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**URBIS**

# **RESPONSE TO RECOMMENDED REASONS FOR REFUSAL**

DA 19/0875 Wallacia Golf  
Course and Nepean Gardens  
Cemetery

Prepared for

**CATHOLIC CEMETERIES BOARD LTD**

11 February 2021

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| Report Number     | P0014166_Final  |

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# 1. INTRODUCTION

This document has been prepared for the Sydney Western City Planning Panel by Urbis Pty Ltd on behalf of the Catholic Cemeteries Board Ltd (the applicant) in response to Penrith Council's (Council's) for recommendation of refusal of DA19/875 for:

*Change of Use of Part of Existing Golf Course to Cemetery Including 27,000 Burial Plots, Chapel and Administration Building, Internal Roads, New Parking and Amended Access from Park Road, Reconfiguration of Golf Course to 9 Holes, New Pool, Gym, Putting & Bowling Greens, and Alterations and Additions to Wallacia Golf Club, Tree Removal and Landscaping, Fencing, Civil and Stormwater Works and new intersection works along Park Road and Subdivision at 13, 17 and 37 Park Road and 512 Mulgoa Road Wallacia.*

The DA is scheduled to be determined on 17 February 2021 at a meeting of the Sydney Western City Planning panel meeting, reference number PPSSWC – 45.

The report has been prepared to assist the Panel in its decision making and is structured in accordance with the reasons for refusal stated in the 7 December 2020 Council Assessment Report and the item numbers used therein correspond to that report.

In responding to the issues, this report seeks to remove potential barriers to the approval of the application and provide the Panel with assurance that the proposal is worthy of approval.

This response has been prepared with inputs from Mills Oakley, Martens & Associates, EcoLogical Australia, Narelle Sonter Botanica, Urbis (spanning specialist Urban Planning, Heritage and Community Planning disciplines), the Transport Planning Partnership, Steensen Varming, Florence Jaquet Landscape Architect, Austral Archaeology and Warren Smith + Partners.

## 2. ITEM 1 – INCONSISTENCY WITH PENRITH LEP 2010

*The application is not satisfactory for the purpose of Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 as the proposal is inconsistent with the provisions of Penrith Local Environmental Plan 2010 as follows:*

- ***The application has failed to demonstrate the permissibility of aspects of the proposal***

The Applicant has provided detailed legal advice on the characterisation of the existing use rights for the golf course on the site as a *recreation facility (outdoor)* (refer to **Appendix A-** Mills Oakley advice dated 25 September 2020). Similarly, the Applicant has demonstrated the pool and gym can be operated as *community facilities* which are permissible on the site in the E3 Zone. In summary, The Mills Oakley Advice confirms:

### Permissibility of Pool/Gym

*Community facilities* are permissible on the site in the E3 – Environmental Management Zone where the pool and gym are proposed. The Applicant has demonstrated the pool and gym can operate as *community facilities*.

Once a determination of permissibility is made by characterising a land use (e.g. *Community Facilities*), the fact that it may also fall within another purpose (e.g. *recreation facility (indoor)* or existing use rights) is legally irrelevant: *Botany Bay City Council v Pet Carriers International Pty Ltd [2013] NSWLEC 147*. See *Mills Oakley advice dated 25 September 2020*.

### Permissibility of Bowling Green

Council states in its preliminary advice on the DA dated 6 March 2020 and its report to the Panel that the bowling green would be best defined as a *recreation facility (outdoor)*. The PLEP definition of the *recreation facility (outdoor)* expressly includes both golf courses and lawn bowling greens.

The Applicant has provided detailed legal analysis on the characterisation of the existing use rights for the golf course on the site as *recreation facility (outdoor)* (refer to Mills Oakley advice dated 25 September 2020). The analysis is soundly based on authority including *Shire of Perth v O'Keefe (1964) 110 CLR 529* and followed in *Jojenji Investments Pty Ltd v Mosman Municipal Council [2015] NSWCA 147*. In particular:

- *Shire of Perth v O'Keefe (1964) 110 CLR 529* stands for the proposition that the characterisation of existing use rights is to be approached at a level of generality; and
- *Jojenji Investments Pty Ltd v Mosman Municipal Council [2015] NSWCA 147* stand for the proposition that where existing use rights are not derived from any consent or approval, as is the case here where the golf course has been operating since 1932 and no original consent can be identified, then the characterisation of the existing use rights is to be characterised at a level of generality as per the principles in *Shire of Perth v O'Keefe (1964) 110 CLR 529*

Council have given no basis or reasons at all to its disagreement of the characterisation of the existing use rights of the golf course on the site as *recreation facility (outdoor)*.

- ***The proposal is inconsistent with Clause 1.2, Aims of Plan, and the objectives of the E3 Environmental Management zone and the RU5 Village zone***

An assessment of the proposal against the objectives of the E3 Environmental Management Zone and RU5 Village Zone was provided within the Statement of Environmental Effects (SEE) submitted with DA19/875 and further assessment is provided below:

### E3 Zone

- The proposal protects and restores areas of the site with special ecological, scientific, cultural and aesthetic values including the rehabilitation of Jerry's Creek riparian corridor resulting in improved natural processes on the site.
- The proposed works include the retention and revegetation of large areas of threatened ecological communities and will contribute to the green grid.

- Adverse impacts on the ecological and aesthetic values of the E3 zone have been minimised through the implementation of different screen planting along the edge of the park and improving natural processes on the site by protecting the Jerrys Creek floodplain from development.
- The proposal has sought to retain Cumberland Plain Woodland (CPW) and River Flat Eucalyptus Forest (RFEF) wherever possible. The development will be subject to a Vegetation Management Plan.
- The proposal minimises conflict between land uses within the zone and land uses adjoining the site as by providing greater setbacks from adjoining land uses, improving the overall interface with neighbouring land uses.

#### RU5 zone

- The proposal provides a golf course, clubhouse and recreational facilities which are complementary to a rural village.
- The proposal does not include any residential development.
- The proposal will not result in any unreasonable increases in demand for public facilities or services as Cemeteries are a low intensity land use. In fact, it is arguable that the cemetery land use is catering for a demonstrable demand for interment facilities and services. The resultant requirements for adequate servicing of the cemetery and enhanced Club facilities has been proven to be possible as evidenced by additional information provided by the Traffic and Transport Planning Partnership and Warren Smith and Partner.

The proposal is consistent with the objectives of both zones and this is not a reason for refusal.

- ***The proposal is unsatisfactory having regard to the following provisions of PLEP 2010:***

#### ***(a) Clause 5.10 Heritage conservation***

The supporting Heritage Impact Statement (**HIS**), Aboriginal Cultural Heritage Assessment (**ACHA**) and Historical Archaeological Assessment demonstrate the proposal is satisfactory in respect of Clause 5.10. In summary the proposal is satisfactory with regards to the provisions of Clause 5.10 because:

- The site is not a heritage item, nor is it located within a heritage conservation area.
- The setback to the rear of the Wallacia Hotel is acceptable – there will be vegetated screening along this boundary and there are no significant visual or physical impacts.
- The land to the rear of the former St Andrew's Anglican Church heritage item will be maintained as a golf course.
- The proposed development will be a low-impact development and the generally peri-urban / semi-rural character of the area will be maintained.

Additional Heritage work undertaken by Urbis includes an assessment of the impacts of the proposed tree removal on the southern side of Park Road. These trees adjoin the Park Road Heritage Conservation Area (No. 6). The Park Road Heritage Conservation Area is deemed to be locally significant for its collection of three inter-war cottages. The trees are located outside of the conservation area boundaries. As mature native trees, they do contribute to the setting of the dwellings.

As the trees are required to be removed to facilitate the road widening associated with the new intersection, a mitigation strategy including replanting and/or replacement of the trees would be accepted as a Condition of Consent. Critically the road widening/intersection works are proposed in a manner that relies on existing vehicular entry points to the site. By doing such it mitigates other impacts such as additional site disturbance. Accordingly, the response to this issue is a reasonable response that enables mitigation measures (ie compensatory tree replacement) to be practically implemented.

In summary, the proposed works will not affect any significant existing views towards heritage items in the vicinity and are considered to have an acceptable impact on the significance, curtilage and setting of the vicinity heritage items.

Austral Archaeology has prepared a supplementary archaeological assessment addressing the impact of road and intersection works and associated tree removal on both built and archaeological heritage values, refer **Appendix B**. The assessment has found that the archaeological material is unlikely to be encountered as part of the proposed development along Park Road. The works are unlikely to harm Aboriginal cultural

heritage or historical archaeological material and no further archaeological investigations are required in this regard for this location.

**(b) Clause 7.1 Earthworks**

The assessment report queries the finished levels adjacent to the refurbished Wallacia Country Club (WCC) and the carpark.

The architectural plans for WCC prepared by Axil Architects and provided to Council on 26 November 2020 indicate the finalised ground levels and their relationship with the natural ground level. Please also refer to Warren Smith & Partners (WSP) drawings C1.03 and C1.04 which illustrate existing and proposed levels including along the western boundary. The variation between existing and proposed levels is minor with deviations ranging from 5mm-20mm provided to comply with statutory drainage and accessibility requirements. The works will not have any detrimental impact on existing drainage patterns.

The HIS has found that the proposal does not have adverse impacts on the adjacent heritage items, archaeological items, or the Park Road heritage conservation area opposite the site. WSP drawings C2.01 and C2.02 illustrate the soil and erosion control measures that are proposed to be implemented on-site. These measures have been designed in accordance with *NSW Managing Urban Stormwater: Soils and Construction* and demonstrate that appropriate measures have been proposed to avoid, minimise or mitigate the impacts of the development.

We therefore refute the finding in Council's assessment report that the ground levels will not achieve compliance with the objective of subclause 7.1(1)(a) which is to *'ensure that earthworks for which development consent is required will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land'*.

The earthworks to provide for Tee 1 will include formalising Jerry's Creek with the provision of a culvert/pipe system under the new 1<sup>st</sup> hole to ensure that flows reticulate through the site without causing precinct flood impacts. There is no engineering reason on why the works cannot be undertaken with consultation with NRAR required to confirm the specific details of the system to be adopted.

**(c) Clause 7.3 Development on natural resources sensitive land**

The site is traversed by land identified as Natural Resources Sensitive Land. The proposed works include earthworks, carrying out of work and clearing of vegetation therefore consent is required.

The landscape masterplan has been developed based on the constraints of the natural resources. Notably the size of the burial area has been informed by the 1:100-year flood extent and ends at the natural boundary formed by Jerry's Creek. Where possible works are located away from identified sensitive lands. This is demonstrated through the location of roads within the memorial park away from areas of ecological sensitivity and the retention, protection and rehabilitation of riparian zones.

Identified areas of threatened ecological communities have been avoided as far as possible and where impacts are unavoidable, these will be compensated through biodiversity offsets. The proposed sewer pipe located in proximity to Jerry's Creek has been designed to rely on predominantly trenchless construction to ensure no impacts to existing trees.

A BDAR has been prepared which outlines the mitigation measures and offsets that have been incorporated into the site design.

**(d) Clause 7.4 Sustainable development**

The ESD Report submitted with the DA demonstrates the proposed development has been designed to achieve a high level of sustainability performance for the project, including high energy performance and environmentally sensitive design considerations.

The recommendations outlined in the ESD Report submitted with the DA will be implemented at the construction certificate stage. The applicant is committed to achieve a minimum 4.5 Green Star certification, consistent with the Penrith DCP and this can be addressed by a condition of consent. Accordingly, the proposal is considered appropriate for approval without consideration of any other relevant matters.

**(e) Clause 7.7 Servicing**

The proposed sewer system utilises a sewer pump station which is located outside the 1% Annual Exceedance Probability (AEP) flood line. The pump station will be provided with storage capacity, generally of one-day volume as per industry standard. This allows for Nepean Gardens to store sewage during peak times in the Sydney Water Network and pump during off-peak times (i.e. 11pm – 3am) when there is spare capacity in the network. A gravity system would not offer this flexibility. The applicant confirms that consultation is underway with Sydney Water regarding proposed servicing of the site. A meeting with WSP, the Applicant and Sydney Water was scheduled for 3 February 2021 however this was cancelled at short notice by Sydney Water and is yet to be rescheduled. WSP are confident that the proposed servicing solution will be acceptable to Sydney Water once the meeting can be convened.

The pipe system has been designed predominately utilising trenchless methods of construction to ensure no impacts to existing trees. The proposed sewer system, west of Jerrys Creek, connects by gravity to the existing Sydney Water system. The enlarged club facilities are deemed not to have a significant increase on the existing sewerage flow from the club to the Sydney Water system.

***(f) Clause 7.18 Mulgoa Valley and (g) Clause 7.19 Villages of Mulgoa and Wallacia***

This issue has been reviewed. Only a small western portion of the subject site lies within the 'Mulgoa Valley' area. The proposed works to the clubhouse and ancillary facilities are located on the very southern fringe of this area, and consist of extensions and refurbishments to existing development. There will be no adverse impacts on the character of the Mulgoa Valley area or the Wallacia Village.



### 3. ITEM 2 – INCONSISTENCY WITH INFRASTRUCTURE SEPP AND SEPP 55 REMEDIATION OF LAND

*The application is not satisfactory for the purpose of Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 as the proposal is inconsistent with the provisions of:*

- **State Environmental Planning Policy (Infrastructure) 2007, specifically clauses 101 and 104**

The most recent letter received from TfNSW, dated 30 October 2020, raised only two remaining issues regarding the proposed vehicle access and entrance into the Club car park.

These issues were addressed in an RFI response issued to Council on 9th November 2020. Our understanding is that subject to responding to the matters dated 30<sup>th</sup> October 2020, TfNSW were satisfied with the proposal. Hence the application is considered appropriate for approval without the need for consideration of any other traffic matters.

- **State Environmental Planning Policy No. 55 Remediation of Land, specifically clause 7**

A Detailed Site Investigation (DSI) was uploaded on the Planning Portal on 13 November 2020. A Remediation Action Plan (RAP) has also been prepared and was uploaded to the Planning Portal on the 30 November 2020. The DSI and RAP do not cover the area of land affected by road widening on the southern side of Park Road.

We note that the Council assessment report states, *“it is concluded that the remaining contamination issues could be resolved through an amended RAP which addresses the data gaps and that this could be managed through a Deferred Commencement condition.”*

The Applicant is willing to accept a requirement to undertake a DSI and RAP on the land on the southern side of Park Road as a Condition of Consent, and we contend that this would be an appropriate response.

## **4. ITEM 3 – INCONSISTENCY WITH DRAFT REMEDIATION OF LAND STATE POLICY**

*The application is not satisfactory for the purpose of Section 4.15(1)(a)(ii) of the Environmental Planning and Assessment Act 1979, as the proposal is inconsistent with the provisions of the Draft Remediation of Land State Policy*

As discussed above, a DSI and RAP for the site have been prepared. The land not assessed under a DSI and RAP is limited to a strip of land on the southern side of Park Road that will be affected by road widening. As previously noted, Council's assessment report acknowledges that this could be managed through a Deferred Commencement condition. The Applicant is willing to accept this as a Condition of Consent.

## 5. ITEM 4 – INCONSISTENCY WITH PENRITH DCP 2014

*The application is not satisfactory for the purpose of Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979, as the proposal is inconsistent with the following provisions of Penrith Development Control Plan 2014:*

### ▪ **C1 Site Planning and Design Principles**

An assessment of the proposal against Part C1 of the PDCP 2014 is provided in the SEE submitted with the DA. The assessment demonstrates the proposed development satisfies Section C1 of PDCP 2014. In summary:

- Analysis of the visual impact of the proposed works upon the locality is contained within the Landscape, and Visual Impact Assessment prepared by Urbis in accordance with Council requirements.
- The ESD Report prepared by Steensen Varming outlines a series of recommendations to achieve a minimum 4-star NABERS and Green Star rating. The recommendations will be implemented during the construction certificate stage.
- The proposed height, bulk and scale is not intrusive to the surrounding landscape. The administration building and chapel building has been designed to integrate into the surrounding environment. The proposed works to Wallacia Country Club are in proximity to existing built form and do not extend above the existing building.
- The proposal responds to the current site topography and landforms. The cemetery and golf course layout have been designed to respond to the existing golf course fairways where possible to minimise tree removal and earthworks.
- CPTED principles have been incorporated into the proposed building designs to maximise safety and amenity for staff and visitors.
- An Access Report has been prepared by Morris Goding Access. The report addresses the principles of Universal Design and provides recommendations for the improvement to ensure compliance with the Disability Discrimination Act.

### ▪ **C6 Landscape Design**

Despite the significant constraints imposed by the APZ, the Landscape Architect and Botanica have worked together in an integrated response to optimise opportunities for landscape of scale to enhance vistas and views towards the building. A response to the DCP provisions within C6 Landscape Design was provided to Council in the RFI submission dated 9 November 2020.

### ▪ **C7 Culture and Heritage**

An assessment of the proposal against Part C7 of the PDCP 2014 is provided in the SEE submitted with the DA. The Heritage Impact Assessment prepared by Urbis and Aboriginal Cultural Heritage Assessment (ACHA) and Historical Archaeological Assessment prepared by Austral conclude the proposed works are supported from a heritage perspective and are recommended for approval subject to compliance with the recommendations provided within the above reports.

### ▪ **C10 Transport, Access and Parking**

An assessment of the proposal against Part C7 of the PDCP 2014 is provided in the SEE submitted with the DA. The Traffic Impact Assessment prepared by The Transport Planning Partnership concludes that Park Road has sufficient capacity to accommodate the proposed uses without generating unacceptable traffic impacts.

### ▪ **C13 Infrastructure and Services**

The Warren Smith and Partners' (WSP) civil engineering report submitted with DA 19/0875 identifies the site is capable of being connected to adjoining services and providing servicing infrastructure. As discussed in **Section 2** the enlarged club facilities are deemed not to have a significant increase on the existing sewerage flow from the club to the Sydney Water system.

### ▪ **Part D5 Other Land Uses**

## ▪ **Section 5.5 Parent Friendly Amenities**

Public amenities are proposed to be located within the new administration building. We acknowledge that the DCP requires that baby change facilities be included in the design of the amenities area. The Applicant is willing to accept this as Condition of Consent.

## ▪ **Section 5.8 Cemeteries, Crematoria and Funeral Homes**

An assessment of the proposal against Part D5 of the PDCP 2014 is provided in the SEE submitted with the DA.

Notably PDCP 2014 requires that Cemeteries be a *minimum* of 10ha in area. The total site area is 44 ha. The proposal in its final state results in the cemetery land use occupying 21.38 ha of this, of which only 7.64 ha are defined as burial space.

The proposed cemetery has been located with sufficient separation between buildings on the site and adjacent dwellings. PDCP 2014 requires a 15m landscape buffer to the side and rear boundaries. Vegetated buffers of 15m or greater are located along all boundaries, varying depending on topography and site constraints. The proposal therefore complies with this control.

The Traffic Impact Assessment (TIA) prepared by The Transport Planning Partnership and submitted with the DA concludes Park Road has sufficient capacity to accommodate the proposed uses without generating unacceptable traffic impacts.

The proposed cemetery is designed to enable compliance with the *Public Health Act 1991* and *Protection of the Environment Operations Act 1997* and supporting regulations. This is reflected in specialist studies that confirm the site is suitable for the use. Ongoing compliance with these statutes would form reasonable Conditions of Consent.

## ▪ **Part E9 Mulgoa Valley**

An assessment of the proposal against Part E9 of the PDCP 2014 is provided in the SEE submitted with the DA. The historical assessment prepared by Urbis concludes that most of the vegetation on the site is twentieth century vegetation, apart from small instances of vegetation along riparian corridors, which will not be impacted.

The design of the new cemetery and golf course has responded to the existing vegetation and sought to supplement this existing stock with additional native planting.

There are a number of trees which are proposed for removal from the site, however these are to be replaced with a larger number of trees to replenish the site and provide appropriate screening between the property and the adjacent heritage items. We note that the assessment report acknowledges the significant replanting proposed.

There are several trees are proposed to be removed on the southern alignment of the road adjoining the Park Road Heritage Conservation Area (No. 6). The Park Road Heritage Conservation Area is significant for its collection of three inter-war cottages. The trees that are proposed to be removed are native mature trees and while technically located outside of the conservation area boundaries, they do contribute to the setting of the dwellings.

Whilst it would be preferable to retain these trees, they are required to be removed to facilitate the road widening associated with the new intersection. A mitigation strategy including replanting and/or replacement will be considered, and this could be addressed by Condition of Consent.

## 6. ITEM 5 – INCONSISTENCY WITH BIODIVERSITY CONSERVATION ACT 2016

The application is not satisfactory for the purpose of Section 4.15(1)(a)(iv) of the *Environmental Planning and Environmental Planning and Assessment Regulation 2000*:

- (a) *The application is unsatisfactory having regard to the matters for consideration under Part 7 of the Biodiversity Conservation Act 2016.*
- (b) *The application is not satisfactory having regard to clause 50 and the requirements under Schedule 1, Part 1, 2(1)(h) and 2(3)(d).*

Biodiversity and threatened species impacts have been fully assessed with extensive reporting and site surveys. The BDAR Assessment prepared by Travers and Addendum Letter prepared by EcoLogical Australia adequately deal with all potential impacts.

A response to the matters specifically raised in Council's assessment report has been prepared by EcoLogical Australia- refer **Appendix C** and summarised below.

### ***Council does not support the credit reduction request***

The assessment report acknowledges that the Travers (2019) Biodiversity Development Assessment Report (BDAR) was prepared by an accredited ecologist and submitted in accordance with the timeframe required by the legislation.

The Travers BDAR sought a reduction in credits due to the amount of planted vegetation on the site which was treated as CPW in the Biodiversity Assessment Method Calculator (BAM-C). Council's position is that a credit reduction was not justified. The proponent does not challenge this position and agrees to retire the credits as required under the BC Act.

The ecological assessment and updated BAM-C assessment was provided to Council in the November RFI. This information is before the Panel to inform a decision on the quantum of credits required to be retired, if consent is granted to the proposal.

The proponent submits that the number of credits required be based on an updated BDAR that includes all biodiversity impacts of the development footprint, using the existing field data collected by Travers to maintain the integrity of the assessment. An updated BDAR could be provided as Condition of Consent.

### **EPBC Referral**

Council state that the applicant has not advised whether the proposal has been referred to the Commonwealth Minister for the Environment under the EPBC Act due to impact to Cumberland Plain Woodland, which is listed as a matter of national environmental significance (MNES).

We confirm that the proposal has not yet been referred to the Commonwealth. The proponent will refer to the Commonwealth following a decision on the DA by the Panel.

Note however that unless the development is being assessed under the 2015 NSW Assessment Bilateral Agreement (Amendment 1 March 2020), decisions under the EPBC Act are not relevant to the assessment and approval process under the NSW legislation. The development is not being assessed under the Bilateral Agreement. It is acknowledged that should the Commonwealth conclude that the action is a Controlled Action, approval from the Commonwealth will be required before commencement of impacts to Cumberland Plain Woodland (CPW).

### **Serious and Irreversible Impacts (SAIL)**

EcoLogical advises that under the Biodiversity Conservation Act 2016 section 7.16(2) (BC Act), a consent authority must refuse a development under part 4 if the development is likely to have a serious and irreversible impact on biodiversity values.

Council quote from the Travers (2019) BDAR which states that '*It is considered that the proposal may constitute serious and irreversible impacts on CPW*'. And, on page 53 of the BDAR: '*The additional impact assessment provision for TECs are outlined under section 10.2.2 of the BAM (2017) and have been applied to the recorded CPW within Appendix 3. As a result of this assessment it is considered that the impact on CPW of 1.12 ha may constitute SAIL*'.

The assessment report states that the above point should be clarified to identify whether the development **will** have a serious and irreversible impact in relation to CPW.

Under the BC Act and the BAM Stage 2 Operations manual, the assessor is not required to provide a recommendation on whether the impact is serious and irreversible. It is the responsibility of the consent authority to determine whether an impact will be serious and irreversible.

The Travers (2019) BDAR should not have made a statement on whether a serious and irreversible impact is likely. The BDAR must provide information for the consent authority to make that determination. The purpose of the BDAR is to assist the consent authority by providing information on the impact. The inclusion of the above statement in the BDAR should not be used as justification for refusal of the development.

In their assessment report Council did not determine that the development is likely to have a SAIL.

In the absence of Council determining there is a SAIL, and to assist the panel with their determination, consideration should be given to the following:

- An assessment of serious and irreversible impacts was undertaken in accordance with the principles contained within Section 6.7.2 of the BC Reg 2017 (refer to Appendix 2 and 3 of the BDAR Assessment prepared by Travers). The assessment states:
  - The proposal allows for the retention of several patches of CPW covering a total of 2.28ha within the study area. The proposed development will remove approximately 1.12 ha of CPW.
  - The loss of CPW vegetation will be offset through the biodiversity offset strategy (BOS).
  - The proposed VMP will involve regeneration of retained areas of CPW, and the revegetation of 1.35 ha of vegetation to fully-structured CPW, including trees, mid-storey and groundcover species.
  - 0.45 ha of moderate–poor quality CPW and 0.67 ha of poor quality (canopy only) CPW is to be removed by the proposed development.
  - The proposed development will remove 1.12 ha of CPW, which is 0.004% of the estimated extant CPW within the Cumberland IBRA sub-region. The proposal is likely to improve the condition of the retained CPW through weed control, bush regeneration and enrichment planting as part of the prepared VMP.
  - The proposal will directly remove CPW vegetation but beyond this will not specifically impact on characteristic and functionally important species in isolation.
  - The CPW remnants within the site are already isolated or fragmented to all aspects by existing roads and surrounding/adjacent residential lots. The proposed development will not further isolate these remnants but will reduce the amount of CPW within the study area, ie the subject site.
  - Travers has prepared a VMP that details restoration measures to contribute to the recovery of CPW within the study area. 1.38 ha of existing CMP will be regenerated through weed control, natural bush regeneration and enrichment plantings. A further 1.35 ha is to be revegetated to fully structured CPW, including trees, mid-storey and groundcover species. This restoration has the potential to provide greater vegetation integrity through more structured plantings including shrubs and groundcovers.
  - Under the *Draft Cumberland Plain Conservation Plan*, a total of 1,015 ha of CPW will be directly impacted by development. Evidently, in some circumstances, the impacts on threatened species, ecological communities, populations and habitat, are outweighed by the social and economic benefits a development will deliver to the State. The proposed impact of 1.12 ha of CPW associated with this development represents 0.1% of the impact assumed under the Draft Cumberland Plain Conservation Plan.

Council also raised concerns regarding potential safety conflicts between the use of the site as a golf course and a cemetery. Specifically, how the proposal will address safety at the interface between these uses (i.e. protection from ball strike), and how possible netting installation may impact on the identified bat populations at the site. A letter of response has been prepared by Scott Champion and submitted at **Appendix D**. In summary:

- The proposed golf holes have been designed to provide a reasonable interaction between golf course and cemetery uses without relying on golf course safety fencing.

- Sufficient setbacks have been provided between the golf holes and cemetery which are supplemented with a permanent 15-metre-wide landscape buffer along the boundary, and additional revegetation planting within the golf course land itself.
- It is considered that golf course safety fencing between the golf course and cemetery lands is not required.

## 7. ITEM 6 - UNSATISFACTORY IMPACTS ON HERITAGE, TRAFFIC, VIEWS, BIODIVERSITY AND TREES

*The application is not satisfactory for the purpose of Section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979 in terms of the likely impacts of the development including those related to:*

▪ ***(i) negative and unsupportable streetscape, heritage, and local character impacts***

The HIS prepared by Urbis and submitted with the DA concludes that the proposed works are supported from a heritage perspective and are recommended for approval as:

- The proposal will not have an adverse impact on the setting of the heritage items.
- Will not undermine or cause physical damage to the heritage items; and
- Will not have an adverse impact on existing significant views to or from the heritage items.

As noted in the RFI response issued to Council dated 9 November 2020, the existing landscaping and vegetated setting of the heritage items along Mulgoa Road and Park Road will be enhanced through the retention and protection of existing trees and the introduction of additional trees and landscaped areas. Where existing trees are required to be removed to facilitate the car park layout, these are to be replaced with a larger number of trees to replenish the site and provide appropriate screening between the property and the adjacent heritage items. The removal of trees has only been proposed where impact is unavoidable.

As described above several trees on the southern alignment of Park Road adjacent to the Park Road HCA are required to be removed to facilitate the road widening associated with the new intersection. As mature native trees, they do contribute to the setting of the dwellings however given the limited number of trees in question and the broader benefits of the proposed use in catering for a demonstrable demand/social need, the requirement for replanting and/or replacement would be accepted as a Condition of Consent.

Overall, the proposal is consistent and complementary with the existing landscaped nature of the area and is sympathetic to the adjacent heritage items.

We further note that the Executive Summary of the Council assessment report identifies that '*works internal to the site are acceptable and the impacts on heritage, archaeology and Aboriginal cultural heritage, could be managed appropriately through conditions which reference the report recommendations.*' (page 3)

***(ii) unsatisfactory traffic, parking, access and related safety impacts***

The TIA previously prepared by The Transport Planning Partnership (TPPP) found that Park Road has sufficient capacity to accommodate the proposed uses without generating unacceptable traffic impacts.

Traffic modelling shows that there will be no significant impact at the intersections. The most recent letter received from TfNSW, dated 30th October 2020, raised only two remaining issues. These issues were addressed in an RFI response issued to Council on 9th November 2020. We understood that subject to responding to the matters dated 30 October 2020, TfNSW were satisfied with the proposal.

With regard to the site's accessibility, TPPP has liaised with TfNSW as bus service provider. TfNSW have confirmed that there are no current plans to provide a bus along Park Road but have suggested that the ability to turn a bus around would be beneficial should future patronage justify a bus service to the cemetery. There is the ability to operate a shuttle bus connecting the Club/Cemetery to Mulgoa Road.

It is acknowledged no pedestrian access to the cemetery is available via a paved walkway and the cemetery entry is approximately 650m from the clubhouse. The Applicant is willing to provide a link connecting the clubhouse and the cemetery which will improve pedestrian accessibility. Subject to compatibility with Golf activities, a path can be provided on the edge of the Golf Course. Where it is deemed unsafe, the path may be provided, in parts, within the road reserve.

We note that there are objections by Council's traffic engineers regarding impacts of road and intersection works on Park Road, Driver Avenue, and in relation to impacts on private access driveways, and owing to unsupportable safety issues. However, to our knowledge, TfNSW who are the road authority for this section of road do not share Council's concerns.



A response to additional issues raised by Council is provided below. These issues are not considered to be significant objections nor unsupportable safety issues, but rather can be resolved through amendments or suitable Conditions of Consent.

- **Council comment:** Driver Avenue should be Left In/Left Out only with a centre median to better control the No Right turn in,

**Applicant Response:** This can be done and suitably conditioned subject to approval from the traffic committee.

- **Council comment:** Conflict is anticipated related to the pedestrian refuge on Park Road and turning traffic from the clubhouse driveway.

**Applicant Response:** Swept paths have been submitted which demonstrate there are no conflicts between the pedestrian refuge and turning vehicles.

- **Council comment:** The intersection treatment plans have short diverge tapers for through traffic and not fully developed painted separation medians at the right turn bay diverge and need to show at least 12.5m heavy vehicle turn paths at the access and Driver Avenue.

**Applicant Response:** As noted in Council's assessment report (page 17), this could be suitably conditioned to be addressed to TfNSW and Council's satisfaction prior to issue of a Construction Certificate.

- **Council comment:** Conflict between service and waste collection vehicles reversing in the carpark.

**Applicant Response:** This was specifically addressed in the last letter to TfNSW. Council's assessment report also notes that completion and compliance with a plan of management could cover these arrangements.

The above issues are not considered to be significant objections nor unsupportable safety issues, but rather can be resolved through amendments or suitable Conditions of Consent.

### ***(iii) unsatisfactory and unsupportable impacts on views and vistas and scenic character***

A Landscape and Visual Impact Assessment (LVIA) was prepared by Urbis and submitted with the DA. Additional consideration of the potential impact on views, vistas and scenic character has been made and photomontages have been subsequently prepared from three viewpoints, refer **Appendix E** and **Appendix F**. The photomontages demonstrate that the proposal will have negligible visual impacts from the assessed viewpoints because::

- The proposed development is of a character similar to the existing golf course landscape. Both are comprised of an undulating, natural landform, with curving, lineal bands of trees in a predominately open grassed landscaped setting.
- Built form in both the existing and proposed scenarios is limited to small, isolated buildings and the proposal will comprise low walls for memorial plaques and plaques or headstones at ground level. The low profile of these components will ensure that there will be no interruption to views over the tree canopy line. Lower profile memorial elements are generally located closer to the boundary especially where the site meets Park Road.
- Views to the proposed development are typically screened by either perimeter or on-site vegetation or built form along its western and south western interfaces.
- Screen planting has been designed to minimise visual impact of headstones from the main internal roads and Park Road and provide privacy for mourners whilst retaining some views in and out for passive surveillance. Generally, grave rows follow existing contouring of the land and re-grading only occurs where localised water ponding may occur.
- The lack of topographic variation reduces the potential for adverse visual impacts. Adjacent elevated areas to the north and west are not elevated enough to allow for overlooking of the proposed development.
- Views from the southern boundary along Park Road are typically screened or filtered by vegetation. A few limited locations allow for unobstructed views to the foreground however banded vegetation within the site prevents more extensive views.

- Views from Mulgoa Road and Greendale Road are screened mainly by built form. The single storey residences fronting Mulgoa Road and immediately adjacent to the site, are surrounded by 1.8m high fencing around the rear yards of the residences. This screens views to the ground plane of the development from both the interiors of the residences as well as the rear yards.
- From the rear yards, the proposed development is also partially screened from view by foreground canopy vegetation around the perimeter of the site reflective of DCP setback requirements.

#### **(iv) unsupportable impacts on character and heritage related to earthworks and levels**

Refer to assessment and response to Item 1 above which addresses the proposal against PLEP 2010 Clause 7.1 – Earthworks. Impacts arising from groundworks are not considered to have adverse heritage and character impacts.

#### **(v) negative social impacts**

Council's assessment report finds that there will be negative social impacts arising from the proposal. The report states that these are linked (page 50) to the impacts of the development on:

- heritage values and significance,
- views and vistas,
- scenic quality,
- biodiversity values, and
- streetscape, trees and landscape

The assessment report does not elaborate on how these issues result in negative social impacts.

Forgoing discussion in this response has addressed the likely impacts of the development on the above matters and found the impacts to be acceptable.

A Social Impact Assessment (SIA) was prepared by Urbis and submitted with the DA. The SIA identified key social impacts and recommendations to help manage and improve potential impacts arising from the proposal. The SIA found that the proposal would have impacts on the local sense of place, due to land use changes associated with the cemetery use. However, these impacts were not found to be severe, and could be managed, particularly as the change will be gradual over several years. Additionally, positive impacts are associated with the refurbishment of Wallacia Golf Club, providing enhanced recreational facilities to the local community.

#### **(vi) negative impacts on biodiversity values, trees and vegetation**

Refer response at **Section 6**.

#### **(vii) unsatisfactory sustainability considerations**

The proposed development has been designed to achieve a high level of sustainability performance for the project, including high energy performance and environmentally sensitive design considerations. The recommendations outlined in the ESD Report submitted with the DA will be implemented during the construction certificate stage and will achieve a minimum 4.5 Green Star certification, consistent with the Penrith DCP. The proposal can therefore be supported on these grounds.

#### **(viii) inadequate landscaping provision and setbacks**

The proposed carpark design was amended as part of the RFI submission dated 9 November 2020 to create additional opportunities for planting in and around the southern carpark. In summary:

- A 2m wide landscaped set back has been introduced to the eastern boundary to improve the interface with the residential dwelling at 21 Park Road.
- Spotted gums are proposed within the carpark as they are relatively fast growing and will develop large canopies to shade a maximum number of car spaces. They will also increase buffer planting on the edges of the car park to suitably address impacts on local character and scenic values, heritage significance and streetscape.
- The proposed landscape incorporates endemic species and echoes planting patterns that are evident in residential development within the village.

- Planting along the interfaces with adjoining properties will always be constrained by the Asset Protection Zone. Continuous screen planting is not possible as it would provide a continuous path for fire close to adjacent buildings and properties.
- Any concern about the narrowness of the tree blisters to support mature tree growth could be addressed by a Condition of Consent that requires in all car park spaces immediately adjacent to the blisters the installation of a product to facilitate root development under hard surfaces, such as *City Green Strata Cell* or *Strata Vault*. Similarly, the same condition could be applied to an extent of car park immediately adjacent to boundary planting beds to facilitate root development to support the mature growth of trees on the boundary.
- The residence at 21 Park Avenue is approximately 1m off the boundary with the proposed car park. The Asset protection zone (APZ) runs along this boundary. The APZ significantly restricts planting that could be accommodated even in a 5.5-metre-wide garden bed.
- Any proposed planting screen shrubs would need to be in discrete and separated small clumps, and any tree canopies separated from the shrubs to prevent 'ladders' for fire, and tree canopies separated sufficiently one from the other so as not to provide a path for fire.
- An alternative approach would be to condition a built, non- vegetative screen along the boundary adjacent to the private open space immediately to the rear of the residence. This would be a pragmatic, less hazardous solution than a wide band of planting adjacent to the residence.

#### **(ix) unsatisfactory building design**

Amended architectural plans prepared by Axil architects were submitted as part of the RFI response of 26 November 2020. The western elevation of the Clubhouse has been amended to articulate the building façade and contribute to its architectural expression thereby creating visual interest. The following design elements have been introduced to the western façade of the Clubhouse, pool and gym building:

- New louvre panels.
- New highlight windows.
- New landscape planter to western wall of Club building at driveway level; and
- New windows and highlight windows to the pool and gym building.

The introduction of highlight windows and louvre panels to the Clubhouse assists in breaking up the elevation, enhances outlook and provides opportunities for passive surveillance over the car park.

## 8. ITEM 7 – THE SITE IS UNSUITABLE FOR THE DEVELOPMENT

*The application is not satisfactory for the purpose of Section 4.15(1)(c) of the Environmental Planning and Assessment Act 1979 as:*

- *The site is not suitable for the proposed development.*

The assessment within the SEE submitted with the original DA, and supporting technical reports confirms that the site is suitable for the proposed development for the following reasons:

- As discussed in Section 2, the proposed cemetery is permissible with consent under the E3 zoning, and Wallacia Country Club and Golf Course are continuations of existing uses on the site. The proposed built form complies with the provisions under the PLEP 2010.
- The site is situated within an established area such as access to services and stormwater infrastructure readily available. These include electricity, gas, water and telephone services and drainage for stormwater and sewerage.
- The proposal responds to the identified need for additional cemetery space within Metropolitan Sydney and the Western District.
- The reduced cemetery size assists with preserving the peri-urban/semi-rural character of the Wallacia area and fulfils the local communities desire for the retention of the golf course.
- The community will be able to take advantage of new and upgraded passive and active recreation facilities on the site.

## 9. ITEM 8 – PROPOSAL IS NOT IN THE PUBLIC INTEREST

**The application is not satisfactory for the purpose of Section 4.15(1)(e) of the Environmental Planning and Assessment Act 1979, as the proposal is not in the public interest.**

As discussed in the SEE submitted with the DA, this application has been prepared in direct response to the key issues raised by the IPC in relation to the former DA. In its assessment of the previous DA, the considered the social welfare of the community to relate to local character and sense of place.

The retention of the golf course on site protects the community's associations and sense of place with the Wallacia Village and the surrounding semi-rural context. The reduction in scale of the cemetery component allows for both uses to occur on the site.

The proposal has strong technical merit and is considered to be in the public interest for the following reasons:

- The DA will deliver critical burial infrastructure for Wallacia and surrounding communities.
  - The Metropolitan Sydney Cemetery Capacity Report identifies the probable exhaustion of burial space in Metropolitan Sydney by 2051, if not before. The proposal will contribute 27,000 full-body burial plots for the benefit of the Wallacia community and surrounding communities.
- The proposal will significantly improve the quality and diversity of recreational offering to the community:
  - The proposed retention of the golf course on the site preserves the sense of place that residents feel towards recreational uses in their community.
  - The proposal will significantly expand the range of recreational offering in a location that is highly accessible to the local community.
  - The diversity will encourage intergenerational uses and activity on the site.
- The proposal includes the delivery of rehabilitated and restored open space on the Jerry's Creek floodplain.
  - This will provide a valued area for public recreation and relaxation to be enjoyed by the community and visitors, for passive and active recreation uses and publicly accessible open space, in perpetuity.

It is considered that the proposal represents a sound and balanced development outcome that respects and positively responds to the site location and amenity of the surrounding locality, supports the local character of the area and is worthy of development approval.

## 10. ITEM 9 – NOT SATISFACTORY DUE TO ISSUES RAISED IN SUBMISSIONS

The application is not satisfactory for the purpose of Section 4.15(1)(d) of the Environmental Planning and Assessment Act 1979 due to matters raised in submissions which include:

A response to submissions received during the public notification period was provided in August 2020. The response addressed the matters below.

- **Impacts of the development on traffic, safety, access and parking**

The impacts of the development on traffic, safety, access and parking matters have been considered in the Traffic and Parking Assessment prepared TTPP. Refer to **Section 7** for further discussion.

- **Impacts of the development on residential amenity**

The proposal achieves a high level of local amenity and does not negatively impact local character or residential amenity. As discussed in **Section 7**, a 2m wide landscaped set back has been introduced to the eastern boundary to improve the interface with the residential dwelling at 21 Park Road.

- **Impacts of the development on trees and biodiversity values**

The impacts of the development on trees and biodiversity values has been considered in the Biodiversity Development Assessment Report prepared by Travers and supplementary information prepared by EcoLogical Australia. Refer to **Section 6** for further discussion.

- **Impacts of the development on local character, views and vistas, heritage significance and scenic quality**

The impacts of the development on local character, views and vista, heritage significance and scenic quality has been considered in the Heritage Impact Statement prepared by Urbis, Statement of Environmental Effects prepared by Urbis and Landscape and Visual Impact Statement prepared by Urbis. Refer to **Section 6** for further discussion.

- **Impacts of the development on the social fabric of the community and the related impacts on health and wellbeing**

The impacts of the development on the social fabric of the community have been considered in the Social Impact Assessment prepared by Urbis. Refer to **Section 7** for further discussion.

# 11. CONCLUSION

This report has considered and responded to the reasons for refusal contained in the Council assessment report prepared in respect of DA19/875.

Reference has been made to previously submitted material and drawn upon further assessment by the consultant team undertaken in response to the assessment report. We trust that this report assists in removing potential barriers to the approval of the application and provides the Panel with assurance that the proposal is worthy of approval.

We reiterate that there is an inherent conflict within the Assessment Report, with some of the stated reasons for refusal contradicting the statement within the Executive Summary of the Council assessment report that:

*".... it is concluded that the remaining contamination issues could be resolved through an amended RAP which addresses the data gaps and that this could be managed through a Deferred Commencement condition, although such a condition is not included as the application is recommended for Refusal based on other matters. The application was accompanied by a series of archaeological, heritage and Aboriginal archaeological and cultural heritage assessments and reports. Whilst it is noted that some additional reports remain outstanding, the assessments in relation to works internal to the site are acceptable and the impacts on heritage, archaeology and Aboriginal cultural heritage, could be managed appropriately through conditions which reference the report recommendations." (page 3)*

We share this view and emphasise to the Panel that the applicant is willing to entertain conditions of approval to further address any remaining minor issues.

The DA will deliver critical burial infrastructure on land which is zone appropriately for this use and for which Council specifies a minimum scale. The proposal will contribute 27,000 full-body burial plots and caters for a demonstrable community need and has been designed in a manner underpinned by a landscape architectural philosophy that respects and responds to existing landform and site constraints.

The retention of a golf course and establishment of other recreational uses within the refurbished Wallacia Country Club will encourage active recreation and appeal to a broad spectrum of the community. These uses, together with an enhanced registered Club will significantly support long term viability of the golfing facilities. Recreational activities on the site area valued social anchor and centralised place for recreation for the Wallacia community. This is not fundamentally altered, but rather enhanced in a manner that affords the longer-term viability of such.

The proposal represents a sound development outcome that respects and positively responds to the site location and amenity of the surrounding locality, supports the local character of the area and is worthy of development approval.

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This report has been prepared with due care and diligence by Urbis and the statements and opinions given by Urbis in this report are given in good faith and in the reasonable belief that they are correct and not misleading, subject to the limitations above.



## **APPENDIX A**

## **MILLS OAKLEY ADVICE**

25 September 2020

Your ref:  
Our ref: BMSS/AJWS/3404807

Catholic Cemeteries Board  
C/- Urbis  
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SYDNEY NSW 2000

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Dear Nazia,

**Legal Advice on Bowling Green Permissibility and Community Facilities in proposed redevelopment of Wallacia Country Club**

We refer to your request for our legal advice in relation to the proposed redevelopment of the Wallacia Country Club site. The need for this advice arises from the Penrith City Council's request for further information with respect to development application DA19/8075 for the land at 13 Park Rd and 512 Mulgoa Rd Wallacia (the '**Site**').

In particular you have asked for advice on:

- a) Whether the proposed bowling green is permissible under any existing use rights that benefit the Site; and
- b) Whether the proposed pool and gym are able to be properly characterised as community facilities under the *Penrith Local Environmental Plan 2010* (the '**PLEP**') and therefore be permissible on the Site if operated by the St Johns Park Bowling Club (the '**SJPBC**') as proposed by DA19/8075.

**Summary Advice**

Based on the background set out in this advice and your instructions, in our view:

- a) The existing golf course (and clubhouse) on the Site operates under existing use rights. The proposed bowling green can be characterised within the same genus of use as the existing golf course. Accordingly, those existing use rights may be enlarged, expanded or intensified under the existing use provisions set out in the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) and the *Environmental Planning and Assessment Regulation 2000* (**Regulations**) to permit the proposed bowling green; and
- b) The SJPBC can be defined as a non-profit community organisation and as such is able to operate community facilities in accordance with the *PLEP*. Accordingly, the proposed swimming pool and gymnasium are able to be characterised as community facilities and therefore are permissible under the *PLEP* on the Site with consent.

**Background**

In preparing this advice, we have understood the relevant facts to be as follows:

- I. The *PLEP* is the Environmental Planning Instrument (**EPI**) relevant to the Site. The *PLEP* came **NOTICE**

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into force on 22 September 2010.

- II. The Site is largely zoned E3 Environmental Management pursuant to the *PLEP* while a very small (comparably) part of the Site in the vicinity of the existing golf clubhouse is zoned RU5 Village.
- III. The Site currently operates as the Wallacia Country Club which comprises an 18-hole golf course, clubhouse, maintenance shed and car park.
- IV. We have been instructed that the golf course on the Site has been in existence and operating since 1932 and continues to operate. We are instructed that a copy of any original development consent or approval for the construction and use of the golf course or clubhouse is unavailable and therefore we do not have any such copy. We have been provided with evidence of the use of the Site as a golf course (and clubhouse) in the form of a range of development consents granted by Penrith City Council (the '**Council**') dating back to May 1988, including the following:
  - DA12/1129 approved on 12 February 2013 for "**Authorisation of Fill Material for Golf Tee & Golf Ball Landing Pad**" on Lot 2 DP 1108408 – 13-15 Park Road, Wallacia;
  - DA03/1128 approved on 16 December 2003 for **Improvements to Wallacia Golf Course** on Lot 412 DP 736070 – 13 Park Road, Wallacia and related Constructions Certificate No. 060145C02 referencing s96(1) Modification Application granted 4 December 2006;
  - DA970005 approved on 7 February 1997 for a "**Machinery Shed...**" for Wallacia Golf Club Limited) and s68 approval of 10 February 1997 for the construction of "farm shed-enclosed-no floor" on Lot 412 DP 736070 – 13 Park Road, Wallacia; and
  - DA379/88 approved on 3 May 1988 for "**Extensions to the existing club house...**" on Lot 412 DP 736070 – Park Road, Wallacia with Building Permit No. 17457 granted on 10 November 1988.
- V. A development application for the Site is currently being assessed. This application seeks approval for "*Change of Use of Part of Existing Golf Course to Cemetery Including 27,000 Burial Plots, New Chapel, Workshop and Administration Buildings, Internal Roads, New Parking and Access from Park Road, Reconfiguration of Golf Course to 9 Holes, New Pool, Gym, Putting & Bowling Greens, and Alterations and Additions to Wallacia Golf Club, Tree Removal and Landscaping, Fencing, Civil and Stormwater Works and Subdivision*". The Applicant is the Catholic Cemeteries Board C/- Urbis ('**DA19/0875**').
- VI. Council have issued a Request for Further Information (the '**RFI**') in relation to DA19/8075 which includes, at item 2, a request for clarification as to the permissibility of the proposed bowling green and on the characterisation of the proposed Gym and Pool as community facilities.

Please let us know if any of the above facts are incorrect, as this may change our advice.

## Detailed Advice

### Permissibility of Bowling Green

- 1.1 As detailed above, the Site is largely zone E3 – Environmental Management under the *PLEP*. DA19/0875 proposes a new bowling green in the *PLEP* E3 Zone. The new bowling green is to be operated as part of the existing Wallacia Country Club together with the existing golf course.
- 1.2 The RFI raises issues of permissibility in the *PLEP* E3 Zone with respect to the proposed bowling green. The *PLEP* definition of 'recreation facility (outdoor)' includes both golf courses and bowling greens. The land use table for the *PLEP* E3 Zone does not expressly permit or prohibit recreation facilities (outdoor). Accordingly, recreation facilities (outdoor), including golf

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courses and bowling greens, are **innominate prohibited uses** in the *PLEP* E3 zone.

- 1.3 As detailed above, we are instructed that that the golf course on the Site has been in existence and operating since 1932 and continues to operate. As also detailed above, we do not have a copy of any original development consent or approval for the construction and use of the golf course but there is evidence of subsequent development consents relating to the use of the Site as a golf course. Accordingly, the permissibility of the bowling green must be explored under any existing use rights that benefit the Site.

#### *Existing Use Rights*

- 1.4 Existing use rights are generally set out and provided for in part 4, division 4.11 of the *EP&A Act* and in part 5 of the *Regulations*. In summary, existing use rights generally allow a prohibited use to continue (and also be modified subject to compliance with certain requirements) on the basis that either the use was taking place lawfully before it became prohibited, or because a development consent had been granted before the prohibition (and the consent had otherwise commenced in accordance with certain timing requirements). As set out above, golf courses are a prohibited use in the *PLEP* E3 zoned part of the Site, being the vast majority of the Site.
- 1.5 As set out in section 4.65 of the *EP&A Act*, an existing use is established in either one of the following two ways:
- (a) a building, work or land was being used for a lawful purpose immediately before that use became prohibited by the coming into force of an environmental planning instrument; or
  - (b) a building, work or land was being used pursuant to a development consent which was granted before the use became prohibited provided that the use had started within one year after it had become prohibited and provided that the use was otherwise taking place lawfully (ie. the use was taking place in accordance with the consent and the consent had otherwise not lapsed).
- 1.6 Section 4.66(1) of the *EP&A Act* then provides the general preservation of an existing right when it says “[e]xcept where expressly provided in this Act, nothing in this Act or an environmental planning instrument prevents the continuance of an existing use.”
- 1.7 Accordingly, the existing golf course (and clubhouse) use on the Site will constitute an ‘existing use’ and the Site will have the benefit of existing use rights if the requirements of section 4.65 of the *EP&A Act* are satisfied.
- 1.8 In order to determine this, it is necessary to both establish when the existing golf course use on the Site became prohibited and how that use came to exist on the Site, and in particular at what time that use became prohibited on the Site.
- 1.9 Prior to the enactment of the *PLEP* (which is the current LEP for the Site), the relevant Environmental Planning Instrument (**EPI**) for the Site was the *Penrith LEP No.201 (Rural Lands) (RLPLEP)*. Under the *RLPLEP*, the Site was zoned 1(a) (Rural “A” Zone – General) and the land use table permitted a ‘recreation area’ with consent in the zone.
- 1.10 Under the *RLPLEP* ‘recreation area’ was defined as follows:
- recreation area means:**
- (a) A children’s playground, or
  - (b) A building or place used for sporting activities or sporting facilities, or
  - (c) A building or place used by the council to provide recreational facilities for the physical, cultural or intellectual welfare of the community, or
  - (d) A building or place used by a body of persons associated for the purposes of the physical, cultural or intellectual welfare of the community to provide those purposes, but does not include a racecourse.
- 1.11 It is in our view highly likely that the use of the Site as a golf course (and golf club) falls within (b) and perhaps even (d) of the above definition of “recreation area” and as a result the golf course and golf club were permissible uses of the site under the *RLPLEP*.
- 1.12 Under the current *PLEP*, recreation areas are still permissible in the relevant zone but ‘recreation area’ is defined more narrowly as follows:

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**recreation area**” means a place used for outdoor recreation that is normally open to the public, and includes –

- (a) A children’s playground, or
- (b) An area used for community sporting activities, or
- (c) A public park, reserve or garden or the like,

and any ancillary buildings, but **does not include a recreation facility (indoor), recreation facility (major) or recreation facility (outdoor)**. [Our emphasis added]

1.13 Relevantly, “recreation facility (outdoor)” is defined in the PLEP as follows:

**recreation facility (outdoor)** means a building or place (other than a recreation area) used predominantly for outdoor recreation, whether or not operated for the purposes on gain, **including a golf course, golf driving range, mini-golf centre, ..., lawn bowling green...or any other building or place of a like character used for outdoor recreation (including any ancillary buildings), but does not include an entertainment facility or a recreation facility (major)**. [our emphasis added]

1.14 The specific exclusion of golf courses from the definition of “recreation area” in the PLEP [by their specific inclusion in the definition of “recreation facility (outdoor)”] must in our view have had the effect of prohibiting golf courses on the E3 zoned portion of the site upon the coming into force of the PLEP, because golf courses are otherwise an innominate use in that zone under the PLEP, and innominate uses are prohibited in the E3 zone. Accordingly, **golf courses became prohibited on the E3 zoned portion of the Site on 22 September 2010**, meaning this is the relevant date for existing use rights purposes (clause 39 of the Regulations).

1.15 Having established that golf courses became prohibited on the Site as at 22 September 2010, it is necessary to look at how the golf course (and golf clubhouse) use came to exist on the Site, particularly in the context of the 22 September 2010 relevant date, to ensure that they were lawful uses at the relevant date.

1.16 As detailed above, we do not have a copy of any original development consent or approval for the construction and use of the golf course or clubhouse. However, we are willing to presume for the purposes of this advice that these uses were taking place lawfully on the Site as at the relevant date, being 22 September 2010. This presumption is based on facts including that:

- Council has granted since May 1988 several consents related to the existing golf course and clubhouse;
- We are not aware that there has ever been any suggestion from Council that the golf course or clubhouse use is or was unlawful;
- The golfing use has been conducted for approximately 90 years, (dating back to 1932), which is obviously a very significant period for there to have been no record of complaints from Council about such use being unlawful.

1.17 It is therefore highly likely that the use of the Site as a golf course (with clubhouse) either:

- (a) was approved and the consent cannot be located, or
- (b) commenced before there was any requirement for a consent under planning law.

1.18 In either case, reliance can be placed on at least the 1988 consent relating to the existing golf course and golf clubhouse and the actions of Council to establish the lawful use of the Site based on a ‘presumption of regularity’ (*Dosan Pty Ltd v Rockdale City Council* [2001] NSWLEC 252). In our view, the above facts and observations provide proof that the Site benefits from existing use rights and this position appears to have been supported by Council.

#### *The Bowling Green and Existing Use Rights*

1.19 At the heart of this issue is the foundation of the existing use rights for the golf course on the Site, the proper characterisation of the existing use on the Site and whether the proposed bowling green can fall within that characterisation of use.

1.20 Section 4.65 of the EP&A Act distinguishes in two limbs between (1) a use which was for a lawful purpose which became prohibited, and (2) a use for which development consent was obtained which became prohibited. The former category of uses did not require development

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consent and the latter are uses which were only lawful because consent had been obtained.

- 1.21 As detailed above, we do not have a copy of any original development consent or approval from 1932 (when use of the Site as a golf course commenced and which was prior to the 1945 amendment to the *LG Act*) for the construction and use of the golf course and, as detailed above, this may be because that use of the Site was either:
  - (a) approved and the consent cannot be located, or
  - (b) commenced before there was any requirement for a consent under the planning law that existed at the time.
- 1.22 On that basis, it can be concluded at a high level that either of the limbs in section 4.65 of the *EP&A Act* could be engaged depending on whether or not development consent was issued for use of the Site as a golf course or if the use of the Site as a golf course commenced before consent for such a use was required. In any event, it has been assumed for the purposes of this advice that the use of the Site as a golf course in 1932 was lawful and this position appears to be supported by Council.
- 1.23 Numerous legal authorities following the principles of Justice Kitto articulated in *Shire of Perth v O'Keefe* (1964) 110 CLR 529 have indicated that **the characterisation of an existing use is to be approached at a level of generality**, for example, a use is to be construed broadly as a community facility rather than specifically as a childcare centre (*Ashfield Municipal Council v Armstrong* [2002] NSWCA 269). This approach utilises what has become known as the 'genus' test.
- 1.24 Perhaps the most comprehensive description of the "characterisation" exercise is by the Chief Judge in *Seraglio v Shoalhaven City Council* [2017] NSWLEC 45 ('*Seraglio*'), where it was found that characterisation for the purposes of existing use rights "looks to the use **actually, physically and lawfully** being carried out on the land and asks what is the end to which that use of the land is seen to serve". It was also found that "the purpose describes the character which is imparted to the land at which the use is pursued". The Court helpfully stated (at [48]):
 

*The proper characterisation of the purpose of a use is an evaluative judgment of the **category of purpose**, expressed at an appropriate level of **generality**, that best describes the **end to which the actual, physical and lawful use of the land is seen to serve**.*[our emphasis added]
- 1.25 However, a line of authority also exists on existing use rights where those rights are founded in development consents, where the approved use has subsequently become prohibited. This line of authority, including *Botany Bay City Council v Parangool Pty Ltd* [2009] NSWLEC 198 ('*Parangool*') and *Botany Bay City Council v Workmate Abrasives Pty Ltd* (2004) 138 LGERA 120 ('*Workmate Abrasives*'), finds that where an existing use is claimed to flow from an existing development consent, then the existing use rights are constrained by any express and limiting words of that development consent.
- 1.26 Relevant to the present situation, both *Workmate Abrasives* at paragraph 14 and *Parangool*, also at paragraph 14, find the genus test '*is irrelevant to a situation where an existing use is claimed to flow from an existing development consent. The genus test would be relevant for characterisation if there was no consent.*' In both *Workmate Abrasives* and *Parangool* the existing use rights were said to flow from particular development consents which expressly defined the approved use. In each of these cases it was the particular use granted by the terms of the development consent which were protected by the now section 4.65 of the *EP&A Act*.
- 1.27 It is to be noted that in the present situation, we do not have a copy of any original development consent or approval from 1932 for use of the land as a golf course. However there are several subsequent consents which, amongst other things, approve the use of fill material for a golf tee & golf ball landing pad, and approve improvements to the golf course. While these consents do provide evidence of existing use rights for the golf course, these consents are not what founded the existing use rights. As was held in *Workmate Abrasives*, 'although there was evidence of a series of consents or purported consents, the only one that mattered was the [founding consent]'. In the present situation, the existing use rights are founded on the use that commenced in 1932 for which there does not appear to be an actual development consent, but nonetheless are accepted as being lawful.

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- 1.28 In circumstances such as these, the NSW Court of Appeal decision in *Jojeni Investments v Mosman Municipal Council* (2015) 208 LGERA 54 ('**Jojeni**') is of assistance. In *Jojeni* the relevant 1933 development consent could not be found but the existence of existing use rights was agreed.
- 1.29 On the task of characterising the existing use in *Jojeni*, it was held by Leeming JA:  
 [71] The preferable way of analysing the ultimate question as to the nature of the existing use rights is that it does not turn on the ordinary construction of the terms of a development consent. **This is not a case like *Parangool* ... where the development consent prescriptively identifies the permitted use. It is instead a case like *Ashfield Municipal Council v Armstrong* ... where the lawful use is not derived from any consent or approval.** The principles articulated by Kitto J in *Shire of Perth v O'Keefe* apply. [our emphasis added]
- 1.30 Following this finding, Justice of Appeal Leeming went on to state at paragraph 76 that '[i]n determining the appropriate genus, "attention should be focused on the [town planning] purpose for which the determination is being made."' That approach was followed in *Seraglio* where it was held by the Chief Judge at paragraph 47 that '[t]he appropriate characterisation of the purpose of the use of land should be done at a level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on, not in terms of the detailed activities, transactions or processes.'
- 1.31 Applying these legal principles including on generality, the town planning purpose for which the determination is being made and the like, and notwithstanding the approvals/consents (as noted above in 'Background') that refer specifically to a golf course and/or clubhouse, it is our view on balance that the existing use on the Site may be properly and appropriately characterised as a "**recreation facility**."
- 1.32 On the basis of the information before us, in our view, such a characterisation of the existing use on the Site is supported by the definition of "recreation facility (outdoor)" which is currently found in the *PLEP* as follows:  
***recreation facility (outdoor)** means a building or place (other than a recreation area) used predominantly for outdoor recreation, whether or not operated for the purposes of gain, including a golf course, golf driving range, mini-golf centre, ..., lawn bowling green...or any other building or place of a like character used for outdoor recreation (including any ancillary buildings), but does not include an entertainment facility or a recreation facility (major).*[our emphasis added]
- 1.33 The fact that **both golf courses and lawn bowling greens are expressly included within this definition** provides further compelling justification in our view that "recreation facility" is an appropriate characterisation of the existing use on the Site.
- 1.34 In our view, the characterisation of the existing use on the Site as "recreation facility" is not so broad that it would permit other activities in such a way that would fall foul of the principle established in *Grace v Thomas Street Café Pty Ltd* (2007) 159 LGERA 57 that the purpose of an existing use should be described broadly enough to cover the activities that were lawfully carried on at the relevant date, but not so broadly as to permit other activities.
- 1.35 Characterising the existing use for the Site is important in the context of the proposed bowling green because section 4.67(1) of the *EP&A Act* and clauses 41 and 42 of the *Regulations* collectively allow an existing use to be "enlarged, expanded or intensified" with development consent. Under clause 42(2) of the *Regulations*, there are two important requirements which a proposed enlargement, expansion or intensification of an existing use must satisfy as follows:
- (a) the enlargement, expansion or intensification must be for the existing use and for no other use; and
  - (b) the enlargement, expansion or intensification must be carried out only on the land on which the existing use was carried out immediately before the prohibition came in (ie. 22 September 2010).
- 1.36 As discussed above, the existing use can in our view be appropriately characterised as "recreation facility" and the proposed bowling green fits within this characterisation. Accordingly,

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the first requirement for the enlargement, expansion or intensification of an existing use as set out above is satisfied in relation to the proposed bowling green.

- 1.37 We understand that the proposed bowling green is to be located entirely within the land on which the existing golf course is located. On the basis that this understanding is correct, then the second requirement for the enlargement, expansion or intensification of an existing use as set out above is also satisfied in relation to the proposed bowling green.
- 1.38 Accordingly and for the reasons given above, **the bowling green component of the proposed redevelopment of the Site is permissible** in our view as an enlargement, expansion or intensification of the existing use rights that benefit the Site.

### Community Facilities

*Are the proposed swimming pool and gymnasium permissible forms of development on the Site as "community facilities"?*

- 2.1 We are instructed that the proposed swimming pool and gymnasium will be operated on the Site by the current operator of the golf course and the Wallacia Country Club, the St Johns Park Bowling Club (**SJPBC**). We are also instructed that the proposed swimming pool and gymnasium will be operated as community facilities and accordingly will be open to community and not limited to members of the golf course and Wallacia Country Club.
- 2.2 The RFI seeks information on whether the proposed swimming pool and gymnasium can be properly characterised as community facilities if the proposal is for the SJPBC to operate these facilities.
- 2.3 As noted by Council in the RFI, "community facility" is defined in the *PLEP* as follows:
 

**community facility** means a building or place –

  - (a) owned or controlled by a public authority or **non-profit community organisation**, and
  - (b) used for the physical, social, cultural or intellectual development or welfare of the community,

but does not include an educational establishment, hospital, retail premises, place of public worship or residential accommodation. [our emphasis added]
- 2.4 It is apparent from the above definition that either a "public authority" or a "non-profit community organisation" must either "own" or "control" each of the proposed swimming pool and the proposed gymnasium in order for those facilities to fall within the definition of "community facility" in the *PLEP*. In this context, "public authority" has the same meaning that it does in the *EP&A Act*. We are not aware that there is any plan or intention for a "public authority" to own or control the proposed swimming pool and gymnasium. As such, a "non-profit community organisation" must own or control the proposed swimming pool and gymnasium in order for those facilities to be "community facilities" under the *PLEP*.
- 2.5 "Non-profit community organisation" is not defined in the *PLEP* or the *EP&A Act*, however, being "not for profit" is clearly an integral requirement of such an organisation. Relevantly, a 'not-for-profit organisation' has the common law meaning of being an 'organisation that is not operating for the profit or gain of its individual members. This applies both while the organisation is operating and when it winds up.': *Re Smith's Will Trusts; Barclays Bank Ltd v. Mercantile Bank Ltd and Ors* [1962] 2 All ER 563 at 567. That meaning is well known and has been adopted by the Australian Taxation Office and the Australian Charities and Not-for-profits Commission.
- 2.6 In our view the SJPBC operates in a manner that meets the not-for-profit definition, as its constitution (available on the SJPBC website at <https://www.sjpbowling.com.au/wp-content/uploads/SJPBC-Constitution-24Oct15.pdf>) contains the requisite clauses the presence of which cause an organisation to be a "not-for-profit". Those clauses are:
  - (a) non-profit clause (clause 10); and
  - (b) dissolution clause (clause 13).
- 2.7 The above evidences that SJPBC is a not-for-profit organisation, which is important because in

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our view that satisfies the “non-profit” element of the definition of “community facility.”

- 2.8 While it seems, in our view, obvious that SJPBC should be characterised as a community organisation based on the types of facilities it operates and, understood in the ordinary sense, the general community focus of those facilities, it is also our view that once the proposed new facilities are open, operating and available to the general public there will be additional evidence that SJPBC operates **for the benefit of the public** and it is therefore appropriate to conclude that it satisfies this element of the definition. The objects of clause (clause 9) in SJPBC’s constitution also indicate that the activities of SJPBC are intended to benefit the wider community, not just its members. It is also relevant to note that although the facilities will be open to any members of the public, it is the members residing in the geographic locality that are most likely to utilise and benefit from the facilities providing further evidence that SJPBC as the managers are operating a community organisation.
- 2.9 We note that Council do not raise issue with part (b) of the definition of community facility which requires the proposed swimming pool and gymnasium be used for the “physical, social, cultural or intellectual or welfare of the community” in order for those facilities to fall within the definition of “community facility” in the *PLEP*. We address this element of the definition for completeness only.
- 2.10 In our view, there is no doubt that a swimming pool and gymnasium are used for the physical development of a local community (it is also arguable such facilities are also used for social development) and that, accordingly, the part (b) of the definition of “community facility” in the *PLEP* is also met.
- 2.11 It is important to note that there has been some disagreement in the courts relating to whether a facility can be characterised as a community facility if its services are not geographically limited to the local community (*Association for Better Living and Education Inc v Wyong Shire Council* [2014] NSWLEC 96) and also if its services are limited to only a part of the local community (*Cranbrook School v Woollahra Municipal Council* (2006) NSWLR 379). Given the proposed swimming pool and gymnasium will be open to the public and not limited to members of the golf club but also are likely only to be patronised by members of the local community, we are satisfied that they can be properly characterised as community facilities.
- 2.12 We are instructed that the SJPBC is a Registered Club under the *Registered Clubs Act* 1976. SJPBC’s constitution states that it is a registered club and this is evidenced by liquor licence no. LIQC300241920. Having satisfied the definition of “community facility” in the *PLEP*, we are not aware of any reason that a Registered Club cannot operate ‘community facilities’. Further, under s10(e)(i) of the *Registered Clubs Act*, a club shall be established for *social, literary, political, sporting or athletic purposes (or for any other lawful purposes)*. This implies that by its very nature a registered club satisfies part (b) of the definition of “community facility”.
- 2.13 In our opinion, the proposed swimming pool and gymnasium can be appropriately characterised as community facilities **and are therefore permissible with consent on the Site**.

*Can the swimming pool and gymnasium use be characterised by another purpose?*

- 2.14 Once a determination of permissibility is made by characterising a land use (e.g. ‘community facility’), the fact that it may also fall within another purpose (e.g. ‘recreation facility (indoor)’ which is an innominate prohibited use in the relevant zone) **is legally irrelevant**.
- 2.15 This approach is supported by Preston CJ in *Botany Bay City Council v Pet Carriers International Pty Ltd* [2013] NSWLEC 147 (‘Pet Carriers’) at [55], which provides:
- The decisions fall roughly into two categories. First, there are decisions which involve a purpose which is a genus and one or more species of purposes falling within that genus. If the genus is a nominate prohibited purpose, development for that purpose will be prohibited even if it could also come within one or more species of purposes that are innominate permissible purposes. Conversely, if the genus is a nominate permissible purpose, development for that purpose will be permissible even if it could also come within one or more species of purposes that are innominate prohibited purposes.*  
[our emphasis added]

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## Conclusion

In our opinion:

- a) existing use rights apply to the site, and the existing use rights can be enlarged, intensified or altered under the existing use right provision in the *EP&A Act* and *Regulations* with consent. As the existing use can be broadly characterised within the genus of recreation facility, and so too can the proposed bowling green, the bowling green can also rely on the existing use rights benefitting the Site; and
- b) the SJPBC falls within the definition of a non-profit community organisation and as such is able to operate community facilities in accordance with the *PLEP*. Accordingly, the proposed swimming pool and gymnasium are able to be characterised as community facilities and therefore are permissible under the *PLEP* on the Site with consent.

If you have any questions or require further information in relation to this advice please do not hesitate to contact Anthony Whealy on +61 2 8035 7848 or Ben Salon on +61 2 8035 7867 or [bsalon@millssoakley.com.au](mailto:bsalon@millssoakley.com.au).

Yours sincerely



**Anthony Whealy**  
**Partner**

Accredited Specialist — Local Government and Planning

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## **APPENDIX B**

## **ARCHAEOLOGICAL RESPONSE**



Reference: 2110  
28 January 2021

Catholic Cemeteries Board  
C/o Urbis  
Angel Place, Level 8, 123 Pitt Street,  
Sydney NSW 2000

Dear Sir or Madam,

**RE: ADDENDUM LETTER REPORT NEPEAN GARDENS MEMORIAL PARK,  
WALLACIA, NEW SOUTH WALES**

Austral Archaeology Pty Ltd (Austral) has previously been commissioned by the Catholic Cemeteries Board (the proponent) to prepare an Aboriginal Cultural Heritage Assessment [ACHA] (Austral Archaeology 2020) and Historical Archaeological Assessment [HAA] (Austral Archaeology Pty Ltd 2019) for the proposed redevelopment of the Wallacia Golf Course, Wallacia, New South Wales (NSW) as part of the Nepean Gardens Memorial Park project.

While the above reports focussed solely on impacts within the boundaries of the existing golf club, Penrith City Council (Council) has requested further information addressing the impact of road and intersection works and associated tree removal on both built and archaeological heritage values. This letter report has been commissioned by the proponent to therefore act as an addendum to the above reports in order to discuss the effect of the additional impacts and tree removal on Aboriginal cultural heritage and historical archaeological material.

The study area for this addendum report consists of portions of land along the northern and southern side of Park Road and is shown on Figure 1 and Figure 2. The study area is within the Penrith City Council Local Government Area (LGA) and is located approximately 13 kilometres south of Penrith and 50 kilometres west of Sydney. The study area is bound by the existing golf course and various properties to the north, and various properties along the southern side of Park Road in the vicinity of the current entrance to the golf club in the western part of the study area.

**1. SUMMARY OF HERITAGE VALUES IN AND AROUND THE STUDY AREA**

The ACHA noted that there is evidence of Aboriginal people occupying and utilising the land around the study area, most predominantly alongside or within 100 metres of waterways such as Jerry's Creek (Austral Archaeology 2020, p.50); this included the presence of a scatter of Aboriginal artefacts at the junction of Park Road and Montelimar Place and a stone hand-axe identified in bush-land to the south of Park Road where it crosses Jerry's Creek (Austral Archaeology 2020, p.24).

In terms of historical heritage values, the study area incorporates the road corridor associated with Park Road, which follows the approximate alignment of the original track linking Blaxland's Farm with the nearby township of Luddenham (Austral Archaeology Pty Ltd 2019, p.16). However, construction of the present day road is likely to have removed any evidence of the earlier dirt track. There is also no evidence of any buildings from Blaxland's Farm having been constructed within the study area.

The western part of the study area is adjacent to two heritage items listed on the *Penrith City Council Local Environmental Plan 2010* (the Penrith LEP) [Figure 3 and Figure 4]:

- St. Andrews Anglican Church (former) – Item Number 326
- Park Road Conservation Area – Item Number HCA6

The church is located to the north of Park Road, and was moved to its present location from Greendale in 1926 (SHI Database #2260326), while the Park Road Conservation Area is located to the south of Park Road and consists of a group of three Inter-War California Bungalow style cottages built close to Park Road during 1920-1930 (SHI Database #2260856).

## **2. STATEMENT OF HERITAGE IMPACT**

### **PROPOSED WORKS**

The proposed works within the two study areas relates to the proposed construction of a new intersection with Park Road in the eastern part of the study area, and alterations to the existing intersection in the western study area, including the slight widening of Park Road to allow for a turning lane, as well as the removal of various trees. Works in both study areas are also likely to include landscaping, fencing, civil and stormwater works (Figure 5 and Figure 6).

It is understood that the construction works will involve:

- Groundworks including subsurface excavation and levelling.
- Construction of roadways and pathways.
- Installation of any required services including stormwater, sewerage and electrical services.
- Associated landscaping works
- Removal of selected trees.

### **ASSESSMENT OF IMPACTS**

Note that the following assessment relates purely to impacts to the archaeological record.

#### **Aboriginal Heritage**

While Aboriginal artefacts have been identified in the vicinity of the study area, these sites have all been located outside of the existing road corridor and in areas subject to lower degrees of historical disturbance. There is no suggestion that any potential archaeological material is likely to be present within the study area, as the construction and ongoing alteration and maintenance of Park Road would have resulted in extensive subsurface ground disturbance.

As such, the proposed works along Park Road are unlikely to harm Aboriginal cultural heritage and no further works are required in this regard for this location.

#### **Historical Heritage**

The historical research undertaken to date has not identified any archaeological material which is likely to be present within the study area. While the proposed works are to be undertaken in proximity to two heritage items listed on the Penrith LEP, heritage values linked to both 'St. Andrews Anglican Church (former)' (Item Number 326) and the 'Park Road Conservation Area' (Item Number HCA6), there is no evidence to suggest archaeological material associated with these items extend beyond their present curtilages and into the road corridor. This is based on the fact that by the time that both items were constructed, the present alignment of Park Road was determined and as such, the buildings were sited to respect the existing road corridor.

In summary, the proposed works along Park Road are unlikely to harm any historical archaeological material and no further works are required in this regard for this location.

## **3. RECOMMENDATIONS**

It is recommended that:

1. This assessment has determined that archaeological material is unlikely to be encountered as part of the proposed development.

2. In the event that historical archaeological relics not assessed or anticipated by this report are found during the works, all works in the immediate vicinity are to cease immediately and Heritage NSW be notified in accordance with Section 146 of the *NSW Heritage Act 1977*. A qualified archaeologist is to be contacted to assess the situation and consult with Heritage NSW regarding the most appropriate course of action.
3. In the event that Aboriginal archaeological material or deposits are encountered during earthworks, all works affecting that material or deposits must cease immediately to allow an archaeologist to make an assessment of the find. The archaeologist may need to consult with Heritage NSW and the relevant Aboriginal stakeholders regarding the find. Section 89A of the *National Parks & Wildlife Act 1974* requires that Heritage NSW must be notified of any Aboriginal objects discovered within a reasonable time.
4. Works near the Park Road Conservation Area (Item Number HC6) and St Andrew's Anglican Church (former) (Item Number 326) need to be carried with care to avoid impacts occurring within the curtilage of these heritage items.
5. To ensure that impacts to unknown heritage values are mitigated during construction, it is recommended that the contractor inductions include an unexpected finds protocol to ensure that archaeological relics not assessed or anticipated by this report are not impacted.

Please do not hesitate to contact me on 0417 084 396 if you wish to discuss any aspect of this submission.

Yours sincerely,



David Marcus

Director

Austral Archaeology Pty Ltd

ABN: 55 629 860 975

M: 0417 084 396

E: [davidm@australarch.com.au](mailto:davidm@australarch.com.au)

## REFERENCES

Austral Archaeology 2020, Neapean Gardens, Wallacia, New South Wales. Aboriginal Cultural Heritage Assessment. Report for Catholic Cemeteries Board.

Austral Archaeology Pty Ltd 2019, Nepean Gardens, 13 Park Rd, Wallacia, NSW (Lot 2 DP 1108408, Lot 1 DP 1254545, Lot 3 DP 18701 and Lot 4 DP 18701); Historical Archaeological Assessment.





**Figure 1 Western Study Area**

2110 Nepean Gardens Addendum Letter Report

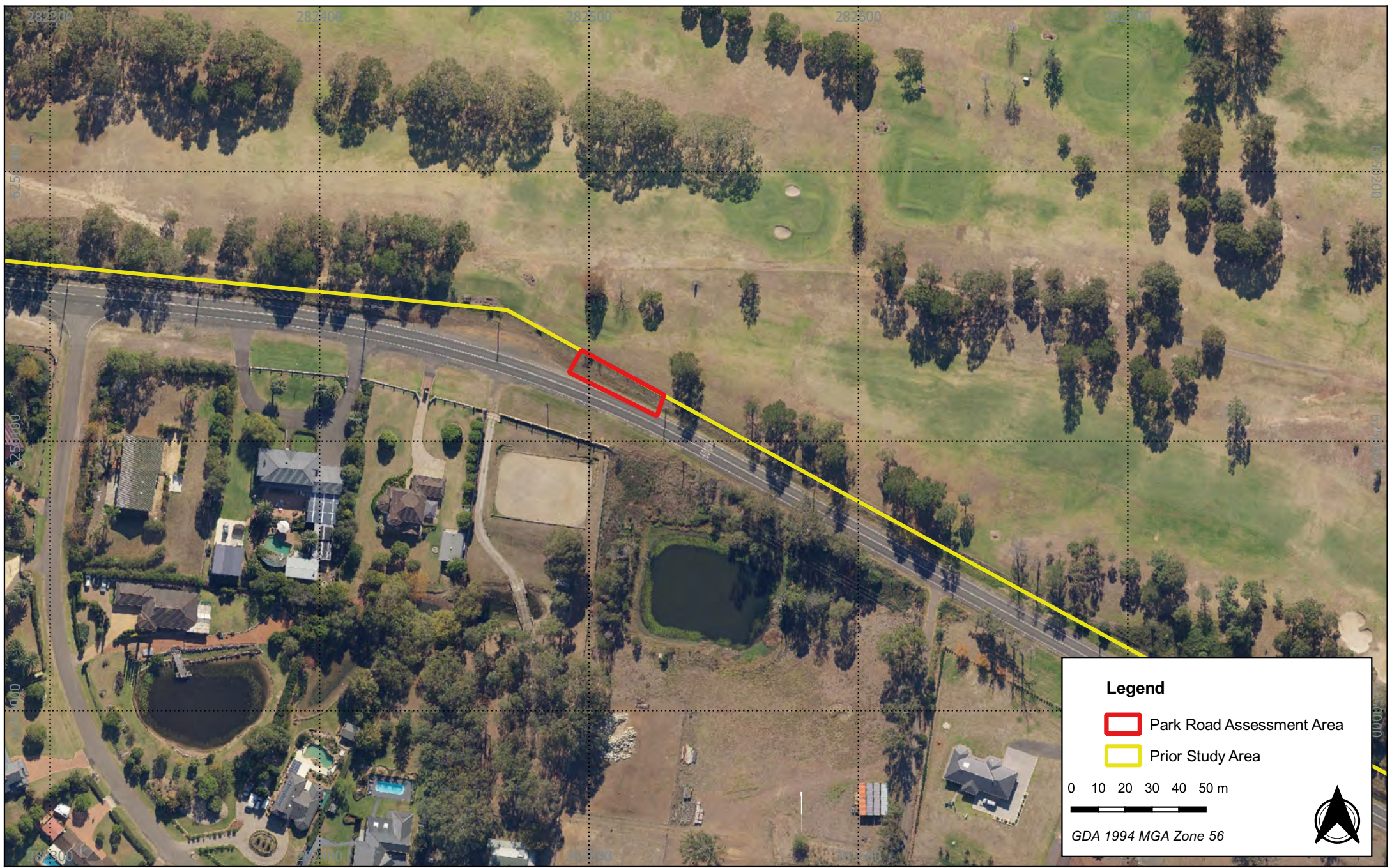
Source: NSW LPI

Drawn by: DM Date: 2021-01-28





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**Legend**

 Park Road Assessment Area

 Prior Study Area

0 10 20 30 40 50 m

GDA 1994 MGA Zone 56



**Figure 2 Eastern Study Area**

2110 Nepean Gardens Addendum Letter Report

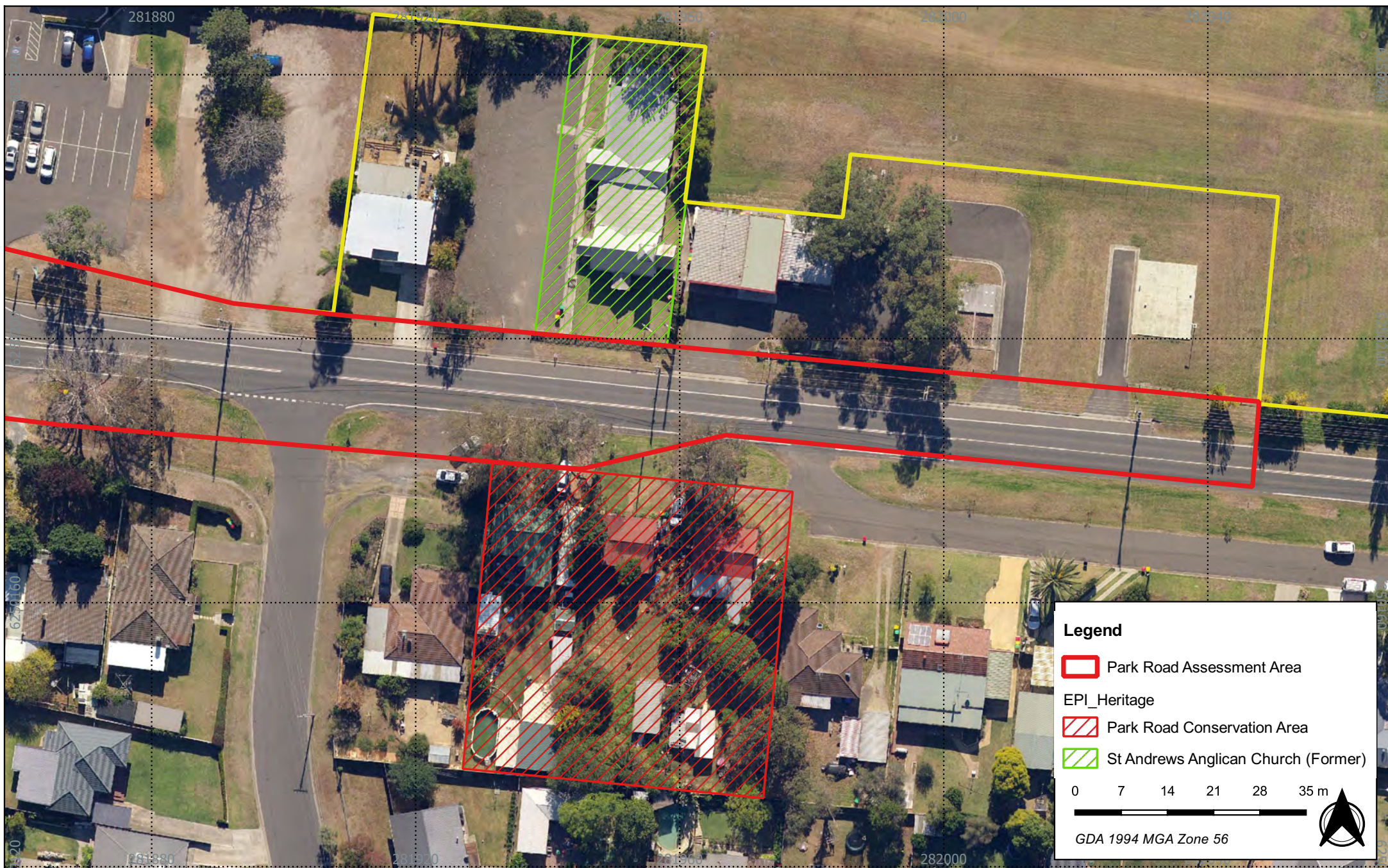
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**Figure 3 Heritage Items Adjacent to Western Study Area**

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Source: NSW LPI

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**Figure 4 Heritage Items Adjacent to Eastern Study Area**

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**A U S T R A L**  
A R C H A E O L O G Y



### Figure 5 Proposed Impacts within Western Study Area

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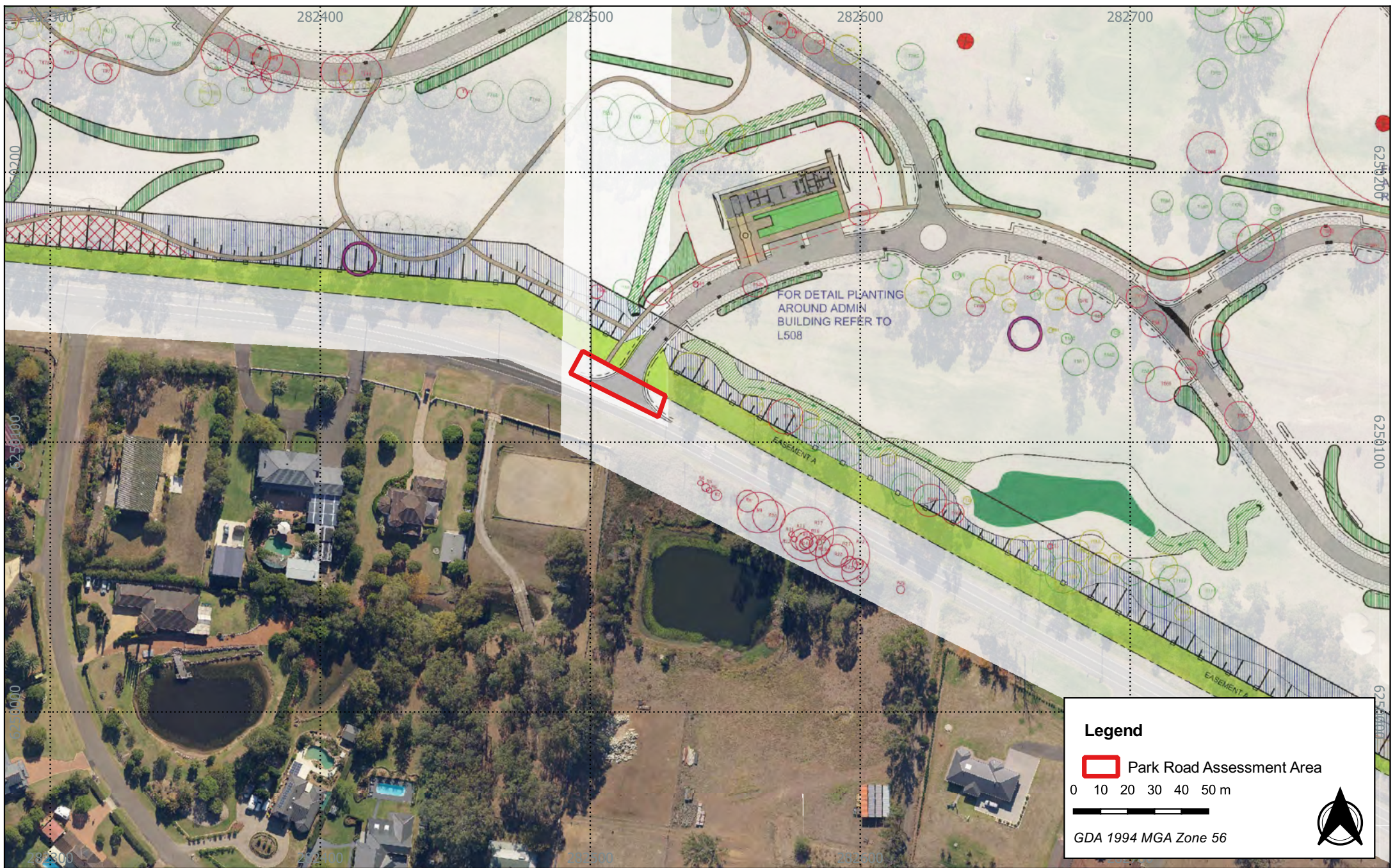
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A U S T R A L

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**Figure 6 Proposed Impacts within Eastern Study Area**

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## **APPENDIX C**

## **ECOLOGICAL RESPONSE**

5 February 2021

Our ref: 20SYD-16049

Urbis  
Angel Place  
Level 8, 123 Pitt Street  
Sydney 2000

Attention: Charlotte Ryan

Dear Charlotte,

**Nepean Gardens DA 19/0875**

Eco Logical Australia provides the following response to the biodiversity related matters for refusal identified by Penrith City Council in their report to the Planning Panel dated 7 December 2020.

| Matter Raised  | Response  |
|--|---|
| <b>Biodiversity Credits</b>                                  |   |
| <i>Council does not support the credit reduction request</i> | <p>The Planning Report acknowledges that the Travers (2019) Biodiversity Development Assessment Report (BDAR) was prepared by an accredited ecologist and submitted in accordance within the timeframe required by the legislation.</p> <p>The Travers BDAR sought a reduction in credits due to the amount of planted vegetation. Councils position was that a credit reduction was not justified. The proponent does not challenge this position and agrees to retire the credits as required under the BC Act.</p> <p>The proponent does however request that the number of credits required be based on an updated assessment that includes all biodiversity impacts of the final footprint, using the field data collected by Travers. By using the existing Travers plot data, the integrity of the assessment is maintained.</p> |
| <b>EPBC Act Referral</b>                                     |   |
| <i>Council sought advice on whether the action had been</i>  | <p>Council state that the applicant has not advised whether the proposal has been referred to the Commonwealth Minister for the Environment under the EPBC Act due to impact to Cumberland Plain Woodland, which is listed as a matter of national environmental significance.</p>  |

| Matter Raised   | Response   |
|---|--|
| <p><i>referred to the Commonwealth</i></p>  | <p>The proposal has not yet been referred to the Commonwealth. The proponent will refer to the Commonwealth following a decision on the DA by the Panel.</p> <p>Note however that unless the development is being assessed under the 2015 NSW Assessment Bilateral Agreement (Amendment 1 March 2020) decisions under the EPBC Act are not relevant to the assessment and approval process under the NSW legislation. The development is not being assessed under the Bilateral Agreement. It is acknowledged that should the Commonwealth conclude that the action is a Controlled Action, approval from the Commonwealth will be required before commencement of impacts to CPW.</p>   |
| <p><b>Biodiversity - Serious and Irreversible Impacts</b></p> <p><i>Council sought further information on whether the development would have a SAIL</i></p> | <p>Under the BC Act section 7.16(2), a consent authority must refuse a development under part 4 if the development is likely to have a serious and irreversible impact on biodiversity values.</p> <p>Council quote from the Travers (2019) BDAR which states that <i>‘It is considered that the proposal may constitute serious and irreversible impacts on CPW’</i>. And, on page 53 of the BDAR: <i>‘The additional impact assessment provision for TECs are outlined under section 10.2.2 of the BAM (2017) and have been applied to the recorded CPW within Appendix 3. As a result of this assessment it is considered that the impact on CPW of 1.12 ha may constitute SAIL’</i>.</p> <p>The Council report states that the above point should be further clarified to state whether the development <b>will</b> have a serious and irreversible impact in relation to CPW.</p> <p>Under the BC Act and the BAM Stage 2 Operations manual, it is very clear that: <i>The assessor is not required to provide a recommendation on whether the impact is serious and irreversible. It is for the consent authority to determine whether an impact will be serious and irreversible.</i></p> <p>The Travers (2019) BDAR should not have made a statement on whether a serious and irreversible impact is likely. The BDAR must provide information for the consent authority to make that determination. The inclusion of the above statements in the BDAR should therefore not be used as justification for refusal of the development. The consent authority is to make that determination. The BDAR assists the consent authority by providing information on the impact.</p> <p>Council did not determine that the development is likely to have a SAIL.</p> <p>In the absence of Council determining there is a SAIL, and to assist the panel with their determination, consideration should be given to the following:</p> |



| Matter Raised | Response   |
|---------------|--|
|               | <p>An assessment of serious and irreversible impacts was undertaken in accordance with the principles contained within Section 6.7.2 of the BC Reg 2017 (refer to Appendix 2 and 3 of the BDAR Assessment prepared by Travers). The assessment states:</p> <p>The proposal allows for the retention of several patches of CPW covering a total of 2.28ha within the study area. The proposed development will remove approximately 1.12 ha of CPW.</p> <p>The loss of CPW vegetation will be offset through the BOS.</p> <p>The proposed Vegetation Management Plan will involve regeneration of retained areas of CPW, and the revegetation of 1.35 ha of vegetation to fully-structured CPW, including trees, mid-storey and groundcover species. 0.45 ha of moderate–poor quality CPW and 0.67 ha of poor quality (canopy only) CPW is to be removed by the proposed development.</p> <p>The proposed development will remove 1.12 ha of CPW, which is 0.004% of the estimated extant CPW within the Cumberland IBRA sub-region. The proposal is likely to improve the condition of the retained CPW through weed control, bush regeneration and enrichment planting as part of the prepared VMP.</p> <p>The proposal will directly remove CPW vegetation but beyond this will not specifically impact on characteristic and functionally important species in isolation.</p> <p>The CPW remnants within the site are already isolated or fragmented to all aspects by existing roads and residential lots. The proposed development will not further isolate these remnants but will reduce the amount of CPW within the study area.</p> <p>Travers has prepared a VMP that details restoration measures to contribute to the recovery of CPW within the study area. 1.38 ha of existing CMP will be regenerated through weed control, natural bush regeneration and enrichment plantings. A further 1.35 ha is to be revegetated to fully structured CPW, including trees, mid-storey and groundcover species. This restoration has the potential to provide greater vegetation integrity through more structured plantings including shrubs and groundcovers.</p> <p>Under the <i>Draft Cumberland Plain Conservation Plan</i>, a total of 1,015 ha of CPW will be directly impacted by development. Evidently, in some circumstances, the impacts on threatened species, ecological communities, populations and habitat, are outweighed by the social and economic benefits a development will deliver to the State. The proposed impact of 1.12 ha of CPW associated with this development represents</p> |

| Matter Raised | Response  |
|---------------|---|
|               | 0.1% of the impact assumed under the Draft Cumberland Plain Conservation Plan |

If further advice or clarification is required I can be contacted on 0405 910 839.

Regards,



David Bonjer  
Principle Planner, NSW

## **APPENDIX D**

## **GOLF COURSE SAFETY RESPONSE**



11 February 2021

URBIS

Angel Place, Level 2, 123 Pitt Street  
SYDNEY NSW 2000

**WALLACIA COUNTRY CLUB - 13 PARK ROAD WALLACIA, NSW  
DEVELOPMENT APPLICATION DA-19/0875**

Dear Charlotte,

Penrith City Council's Assessment Report for Development Application DA 19/0875 states that:

*"Insufficient information is provided as to how the uses of golf course and cemetery will address safety at the interface boundary (i.e. protection from ball strike), and how this may impact biodiversity values (noting the existence of significant bat species)."*

We provide the following comments in response to this matter:

- a) The proposed golf holes have been designed to provide a reasonable interaction between golf course and cemetery uses without relying on golf course safety fencing.

Sufficient setbacks have been provided between the golf holes and cemetery which are supplemented with a permanent 15 metre wide landscape buffer along the boundary, and additional revegetation planting within the golf course land itself.

We do not envision a requirement for golf course safety fencing between the golf course and cemetery lands.

Please contact me if you require any further information.

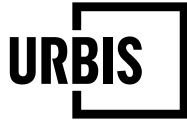
Best regards,

A handwritten signature in blue ink, appearing to read "Bob Harrison", with a stylized flourish at the end.

BOB HARRISON

## **APPENDIX E**

## **LANDSCAPE AND VISUAL IMPACT RESPONSE**



## WALLACIA GOLF COURSE - PPSSWC – 45 – DA19/0875

### RESPONSE TO COUNCIL ASSESSMENT REPORT – LANDSCAPE AND VISUAL MATTERS

| Visual Impacts | ISSUE   | RESPONSE   |
|----------------|---|--|
| 1              | <ul style="list-style-type: none"> <li>Consider development to conflict with objectives of the Clause 7.5 Protection of scenic character and landscape values.</li> </ul> | <p>The LVIA (Section 6.1) finds the relative lack of topographic variation, that reduces the potential for overlooking, in conjunction with the generally tall canopy vegetation, results in views being confined to relatively proximate locations where ground storey vegetation is lacking, such as the frontage along Park Road.</p> <p>Scenic quality is somewhat subjective, but typically is a combination of a range of factors that have been found to contribute to the human appreciation of landscape. The factors are:</p> <ul style="list-style-type: none"> <li>• topographic variation and ruggedness;</li> <li>• strong patterning of vegetation; and</li> <li>• the presence of water.</li> </ul> <p>At a regional level, these attributes are present.</p> <p>However, at the local level, particularly when considering the scenic qualities of the township or township interface area, they are less applicable. Quality in these instances tends to centre around the quality of design responses from built form and landscape.</p> <p>Additionally, the balance between built-form and landscape is also a consideration – that built-form does not dominate the landscape. The proposal is low scale, with very few built-form insertions, with those that are proposed, being of high quality architectural standard. The landscape design is also well considered, with the resulting landscape character being that of a parkland-like landscape.</p> <p><b>Views.</b> Views are possible into the existing site from Park Road. However, these are more like glimpses and none are mid or distant.</p> |

|   |   |   |
|---|---|---|
|   |   | <p><b>Vistas.</b> The term “vista” is typically applied to long distance or expansive and panoramic views. Given the relatively minimal topographic variation and the density and patterning of canopy vegetation within the landscape of the setting, there are no vistas identified in the LVIA that would be impacted</p>  |
| 2 | <ul style="list-style-type: none"> <li>Insufficient view analysis to satisfy Council that views and vistas to the cemetery will not be poorly impacted.</li> </ul>  | <p>Refer to previous comment on Views and Vistas.</p> <p>Given the project area has a slight fall to the north, away from Park Road and the township, and the primary components of the project, the memoria, are of a very low profile, the visual catchment will be confined to a relatively small area along the southern interface.</p> <p>Viewpoints to the north are limited and more distant, with views screened by intervening vegetation.</p> <p>The assessment process did not allow for access to private residences. However, viewpoint assessment was undertaken from publicly accessible locations which were representative of views from nearby residences, such as VP1 on Mulgoa Road which is an elevated location and demonstrates the effect that scattered vegetation within the landscape has on the screening of view. As the cleared fairways of the existing golf course and club house are not visible, the components of the project would not be visible.</p> <p>Assessment of viewpoints was not undertaken for locations where no view was possible.</p> <p>Views have been provided for five locations along Park Road adjacent to the project, which, in my opinion is a greater number than would typically be provided for a single aspect of a project.</p> |
| 3 | <ul style="list-style-type: none"> <li>No photomontage of what will be visible from Park Road or other important vantage points has been provided.</li> </ul>   | <p>Photomontages can be provided for key vantage points of concern to Council, as an RFI response.</p>  |
| 4 | <ul style="list-style-type: none"> <li>It is not ascertained that the locations of landscaping elements and tree stands will be effectual in screening and limiting long range or broad views.</li> </ul> | <p>As the existing clearings for the golf course or the golf club house itself are not visible from the more distant, elevated location of VP1 on Mulgoa Road, it would be logical to assume that the project, which includes no clearing of trees, significant extents of additional planting, two small buildings and very low memoria, will not have a negative influence on this longer distance view or others at a similar elevation or distance.</p>   |

|   |   |   |
|---|---|---|
|   |   | Additionally, assessment methodologies consistently assume that impact reduces with distance.   |
| 5 | <ul style="list-style-type: none"> <li>Consider it is not apparent that the 15m buffer to Park Road will be effective in mitigating negative impacts on important views and vistas and on local character.</li> </ul> | <p>Landscape buffer width around the site entire site perimeter is 15 m. Within this width, multi-layered screen planting will be established. Typical landscape buffers for a range of infrastructure projects in rural or peri-urban settings range from 5 – 20 metres. Therefore, I am of the opinion that given the relatively low scale development proposed, that 15m is more than adequate.</p> <p>However, the proposed landscape response does not apply the same structure of planting for the entire interface with Park Road. The approach recognises that screening is required in some areas where there are more components, while allowing for filtering of views where the component of the project are limited and where the character will be visually open and park-like.</p> |

Prepared by:

Peter Haack RLA

16<sup>th</sup> December 2020



## **APPENDIX F**

## **PHOTOMONTAGES**

# **DA19/0875 NEPEAN GARDENS, WALLACIA, NSW**

## **PHOTO-SIMULATIONS**

PREPARED FOR  
**CATHOLIC CEMETERIES BOARD**  
10 FEBRUARY 2021

**PHOTO-SIMULATIONS PREPARED BY:**

Urbis, Level 10, 477 Collins Street, MELBOURNE 3000.

**DATE PREPARED :**

10th February 2021

**VISUALISATION ARTIST :**

Ashley Poon, Urbis – Lead Visual Technologies Consultant

Bachelor of Planning and Design (Architecture) with over 15 years' experience in 3D visualisation

Natalie Dubinski - Landscape Architect

**LOCATION PHOTOGRAPHER :**

Rachel Smithers, Urbis - Associate Director, National Design

**CAMERA :**

Canon EOS 550D - 18 Megapixel digital SLR camera (1.6x crop sensor)

Canon EOS 6D - 20 Megapixel digital SLR camera (Full-frame sensor)

**CAMERA LENS AND TYPE :**

Canon EF-S 18-55mm f/3.5-5.6 IS STM

Canon EF 16-35mm f/2.8L II USM

**SOFTWARE USED :**

- 3DSMax 2021 with Arnold 4.0 (3D Modelling and Render Engine)
- AutoCAD 2021 (2D CAD Editing)
- Globalmapper 22 (GIS Data Mapping / Processing)
- Photoshop CC 2020 (Photo Editing)

**DATA SOURCES :**

- Proposed Landscape plans received from Landscape Architects - 2021-01-25
- Proposed 3D Revit model received from Architect - 2021-01-22
- Site survey data received from Landscape Architect - 2020-05-04
- Point cloud and Digital Elevation Models from NSW Government Spatial Services datasets - Penrith 2019-07
- Aerial photography from Nearmap - 2020-04-25

**METHODOLOGY :**

Photo-simulations provided on the following pages have been produced with a high degree of accuracy to comply with the requirements as set out in the practice direction for the use of visual aids in the Land and Environment Court of New South Wales.

The process for producing these photo-simulations are outlined below:

- Photographs have been taken on site using a digital SLR camera coupled with a quality lens in order to obtain high resolution photos whilst minimising image distortion. Photos are taken hand-held and at a standing height of 1.6m above natural ground. Photos have been taken at 50mm (or equivalent) to provide a standard view. A photo taken using the 50mm focal length on a full-frame camera (equivalent to 40° horizontal field-of-view / 46.8° diagonal field-of-view) is an accepted photographic standard to approximate human vision.
- Using available geo-spatial data for the site, including independent site surveys, aerial photography, digital elevation models and LiDAR point-clouds, the relevant datasets are validated and combined to form a geo-referenced base 3D model from which additional information, such as proposed architecture, landscape and photographic viewpoints can be inserted.
- Layers of the proposed development are obtained from the designers as digital 3D models and 2D plans. All drawings/models are verified and registered to their correct geo-location before being inserted into the base 3D model.
- For each photo being used for the photo-simulation, the location, camera, lens, focal length, time/date and exposure information is extracted, checked and replicated within the 3D base model as a 3D camera. A camera match is created by aligning the 3D camera with the 3D base model against the original photo, matching the original photographic location, orientation.
- From each viewpoint, the final photo-simulation is then produced by compositing 3D rendered images of the proposed development into the original photo with editing performed to sit the render at the correct view depth. Photographic elements are cross-checked against the 3D model to ensure elements such as foreground trees and buildings that may occlude views to the proposed development are retained. Conversely, where trees/ buildings may be removed as part of the proposal, these are also removed in the photo-simulation.













PROPOSED CHAPEL  
(NOT VISIBLE - SCREENED BY  
EXISTING TREES AND PROPOSED  
VEGETATION)  
~270M

EXISTING TELCO POLE  
~400M

PROPOSED LAWN BURIAL AREA - PLAQUES  
(NOT VISIBLE - HIDDEN DUE TO RISE IN  
FOREGROUND TOPOGRAPHY)  
~70M

PROPOSED FULL  
MONUMENTAL WITH  
HEADSTONES AT 1500MM  
(NOT VISIBLE - SCREENED BY  
PROPOSED VEGETATION)  
~140M

















PROPOSED ADMINISTRATION BUILDING  
(PARTIALLY SCREENED BY PROPOSED  
GABION WALL AND VEGETATION)  
~105M

PROPOSED CHAPEL BEYOND  
EXISTING TREES  
(NOT VISIBLE - SCREENED BY  
EXISTING TREES)  
~350M

PROPOSED 1M HIGH GABION  
WALL



