THORNTON NORTH PENRITH PTY LIMITED

41, 184 AND 192 LORD SHEFFIELD CIRCUIT, PENRITH

MEMORANDUM OF OPINION[1]

1. My instructing solicitors act on behalf of Thornton North Penrith Pty Ltd atf Thornton North Penrith Unit Trust.

2. Thornton proposes to undertake development at a site known as 41, 184 and 192 Lord Sheffield Circuit, Penrith. On 11 March 2022, Thornton lodged two Development Applications with Penrith City Council. The Development Applications seek consent for construction and operation of a mixed use development in the form of two sets of two residential towers over a five-storey commercial podium and car parking basement with respect to each of the components of land the subject of the development applications.

3. On 22 September 2023, I provided my Memorandum of Opinion concerning the ability to grant consent to the Development Applications having regard to the fact that the land the subject of the Development Applications also forms part of a broader parcel of land the subject of a Concept Approval granted by the Minister for Planning and Infrastructure on 9 November 2011.

4. The consent authority for the Development Applications is the Sydney Western City Planning Panel. On 7 November 2023 the Panel as then constituted determined to refuse the grant of development consent for both of the Development Applications. In effecting that decision, the Panel provided the following reasons for refusal:

> "1. DA22/0213 and DA22/0214 propose separate (although related) developments and each must include community infrastructure under clause 8.7(3) of Penrith LEP. The DA material presently submitted to the Panel does not contain

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a sufficiently resolved proposal for community infrastructure to satisfy that requirement.

2. Concurrence to the granting of consent is required by section 2.99(3) of SEPP (Transport and Infrastructure) 2021 before development consent can be granted, but it has not been obtained.

3. The Panel is not satisfied that the Applicant's written request has adequately addressed the matters required to be demonstrated by subclause 4.6(3) of Penrith LEP in relation to the variation of the requirements of clause 8.2 of the LEP."

5. On 11 January 2024 the client lodged two requests for review pursuant to s.8.2 of the *Environmental Planning and Assessment Act*. I have been briefed to provide my opinion with respect to certain questions as related to that review process, which questions I shall repeat as headings to the analysis that follows.

(1) Whether the a planning agreement is the appropriate legal mechanism by which community infrastructure offered in respect of DA02 (comprising the upgrade to the public domain) could be counted towards the requirement to provide community infrastructure for DA01, and whether there is another mechanism relevant to the development applications?

6. In my opinion, in the circumstances of the present case where there are two Development Applications which provide for the provision of community infrastructure, albeit in non-equal ways, the appropriate mechanism to ensure that the community infrastructure so unequally to be provided by the two Development Applications is able to be attributable to both of the Development Applications is via the mechanism of a voluntary planning agreement. The main reason for that position is, as set out below, because of the confines of the satisfaction required by cl.8.7 of the Penrith LEP.

7. Clause 8.7 of the Penrith LEP is entitled "Community infrastructure on certain key sites". The subject site is one of the sites nominated in clause 8.7(4), which then, by operation of clause 8.7(3), permits the relaxation of the constraint with respect to floor space ratio and height otherwise determined via clauses 4.3, 4.4 and 8.4(5) of the Penrith LEP.

8. Clause 8.7(5) enumerates certain matters to which the consent authority must have regard in determining whether to grant consent under the clause. Those matters include the objectives of the clause (specifically set out in clause 8.7(1)), whether the development exhibits design excellence (a topic which itself is dealt with elsewhere in the Penrith LEP) and the nature and value of the community infrastructure to the City Centre. Community infrastructure is defined in clause 8.7(6) to mean "development for the purposes of recreation areas, recreation facilities (indoor), recreation facilities (outdoor), recreation facilities (major), public car parks or public roads".

9. As I am instructed, that which is proposed to constitute the community infrastructure comprises recreation facilities (indoor) and public roads (in the form of a pedestrian link). It is also the case that one of those elements is to be provided in one of the Development Applications, the other is to be provided in the other of the Development Applications, and (to use the words of clause 8.7(5)(c)) "the nature and value of the community infrastructure to the City Centre" is not equal as between either of those elements, and hence either of the Development Applications.

10. The part of clause 8.7 that is relevant to the present issue is clause 8.7(3) in which the power to grant consent to a building with height and floor space ratio greater than that which is otherwise prescribed in clauses 4.3, 4.4 and 8.4(5) is predicated upon the precondition that "the proposed development includes community infrastructure" (my emphasis). In its terms, the clause is directed to a consideration that "the proposed development" (that is, the definite article) is one which includes community infrastructure.

11. In the circumstances of the present case, where the development of the overall project site is to be effected via the mechanism of two separate (albeit cross-referenced) Development Applications, in my opinion the better (and safer) construction is that that question is to be asked for both of the Development Applications, but not only once for the both of them. In other words, there is required to be a satisfactory answer to the clause 8.7(3) question for DA01 sufficient to permit the relaxation of the height and FSR controls and if so satisfied, consent can be granted to that Development Application; and

separately, or subsequently, or even contemporaneously, the same question is to be asked with respect to DA02 and, again, if a satisfactory affirmative answer is obtained, then there can be a grant of consent for the proposed height and floor space ratio of the buildings the subject of that application.

12. In circumstances where, as I have set out above, the contribution from each of the portions of the overall site (manifest in the geographical split between the two Development Applications) is not the same, the difficulty becomes the attribution of what might be regarded as community infrastructure "credit" (or surplus) from one development consent to the other.

13. In my opinion, the most appropriate mechanism to achieve an overarching provision of community infrastructure is via the mechanism of the entry into of a voluntary planning agreement pursuant to subdivision 2 of Division 7.1 of the EP&A Act. In that subdivision, pursuant to s.7.4(2), the provision of the community infrastructure would clearly be within the ambit of a planning agreement. As a general proposition, also, there is no barrier to a single planning agreement being applicable to more than one development application (although s.7.4(1)(b) references "a development application", that is, a singular application, s.8(b) of the *Interpretation Act* would permit a reference to the singular as including a reference to the plural).

14. In that way, the one planning agreement can reference both of the Development Applications sufficient that the provision of community infrastructure can thereby (that is, through the mechanism of the Planning Agreement) be referable to the consideration under clause 8.7(3) that the Development Application brings with it community infrastructure.

15. I am instructed that the client has in fact proffered an offer to enter into a voluntary planning agreement via a document lodged with the Council on 28 November 2023, and that in its form it provides for the provision of the community infrastructure contemplated by clause 8.7 across both of the development applications. I am also instructed that, to date, the Penrith City Council has not expressed a position of acceptance of that offer.

16. In my opinion, the absence of acceptance of the offer by Penrith City Council is no barrier to the adoption of the mechanism of a planning agreement as satisfying the requirement of clause 8.7 of the Penrith LEP. This is because, pursuant to s.7.7(3):

> "…a consent authority can require a planning agreement to be entered into as a condition of a development consent, but only if it requires a planning agreement that is in the terms of an offer made by the developer in connection with … (a) the development application…"

17. In the instance of the present case, the consent authority is, as referenced above, the Panel. In the grant of the consent(s), the Panel can impose a condition for both of the consents (or if sequenced, the first of them) for the proponent to enter into a planning agreement in the form of the letter of offer of 28 November 2023.

18. In its terms the section is concerned with imposing an obligation upon the proponent. The condition would not extend to an obligation upon a planning authority (in this instance, the Penrith Council): *Progress & Securities v Burwood Council* (2008) 158 LGERA 102 at [28] and [29] per Jagot J. As set out by Jagot J in that case, especially at [28], such a condition could not, by the mere fact of its imposition, bind the planning authority to enter into the Planning Agreement. The condition would be one that the developer must fulfil to comply with the Development Consent [and] the fact that a condition may not be able to be performed other than with the cooperation of a third party does not make it invalid.

19. In that respect, if it be the case that, ultimately, the Council does not wish to enter into the Planning Agreement contemplated by the letter of offer, then that would not invalidate the condition. Equally, it would not invalidate the consideration, at point of determination of the Development Consent, of satisfaction of the clause 8.7(3) question by reference to the provision of community infrastructure in the form of the Development Application. If, ultimately, the Council does not wish to enter into the Voluntary Planning Agreement, then it would be it, rather than the proponent, that has failed to effect the actual provision of the community infrastructure; however, for the

purposes of clause 8.7(3), as referred above, the relevant question is at the point of the grant of development consent; that is, the development application (including its referenced planning agreement) will have provided community infrastructure sufficient for the engagement of the power to grant consent.

20. In the alternative to a condition requiring the entry into of the Voluntary Planning Agreement, another mechanism would be to ensure that the Development Application itself (and hence any grant of development consent in consequence upon it) effects the provision of the community infrastructure. This can be done via a prescription to construct the community infrastructure and/or provide for its availability to serve the public intent of clause 8.7[2]. This was the mechanism that was offered (and accepted by the Land and Environment Court) in *Urban Apartments v Penrith City Council* [2023] NSWLEC 1094, especially at [39](2) and [79].

21. In this alternative instance, whilst in my opinion there is clear power to effect the provision of the community infrastructure in the absence of the mechanism of a voluntary planning agreement, the issue then becomes, as I have set out above, the need to ask the clause 8.7(3) question for each of the Development Applications and the apparent disparity in the provision of community infrastructure as between the two Development Applications. Notwithstanding that need, if it be the case that there is a logical (or prescribed) sequence to the undertaking of the two Development Consents, and if it be the fact that the majority of the community infrastructure (including the "surplus") is provided in the first of the consents, then there does not appear to be any reason why that cannot be taken into account in the circumstances of the consideration of the second Development Application, albeit that the terms of clause 8.7(3) are limited to a consideration of the Development Application. This is because the question of "value" is not a precondition to the exercise of the power, but more a matter of consideration pursuant to clause 8.7(5). Thus, at the time of the consideration of the "second" development application (the "first" having

[2] For reasons not strictly relevant to these applications, that provision cannot be via the mechanism of a condition which effects a dedication of land or payment of a cash contribution (other than via a planning agreement): *L&G Management v Council of the City of Sydney* (2021) 252 LGERA 31.

provided the “surplus”), the question of the value could readily include the fact of the “surplus” afforded by the first consent.

(2) In relation to clause 8.2 of Penrith LEP, whether a clause 4.6 request is required in the light of the additional solar studies

22. Clause 8.2 of the Penrith LEP, as applying to the subject land, provides that:

> “…development consent may not be granted to development on land to which this Part applies 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.”

23. As I am instructed, there are instances throughout the year in which there is such a (albeit slight) increase in overshadowing of public open space to a greater degree than would result from adherence to the controls referenced in the clause, but that there are other instances in which there is an increase in solar reception at such spaces, and the overall position is a net benefit in solar reception at public places compared to the situation of a compliant building envelope.

24. Notwithstanding the overall net benefit in solar reception to the public spaces, in my opinion, *prima facie* the clause would be breached. That is because, to use the words of clause 8.2, “the development would result in overshadowing”.

25. The clause does not nominate a point in time (in the year) at which the overshadowing is to be determined. Whilst conventionally overshadowing exercises are undertaken at the winter solstice, where the purpose of the clause is directed to solar access to public open spaces (generally), it makes absolute sense for the consideration to be year-round; especially having regard to the fact that such spaces are enjoyed by members of the public, year-round.

26. If it is the case that there is any additional overshadowing (and in that respect, a simple volume study for the base case of the controls can be adopted), then there is a *prima facie* breach of the provision.

27. In *Urban Apartments*, Commissioner Horton determined that the provision was a development standard: [215]. Accordingly, in the circumstances of the breach of a development standard, clause 4.6 of the Penrith LEP can be utilised to provide for flexibility in its application.

28. The fact of the overall net increase in solar reception at the public places compared to a development standard based assessment, and for that matter the fact of increases at certain times of the year, in my opinion, can be adopted and utilised as environmental planning grounds in the clause 4.6 request: see for example *Merman Investments v Woollahra Municipal Council* [2021] NSWLEC 1582 at [74] (by parity of reasoning).

(3) Whether the design guidelines which accompanied the Concept Plan may continue to have some relevancy in the determination of the Development Applications?

29. As set out at the outset, on 22 September 2023 I provided my Opinion as to why the Concept Approval bears no relevance to, or constraint upon, the determination of the current Development Applications.

30. That Concept Approval referenced certain Design Guidelines.

31. If it be the case that the Design Guidelines are engaged only through the mechanism of the Concept Approval (i.e. if there is no other legislative or instrument-based basis for their being referenced), and if it be the case that I am correct in my opinion that the Concept Approval bears no legislative constraint to the determination of the current Development Applications, then in my opinion there is no foundation for requiring that the Design Guidelines be considered in the determination of the Development Applications.

32. In any case, as I am instructed, following the Concept Approval the Design Guidelines were in fact incorporated into Part B of Chapter 11 of the *Penrith Development Control Plan 2014*, and as such would only bear relevance through the mechanism of being a development control plan which, if relevant

to the Development Applications, is required to be taken into account pursuant to s.4.15(1)(a)(iii) of the EP&A Act.

Chambers,
19 February 2024

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