

<b>DATE OF DEFERRAL</b>	13 May 2024
<b>DATE OF PANEL BRIEFING</b>	29 April 2024
<b>PANEL MEMBERS</b>	Justin Doyle (Chair), Louise Camenzuli, David Kitto, Karen Hunt, George Brticevic
<b>APOLOGIES</b>	None
<b>DECLARATIONS OF INTEREST</b>	None

Papers circulated electronically on 24 April 2024.

#### **MATTER DEFERRED**

PPSSWC-335 – Campbelltown – 1398/2023/DA-U – 8 Noonan Road, Ingleburn - Change of use from motor vehicle repair station and truck wash to a waste management facility that use the existing warehouse for scrap metal yard.

#### **REASONS FOR DEFERRAL**

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

The Panel agreed to defer the determination of the development application (DA) until early September 2024 to allow the matters listed below to be addressed by the applicant and council.

The decision to defer the matter was unanimous.

#### **Orderly staging of continued use and proposed development on site**

The Council had recommended the DA for approval subject to conditions, but the Panel was of the view that the relevant considerations for assessment of the DA have not been sufficiently addressed.

The DA is seeking to regularise unlawful development on the site. The Panel understands that the Council has deferred further action to restrain the present use while the DA remains pending. That issue of compliance has not been referred to the Panel, and the Panel has not resolved any position in relation to it.

The situation of a consent authority considering an application seeking to retrospectively approve unlawful work was considered by the South Australian Supreme Court in its judgement in *Kouflidis and Jenquin Pty Ltd v Corporation of the City of Salisbury* (1982) 29 SASR 321 at 323-324; 49 LGERA 17 at 19-20 which has been applied many times by the Land Environment Court (recently by Preston CJ in *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* [2018] NSWLEC 207; 235 LGERA 345 at [128]). King CJ with whom Mohr J agreed, sitting as a Full Court of the South Australian Supreme Court said:

“The learned judge in the Land and Valuation Court was rightly concerned with the activities of a person ‘who, cynically and fraudulently, changes the use of his or her land, and who hopes, by doing so, to present planning authorities with a fait accompli, and thus to extract a planning consent to the changed use’. His Honour posed the question: ‘How should such a person fare when his or her application comes to be considered at the administrative and judicial level?’ The answer,

it seems to me, is that the unlawful use should be ignored. It does not enter into the planning considerations upon which the planning decision must be made. The punishment of the unlawful conduct should be left to criminal proceedings. The supposed fait accompli should not be recognized as such. The unlawful user of the land should gain no advantage from having established an unlawful use. Any argument based either directly or indirectly upon the unlawful use should be firmly rejected. For instance, the argument put in the present case that the patronage given the unlawful business by the public indicates a local demand for the facility and is a consideration in favour of planning consent, should be rejected as an attempt to gain an advantage from the unlawful use by erecting an argument on the basis of that unlawful use.”

When applying that authority, it has also been recognised that a merit assessment of a DA is similarly not to be directed to punishing a person who has carried out unlawful work (See *Jonah v Pittwater Council* [2006] NSWLEC 99, (2006) 144 LGERA 408).

While the Panel has reached no position as to whether the ongoing unlawful use ought to be restrained, it is clear that the outcome of the DA ought to be determined as soon as practicable.

It is therefore of concern that the DA has been under assessment for over a year now and is still missing information that is essential to the determination of the DA (see below).

The Panel asks that the DA be reported on by Council by September 2024, and the Panel may determine the DA based on the material then before it. An assessment report is requested before the end of August 2024.

If the DA is to be reported for approval, the Council will need to consider carefully how the consent is to operate in relation to any ongoing activities on site, which would need to be addressed in the conditions of consent.

### **Water-related impacts**

The proposed development is in the Georges River Catchment, which is a regulated catchment for the purposes of *State Environmental Planning Policy (Biodiversity and Conservation) 2021* (the Biodiversity and Conservation SEPP). It is also designated development under the *Environmental Planning and Assessment Act 1979* because it is for a waste facility within 100 metres of Bunburry Curran Creek.

Under part 6.2 of the Biodiversity and Conservation SEPP, a consent authority is required to consider and, in some cases, be satisfied of several matters prior to determining a DA in a regulated catchment including:

- water quality and quantity (clause 6.6)
- aquatic ecology (clause 6.7)
- flooding (clause 6.8)
- recreation and public access (clause 6.9)
- controls on land within 100 metres of a natural waterbody (clause 6.11)
- controls on development for waste or resource management facilities (clause 6.22).

Consideration is also required as to whether any part of the development is a “controlled activity” for the purposes of the Water Management Act 2000.

The council’s assessment report does not specifically consider any of these matters, leaving the Panel with insufficient information to be able to make an informed decision on these matters.

The council must ask the applicant to provide additional information on these matters (if necessary) in sufficient time for it to be considered and addressed in the assessment report to be provided by the end of August 2024.

## **Land contamination**

Given the previous use of the site, the land may be contaminated.

Under chapter 4 of the *State Environmental Planning Policy (Resilience and Hazard Hazards) 2021* (the Resilience and Hazards SEPP), a consent authority must not approve a DA unless it has considered whether the land is contaminated; and if the land is contaminated, it is satisfied that the site is either suitable or can be made suitable for the proposed development.

The DA and council's assessment report do not currently contain any information that would allow the Panel to consider and be satisfied about these matters.

The Panel understands the council has asked the applicant to provide further information on these matters, but this has not been done yet.

The applicant must provide the outstanding information to the council by the end of July 2024, and the council must address the relevant matters in the updated assessment report and any proposed conditions of consent for the development by the end of August 2024.

## **Hazards**

The proposed development may pose a hazard to people and land uses in the surrounding area.

The Panel understands the council has asked the applicant to submit a preliminary hazards analysis of the development, but this has not been done yet.

In the absence of this analysis, the council has recommended a condition (condition 43) requiring the applicant to submit a preliminary hazards analysis to the appointed Principal Certifier for approval prior to the issue of a construction certificate.

The Panel does not support this approach as this is a matter that should be considered prior to determining the DA, not afterwards.

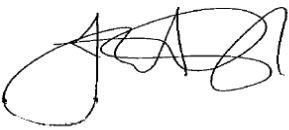




The applicant must provide a preliminary hazards analysis of the development to the council by the end of July 2024, and the council must consider whether the proposed development will indeed pose a hazard to people and land use in the surrounding area in the updated assessment report and revised conditions for the development by the end of August 2024.

## **ACTIONS**

To allow the Panel to determine the DA as quickly as possible, the Panel directed that:

1. A further Panel meeting be convened, preferably in May 2024, with the applicant and the council to clarify the steps that must be taken to enable the Panel to determine the application in early September 2024, at the latest.
2. The applicant is to provide all outstanding information to the council via the planning portal on the matters discussed above by the end of July 2024.
3. The council is to submit an updated assessment report and proposed conditions for the development to the Panel by the end of August 2024.

If the applicant does not provide the outstanding information by the end of July 2024, the Panel is likely to determine the DA in August 2024 on the current information.

PANEL MEMBERS	
 Justin Doyle (Chair)	 Louise Camenzuli
 David Kitto	 Karen Hunt
 George Brticevic	

SCHEDULE 1		
1	PANEL REF – LGA – DA NO.	PPSSWC-335 – Campbelltown – 1398/2023/DA-U
2	PROPOSED DEVELOPMENT	Change of use from motor vehicle repair station and truck wash to a waste management facility that use the existing warehouse for scrap metal yard.
3	STREET ADDRESS	8 Noonan Road, Ingleburn
4	APPLICANT/OWNER	Applicant: Smart Planning and Design Pty Ltd Owner: Shine Motor Corporation/Caterina Severino
5	TYPE OF REGIONAL DEVELOPMENT	Designated development - waste management facility or works
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 (Planning Systems) 2021</li> <li>State Environmental Planning Policy (Biodiversity and Conservation) 2021</li> <li>State Environmental Planning Policy (Resilience and Hazards) 2021</li> <li>State Environmental Planning Policy (Precincts – Western Parkland City) 2021</li> <li>State Environmental Planning Policy (Transport and Infrastructure) 2021</li> <li>Campbelltown Local Environmental Plan 2015</li> </ul> </li> <li>Draft environmental planning instruments: Nil</li> <li>Development control plans: <ul style="list-style-type: none"> <li>Campbelltown Development Control Plan 2015</li> <li>Campbelltown 2032</li> </ul> </li> <li>Planning agreements: Nil</li> <li>Provisions of the <i>Environmental Planning and Assessment Regulation 2021</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: 22 April 2024</li> <li>Written submissions during public exhibition: Nil</li> </ul>
8	MEETINGS, BRIEFINGS AND SITE INSPECTIONS BY THE PANEL	<ul style="list-style-type: none"> <li>Kick Off Briefing: 10 July 2023 <ul style="list-style-type: none"> <li><u>Panel members</u>: Justin Doyle (Chair), David Kitto, Louise Camenzuli, Karen Hunt, George Brticevic</li> <li><u>Council assessment staff</u>: Michelle Penna, David Smith, Zoran Sarin</li> <li><u>Applicant representatives</u>: Emma Breen, David Klingberg</li> </ul> </li> <li>Final briefing to discuss council's recommendation: 29 April 2024 <ul style="list-style-type: none"> <li><u>Panel members</u>: Justin Doyle (Chair), David Kitto, Louise Camenzuli, Karen Hunt, George Brticevic</li> <li><u>Council assessment staff</u>: Michelle Penna</li> </ul> </li> </ul>
9	COUNCIL RECOMMENDATION	Approval
10	DRAFT CONDITIONS	Attached to the council assessment report

