

## DETERMINATION AND STATEMENT OF REASONS

### SYDNEY WESTERN CITY PLANNING PANEL

<b>DATE OF DETERMINATION</b>	26 March 2024
<b>DATE OF PANEL DECISION</b>	26 March 2024
<b>DATE OF PANEL MEETING</b>	12 February 2024
<b>PANEL MEMBERS</b>	Justin Doyle (Chair), David Kitto, Louise Camenzuli
<b>APOLOGIES</b>	None
<b>DECLARATIONS OF INTEREST</b>	<p>Ross Fowler: Penrith City Council has an interest in the subject property and the proposed subdivision.</p> <p>As a Councillor on Penrith City Council my involvement with the consideration of this application creates a conflict of interest.</p> <p>Tricia Hitchen: As the Mayor of Penrith I believe I have a conflict of interest.</p> <p>Carlie Ryan: As DA22/0318 is a Council DA I have a conflict.</p>

Papers circulated electronically on 19 February 2024.

#### MATTER DETERMINED

**PPSSWC-243 – Penrith – DA22/0318** - 158-164 Old Bathurst Road, Emu Plains - Torrens Title Subdivision into 40 Industrial Lots, 1 Stormwater Management Infrastructure Lot & Public Roads including Land Remediation, Earthworks, Civil Engineering Works & Public Domain Landscaping.

#### PANEL CONSIDERATION AND 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 observed at item 8 in Schedule 1.

#### Development application

The panel determined the development application should be approved pursuant to section 4.16 of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

The final determination requires a final set of conditions to be prepared having regard to the discussion below.

The decision was unanimous.

#### REASONS FOR THE DECISION

The panel determined the application should be approved for the reasons outlined in the council assessment report and further memorandum to the panel by Landmark Planning, dated 6 March 2024.

This proposal for a 37 lot industrial subdivision will add to the available stock of factory and warehouse accommodation in the Penrith Local Government Area, adding to the local economy. The Panel was assisted by an assessment report and further memorandum addressing the material considerations arising under s 4.15 of the EP&A Act prepared by Landmark Planning, a consultant planning firm engaged by Council to provide an independent assessment of the DA due to Council being the owner of the subject site.

The Panel accepts and adopts the conclusions documented in that assessment report and further memorandum, with the exception of issues concerning the vegetated earth along the David Road and Old Bathurst Road frontages discussed further below.

Specifically, the Panel agrees with the conclusions communicated by the assessment report:

- a) With the improvements to the Old Bathurst Road/David Road intersection to be funded by the developer, impacts on the local road system will be managed acceptably, noting that the proposal was referred to TfNSW for comment. TfNSW has responded with advice and proposed conditions which have been incorporated into the recommended conditions of consent. The proposal thereby adequately addresses the relevant provisions of SEPP (Transport Infrastructure) 2021.
- b) The site is to be remediated under a separate development consent to DA23/0506 approved by Penrith Local Planning Panel on 24 August 2023.
- c) The proposal has been assessed to be consistent with the scale of development in the surrounding industrial precinct. It will have a high quality and consistent appearance.
- d) The proposed signage has been assessed to be acceptable, and will not unduly impact on the scenic quality of Emu Plains in the context of available views of the Blue Mountains foothills.
- e) The development will be consistent with the objectives of the E4-General Industrial Zone including particularly to promote development that makes efficient use of industrial land. The development will comply with relevant provisions of the Penrith LEP.
- f) The proposal has been suitably designed with regard to potential flood risk associated with overland flow from the Nepean River, noting some reshaping of the existing swamp into a constructed wetland and pond will assist in meeting compliance with section C3.5 of Penrith DCP 2014. The use of the subject property is not expected to exceed the capacity of available flood evacuation routes.
- g) Having regard to the matters discussed above, the development is in the public interest.

One area of disagreement between the applicant and the Council assessment team assisted by Landmark is a conclusion recorded in the assessment report and further memorandum that the proposed complete removal of the landscaped earth mound along the David Road and Old Bathurst Road frontages would be inconsistent with the objectives and requirements of clause 7.30 of the Penrith LEP which aims to incorporate planning and design measures into new development to reduce urban heat in Penrith. Removal of the earth mound is also said in the Council assessment to be in conflict with clause 7.5 of Penrith LEP which aims to “identify and protect areas that have particular scenic value either from major roads... or other public places”.

The applicant has responded by stating that the earth mound which is comprised of loose fill apparently bulldozed to the north and western boundaries as part of the historical use of the site is inappropriate for the future land use, and unreasonably constrains the development potential of the land. The applicant points out that a requirement to retain the vegetation on the mound would exceed the minimum landscaped setback requirements as outlined within Section D4 of the Penrith DCP 2014 being 15m along the frontage to Old Bathurst Road and 9m along the frontage to David Road.

These photographs show part of the extensive presentation of trees to Old Bathurst Road and David Road to around 10 metres in height including stands of Casuarina and Eucalypt species. The last photo shows the extent of the site. The Old Bathurst Road and David Road frontages presently measure around 764 metres most of which is densely vegetated.



Figure 1 - looking east from the intersection



Figure 2 - Looking west from the intersection



Figure 3- looking west along Old Bathurst Road



Figure 4 – The site showing trees on northern boundaries

The Panel agrees with the Council's assessment that complete removal of the trees along Old Bathurst Road which is an arterial road, and which retains scenic value given its position adjacent to the lower Blue Mountains, would be inconsistent with clauses 7.5 and 7.30 of Penrith LEP. Reference to section 1.1.2 Key Areas with Scenic and Landscape Values from the DCP also supports the retention of the longstanding natural landscape buffers which contribute to the scenic quality of Old Bathurst Road which is a major road and a public place in the local government area, so as to contribute to local identity, and to a lesser extent David Road.

While the Panel accepts that it might be possible to achieve over time a significant vegetated screen through replanting, for more than a decade nothing approaching the contribution of the existing screen is possible. The Panel observes that in the surrounding road system back to and onto the freeway earth mound planted with native vegetation is a frequently adopted theme in the scenic character of the area. The large size of the subject site presently in public ownership would seem to allow for a reasonable development outcome on the site while preserving some degree of the tree lined presentation to the road frontages.

It is notable that the recently approved industrial development on the other side of David Road does not include any tree planting within the boundary relying instead on new street planting which is presently immature. The development also has a commercial use adopting a nil setback to the corner. That result should not in the Panel's opinion be replicated along Old Bathurst Road, if the scenic attributes of the area are to be retained.

At the Panel meeting, the Panel invited the Council and the applicant to confer in the hope that a compromise design could be achieved.

The Panel agrees with the assessment of Landmark in its memorandum to the Panel that the Applicant's response to that process does not provide a sufficient solution to address the issues discussed above. The Applicant states that its objective in the plan was that the cut of the mound was to "retain the existing vegetation that maintains a visual screen when viewed from Old Bathurst Road and David Road". The Panel is not satisfied the plan submitted will sufficiently achieve that result.

In those circumstances, the Panel resolves in substance to adopt the approach recommended in the staff assessment report subject to the comments below, which will retain the vegetated buffer.

However, the Panel is of the view that some narrowing of the tree mound and removal of some trees within the mound from the vegetated buffer is likely to be justified, and could be achieved through a modification or review application, or a separate tree removal application. The Panel expects that it will be necessary to identify the extent of the tree buffer that needs to be retained to properly respond to clauses 7.5 and 7.30 of the LEP, section 1.1.2 Key Areas with Scenic and Landscape Values from the DCP, and to plot with an arborist's advice the extent to which the landscaped buffer can be excavated to permit the planned tree retention to survive. A retaining wall could be planned where it will not threaten the health of trees intended to be preserved. A management plan for the retained vegetation (which may well allow for suitable tree removal within the retained area - particularly weed trees or inappropriate exotics) could be prepared.

The compromise plan submitted by the Applicant would not preserve an adequate tree buffer, and determination of the DA should not be further delayed.

Any future application to alter the landscaped mound to allow the area of the industrial development to extend should:

- (a) Justify the tree removal with reference to clauses 7.5 and 7.30 of Penrith LEP and section 1.1.2 Key Areas with Scenic and Landscape Values from the DCP.
- (b) Be supported by an arborists assessment as to any constraints on excavation into the earth mound necessary to protect trees intended to be preserved.

Removal of weed trees and inappropriate exotics and canopy thinning is likely to be appropriate. Some reduction of the width of the earth mound appears to be possible while maintaining the scenic presentation to the roads and public places, and selective removal of parts of the vegetated screen may well be justified.

## **CONDITIONS**

The Panel has reviewed the Table setting out the respective positions of the parties uploaded to the Portal on 1 March 2024 entitled Applicant's Request & Council Comments for SWCPP.

In response to the separate conditions there discussed, the Panel concludes:

### Condition 97 (Point 1)

- (a) The word "architectural" should be removed from (1).
- (b) The Condition should allow for removal of any tree within the earth mound with the written approval of Penrith Councils Tree Management Officer or Natural Systems Team Leader, noting particularly the desirability of removing weed or inappropriate trees, and the fact that there are plainly trees behind the top of the bank which are not visible from the public roads. Removal of trees to permit the approved vehicular access will be necessary.
- (c) A plan indicating the extent of tree removal is necessary before work within 5 metres of the toe of the earth mound commences. There is no reason why work on other parts of the site cannot commence without that plan being resolved.

#### Condition 97 (Point 2)

If the principles identified in Condition 97 are adopted, it is not necessary for there to be a deferred commencement condition which would hold up work on the site which does not affect the tree mound.

#### Condition 97 (Point 3)

This condition concerns preparation of a vegetation management plan for the following areas:

- 'Constructed Wetlands – Lot 31' as shown in the revised Plan of Subdivision
- Rear setbacks of Lots 14–2113-20; Lot 31 and Lot 323–38; and
- Area along the south to eastern boundary where it interfaces with the road and boundary fence.

A vegetation management plan endorsed by a suitably qualified ecologist for retained vegetation will be needed before work in those areas of the retained vegetation commences.

Provided that the tree mound is to be substantially preserved, a minimum tree replacement rate of 1:1 is sufficient, provided that replanting numbers are sufficient to satisfy the project ecologist or bush regenerator that they will offset the tree removal.

#### Condition 97 (Point 4)

A site audit statement which records the opinion of the auditor that the site has been remediated sufficiently to be suitable for the use approved by this DA provided to the Council and the certifying authority will be sufficient. Further review of the audit by Council (noting that the audit itself is an independent verification process) is not required provided that the conditions of the development consent granted for DA23/0506 are met. The conditions of the development consent granted for DA23/0506 regulate the decontamination works.

The conditions should also record that no site works under the consent to this DA which disturb the soil should occur on site without confirmation from the site auditor that they are consistent with the development consent granted for DA23/0506 and relevant standards, procedures and guidelines.

#### Condition 34 & Condition 37

The Panel notes agreement in relation to these conditions which should be implemented.

#### Conditions 35 & 36

The Panel notes agreement in relation to these conditions subject to the discussion above.

#### Condition 38

This condition appears to be resolved by the discussion of the conditions above. Relevant policies for safe tree removal should be applied, and tree removal permitted by Penrith Council's Tree Management Officer or Natural Systems Team Leader should be allowed.

#### Conditions 29 and 39

The Panel notes agreement (or at least the absence of objection) in relation to these conditions.




The Council is to submit a final set of conditions addressing the discussion above (which the Panel does not intend to require a deferred commencement) as soon as practicable.

### **CONSIDERATION OF COMMUNITY VIEWS**

In coming to its decision, the panel considered a written submission made during public exhibition. The panel notes that issues of concern included:

- Roadworks, intersection design and impact upon cyclists

The panel considers that these issues have been suitably addressed in the proposed intersection works.

PANEL MEMBERS	
<div>Justin Doyle (Chair)</div> <div></div>	<div>David Kitto</div> <div></div>
<div>Louise Camenzuli</div> <div></div>	



SCHEDULE 1		
1	PANEL REF – LGA – DA NO.	PPSSWC-243 – Penrith – DA22/0318
2	PROPOSED DEVELOPMENT	Torrens Title Subdivision into 40 Industrial Lots, 1 Stormwater Management Infrastructure Lot & Public Roads including Land Remediation, Earthworks, Civil Engineering Works & Public Domain Landscaping
3	STREET ADDRESS	158-164 Old Bathurst Road, Emu Plains
4	APPLICANT/OWNER	Applicant: GLN Planning / Penrith City Council Owner: Fletcher Building Products Australia Pty Ltd
5	TYPE OF REGIONAL DEVELOPMENT	Council related development over \$5 million
6	RELEVANT MANDATORY CONSIDERATIONS	<ul style="list-style-type: none"> <li>Environmental planning instruments: <ul style="list-style-type: none"> <li>State Environmental Planning Policy (Biodiversity and Conservation) 2021</li> <li>State Environmental Planning Policy (Industry and Employment) 2021</li> <li>State Environmental Planning Policy (Planning Systems) 2021</li> <li>State Environmental Planning Policy (Resilience and Hazards) 2021</li> <li>State Environmental Planning Policy (Transport and Infrastructure) 2021</li> <li>Penrith Local Environmental Plan 2010</li> </ul> </li> <li>Draft environmental planning instruments: Nil</li> <li>Development control plans: <ul style="list-style-type: none"> <li>Penrith Development Control Plan 2014</li> </ul> </li> <li>Planning agreements: Nil</li> <li>Provisions of the <i>Environmental Planning and Assessment Regulation 2000</i>: Nil</li> <li>Coastal zone management plan: Nil</li> <li>The likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality</li> <li>The suitability of the site for the development</li> <li>Any submissions made in accordance with the <i>Environmental Planning and Assessment Act 1979</i> or regulations</li> <li>The public interest, including the principles of ecologically sustainable development</li> </ul>
7	MATERIAL CONSIDERED BY THE PANEL	<ul style="list-style-type: none"> <li>Council assessment report: 19 February 2024</li> <li>Memorandum to the Panel: 6 March 2024</li> <li>Recommended Conditions of Consent DA22/0318 – Applicant’s Request &amp; Council Comments for SWCPP uploaded to Portal 1 March 2024</li> <li>Written submissions during public exhibition: One (1)</li> <li>Total number of unique submissions received by way of objection: One (1)</li> </ul>
8	MEETINGS, BRIEFINGS AND SITE INSPECTIONS BY THE PANEL	<ul style="list-style-type: none"> <li>Briefing: 27 June 2022 <ul style="list-style-type: none"> <li><u>Panel members</u>: Justin Doyle (Chair), Louise Camenzuli</li> <li><u>Council assessment staff</u>: Robert Craig, Gavin Cherry, Donna Clarke (Consultant)</li> </ul> </li> <li><i>Briefing: 12 December 2022</i> <ul style="list-style-type: none"> <li><u>Panel members</u>: Justin Doyle (Chair), Louise Camenzuli</li> <li><u>Council assessment staff</u>: Robert Craig, Gavin Cherry, Donna Clarke (Consultant)</li> <li><u>Applicant representatives</u>: Michael Hanisch, Ruma McCracken, Amanda McMurtrie, Vladimir Guazons</li> </ul> </li> <li>Final briefing to discuss council’s recommendation: 12 February 2024 <ul style="list-style-type: none"> <li><u>Panel members</u>: Justin Doyle (Chair), Louise Camenzuli</li> </ul> </li> </ul>

		<ul style="list-style-type: none"> <li>○ <u>Council assessment staff</u>: Robert Craig, Gavin Cherry, Donna Clarke (Consultant)</li> <li>○ <u>Applicant representatives</u>: Michael Hanisch, Peter Lawrence, Matthew Bullivant, Amanda McMurtrie, Ruma McCracken</li> </ul> <ul style="list-style-type: none"> <li>● Site inspection by Panel Chair: 13 March 2022</li> </ul>
<b>9</b>	<b>COUNCIL RECOMMENDATION</b>	Approval
<b>10</b>	<b>DRAFT CONDITIONS</b>	Attached to the council assessment report