full removal of the mound and trees in the area along David Rd.

However, the Applicant provided a commitment to retention of the trees and associated mounding below via a letter dated 14 July 2023 (Attachment 23.4), which accepts a condition of consent for retention of the mound along the David Rd frontage and allow for a favourable recommendation on this basis and subject to the conditions. This commitment has formed the basis of the favourable recommendation of the Assessment Report and associated recommended conditions of consent. I strongly advise that the assessment would be altered and the application not supported if this commitment is no longer provided by the applicant.

It is preferred that the application be amended in full before an active consent is granted for there to be a robust and clear outcome which is well documented by being shown on a consistent set of approved plans

and so there is no uncertainty. This is gravely important given the presence of an advertising sign on the site indicating that the land is for sale and all future purchasers should be afforded the opportunity to view accurate approved plans.

3. Recommended Conditions of Consent

Applicant's Comment	Comment
Condition 97.1	<p>Support deletion of "Architectural" from the first part of Condition point 1 and replacement with "Plan of Subdivision".</p> <p>Do not support deletion of part a) 1 to 5 of Condition point 1 as necessary to achieve compliance with legislative controls.</p> <p>Could consider support to move part b) to d) of Condition point 1 to "prior to Subdivision Works Certificate". It was considered that as the plan set was being updated to be a consistent set of approved plans so there is no uncertainty, these changes and information could be undertaken at this time.</p>
Condition 97.2	<p>Do not support the mound being removed and condition should stay.</p> <p>Council's Tree Management Officer has indicated that it is imperative for the Arborist Report to be updated given the time from the last review of the trees over the whole site and changes to climatic conditions and should occur prior to the final plan set to ensure the stamped approved plans are accurate.</p> <p>Do not support an amendment to condition to only require an updated arborist report for those trees to be retained in Lot 32-34.</p>
Condition 97.3	<p>Support changes to of Condition point 3 to correct typos to Lot numbers which were changed the Plan of Subdivision submitted on the day before the report was finalised. The correct numbering should be:</p> <ul style="list-style-type: none"> • 'Constructed Wetlands - Lot 31' as shown in the revised Plan of Subdivision • Rear setbacks of Lots 13-20; Lot 31 and Lot 32-38; and <p>Do not support change to timing or other suggested changes which are imperative from a biodiversity and tree management and protection perspective and respond to concerns previously raised regarding the likely damage to vegetation during construction in particular within the wetlands area.</p> <p>The additional 3m from the TPZ was to allow vehicle access for maintenance whilst subdivision works are being undertaken. The requirement for/use of this area can be reassessed when DA's come in for individual sites if needed.</p> <p>Further, it could take up to 5 years (before consent lapses) before any work is undertaken on the site in which time the trees will grow and TPZ size will increase. The 3m setback will allow for the continued growth of the trees ensuring works will still be outside the TPZ of the trees.</p>

	The replacement planting rate of 3:1 is consistent with Councils DCP because it states, <i>"an equal or greater number than those removed"</i> . The ratio of 3:1 is commonly used in the industry and is reflective of the requirement to achieve urban heat measures.
Condition 97.4	<p>Do not support change to not require approval by Council of the Site Audit statements and reports. This is required for Council to be satisfied that the site is suitable from a land contamination perspective prior to an active consent which allows works given that land remediation was removed from this current application.</p> <p>Further, site suitability is to be ensured prior to any disturbance to the land, which may not be effectively captured should the condition be revised to 'Prior to Subdivision Certificate'. If this change to prior to SC was supported, subdivision works would have been carried out prior to this time and could result in a change to the condition of the land. Given the potential risks to human health (as well as the environment), it needs to be ensured that the land is remediated before construction workers are present on site, and also before land is moved about the site during earthworks (potentially spreading the contaminated materials). If the applicant did not obtain a Site Audit Statement until this time, the site Auditor may also not issue one and may require additional assessment as the land has been disturbed.</p>
Conditions 34 & 37	<p>There is a nuance between Conditions 34 and 37 which is –</p> <ul style="list-style-type: none"> • one condition requires a Project Arborist to be engaged to write a Site-Specific Tree Protection Plan (Specification) and Drawing; and • the other is the requirement for a Project Arborist to be onsite to manage the works. <p>In re-reading the conditions, it was noticed that Condition 37 should come before Condition 34 (i.e. writing of the Tree Protection Plan (Specification) and Drawing first so the Project Arborist can then apply it once work starts. As such, minor changes could occur to Conditions 34 and 37 regarding timing and any duplicate points deleted.</p>
Condition 35	Do not support suggested changes which are imperative from a tree management and protection perspective. Refer to above regarding 3m from the TPZ.
Condition 36	<p>Conditions 35 and 36 refer to different areas of the site. In addition, Condition 12 is more specific to the whole site and is a coverall in case all reports are not provided/followed and provides the bare essentials for tree protection.</p> <p>The preference is for the conditions to remain separate, however could be combined if required and any duplicate points deleted.</p> <p>Do not support suggested changes which are imperative from a tree management and protection perspective. Refer to above regarding 3m from the TPZ.</p>
Condition 38	<p>The removal method is standard industry requirement. Trees to be removed need to be correctly identified and agreed to ensure the correct trees are removed. A clear plan will ensure correct trees are removed and will inform the extent of replanting required.</p> <p>Do not support suggested changes which are imperative from a biodiversity and tree management and protection perspective.</p>

Condition 39	<p>It is Council's Tree Management Officer advice that a full TPZ is required. AS4970 – 2009, Protection of trees on development sites provides an intrusion of up to 10%, but this is not an automatic encroachment. The trees in the location are directly adjacent to substantial earthworks that require excavation and batter. If works are too close to the trees, destabilisation could occur, particularly if a 10% intrusion was permitted and then over excavation occurred (it cannot be controlled that excavation disturbance will not occur outside the extent of the "line on the plan"), therefore a full TPZ is required and can be substantiated.</p> <p>Do not support suggested changes which are imperative from a tree management and protection perspective.</p>
Condition 29	<p>Whilst not mentioned by the applicant, I have become aware of wording discussed in the report under 'Likely Impacts' relating to the Duck Pond on page 25 of the report which was indicated to be added to the conditions but was missed. As such, the following point should be added into Condition 29:</p> <ul style="list-style-type: none"> the methods of disposing of dam water, noting the findings and recommendations of the 'Surface Water Management Options Assessment - 158 to 164 Old Bathurst Road, Emu Plains' prepared by JBS&G dated 24 February 2022.

It is concerning that some of the changes suggested to conditions by the Applicant relate to the mound and trees along David Rd not being retained, which is contrary to commitment by the Applicant to retention of the trees and associated mounding below via a letter dated 14 July 2023 (Attachment 23.4) and acceptance of a relevant condition of consent.

4. Further Information

The letter indicates that further information is being prepared, however as this has not been forthcoming at the time of writing of this memo on the day of the meeting, time has not been afforded by the Applicant for consideration of any additional information.

Yours faithfully,



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Landmark Planning Pty Ltd