

MEMORANDUM

Reference:	DA22/0318
To:	Sydney Western City Planning Panel
From:	Donna Clarke – Landmark Planning, Consultant Planner on behalf of Penrith City Council
Date:	6 March 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 was considered by the Sydney Western City Planning Panel on Monday 26 February 2024 and deferred for further information. Below is an extract of the Panel's deferral and actions:

"REASONS FOR DEFERRAL

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

The Panel heard from the Applicant and Council on the key issue of the proposed deferred commencement condition requiring the mound and existing vegetation along the David Road frontage of the development site to be retained.

The Panel deliberated on the matter and agreed to unanimously defer determination of the matter to allow the Applicant and Council to provide the information listed in 1 and 2 below.

ACTIONS

To allow for the progression of the Development Application to determination, the Panel directed that:

1. The Applicant is to provide the Planning Panels Secretariat and Council with its position, including any possible compromise in relation to the vegetated mound and details of any proposal to incorporate advanced plantings along the boundary earth mound, together with the reasons for any requested changes to the draft conditions by COB Friday 1 March 2024.

2. Council is to submit to the Planning Panels Secretariat and Applicant its response to the information submitted by the Applicant (required by item 1) by COB 6 March 2024.

The Panel also encouraged direct communication between the relevant advisors to the Applicant and Council with a view to narrowing any dispute to the matters.

Following submission of the information listed above, the Panel anticipates that the Development Application can be determined by circulation of documents.

If the outstanding information is not provided by COB 6 March 2024 the Panel may move to determine the application based on the information currently at hand."

The Applicant has submitted the following in response to Point 1 of the deferral and actions:

- “Covering letter responding to the request from the Panel to;
 - o Consider retention of part of the mound, and
 - o Review the comments from the Assessment Manager on the conditions.
- A mound retention plan prepared by Acor.
- An updated table including the Assessment Managers and the Applicant’s comments on the conditions of consent.”

The Applicant has indicated by way of letter dated 1 March 2024 that they would accept a condition for either:

- a) Retention of mound and vegetation as depicted on mound retention plan prepared by Acor, dated 1 March 2024, or
- b) Advanced planting.

From reviewing the letter, the Applicant has not formally amended the application and the plan and suggested advanced planting condition is for information only. The Applicant remains of the opinion that full removal of the mound and vegetation for the area in question on David Road frontage and the corner of Old Bathurst Road frontage is acceptable without the need for the above.

The above information was lodged on the Portal and reviewed and comments provided in response:

1. Mound & Tree Retention Plan

The Applicant has provided a mound retention plan prepared by Acor, dated 1 March 2024. An extract is shown below in Figure 1.

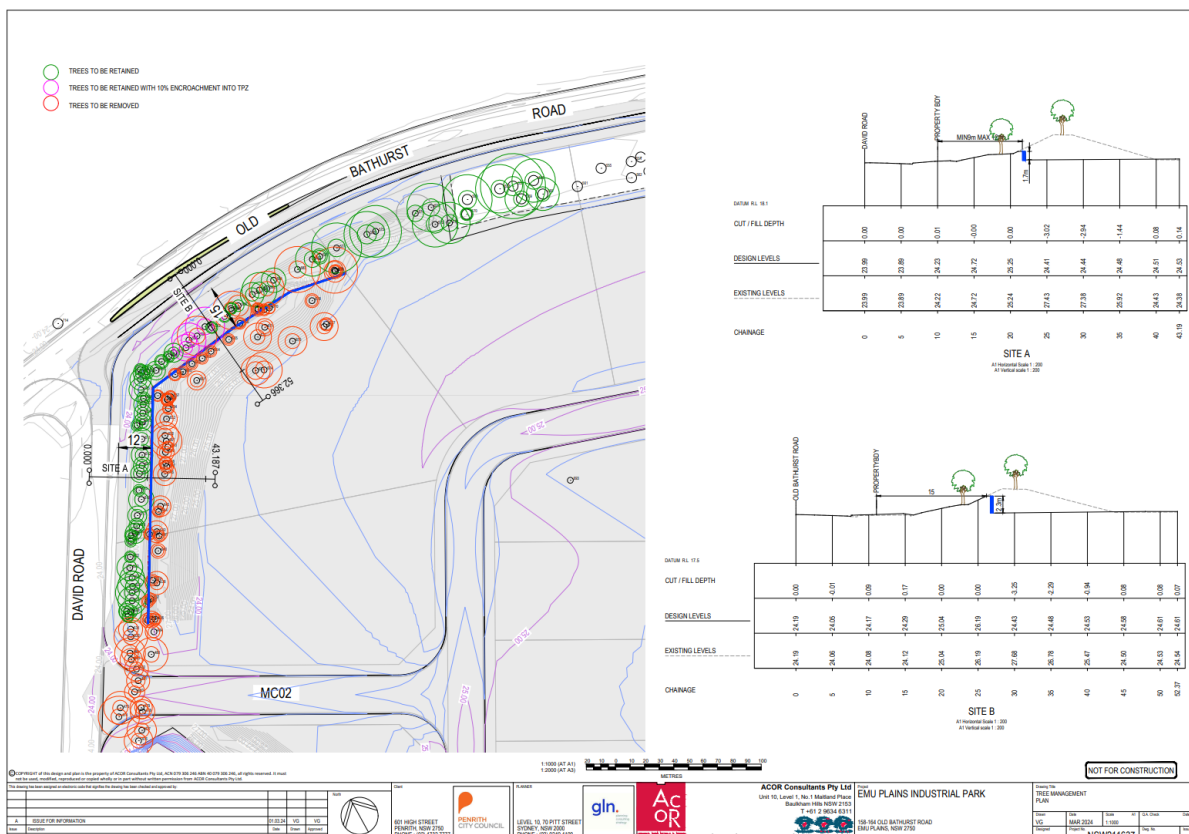


Figure 1: Extract mound retention plan prepared by Acor, dated 1 March 2024

The Applicant's letter indicated partial mound retention and indicated *"The portion of the mound being retained will vary in height between approximately 1.7m and 2.3m above the adjoining road level"*.

Figure 1 indicates in both plan and section form the extent of the batter into the proposed lots, as well as the location of the existing trees. The plan and section indicates tree retention (shown green and pink on the plan) for the part closest to the two roads and the second row of trees on the mounding and other trees being removed (shown red on the plan), the whole mound being removed, and a retaining wall (shown blue on the plan) proposed.

In my opinion, the plan does not include any mound retention, as can be seen clearly in the Sections on the plan. The area suggested to be part of the mound being retained by the Applicant is the lower battering of the mound on one side only and does not have the height which is characteristic of the existing mound. The height of 1.7m and 2.3m above the adjoining road level indicated by the Applicant relates to the highest point at the top of the retaining wall and is not reflective of the landform of the majority of this area. The plans do not indicate the height of the top of the existing mound, but from a review of Site A Section, the top is estimated to be 5.1m, which is a removal of 3.4m of height.

As detailed in the Assessment Report and the recommended Deferred Commencement Consent, there was an expectation that the trees and mounding below could remain, however, the wide batter associated with the mound which extends into the rear of the proposed industrial lots could be reduced by way of engineered retaining at a sufficient distance from the trees to ensure their long term survival. This would ensure the height of the existing mound is retained, as well as the trees on top.

It has not been explained in the response by the Applicant as to why the mound and all trees along David Rd are not being retained, contrary to their previous commitment 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.

The Applicant did not discuss the plan with myself as the Independent Planning Consultant or Council's Technical Officers during its preparation, as suggested by the Panel.

The plan and supporting information has been reviewed by Council's Tree Management Officer and myself as the Independent Planning Consultant and is not supported for the following reasons:

- a) This sketch achieves only limited canopy tree retention and a row of trees remains for the lower part of the frontage close to the street (i.e. no trees are retained on an elevated mound). The Sections provides an illustrative depiction of the extent of the mounding and existing trees which are being removed (i.e. existing mound shown dotted and existing trees on top), which has not previously been provided. It is clear on the plan that a substantial area is being removed with no part of the mound remaining, therefore no elevated natural screening or shading remains with only a row of trees at ground level.
- b) The amount of shade extending into the site onto the proposed lots provided by the existing trees on top of the mound will not be able to be achieved by the plan, either initially whilst trees grow, or in the future due to the sizable reduction in ground levels due to mound removal.
- c) The Panel questioned the Applicant at the briefing about retaining or reinstating a smaller mound, but this has not been proposed. If the mound was to be removed as proposed and the Panel required planting on a smaller mound, that smaller mound may be detrimental to the existing trees to be retained. Details are required of any smaller mound and its location and distance to trees being retained in order to consider any impacts upon tree retention. It is considered that the

distance of a new mound into the site behind the row of trees being retaining along the road frontage would not necessarily result in a significant increase in developable area within the proposed lots, and therefore retention of the existing mound and trees would be a superior outcome.

- d) On the Applicant's mound retention plan, the proposed retaining wall is shown blue. This is considerably closer to David Road and Old Bathurst Rd than anticipated. In my planning assessment of the application, I had envisaged that the retaining wall would have been approximately where I have indicated red on the extract below in Figure 2 and allowed for the retention of the two main rows of trees (and mound below). This red line provides for more developable area than the mound being retained in full but still achieves the necessary mound and tree retention to achieve the legislative controls regarding urban heat and landscape and scenic values.

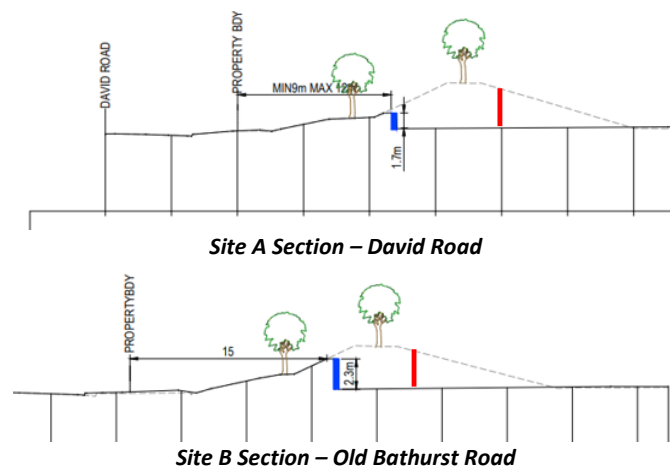
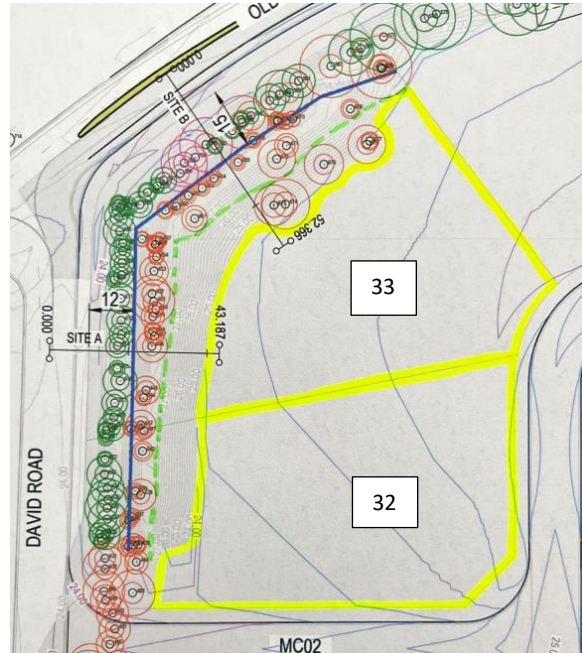


Figure 2: Recommended Retaining Wall location on Sections from mound retention plan. Blue is as proposed by the Applicant & Red is approximate as envisaged deferred commencement condition (subject to further arboricultural assessment and engineering detail)

- e) Both the blue and red lines shown on the above plan in Figure 2 require further investigation to ensure that the retaining wall location is acceptable with respect to the trees remaining and their long term viability and health. The proposed blue line location assumes that tree roots do not extend past the calculated tree protection zone but as they are young, they may extend further and the proposed location of the retaining wall does not provide sufficient space for the continued growth of the tree. Following the Panel meeting, a sketch from Council's Tree Management Officer was provided to the Applicant which indicated the retaining wall back further to provide room for future growth (similar to the red line location). This sketch appears to have been ignored in preparation of the plan by the Applicant.
- f) The retaining wall is red is a more acceptable location, however this would be site dependent and require a thorough assessment which was expected to occur prior to satisfaction of the Deferred Commencement condition. In locating the retaining wall, there needs to be consideration as whether there is an intrusion into any of the TPZ's but also there needs to be sufficient room for the continued growth of the trees. Further, construction techniques for the retaining wall is unknown and likely be detrimental to the trees (e.g. drainage behind the retaining wall), particularly in regard to the time root systems may be exposed to the elements. As such, it is expected that the retaining wall will need to be relocated further into the proposed lots once the construction techniques are identified. The proposed Deferred Commencement condition requires the Arborist and Engineer to review together to determine the location of any retaining.

- g) There are some comments in the letter about proposed TPZ encroachments, which is not supported as outlined within the Conditions of Consent Table.
- h) The proposed retaining wall is up to 2.3m high and should provide for terracing to reduce the overall sheer height and landscaped.
- i) The Applicant has indicated that *“The extent to which the mound is being retained (as proposed in the attached plan) on the Site exceeds the minimum landscaped setback requirements as outlined within the Section D4 of the Penrith City Council Development Control Plan 2014 of 15m for Old Bathurst Road and 9m for David Road”*. I have discussed this within the assessment report and reconfirm that the DCP numerical setback is not the only consideration and the DCP objectives of that control extend to qualitative outcomes that necessitate a reasonable level of tree retention. It is not sufficient to only apply a setback line to future built form to then inform retention as any proposal warrants a setback commensurate with whatever is needed to ensure the protection and retention of the trees or at least sufficient trees to screen the development and comply with urban heat and scenic quality considerations in the LEP and DCP. Setback controls cannot be considered in isolation and must also have regard to other controls which require developments to be designed to ensure that existing mature trees can be retained.

From the Panel meeting it is clear that developable area is the key concern driving the resistance from the Applicant to retain the mound and trees contrary to the previous commitment for a condition of consent. The image below is a rudimentary mark-up of the developable area of Proposed Lots 32 and 33 with the full mound retention shown yellow, the Applicant’s proposed retaining wall location shown blue and the envisaged deferred commencement condition location of shown dotted green which is subject to further investigations to determine the exact location.





	Approx. Developable Area of Lots 32 and 33 with Mound being fully retained
	Envisaged location of retaining wall under Deferred Commencement condition, showing additional Developable Area of Lots 32 and 33, subject to detailed arboricultural assessment and engineering detail

Figure 3: Estimated Developable Areas of Proposed Lots 32 and 33

Having regard to the existing mound and the developable area available on the proposed lots, I provide the following information extracted from the Applicant's plan:

Site A Section – David Road

- Based on the full mound retention, Lots 32 and 33 would have approx. 81m depth within the lots for developable area.
- Based on the Applicant's retaining wall location, Lots 32 and 33 would have approx. 99m depth within the lots for developable area.

It is my opinion that approx. 81m with full mound retention would still be sufficient depth for development to be viable on the proposed lots. A review of the surrounding industrial area indicates a mixture of lot shapes and sizes and many lots with depths less than 81m.

The third alternate option as envisaged by the Deferred Commencement condition (shown dotted green in Figure 3 above) is considered to be a good compromise and achieves the legislative requirements as well as increasing developable area. This option would (subject to the detailed TPZ investigation) result in a retaining wall approx. 20m (variable) into the site. Based on this alternate retaining wall location, Lots 31 and 32 would have approx. 91m depth within the lots for developable area. This is ample developable area.

Site B Section – Old Bathurst Road

- Based on the full mound retention from Old Bathurst Road, Lot 32 at the location of the section would have approx. 81m depth from David Rd and 48m width from Old Bathurst Road within the lot for developable area.
- Based on the Applicant's retaining wall location from Old Bathurst Road, Lot 32 at the location of the section would have approx. 81m depth from David Rd and approx. 65m width from Old Bathurst Road within the lots for developable area.

In my opinion, all options provide for developable areas on both proposed lots.

The deferred commencement position (shown dotted green in Figure 3 above) does require some concession regarding tree removal within Proposed Lot 33 being the clump of trees within the site on the lower batter of the mound. Council's Tree Management Officer would prefer these trees to remain, however on balance, their removal could be supported should the mound and row of trees on top remain as shown outside of the green dotted line in Figure 3. This compromise would increase developable area on proposed Lot 33. Importantly, this position also allows for the retaining wall to be sufficient distance from the trees shown pink on the plan which would have a TPZ encroachment. This encroachment would no longer be necessary and the ultimate location of the retaining wall would also ensure all the trees remaining would not have a TPZ encroachment.

It is concluded that should the Applicant not consider the depth achieved by mound retention, or the compromise anticipated by the deferred commencement condition and outlined above to be sufficient, it would be more appropriate for Lots 31 and 32 to be consolidated to provide one larger lot. It is important to remember that this site currently has no approval for any industrial subdivision and there is no guarantee for a certain number of lots or developable area and the proposal must respond to site constraints. One larger lot would also assist with further variety of lot sizes within the subdivision to cater for different users.

2. Additional Condition of Consent – Advanced Planting

The letter detail's acceptance of either partial tree retention as shown on the plan or acceptance of the following:

"A condition that requires the planted Eucalyptus Tetricornis proposed on the Old Bathurst Road and David Road frontage of Lots 32-34 (in accordance with the Landscape Plans) to be mature trees of a pot size 75L or greater subject to availability".

The Applicant is requesting full removal of the mound and all trees and imposition of a condition for advanced planting, or alternatively partial mound and tree retention as per the plan shown in Figure 1.

The suggestion that it is an 'either/or' position is illogical and it is considered that both the mound and tree retention in some form (refer to above discussions) plus the advanced planting would be appropriate to satisfy the legislative requirements.

Further, the proposed 75L pot size suggested for the proposed new trees is considered to be too small, and advanced specimens would be expected to be larger than 100L. The final pot size depends on the height of advanced tree wanted in the new landscape, with the height dictating the pot size.

Given that the mound and the trees on the side and top of the mound are being removed, new plantings would need to achieve a substantial height to compensate for the loss of elevated canopy trees and therefore the pot sizes should be in excess of 100L. Having said that, the detail of the specific trees and their location and the pot sizes of those surrounding must be considered as a whole to ensure a variation of stock and sizes is achieved through a mix of advanced and smaller species to allow the plants to adapt and thrive.

If advanced species was supported, a recommended additional point is suggested within the recommended Deferred Commencement Condition 97 as follows:

e) The planted Eucalyptus Tetricornis proposed on the Old Bathurst Road and David Road frontage of Lots 32-34 (in accordance with the approved Landscape Plans) are to be mature trees of a minimum pot size 100L or greater. Details of the pot sizes for specific trees are to be shown on the updated Landscape Plans and the pot sizes should be increased in size where there is a need for additional height in the landscape design and in areas where it is necessary to compensate for mature tree loss. The final pot sizes will be approved by Council's Tree Management Officer having regard to the variation of stock and sizes in the landscape design.

3. Conditions of Consent Table

The submitted table was a collaboration between the Applicant and myself and outlines the requested changes by the Applicant and Council's position.

Changes have been recommended in the Council response column which are suggested could be easily incorporated should the application be approved by the Panel.

There are still areas of non-agreement with respect to recommended conditions of consent, as outlined within the table, primarily regarding land contamination and trees.

In addition, the above condition regarding advanced planting should be incorporated into within the recommended Deferred Commencement Condition 97.

4. Clauses 7.5 and 7.30 of the Penrith Local Environmental Plan 2010 (PLEP)

The Applicant's letter indicates that they believe they satisfy Clauses 7.5 and 7.30 of the PLEP without the plan amendment or additional condition regarding pot size (i.e. with full mound and tree removal) and states:

"Notwithstanding the revised plan, the Applicant is still of the opinion that development as proposed (with the mound being removed) meets and exceeds the relevant tests of Clause 7.5 and 7.30 of the Penrith Local Environmental Plan 2010 (PLEP), which requires the Consent Authority to be satisfied that measures have been taken/incorporated to:

- *Minimise visual impacts on the area of schedule landscape value (Clause 7.5),*
- *Reduce the urban heat island effect (Clause 7.30).*

The Applicant reiterates that the test under both clauses does not require a comparison between the existing and proposed site condition. The clauses anticipate redevelopment of the land, requiring development of the land to include measures that contribute to achieving the objective. In the circumstances of this proposal the proposed measures incorporated into the design to reduce visual impacts and minimise urban head island effect include:

- *retention of over 1.5ha of land that contains existing trees,*
- *inclusion of water in the landscape environment (wetlands),*
- *removal of any access of Old Bathurst Road, and*
- *provision of extensive landscaping that almost double the tree canopy cover*

These mitigation measure far exceeds the measures implemented in approved developments to the west of the Site."

The Applicant appears to be suggesting through the comment above that there is no need to consider the existing site conditions and only consider the proposed measures as part of the redevelopment. The fundamentals of planning of a development includes a site analysis and consideration of the existing site characteristics, which in this case includes substantial mounding and dense periphery canopy trees and supporting vegetation, as well as other features including an existing wetland area. The application as proposed with full mound and tree removal, nor the plan provided with partial tree retention, respond or design to the constraints of the site.

Further, the Applicant is attempting to imply that Clauses 7.5 and 7.30 of the PLEP is satisfied by the listed measures above. In this regard:

- The indication of retention of over 1.5ha of land that contains existing trees equates to only 10% of the site. This is not an excessive percentage when considering the size of the overall development. The requested mound and tree retention would increase only marginally the percentage and area being retained, but the benefits would be significant and far reaching from a visual and urban heat perspective. Importantly, environmental sustainability including vegetation retention is a fundamental aspect of the overall design and not an optional extra as viewed by the applicant.
- The site already has the wetlands area and its retention is supported. However, the existing vegetation also retains water into the landscape environment and the full removal of the area along David Road and Old Bathurst Road unnecessarily reduces water in the landscape environment.
- The removal of the proposed vehicular access off Old Bathurst Road was required from a traffic perspective and was not proposed to achieve greater tree retention. Given the traffic volumes on Old Bathurst Road, this access should not have been proposed from a safety perspective and trees retained from the initial design.

- The provision of extensive landscaping that almost doubles the tree canopy cover is an important measure to compensate for the loss of existing vegetation and is assist with addressing visual and urban heat concerns. This is the only measure which assists with respect to Clauses 7.5 and 7.30 of the PLEP, however, it is not possible to compare the visual and shading benefits which are achieved immediately from the mound and tree retention, with that of a flat cleared area with new landscaping. The same level of shade and height will never be achieved by the proposal, nor by the current plan with limited retention or the condition for advanced planting.

The position expressed within the recommended Deferred Commencement, as explained above, remains as the necessary outcome in order for Clauses 7.5 and 7.30 of the PLEP to be satisfied.

In summary, it is my opinion that the position put forward within the assessment report and recommended conditions, including a Deferred Commencement condition, remains unchanged. No changes have been made by the Applicant to the proposal. Limited changes suggested to recommended conditions of consent in the Council response column could be easily incorporated into the recommended conditions should the application be approved by the Panel.

I am available to discuss should you require.

Yours faithfully,



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