

COUNCIL ASSESSMENT REPORT

Panel Reference	PPSSWC-49
DA Number	DA19/0826
LGA	Penrith
Proposed Development	Carry Out Works as 'Waste Disposal Facility', Including; the Importation, Placement and Compaction of Clean Waste (Soil); Bulk Earthworks (Cut and Fill) to Bench the Site With Edge Batters; Removal of Vegetation; Demolition of Structures, Dam De-Watering; Construction of Temporary Sediment Basins; and Heritage Salvage Works (Designated and Integrated Development)
Street Address	1669-1723 Elizabeth Drive BADGERYS CREEK NSW 2555
Applicant/Owner	Mirvac Projects Pty Ltd / Clifton Avenue Holdings Pty Ltd
Date of DA lodgement	26 November 2019
Total number of Submissions	• 4
Number of Unique Objections	• 4
Recommendation	Refusal
Regional Development Criteria (Schedule 7 of the SEPP (State and Regional Development) 2011	- The proposal meets the category of "<i>private infrastructure and community facilities over \$5 million</i>" which includes a '<i>waste or resource management facility</i>' and the cost of works stated to be \$6.7 million; and - The proposal as it was lodged (prior to amendment) meets the category of "<i>particular designated development</i>" which includes a waste management facility that meets the requirements for Designated Development involving the disposal of waste within 100m of a watercourse and of a quantum over 100,000 tonnes. It is understood that the amended proposal has reduced the quantum of imported fill (waste) to just below the 100,000 tonne trigger.
List of all relevant s4.15(1)(a) matters	The relevant planning documents include: - The Environmental Planning and Assessment Act, 1979; - The Environmental Planning and Assessment Regulations, 2000; - Biodiversity Conservation Act, 2016; - Water Management Act, 2000; - National Parks and Wildlife Act, 1974; - State Environmental Planning Policy (Infrastructure) 2007; - State Environmental Planning Policy (Western Sydney Employment Area) 2009; - State Environmental Planning Policy (State and Regional Development) 2011; - State Environmental Planning Policy No. 55 - Remediation of Land; - State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007; - Sydney Regional Environmental Plan No.20 – Hawkesbury Nepean River; and - Penrith Local Environmental Plan 2010. Note that the State Environmental Planning Policy (Western Sydney Aerotropolis) 2020 does not apply to the Development Application because of Savings Provisions. However, various Aerotropolis and regional related strategic documents do apply. These are outlined in the Executive Summary of the Report.
List all documents submitted with this report for the Panel's consideration	The relevant documents submitted include: - Civil drawings of proposed earthworks; - Applicant's Letter to Respond to WSAP (Western Sydney Aerotropolis Plan) - Environmental Impact Statement; - Referral response from Transport for NSW; - Two Referral Responses from the Western Sydney Planning Partnership; - Copy of the Panel's Briefing Minutes Dated May 2020.
Summary of key submissions	Comments made in submission are summarised as: - Support for the proposal as this will reuse waste from WestConnex Project; - Inappropriate to consider development in advance of precinct planning for Aerotropolis; - Area is subject to airport protection and may affect airport operations;

	• Unclear as to intended nature of the use and whether waste facility will attract birds and wildlife (consideration for airport operations); • Clarification as to whether waste stockpiles will breach the airport obstacle limitation; and • Consideration by future land users of the existing operation of the adjoining waste resource facility.
Report prepared by	Sandra Fagan, Senior Planner
Report date	4 December 2020

Summary of s4.15 matters

Have all recommendations in relation to relevant s4.15 matters been summarised in the Executive Summary of the assessment report?

Yes

Legislative clauses requiring consent authority satisfaction

Have relevant clauses in all applicable environmental planning instruments where the consent authority must be satisfied about a particular matter been listed, and relevant recommendations summarized, in the Executive Summary of the assessment report?

Yes

e.g. Clause 7 of SEPP 55 - Remediation of Land, Clause 4.6(4) of the relevant LEP

Clause 4.6 Exceptions to development standards

If a written request for a contravention to a development standard (clause 4.6 of the LEP) has been received, has it been attached to the assessment report?

Not applicable

Special Infrastructure Contributions

Does the DA require Special Infrastructure Contributions conditions (S7.24)?

Note: Certain DAs in the Western Sydney Growth Areas Special Contributions Area may require specific Special Infrastructure Contributions (SIC) conditions

Not applicable

Conditions

Have draft conditions been provided to the applicant for comment?

Note: in order to reduce delays in determinations, the Panel prefer that draft conditions, notwithstanding Council's recommendation, be provided to the applicant to enable any comments to be considered as part of the assessment report

No

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DA No.:	DA19/0826
PROPOSED DEVELOPMENT:	Carry Out Works as 'Waste Disposal Facility', Including the Importation, Placement and Compaction of Clean Waste (Soil); Bulk Earthworks (Cut and Fill) to Bench the Site With Edge Batters; Removal of Vegetation; Demolition of Structures; Dam De-Watering; Construction of Temporary Sediment Basins; and Heritage Salvage Works (Designated and Integrated Development) - Lot 5 DP 860456,1669 - 1723 Elizabeth Drive, BADGERYS CREEK NSW 2555
APPLICANT:	Mirvac Projects Pty Ltd
REPORT BY:	Sandra Fagan, Senior Planner, Penrith City Council

Assessment Report

Executive Summary

Summary:

The proposed development is primarily for bulk earthworks, being cut and fill, across the site as well as the importation of waste (crushed rock / soil) to the site. Both the soil obtained as a result of the cut and the soil imported to the site, will be placed and compacted on the land to create level building pads / benches, that will accommodate a future development and buildings. The proposed works also include 1 in 4 batters as edge treatments, removal of vegetation, demolition of former farm structures, de-watering of four dams, temporary sediment basins and salvage of Aboriginal heritage artefacts.

The intent of the proposed works is to act on the current opportunity that exists to accept good quality fill (sandstone) from other major infrastructure projects in Sydney, as well as prepare the subject site for a future warehouse employment use, given that the site is located within the new Western Sydney Aerotropolis. Mirvac refer to their future vision for the site as the 'Elizabeth Enterprise Development'.

The proposal was amended in August 2020 to address some of the concerns raised by Council staff and respond to comments from the Sydney Western City Planning Panel following the briefing of the Panel in May. In particular, the Panel wanted to consider whether there could be a reduced scope of works that struck the right balance between the timing needs of the applicant and the Council staff's planning concerns, particularly given (at the time) that the Discussion Paper for the new Aerotropolis SEPP indicated that the proposed zone for the site would be an Enterprise Zone, which permits warehouses.

The amendments to the proposal included setting back the proposed earthworks 50 metres from the eastern boundary, adjoining the South Creek riparian corridor, and setting back the proposed earthworks from Elizabeth Drive by 30 metres. Additional information was also submitted, including an Aboriginal Cultural Heritage Assessment Report, a contamination report, and further biodiversity information. The amendments addressed flooding and technical engineering matters to a suitable degree.

However, the amended proposal has not addressed an overarching concern of Council staff. Staff also requested that the height and amount of the fill be significantly reduced so that the natural topography of the land was not greatly altered, prior to a better understanding of what the more detailed planning controls and objectives for the Badgerys Creek Precinct would contain, and how the proposed works might contextually fit in with surrounding

future development and interfaces. The amended application has not reduced the height of the fill (or depth of the cut), with the fill in some parts being approximately 9 metres above existing natural ground level. In addition, concern is raised as to the visual effect of the works in context with adjoining sites and the public domain, most notably, Elizabeth Drive to the south and the Wianamatta - South Creek riparian corridor to the east. The proposed site bench levels also have ramifications for how a future development will interact and connect to these adjoining spaces, both physically and visually. Other outstanding issues relate to loss of heritage, loss of vegetation, inadequate information relating to remediation, traffic impacts, air quality and noise impacts.

It is therefore considered that the scope and extent of cut and fill is excessive and would result in too significant a change to the natural topography of the land, which in turn would not meet the objectives and principles of the Aerotropolis vision, would create a poor interface with surrounding private and public lands and does not represent the orderly development of land.

In addition, maps in the Draft (exhibited) Aerotropolis Precinct Plan show part of the development site as a green space, denoted as an "urban park or pocket park" (Page 81, Figure 15). At first glance this would appear contrary to the Aerotropolis SEPP zone in that portion of the site which is Enterprise Zone. Notwithstanding that the Aerotropolis SEPP and Draft Precinct Plan **do not apply** to the Development Application, this is a matter which may require further resolution with the Department and the Western Sydney Planning Partnership.

The Development Application was lodged approximately one year ago. It also follows a previous development application (DA19/0319) for similar works. The previous application was withdrawn prior to determination, but was also recommended by staff for refusal.

With regard to the current Development Application before the Panel, the applicant has been provided with direction from Council staff and opportunities to amend the proposal. The various documents relating to the Aerotropolis refer to respecting natural topography and respecting and enhancing landforms by minimising major earthworks. Although some of these documents do not strictly apply to the Development Application (because of Savings Provisions) they are useful in understanding the principles and objectives for development within Badgerys Creek, including lands adjoining the subject site. The Aerotropolis documents have therefore assisted in informing the merit assessment of the proposal.

It is unclear what the applicant's justification is for requiring so much cut and fill, and for the particular levels proposed. The amount of fill does not relate to flood planning levels, as the extent of the flood line has been adopted and the proposed earthworks have been set back and are not near the flood line. The current contours of the topography are not significantly pronounced. The land has approximately a 20 metre fall from the south-west corner down to the north-east corner, and the gradient fall towards South Creek is approximately 6%. The proposed development does not manage the level differences from within the site, but seeks to manage the level change by creating batters at all site edges. Although it is unclear at this stage, cost and ease of construction may be mitigating factors, as internalised retaining walls to deal with the level changes from within the site is likely to cost more than a site edge batter.

The Development Application is recommended for refusal. The main discussion about the proposed earthworks is contained in the report heading 'The likely impacts of the development'.

Categorisation of Proposed Works:

Mirvac Projects Pty Ltd have lodged this application as an Integrated Development Application for Designated Development for a proposed '*waste disposal facility*', stating that the works fall within the definition of a '*waste or resource management facility*'. It is considered that the importation of fill to the site and the placement and compaction of that **imported** fill does meet the definition of a '*waste disposal facility*', because the soil/fill (being the waste) is reused on the site.

However, it is questionable whether the remainder of the earthworks, being the cut and fill on the subject site, also best

meets the definition of a waste disposal facility. It is this author's view that the best-fit definition for the cut and fill within the subject site is 'earthworks', with 'earthworks' being defined in the Penrith Local Environmental Plan (LEP) as 'excavation and filling'. This is relevant because the proposed earthworks are to bench the site to create level building pads for a future warehouse development, which is prohibited in the current and still applicable RU2 Rural Landscape zone of the site. Therefore, and given that the Aerotropolis SEPP and new zones do not apply to this DA, it is also considered that the earthworks are not permitted by the LEP RU2 zone.

Categorising the works as a 'waste disposal facility' overcomes the prohibition in the Penrith LEP and the current RU2 Rural Landscape zone. This is because the State Environmental Planning Policy (Infrastructure) 2007 (ISEPP), at Division 23, Clauses 120-123, permits a 'waste or resource management facility' in a prescribed zone, with the RU2 Rural Landscape zone identified as a prescribed zone. The ISEPP is a higher order planning instrument and therefore overcomes the Penrith LEP prohibition.

However, (and for information purposes only) the Aerotropolis SEPP would have had the effect of prohibiting a 'waste or resource management facility' that involved organic or putrescible waste, because the site is partly located within the 3km wildlife buffer zone map. The intent of the wildlife control is related to aviation safety. It aims to not allow uses that would attract wildlife and lead to bird strikes. The applicant has clarified that they do not intend to operate the site as a waste facility and at any rate, it would not involve organic or putrescible waste. The Aerotropolis SEPP does not apply to the DA, and therefore this clause also does not apply, notwithstanding that it would not apply given the applicant's clarification. No works are proposed in the portion of the site zoned E2 - Environmental Conservation and the ISEPP does not permit the works/use in the E2 zone. This report will provide more detail about the use, planning definitions and categorisation of the works, and whether the proposed earthworks fall within the same definition.

It is understood that Mirvac do not seek to use the site as an on-going waste facility after the initial placement and compaction of imported fill on the land. In this regard, Mirvac have stated that they would accept a time limited consent of up to 2 years, which would allow the proposed earthworks to be completed. It is understood that Mirvac's future vision for the site is a development involving employment uses in the form of warehouse and distribution centres. Mirvac have called this the Elizabeth Enterprise Development. To date this vision for the site does not have approval from either Council or the Department of Planning, Industry and Environment. At this stage, the documents relating to the future development of the site are a vision statement of the applicant's.

Consent Authority:

The Sydney Western City Planning Panel is the consent authority. The proposed development falls within two categories of 'Regionally Significant Development'. The first is the category of 'private infrastructure and community facilities over \$5 million', which includes a waste or resource management facility (the cost of works is \$6.7 million). The second is the category of 'particular designated development', which includes waste management facilities that meet the requirements for Designated Development. The original application when lodged did meet the quantity requirement for Designated Development. However, the amendments to the proposal have reduced the amount of waste being imported to the site to just under the 100,000 tonne trigger for Designated Development. Therefore, it is considered that the amended proposal may no longer be Designated Development, although the procedural requirements for Designated Development have already been carried out based on the proposal as lodged. In this regard, the applicant obtained the Secretary's Environmental Assessment Requirements (SEARs) prior to lodging the DA, dated 20 February 2019 (SEAR 1295). In addition, a copy of the submissions received during the exhibition period has been forwarded to the Department (DPIE) and the Department responded on 9 March 2020.

Notwithstanding that the proposal may no longer be Designated Development, the proposal is still 'Regionally Significant Development' as it meets the first category of 'private infrastructure and community facilities over \$5 million'. The application was briefed to the Panel on 18 May 2020 and the Panel's Record of Briefing was made available to the applicant, with an accompanying letter from Council staff, dated 28 May 2020, raising issues and requesting amendments to the proposal.

The application has been lodged as Integrated Development, as the works are close to a water course, being South Creek. General Terms of Approval have been received from the Natural Resources Access Regulator (NRAR). In addition, the NSW Environment Protection Authority (EPA) have stated that a licence is not required for the importation of the fill.

The proposal also triggers the requirement to obtain approval from the NSW Heritage Office under the National Parks and Wildlife Act, for Aboriginal cultural heritage. However, the applicant has chosen not to lodge the application as Integrated for the purposes of Aboriginal heritage, although a heritage report has been submitted as part of the amended proposal. (In this regard, and IF the Panel were of a mind to approve the application, then only a Deferred Commencement Consent should be granted so that the required approvals from the Heritage Office could be obtained prior to any works commencing.)

Planning Controls and Legislation:

There are a number of State Environmental Planning Policies that relate to the land and the proposed development. These will be detailed in the report. In summary, the most relevant include:

- State Environmental Planning Policy (Infrastructure) 2007 - relates to permissibility as it allows a '*waste disposal facility*' to be located on RU2 - Rural Landscape land;
- State Environmental Planning Policy (Western Sydney Employment Area) 2009 - relates to the requirement for a detailed Development Control Plan; and
- State Environmental Planning Policy (State and Regional Development) 2011 - relates to triggering Regionally Significant Development.

In addition, various documents from the NSW Government have been released over time regarding the growth of Sydney and the new Western Sydney Aerotropolis. The subject site is located within the Aerotropolis. However, depending on the release time of the planning related documents, some of the documents do not technically apply to the proposed development, given that the DA was lodged on 26 November 2019 and the Aerotropolis SEPP contains Savings Provisions.

Notwithstanding that the Aerotropolis SEPP does not apply to the Development Application, this author has considered the airport related planning documents, including the recently exhibited (draft) Aerotropolis Precinct Plan and Technical Reports. It is considered that to carry out a proper merit based assessment of the proposal, some thought must be given to the new planning controls that relate to the land (if not the subject Development Application) and the surrounding lands. These controls are relevant to provide information about desired future character and uses, and are applicable to surrounding land, thereby providing context for desired outcomes.

A summary of the **Aerotropolis** related documents and regional strategies in the order of their release is as follows:

- '*State Infrastructure Strategy*', and the '*Future Transport Strategy 2056*' - released March 2018 - these reference an integrated approach to social infrastructure, transport and planning;
- '*Greater Sydney Region Plan - A Metropolis of Three Cities*' - released March 2018 with the two strategies mentioned above - establishes the 40 year vision for the growth of the Greater Sydney Region and the vision for a Western Parkland City, and establishes the idea of the '*30-minute city*';
- '*Western City District Plan*' - establishes the regional vision for the Western Parkland City;
- '*Western Sydney Aerotropolis Land Use and Infrastructure Implementation Plan, Stage 1: Initial Precincts*' (**Stage 1 LUIP**) - exhibited from 21 August 2018 - implements the strategic and regional vision referenced in the Western District Plan for the Western Parkland City and supports the delivery of the Western Sydney

Airport. Provides the Structure Plan that outlines the proposed land uses for the initial precincts;

- Section 9.1 Ministerial Direction (under the Environmental Planning and Assessment Act, 1979) requires that, under Direction 7.8, any Planning Proposal to rezone or change controls to be consistent with the LUIIP. This Ministerial Direction is effective from 20 August 2018, but **does not strictly apply** to Development Applications;
- '*Western Sydney Aerotropolis What We Heard Community Consultation Report*' - released September 2019 - summary of the feedback after exhibition of the Stage 1 LUIIP;
- '*Western Sydney Aerotropolis Plan*' (WSAP) - exhibited 6 December 2019 to 13 March 2020 - includes overarching planning principles, distribution of land uses, the phasing of precincts and identification of high-level transport framework. The Plan establishes 10 precincts, identifies the land use planning outcomes, and sets out a sequenced approach to precinct planning. The WSAP was adopted on 11 September 2020;
- '*Western Sydney Aerotropolis Discussion Paper on the Proposed State Environmental Planning Policy*' - released December 2019. This paper was prepared under the EP&A Act to provide an explanation of the intended effect of the proposed SEPP;
- '*Draft Aerotropolis Development Control Plan - Phase 1*' - exhibited 6 December 2019 to 13 March 2020. The DCP identifies the precinct planning principles, objectives and performance outcomes to allow precinct planning to progress. The DCP - Phase 1 **will not apply** to the Development Application pursuant to Clause 1.4.2 of the DCP which relates to Savings and Transitional Provisions. The DCP - Phase 1 was adopted in September 2020;
- '*State Environmental Planning Policy (Western Sydney Aerotropolis) 2020*' - The SEPP was made on 1 October 2020 and is the legislative planning policy which provides the primary development controls for the Aerotropolis. It creates the new zones for the precincts and provides statutory requirements for assessment and procedures for Development Applications. The SEPP implements the WSAP with the first aim of the SEPP being to facilitate development in accordance with the objectives and principles of the WSAP. The SEPP **does not apply** to the Development Application pursuant to Clause 53 which relates to Savings and Transitional Provisions given that the Development Application was made on 26 November 2019;
- '*Draft Aerotropolis Precinct Plan*' - on exhibition between 10 November 2020 and 18 December 2020. This Precinct Plan fulfils the requirements of Part 7 Division 1 Clause 40 of the SEPP by providing the planning requirements to enable development. The Plan includes performance criteria for development, and mapping showing land uses and the strategic vision. The Plan applies to the Badgerys Creek Precinct (in which the subject site is located). However, the Precinct Plan **does not strictly apply** to the subject Development Application as the Plan has been made under the SEPP, and the SEPP contains Savings Provisions and does not apply to the DA;
- '*The Aerotropolis Urban Design and Landscape Plan Report*' - This is a technical report which has also been released with the draft Precinct Plan. This Report forms the basis of the draft Precinct Plan;
- There are a number of other Technical Reports which have been released at the same time as the exhibition of the Draft Precinct Plan. These relate to; transport modelling; economic feasibility; wildlife management; air quality and odour; utilities; land capability; stormwater; biodiversity; social infrastructure needs and audit; Aboriginal engagement; heritage assessment; bushfire risk and management; and sustainability and heat;
- The Draft Precinct Plan and other Technical Reports can be found at the following link:
<https://www.planningportal.nsw.gov.au/WSAPP>;

- Also on exhibition at the same time as the Draft Aerotropolis Precinct Plan is the proposed '*Special Infrastructure Contribution*' (SIC) for Western Sydney Aerotropolis. The site will be located within the special contributions area, although at present, the contributions plan is not yet made. The Contributions Plan refers to a 2-tier rate, being a Net Developable Area rate (charged per hectare of net developable land) and applied at subdivision stage, and a Station Precinct charge applied to certain lands (near the two new Metro stations) and charged as a percentage of the cost of works. The (draft) net developable area rate is listed as \$200,000 per hectare for the Enterprise zone and the amount could be offset for works-in-kind. It does not appear that the Station Precinct charge would apply to the subject site. This document can be accessed at: <https://www.planningportal.nsw.gov.au/Western-Syd-Areo-SIC>;
- The next stage for the release of planning documents will be the '*DCP - Phase 2*' although this document is not currently on public exhibition.

Western Sydney Planning Partnership:

As part of the delivery of the Western Sydney Airport, the Western Sydney Planning Partnership was formed under the Western Sydney City Deal (created on 4 March 2018). The Partnership brings together the various western Sydney Councils (including Penrith, Blacktown and Liverpool), the NSW Government (DPIE and Transport for NSW) and the Greater Sydney Commission.

Although the Western Sydney Planning Partnership has no legislative (statutory) standing, it is the body responsible for preparing the re-zonings for the Aerotropolis precincts and the Precinct Plans. The airport related documents also reference the creation of a new development Authority (similar to the development authorities at Barangaroo and Sydney Olympic Park), to oversee development of the Aerotropolis into the future, as well as the Sydney Metro Authority.

The Partnership have commented on both the original and amended proposal. The Partnership have raised concerns which are summarised below and outlined in the Submissions section of this report.

Submissions:

The original application was publicly exhibited, advertised, and notified to surrounding property owners in accordance with the requirements for Designated and Integrated Development. Four submissions from the following organisations have been received:

- The Department of Infrastructure, Transport, Cities and Regional Development (Commonwealth Department that is the regulator of the airport);
- Western Sydney Airport;
- SUEZ Australia and New Zealand; and
- John Holland / CPB Rozelle Interchange WestConnex - letter in support.

The summary of the comments made are:

- Inappropriate to consider application for development in advance of precinct planning work undertaken by the Western Sydney Planning Partnership;
- The site is located in an area that is subject to airport protection and will be affected by airport operations;
- Lack of consultation with Western Sydney Airport;
- Unclear as to the nature of the proposed use and waste material to be imported. Particular concerns if putrescible waste is imported, wildlife attraction (bird strikes) or generation of landfill gases;
- Clarification as to whether any waste or stockpiles will breach the airport obstacle limits;
- Consideration by future land users of the existing operations of the SUEZ waste facility;
- Master planning could consider potential synergies between the site's ultimate land use and the existing

- SUEZ operations; and
- WestConnex confirm that they will accept the site as a spoil disposal location and support the proposal.

With regard to referrals and concurrence requests to external agencies, comments have been received from the following departments:

- Transport for NSW (TfNSW) - letters dated 18 February and 17 November 2020 - object to proposal and would require further information;
- NSW Environment Protection Authority (EPA) - letter dated 2 March 2020 - have advised that an Environment Protection Licence is not required;
- Natural Resources Access Regulator (NRAR) - General Terms of Approval granted on 10 February 2020; and
- Western Sydney Planning Partnership (WSPP) - 2 letters relating to original and amended proposal, dated 15 May and 1 December 2020 - the first letter raises some concerns, suggests that the proposal may be premature and requests consideration of the WSAP and Discussion Paper for the Aerotropolis SEPP. It also raises concerns around the visual impact and interface issues. The second letter, which relates to the amended proposal, states that the Partnership has concerns about the amount of fill, vegetation removal, visual impacts and interface with adjoining properties, loss of Aboriginal and non-Aboriginal heritage, and that the application is not consistent with the vision for the Badgerys Creek Precinct.

Conclusion:

The key issues of concern and the reasons the application is being recommended for refusal are:

- Proposal is contrary to the Objects of the Act and does not represent the orderly development of land;
- Proposed earthworks (cut and fill) component of the proposal is not permissible in the current RU2 zone and is not permissible by virtue of the Infrastructure SEPP;
- Non-compliance with Clause 18 of the SEPP (WSEA) due to the lack of a site specific DCP or a waiver for one;
- Detrimental and adverse impacts on the character and appearance of the area and the site interface treatments, by virtue of the excessive depth and height of the cut and fill and the resulting landform;
- Detrimental impact on the natural topography of the land and the site's setting with regard to adjoining sites, the riparian corridor and Elizabeth Drive;
- Inadequate information to address traffic related impacts;
- Inadequate information to fully address biodiversity impacts and the proposed removal of all vegetation from the development site;
- Proposal is unlikely to meet the objectives and principles established in the Stage 1 LUIIP and WSAP documents for the Badgerys Creek Precinct and Wianamatta-South Creek Precinct;
- Proposal is likely to have an adverse impact on both Aboriginal cultural heritage and non-Aboriginal heritage; and
- Proposal is not in the public interest as it does not address and meet the objectives and principles for the Aerotropolis documents which are in the public realm and establish the desired future outcomes for the area.

Site & Surrounds

The subject site is Lot 5 in DP 860456, with the address being 1669 – 1723 Elizabeth Drive, Badgerys Creek. The site is predominantly rural land, currently occupied by a rural dwelling and ancillary structures. The site has an area of 54.41 hectares.

The site's eastern edge is irregular as it is formed by the top of the bank of South Creek. Therefore, part of the eastern side of the site is within the South Creek riparian corridor, which generally corresponds to the site's E2 – Environmental Conservation zoning.

The western boundary abuts a secondary and unnamed road which provides access to SUEZ, a licensed and approved waste management and resource recovery facility. Rural-residential lands are located to the north and south of the site.

The land generally slopes from the west (adjoining the SUEZ site) down to the east (to the South Creek riparian corridor) with this gradient being approximately 6%. Specifically, from the south-west corner to the north-east corner there is approximately a 20 metre fall. From Elizabeth Drive (to the south) towards the north of the site, there is approximately a 10 metre fall.

The subject site is affected by flooding, although the proposed works will not be near the adopted flood line. Council have recently adopted an updated flood level for the land, which corresponds to the 1 in 100 year flood event.

The subject site, and surrounding lands are located within the Western Sydney Aerotropolis. The Aerotropolis SEPP has rezoned part of the subject site to an Enterprise Zone with the lands within and near the riparian corridor being rezoned to an Environment and Recreation Zone. These zones correspond to the Badgerys Creek Precinct and the Wianamatta - South Creek Precinct.

Proposal

The proposed works (as amended) include the following:

- Importation of clean waste (soil, likely to comprise of mostly crushed sandstone) onto the site. The amount of imported soil will be approximately 268,131 cubic metres (reduced from the original 528,803 cubic metres) and will consist of Virgin Excavated Natural Material (VENM) and Excavated Natural Material (ENM). The imported fill will represent approximately 37% of the material to be used in the proposed earthworks at the site;
- Further bulk earthworks in the form of cut and fill, involving 450,900 cubic metres of cut (slightly increased from the original 448,166 cubic metres) and 450,899 cubic metres of fill (slightly increased from the original 448,165 cubic metres). The total fill with the imported material will be 719,030 cubic metres (decreased from the original 976,968 cubic metres);
- The placement and compaction of the soil and waste mentioned in the two bullet points above to create 3 tiers of level building pads that will bench the site;
- The site benching will generally form three levels, with each bench being lower than the preceding one. In this way, the levels are lower to the east in the direction of South Creek. The three benches will be at RL 58.50, RL 53.50, and RL 51.50 (with the last bench at the eastern side of the site ranging from RL 51.50 at the northern end to RL 51.00 in the middle and RL 50.50 at the south eastern corner);
- The depth of both the cut and fill will range from between 1 metre to 9 metres, with 1 in 4 batters to form the edges of the earthworks;

- The extent of earthworks adjoining Elizabeth Drive has been set back from the road by 30 metres, and the earthworks fronting the Wianamatta - South Creek riparian corridor will be set back 50 metres from the corridor. The proposed earthworks will be above the adopted flood level;
- Removal of all vegetation in the area of the proposed earthworks;
- De-watering and de-commissioning of the four existing dams in the area of the earthworks;
- Construction of 3 temporary sediment basins;
- Heritage salvage works relating to Aboriginal cultural heritage; and
- Removal of all former farm related buildings and structures from the site, and construction of a temporary works shed.

The proposed works will involve approximately 600 truck movements per day (300 in and 300 out) equating to 120 truck movements per hour (60 in and 60 out).

The applicant has lodged the DA pursuant to the provisions of the Infrastructure SEPP and has defined the proposed works as a '*waste disposal facility*', which is a type of '*waste and resource management facility*'. Therefore, the applicant is technically applying to carry out works under the definition of a '*waste disposal facility*', although the continuing use of the land will not be a 'rubbish tip' or 'waste facility' in the colloquial meaning. This is discussed further in the report. In this regard, the applicant has stated that they would accept a 2-year time limited consent.

The Development Application also triggers the following statutory requirements:

- The application has been lodged as Designated Development for a '*Waste or Resource Management Facility*', specifically for a '*waste disposal facility*';
- The application has been lodged as Integrated Development seeking concurrence relating to the Water Management Act for works near a waterbody;
- The application has been lodged as Integrated Development seeking concurrence under the Environment Protection Act relating to the type of fill to be imported to the site;
- Although the proposed development would also trigger the requirement for an approval relating to Aboriginal cultural heritage, under the National Parks and Wildlife Act, the applicant has chosen to not lodge the application as Integrated Development for the purpose of heritage;
- The proposed development falls within the definition of '*Regionally Significant Development*'; and
- The Secretary's Environmental Assessment Requirements (SEARs) were obtained on 20 February 2019 in accordance with the requirements for Designated Development (SEAR 1295).

Plans that apply

- Local Environmental Plan 2010 (Amendment 4)
- Development Control Plan 2014
- State Environmental Planning Policy (Infrastructure) 2007
- State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007
- State Environmental Planning Policy (State and Regional Development) 2011
- State Environmental Planning Policy (Western Sydney Aerotropolis) 2020
- State Environmental Planning Policy (Western Sydney Employment Area) 2009
- State Environmental Planning Policy No 55—Remediation of Land
- Sydney Regional Environmental Plan No.20 - Hawkesbury Nepean River

Planning Assessment

• **Section 1.7 - Application of Part 7 of Biodiversity Conservation Act 2016**

The development has been assessed in accordance with the matters for consideration under Section 1.7 of the Environmental Planning and Assessment Act 1979 having specific regard to the Biodiversity Conservation Act 2016.

The proposal will remove approximately 1.63 hectares of Cumberland Plain Woodland, 0.69 hectares of Castlereagh Ironbark Forest, as well as 0.89 hectares of coastal freshwater wetlands (located around dams and waterlogged drains). Species of bats were also recorded. The Aerotropolis Planning Package refers to planning in a 'landscape-led' approach, which suggests that landscape is retained where possible and development is designed around existing landscape features and elements.

A more detailed discussion relating to this issue is contained in the Referrals section of this Report (below) under the heading Environmental - Biodiversity as it relates to referral comments received from Council's Biodiversity Officer. In summary, Council's Biodiversity Officer still has concerns with the proposed development, notwithstanding the additional information received.

• **Section 2.12 – Sydney Western City Planning Panel (SWCPP)**

The Sydney Western City Planning Panel is the consent authority by virtue of Section 4.5(b) of the *Environmental Planning and Assessment Act 1979*, which states that a regional planning panel is the consent authority for development that is declared by an environmental planning instrument as '*regionally significant development*'. Schedule 7 of State Environmental Planning Policy (State and Regional Development) 2011 contains the triggers for development that constitutes '*regionally significant development*'. The development falls within the category of '*regionally significant development*'.

The proposed development meets the category requirements for '*private infrastructure and community facilities over \$5 million*', which includes a waste or resource management facility. The proposed cost of works is \$6.7 million, thereby taking the proposal above the \$5 million threshold.

In addition, the original proposal was lodged as Designated Development. A second category in Clause 7 of Schedule 7 of the SEPP (State and Regional Development) is '*particular designated development*', which includes waste management facilities or works which meet the requirements for Designated Development. The triggers for Designated Development are contained in Clause 32 of Schedule 3 of the Environmental Planning and Assessment Regulations, and include the disposal of waste on land within 100m of a natural waterbody and when the quantum of waste exceeds 100,000 tonnes. The original proposal exceeded the 100,000 tonne trigger.

However, the proposal was amended to set back the scope of the earthworks from the southern and eastern boundaries. The amount of overall fill, including the amount of imported fill was therefore reduced in quantity. The amended civil drawings state that the amount of imported fill will be 268,131 cubic metres, which equates to approximately 94,689 tonnes, bringing the proposed amount of waste disposal below the 100,000 tonne trigger.

A briefing to the Panel was held on 18 May 2020. A number of matters for further consideration were raised by the Panel. One of those included whether a reduced scope of works or a "*staging of the consent process, with a more limited filling program considered now to permit the introduction of VENM waste,, while deferring to later consideration of the final profile of the site (its ultimate height and batter gradient)*".

This question was put to the applicant, specifically whether the imported waste could be stockpiled on the

site, or whether the imported waste could be placed and compacted on the site, but with no additional cut and fill. The applicant responded by stating that stockpiling the waste could lead to it being contaminated in the future and not complying with the requirements for VENM. This statement appears to correlate with the letter from the NSW Environment Protection Authority dated 2 March 2020. Placing and compacting just the waste onto the site would also not be efficient as the waste is likely to be good quality crushed sandstone, which needs to be mixed with the lower quality soils on the site before placement and compaction.

- **Section 4.14 - Bushfire prone land assessment**

The site is identified as bush fire prone but no further bushfire protection measures would be required at this time given the nature of the proposed works being earthworks, with no buildings or structures proposed.

- **Section 4.15 - Evaluation**

Section 4.15 of the Act sets out matters for consideration in determining a development application, including SEPP, LEP and DCP controls, Planning Agreements and the Regulations. Consideration is also to be given to environmental impacts on both the natural and built environments, social and economic impacts in the locality, any submissions, the public interest and the suitability of the site. An assessment pursuant to Section 4.15 is made throughout this Report.

- **Section 4.46 - Integrated development**

The application has been lodged as Integrated Development in accordance with Section 4.46 of the Act with regard to the requirement for approval under Section 9.1 of the Water Management Act, given that works are located within 40 metres of a water body (South Creek). General Terms of Approval from the relevant water authority, being the Natural Resources Access Regulator (NRAR) have been received.

Further, the NSW Environment Protection Authority (EPA) have provided their comments in a letter dated 2 March 2020 to state that the proposed works are unlikely to require an Environment Protection Licence (EPL).

Given that the proposal also involves disturbance to Aboriginal cultural heritage, an approval under Section 90 of the National Parks and Wildlife Act 1974 would also be required. However, the applicant has chosen not to lodge the application as Integrated Development for the purpose of heritage. This is the applicant's choice and is not strictly a requirement at DA lodgement, although it carries further risk for the applicant if any subsequent approval from external agencies is not forthcoming. Council staff did ask the applicant to amend the application to include Integrated Development for the purpose of heritage, because that would also allow staff to refer the heritage report to the NSW Heritage Office and obtain comments in response. Without the Integrated referral process, this has not been able to occur.

If the Panel were of a mind to approve the Development Application, then the only form of consent that should be granted would be a Deferred Commencement Consent, with the requirement to obtain the necessary heritage permits from the Heritage Office prior to any works commencing.

- **Section 7.12 - Developer Contributions**

If the application were to be recommended for approval, it is considered that contributions pursuant to Section 7.12 of the EP&A Act would apply to the development, as the cost of works is over Council's trigger of \$100,000, with the cost of works listed to be \$6.7 million. A 1% levy would be charged.

The Draft Special Infrastructure Contributions Plan (SIC) that relates to the Aerotropolis has been placed on

exhibition by the Department of Planning, Industry and Environment until 18 December 2020. Therefore, this contributions plan is not currently in place and does not apply to the Development Application. Given that the recommendation is for refusal, the matter of contributions is a moot point at this time.

Section 4.15(1)(a)(i) The provisions of any environmental planning instrument

State Environmental Planning Policy (Infrastructure) 2007

Permissibility

Clause 121 of the Infrastructure SEPP states that development for the purpose of '*waste or resource management facilities*' can be carried out by any person with consent on land in a prescribed zone. Clause 120 of the SEPP designates the RU2 – Rural Landscape zone as a prescribed zone.

The definition of a '*waste or resource management facility*' is contained in the Standard Instrument, which states that a:

"waste or resource management facility means any of the following:

- (a) A resource recovery facility,*
- (b) A waste disposal facility,*
- (c) A waste or resource transfer station,*
- (d) A building or place that is a combination of any of the things referred to in paragraphs (a) to (c)."*

The Penrith LEP has a definition for a '*waste disposal facility*', meaning "*a building or place used for the disposal of waste by landfill, incineration or other means, including such works as recycling, resource recovery and other resource management activities, energy generation from gases, leachate management, odour control and the winning of extractive material to generate a void for disposal of waste or to cover waste after its disposal*".

Schedule 3 of the Environmental Planning and Assessment Regulations also has a definition for '*waste*', being "*waste includes any matter or thing whether solid, gaseous or liquid or a combination of any solids, gases or liquids that is discarded or is refuse from processes or uses (such as domestic, medical, industrial, mining, agricultural or commercial processes or uses). A substance is not precluded from being waste for the purposes of this Schedule merely because it can be reprocessed, re-used or recycled or because it is sold or intended for sale*".

It is therefore accepted that the part of the proposed development involving the importation of soil to the site can best fit within the definition of a '*waste disposal facility*'. The soil from off site is considered to fall within the definition of '*waste*'. The action of bringing the waste to the subject site and reusing it is considered to fall within the definition of a '*waste disposal facility*' regardless of whether this action is a one-off activity.

The Infrastructure SEPP, being a higher order planning instrument, therefore overcomes the prohibition in the Penrith Local Environmental Plan (LEP) for this part of the development.

However, it is questionable whether the part of the proposed development which involves bulk earthworks being the cut and fill from within the site can also be categorised as a '*waste disposal facility*' and '*waste*' given that the more likely and closer-fit definition for those works is "*earthworks means excavation or filling*", taken from the Penrith LEP. This is relevant to the question of permissibility under the current zone of the land given that the RU2 - Rural Landscape zone would not permit development for the purposes of warehouse and distribution centres, and that the proposed

earthworks are site preparatory works for a future warehouse development.

However, it should also be noted that the question of permissibility is really one of timing. The new Aerotropolis SEPP 2020 zones the land Enterprise and would permit a warehouse development, allowing the earthworks as site preparatory works to be permissible with consent. Given the Aerotropolis SEPP contains Savings and Transitional Provisions, the new zone under the SEPP cannot be relied upon for this Development Application.

No works are proposed in the portion of the site zoned E2 – Environmental Conservation. The Infrastructure SEPP does not permit the works/use in the E2 zone.

The applicant has presented a further argument for permissibility based on Clause 121(3) of the Infrastructure SEPP, which calls into consideration the SEPP (Mining). This is discussed below under a separate heading.

Consideration of Impacts Pursuant to the Infrastructure SEPP

Clause 123 of the Infrastructure SEPP then outlines matters to take into consideration when determining an application *"for the purpose of the construction, operation or maintenance of a landfill for the disposal of waste, including putrescible waste"*. The matters to consider are:

(a) Whether there is a suitable level of recovery of waste, such as by using alternative waste treatment or the composting of food and garden waste, so that the amount of waste is minimised before it is placed in the landfill - The proposed development would meet this requirement as the soil to be imported is being recovered and reused.

(b) Whether the development adopts best practice landfill design and operation, and reduces the long term impacts of the disposal of waste - For reasons stated in this report, the 'landfill design' is not supported.

(c) Whether the land on which the development is located is degraded land such as a disused mine site, and whether the development is located so as to avoid land use conflicts, including whether it is consistent with any regional planning strategies - In this regard, the land is not degraded but will be developed as part of the Aerotropolis. With regard to consistency with regional planning strategies, for the reasons outlined throughout this report, the proposal is not considered to be consistent with the WSAP and Stage 1 LUIIP (the regional strategies that preceded the Aerotropolis SEPP) because of the significant changes proposed to the natural topography of the land and the consequences of these changes to the appearance and interface edges of the site in its context.

(d) Whether transport links to the landfill are optimised to reduce the environmental and social impacts associated with transporting waste to the landfill - For reasons outlined below with regard to the submission by Transport for NSW, it is considered that the proposal does not optimise transport links associated with transporting the waste to the site and the application has not provided adequate information to address the concerns raised by Transport for NSW.

State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007

The applicant has also provided another argument relating to permissibility in the Infrastructure SEPP regarding Clause 121(3). This generally states that the disposal of VENM or clean fill can be carried out with consent on any land where mining, industries or extractive industries can be carried out. The applicant then takes you to Clause 7(3) of the SEPP (Mining, Petroleum, Production and Extractive Industries) 2007 and states that this clause in the Mining SEPP permits an extractive industry on land on which agriculture is permitted. Because the current zone of the land is RU2 - Rural Landscape, under the Penrith LEP, the applicant states that agriculture is permitted on the land and therefore the disposal of clean fill is permitted by the SEPP (Mining).

However, this premise is also based on all of the proposed works falling within the definition and category of waste disposal. It is therefore again questionable whether that portion of the proposed works which is more closely described as '*earthworks*' is permitted using the same methodology.

State Environmental Planning Policy (State and Regional Development) 2011

Clause 20 of the SEPP (State and Regional Development) 2011 declares development specified in Schedule 7 to be regionally significant development. Clause 7 in Schedule 7 of the same SEPP then declares "*Particular designated development*" as being '*regionally significant development*'. This includes development for the purpose of "*waste management facilities or works which meet the requirements for designated development under Clause 32 of Schedule 3 to the Environmental Planning and Assessment Regulation 2000*". Pursuant to Schedule 3, Clause 32(1)(d) of the Regulations, the original proposal was classified as Designated Development as the proposed works involved the disposal of waste on land within 100m of a natural waterbody and the quantum of waste exceeded the 100,000 tonne trigger.

However, the proposal was then amended to set back the scope of the earthworks from the southern and eastern boundaries. The amount of overall fill, including the amount of imported fill was therefore reduced in quantity. The amended civil drawings state that the amount of imported fill will be 268,131 cubic metres, which equates to approximately 94,689 tonnes, bringing the proposed amount of waste disposal below the 100,000 tonne trigger.

Notwithstanding that the amended proposal may not fall within the category for Designated Development, the proposed development falls within the category of '*private infrastructure and community facilities over \$5 million*', which includes a waste or resource management facility. The proposed cost of works is \$6.7 million, thereby taking the proposal above the \$5 million threshold.

Therefore, the SEPP is relevant as it establishes that the proposed development is Regionally Significant Development for which the consent authority is the Sydney Western City Planning Panel.

State Environmental Planning Policy (Western Sydney Aerotropolis) 2020

State Environmental Planning Policy (Western Sydney Aerotropolis) 2020 was made on 1 October 2020. Clause 53 contains savings and transitional provisions, with Sub-clause (1) reading as follows:

"A development application for development on land to which this Policy applies that was lodged and not finally determined before the commencement of this Policy is to be determined as if this Policy had not commenced."

Therefore, the subject Development Application, which was lodged on 26 November 2019 (before the

commencement of the Aerotropolis SEPP) and which has not been finally determined qualifies for this savings provision. The subject Development Application is to be determined as if the Aerotropolis SEPP had not commenced.

This means that the new Enterprise zone does not apply to the development site (noting that the proposed earthworks as site preparatory works for a warehouse development would be permissible in the Enterprise zone). In addition, the SEPP would prohibit a '*waste or resource management facility*' at the site, if organic or putrescible waste was involved, because part of the site is located within the 3km wildlife buffer zone. This area restricts waste facilities that include organic or putrescible waste, as this may attract wildlife such as birds and may increase the risk of bird strikes. The applicant has clarified that they do not intend to operate the site as an ongoing waste facility and at any rate, this would not involve organic or putrescible waste.

Nor does the procedural requirement for obtaining the concurrence of the Director General for the proposed development apply, given that the DA has been lodged before the adoption of the detailed Precinct Plan for Badgerys Creek (Clause 42). It also means that the recent and exhibited Draft Precinct Plan for the Aerotropolis may not technically apply as the Precinct Plan was made under the SEPP (Clause 40).

Notwithstanding that the SEPP **does not apply** to the Development Application, it is considered that the aims of the policy can still apply to the **land**, as well as the lands surrounding the subject site, both adjoining the site and beyond. It is therefore appropriate to give some thought to the objectives of the SEPP and the Draft Precinct Plan as they assist in a merit based assessment as to the appropriateness and contextual fit of the proposed development, keeping in mind that all other sites surrounding the subject site will need to comply and accord with the aims of the SEPP as they proceed to redevelopment.

In addition, there are a number of regional and Aerotropolis related strategic documents that are informative, not statutory, and would also apply to the land and the Development Application. These are referenced in the Executive Summary. These reports also assist in setting the scene for the type of development that is expected and desired in the area. Giving some thought to these informative documents will assist in carrying out an assessment of the likely impacts of the development as required by Section 4.15 of the Environmental Planning and Assessment Act. The documents include; the Western District Plan; the Stage 1 LUIIP; the WSAP; the Discussion Paper on the Proposed SEPP; and the Technical Report titled 'Aerotropolis Urban Design and Landscape Plan Report'.

The merit based assessment of the application is discussed throughout this Report, including under the section heading 'Likely impacts'.

In addition, the briefing minutes of the Sydney Western City Planning Panel sought clarification about what appeared to be an anomaly with the boundaries of the proposed Aerotropolis SEPP zones (ENT - Enterprise Zone and ENZ - Environment and Recreation Zone) which also correspond to the Badgerys Creek Precinct and the Wianamatta-South Creek Precinct boundaries. The WSAP (prior to the SEPP) used the former adopted flood level (being the PMF) as the boundary line, while the SEPP recognises the recently adopted flood level (being the 1 in 100 year flood level). This change to the adopted flood levels explains the difference between the zone boundaries. The proposed earthworks are wholly contained within the land zoned Enterprise (if the Aerotropolis SEPP were to apply to the Development Application).

For information purposes, the area on which the earthworks are proposed to be carried out are located within the following Aerotropolis SEPP Maps:

- Land Application Map - site is within;
- Aerotropolis Boundary Map - site is within and also identified as within the Badgerys Creek Precinct (the subject site east of the proposed works is within the Wianamatta-South Creek Precinct);

- Land Zoning Map - site is identified as zoned ENT - Enterprise (the subject site to the east of the proposed works is zoned ENZ - Environment and Recreation);
- Noise Exposure Contour Map - site is within the 25-30 ANEC (Australian Noise Exposure Concept);
- Obstacle Limitation Surface Map - site has an OLS height limit of 74.1m (RL 125.5);
- Lighting Intensity and Wind Shear Map - site is identified as being within Light Control Zone C;
- Wildlife Buffer Zone Map - part of the site is located within the 3km wildlife buffer zone;
- Wind Turbine Buffer Zone Map - site is within the 3km buffer zone;
- Flood Map - eastern side of site is shown in the 1 in 100 year flood extent; and
- Transport Corridors Map - shows Elizabeth Drive as part of the road network.

State Environmental Planning Policy (Western Sydney Employment Area) 2009

The subject site falls within the land application map of the State Environmental Planning Policy (Western Sydney Employment Area) 2009 (WSEA SEPP). The site is identified in this SEPP as being in Precinct 11 - Broader Western Sydney Employment Area.

The site is also 'unzoned' land under this SEPP as per the Land Zoning Map. However, the WSEA SEPP was amended on 11 June 2020 to include controls relating to the Mamre Road precinct. In making the amendments, Clause 12 was repealed. Clause 12 related to development with consent on unzoned land and was a further argument raised by the applicant as to permissibility. The amendments to the SEPP also reduced the area of the Land Application Map in a way that shrunk the area to which the SEPP applies. The amended Land Application Map as of the SEPP on 11 June 2020 does not include the subject site.

However, Savings Provisions were written into the SEPP amendments at Clause 34(2). The Savings Provision clause is written in such a way that it 'turns off' the SEPP amendments, **except** for the repeal of Clause 12 (Development on Unzoned Land). Therefore, the subject site is still within the land application of the SEPP and is still 'unzoned land' pursuant to the SEPP but without Clause 12 which permitted some development on unzoned land.

Because of the Savings Provisions, the assessment below is made against the historical version of the SEPP as of 10 June 2020, prior to the amendments that came into effect on 11 June 2020, except for the repeal of Clause 12.

In addition, Clause 11 of the Aerotropolis SEPP replaces the maps in the SEPP (WSEA), but this is not applicable to the current Development Application because of the Savings Provisions written into the Aerotropolis SEPP. The end effect is that the Aerotropolis SEPP does not apply to the current Development Application and therefore the maps in the SEPP (WSEA) as of 10 June 2020 still apply to the proposed development. The Land Application Map in the SEPP (WSEA) includes the subject site.

The following clauses of the SEPP (WSEA) are therefore applicable to the Development Application as they appear in the SEPP as on 10 June 2020.

Clause 15A Demolition requires development consent: The proposal includes demolition of all structures on site which is compliant with this clause.

Clause 18 Requirement for a Development Control Plan: Clause 18(1) of the SEPP outlines that the consent authority must not grant consent to development on any land to which the SEPP applies, unless a DCP has been prepared for the land. Clause 18(2) and Schedule 4 outline specific requirements that are to apply to any such DCP.

A review of Schedule 4 has determined that, with the exception of the Sydney Science Park, Erskine Business

Park and Mamre West Precinct, the Penrith DCP 2014 does not meet these requirements and cannot be used to satisfy Clause 18 of the SEPP. This matter was recently raised in June 2020, during the Panel's consideration of Development Application DA19/0470 (PPSSWC-7) relating to the SUEZ site, which adjoins the subject site to the west. In the SUEZ case, a waiver of the DCP requirement was obtained from the Department in accordance with Clause 18(1) and on that basis a determination of the application was able to proceed.

It is understood that the onus is on the applicant to request a DCP waiver from the Secretary. To date, no waiver has been obtained or received in relation to this application. In order for the Panel to consider granting consent, a site specific DCP is required that addresses all of the requirements of Clause 18 and Schedule 4 of WSEA SEPP. The requirement of this clause has not been met as a compliant DCP or a waiver has not been submitted. It is unclear whether the Aerotropolis DCP - Phase 1 would meet the DCP requirements as contained in Schedule 4 of the SEPP. However, because of the Savings Provisions in the Aerotropolis SEPP, the SEPP, and therefore the DCP, would not apply to the current Development Application.

Clause 32 - Preservation of trees or vegetation: The proposed development will include the removal of all vegetation from the area where the earthworks are proposed. This matter is discussed under the Biodiversity Conservation Act heading of this report above. Council's Biodiversity Officer still has some concerns with the level and adequacy of the information submitted to date and this is discussed further below under the Referrals heading.

State Environmental Planning Policy No 55—Remediation of Land

This SEPP requires that the consent authority is satisfied that the site is either suitable for the proposed use in its current state, or, can be made suitable after remediation. A Detailed Site Investigation report (dated 5 June 2020) was submitted with the amended application. It shows potential contamination (zinc, methane, copper, lead, ammonia, asbestos, and PFAS). Council's Environmental Management Officer recommends that an amended Detailed Site Investigation be carried out by the applicant in order to address the report's own recommendations regarding additional sampling. Remediation would also be required and a Remedial Action Plan would need to be submitted. The application has not included a Remedial Action Plan, and therefore the matter of suitability of the site in terms of remediation has not been satisfactorily addressed.

Sydney Regional Environmental Plan No.20 - Hawkesbury Nepean River

This Policy aims *"to protect the environment of the Hawkesbury-Nepean River system by ensuring that the impacts of future land uses are considered in a regional context"*. The Policy requires consent authorities to assess development applications with regard to general and specific considerations, policies and strategies. The proposed development would require consent pursuant to the SREP as an area greater than 100m is affected by fill more than 1m deep.

In a regional sense, the proposed development is considered to negatively impact on the strategic vision for the Wianamatta - South Creek Riparian Corridor because of the poor interface relationship between the riparian corridor and the levels of the development site. The strategic direction for the South Creek precinct is described in the LUIIP as follows:

"South Creek, encompassing the full extent of South Creek and its tributaries through the Aerotropolis to act as the central structural element to a connected open space network that connects pedestrian and cycle paths with community facilities, restaurants and cafes, as well as water management."

Although technical matters relating to water quality and flooding impacts could be resolved, it is considered that the proposed benching of the site does not take into account the regional significance of the waterways throughout the Aerotropolis.

Local Environmental Plan 2010 (Amendment 4)

Provision	Compliance
Clause 1.2 Aims of the plan	Does not comply - See discussion
Clause 2.3 Permissibility	Does not comply - See discussion
Clause 2.3 Zone objectives	Does not comply - See discussion
Clause 2.7 Demolition requires development consent	Complies
Clause 5.10 Heritage conservation	Does not comply - See discussion
Clause 7.1 Earthworks	Does not comply - See discussion
Clause 7.2 Flood planning	Complies - See discussion
Clause 7.5 Protection of scenic character and landscape values	Does not comply - See discussion
Clause 7.9 Development of land in the flight paths of the site reserved for the proposed	Does not comply - See discussion

Clause 1.2 Aims of the plan

The Penrith Local Environmental Plan is still applicable to the Development Application because of the Savings Provisions of the Aerotropolis SEPP. Therefore, the proposed development should still meet the relevant aims of the Plan (LEP). The relevant aims include:

- (a) to provide the mechanism and planning framework for the management, orderly and economic development, and conservation of land in Penrith,
- (b) to promote development that is consistent with the Council's vision for Penrith, namely, one of a sustainable and prosperous region with harmony of urban and rural qualities and with a strong commitment to healthy and safe communities and environmental protection and enhancement,
- (c) N/A
- (d) to foster viable employment, transport, education, agricultural production and future investment opportunities and recreational activities that are suitable for the needs and skills of residents, the workforce and visitors, allowing Penrith to fulfil its role as a regional city in the Sydney Metropolitan Region,
- (e) N/A
- (f) to protect and enhance the environmental values and heritage of Penrith, including places of historical, aesthetic, architectural, natural, cultural, visual and Aboriginal significance,
- (g) to minimise the risk to the community in areas subject to environmental hazards, particularly flooding and bushfire, by managing development in sensitive areas,
- (h) to ensure that development incorporates the principles of sustainable development through the delivery of balanced social, economic and environmental outcomes, and that development is designed in a way that assists in reducing and adapting to the likely impacts of climate change.

In addition, the SEARs list "strategic context" first under the key issues heading for the applicant to address in the EIS stating that the application must demonstrate that the proposal is consistent with all relevant planning strategies, including the Stage 1 LUIIP. For the reasons outlined throughout this report, it is considered that the proposed development does not meet the aims of the Penrith LEP, nor the aims and objectives of the relevant strategic plans, including those related to the Aerotropolis.

Clause 2.3 Permissibility

The current and existing zone of the subject site is RU2 - Rural Landscape and E2 - Environmental Conservation. The proposed works are wholly contained within that part of the land zoned RU2. The Penrith LEP does not permit a '*waste disposal facility*' on the land, nor does it permit '*warehouse and distribution centres*'. Therefore, the applicant is relying on the Infrastructure SEPP to overcome the LEP prohibition for the works deemed to be a '*waste disposal facility*'. This has been discussed above.

It is questionable whether the part of the proposed development incorporating the proposed earthworks (cut and fill) and the placement and compaction of that soil around the site to form level building pads, can be deemed to be within the category of a '*waste disposal facility*'. The proposed earthworks, using the soil already on the site, are more closely defined as earthworks which are site preparatory works for a future warehouse and distribution centre use. Therefore, it is considered that the earthworks, as site preparatory works are prohibited under the Penrith LEP as the future use is a prohibited use.

It should be noted and is relevant to state that should the Aerotropolis SEPP apply to the application, then the Enterprise zone on the land would permit the earthworks as site preparatory works, as the Enterprise zone permits a warehouse and distribution centre development.

Clause 2.3 Zone objectives

The objectives of Zone RU2 - Rural Landscape are:

- To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.
- To maintain the rural landscape character of the land.
- To provide for a range of compatible land uses, including extensive agriculture.
- To minimise conflict between land uses within the zone and land uses within adjoining zones.
- To preserve and improve natural resources through appropriate land management practices.
- To ensure development is compatible with the environmental capabilities of the land and does not unreasonably increase the demand for public services or public facilities.

The objectives of Zone E2 - Environmental Conservation are:

- To protect, manage and restore areas of high ecological, scientific, cultural or aesthetic values.
- To prevent development that could destroy, damage or otherwise have an adverse effect on those values.
- To protect, manage, restore and enhance the ecology, hydrology and scenic values of riparian corridors and waterways, wetlands, groundwater resources, biodiversity corridors, areas of remnant indigenous vegetation and dependent ecosystems.
- To allow for low impact passive recreational and ancillary land uses that are consistent with the retention of the natural ecological significance.

The proposed development is not considered to meet the objectives of either zone.

Clause 5.10 Heritage conservation

Aboriginal Cultural Heritage:

Given that the proposed development involves bulk earthworks, any Potential Archaeological Deposits (PADs) and artefacts will be disturbed by the proposed works.

The original application included a survey of Aboriginal artefacts and areas of potential archaeological

deposits (PADs). The consultant's report identifies 3 PADs and 4 individual artefacts, concluding that at least one PAD area needs further investigation. The SEARs issued for the proposal stated that a full heritage assessment needed to be carried out.

The Sydney Western City Planning Panel also raised the issue of Aboriginal cultural heritage in their briefing minutes. Council staff therefore requested that the applicant amend the DA by lodging the application as Integrated Development with the required detailed heritage report. The applicant did provide the heritage report, known as an ACHAR, being an Aboriginal Cultural Heritage Assessment Report (dated June 2020), but chose not to amend the application to seek General Terms of Approval from the NSW Heritage Office. The applicant is not required to lodge the DA as Integrated Development but this means that preliminary comments and a review of the ACHAR from the NSW Heritage Office cannot be obtained.

The subsequent ACHAR found *"A total of eight Aboriginal sites have been identified within the study area, comprised of one subsurface artefact site, six surface artefact sites and one area of PAD"*. The report states that of these eight, one scatter site has been assessed as having high significance, two 'isolated finds' have moderate significance, and 4 others (both scatter sites and isolated finds) have low archaeological significance. The one PAD site is outside the area of the proposed earthworks.

No works that impact the ground surface can be undertaken until an Aboriginal Heritage Impact Permit (AHIP) is issued by the NSW Heritage Office under the National Parks and Wildlife Act, 1974. The AHIP is issued post-development consent.

An assessment of Aboriginal cultural heritage is a differently specialised skill set than non-Aboriginal heritage. Therefore, although the application was reviewed by Council's external heritage consultant, the consultant's experience does not sit with Aboriginal cultural heritage. Council staff also discussed the matter with Council's Aboriginal Liaison Officer, however, that staff member's qualifications do not lie with assessing heritage matters. Staff also discussed the matter with the Western Sydney Planning Partnership who have raised heritage matters in their submission. While all of these discussions are useful, Council staff rely on the Integrated Development process to obtain preliminary advice and General Terms of Approval from the NSW Heritage Office.

The ACHAR submitted by Artefact Heritage (applicant's consultants) appears thorough and professional. However, it is not clear whether the NSW Heritage Office would support the proposal. Council staff contacted the NSW Heritage Office to seek some feedback on this issue. The Heritage Office advised that they will only review the documentation in the context of an Integrated DA. Council staff then requested that the applicant amend the proposal to include Integrated Development and a formal referral for General Terms of Approval from the Heritage Office. The applicant declined to do so.

In addition, if the Aerotropolis SEPP were to apply to the DA, Clause 28(9)(b) would require the consent authority to notify the local Aboriginal communities about the application and take into consideration any responses received within 28 days of that notice.

In addition, the recent Precinct Plan on exhibition includes a heritage study undertaken for the Western Sydney Planning Partnership. This heritage report identifies that part of the site contains areas of high and moderate Aboriginal heritage sensitivity. The Aerotropolis is being planned with 'Connecting with Country' as one of the leading principles. Therefore, it is unclear at this time whether the proposed loss of Aboriginal cultural heritage is appropriate.

Non-Aboriginal Heritage:

In addition, the package of Aerotropolis documents recently placed on exhibition until 18 December 2020 includes the Technical Report relating to Urban Design and Landscape. This report shows, on Page 206, a

'local unlisted heritage item' that appears to be located on the northern boundary of the site. The Western Sydney Planning Partnership also commissioned a Technical Report relating to Heritage, carried out by Extent Heritage. It states that the aforementioned unlisted heritage item is the site of the former Exeter House. It is a potential archaeological site and has extant landscape elements. It was the former residence of James Badgery, circa 1810. The house was demolished before 1980.

The Extent Heritage Report also references other areas of interest which require further consideration. They include convict quarters, farm huts, a barn, and farm structures dating to the early 19th century. The report states that archaeological remains from Exeter House (and Farm) have the potential to be State-significant.

Therefore, this information warrants further investigation on heritage grounds, and at this point, the proposed development is likely to have an adverse impact on the potential heritage value of the site.

Clause 7.1 Earthworks

The LEP contains specific objectives for earthworks, which is to ensure that the works will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land.

The LEP states that before granting consent, the consent authority must consider the following matters:

- (a) *the likely disruption of, or any detrimental effect on, existing drainage patterns and soil stability in the locality,*

The proposed works will occur above the adopted flood level so will not alter existing flood patterns. Although sediment basins are proposed, these are temporary and will only act as sediment basins. The long term stormwater management of the site is not part of the application and will be designed with the future development of the land for employment uses.

- (b) *the effect of the proposed development on the likely future use or redevelopment of the land,*

This matter has been discussed in the body of the report. In short, the proposed earthworks could facilitate a future light industrial and employment use which is likely to align with the Enterprise Zone in the Aerotropolis SEPP. It is understood that the applicant's intention is for warehouse type buildings and uses. However, it is noted that an operational 'waste or resource facility', storing or handling organic or putrescible waste, would be prohibited given the site is partly within the 3km wildlife buffer zone, although it is acknowledged that the proposal does not include ongoing use as a waste facility and at any rate, it would not involve organic or putrescible waste. However, the proposed development is considered to have an adverse impact on the redevelopment of the land for the reasons outlined in this report. This includes not respecting the existing topography of the land and creating levels which are significantly different to existing natural ground levels that result in a poor interface with adjoining properties and the public domain.

- (c) *the quality of the fill or the soil to be excavated, or both,*

The fill to be imported to the site will only be either VENM or ENM (Virgin Excavated Natural Material or Excavated Natural Material) or material covered by the NSW EPA Resource Recovery Orders (RRO) and Exemptions. The NSW EPA have written to Council on 2 March 2020 to advise that it is unlikely the proposed works will need an Environment Protection Licence.

- (d) *the effect of the proposed development on the existing and likely amenity of adjoining properties,*

This issue has been discussed throughout this report. Council's Environmental Management Officer has raised concern about the submitted air quality and noise report with regard to the omission of certain sensitive receivers. Other amenity issues relate to the proposed finished land form and its relationship to surrounding land. In this regard, the proposed development is not considered to result in a sympathetic finished landform and is not well integrated with surrounding properties, both private and public lands. Therefore, the proposed development will have an adverse impact on the existing and future amenity of adjoining properties and the site's interaction with the adjoining riparian corridor.

(e) *the source of any fill material and the destination of any excavated material,*

The letter from the NSW EPA states that the imported material may come from other infrastructure projects in Sydney, and may contain what the EPA refer to as 'tunnel spoil'. This aligns with information received from the applicant. There is no objection in principle to the proposal receiving spoil from infrastructure projects, subject to the required approvals from the NSW EPA. In the same manner, there is no objection in principle to the subject site receiving the fill material. However, it is where and how the fill material is placed on the subject site, including the other proposed earthworks and benching of the site, that is not acceptable on planning grounds.

(f) *the likelihood of disturbing relics,*

Aboriginal cultural heritage and non-Aboriginal heritage, including archaeology, has been discussed throughout this report. The proposed development will have an adverse impact on relics that have been identified within the subject site, and this matter has not been satisfactorily addressed in the Development Application.

(g) *the proximity to and potential for adverse impacts on any waterway, drinking water catchment or environmentally sensitive area,*

The Natural Resources Access Regulator has provided their General Terms of Approval for the proposed works. A Controlled Activity Approval under the Water Management Act would then be required. Council's Engineer and Waterways Officer have raised no objection to the technical aspects of the proposed development. However, on planning and design grounds, the proposed development would not align with the strategic vision of the blue-green spine which includes the Wianamatta-South Creek Corridor. This is due to the proposed levels and benching of the site resulting in a significant height difference between the levels of the development site and the adjoining future public domain.

(h) *any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development,*

Council's Biodiversity Officer has raised concerns with the proposal, including that efforts to minimise loss of vegetation have not adequately been demonstrated. Impacts to the heritage significance of the site has also not been adequately demonstrated. Further, the proposal does not demonstrate how future development on the site will interact and connect with surrounding properties, including Elizabeth Drive and the Wianamatta-South Creek riparian corridor.

(i) *the proximity to and potential for adverse impacts on any heritage item, archaeological site, or heritage conservation area.*

Aboriginal cultural heritage (both artefacts and potential areas of deposits) have been found on the site. The Aerotropolis Precinct Plan also identifies the remains of non-Aboriginal historic items which may be worthy of listing or at least further investigation. Therefore, the Development Application has not adequately considered the heritage significance of the site, to an extent where a recommendation of support can be given to disturbing relics.

Clause 7.2 Flood planning

The eastern portion of the site, towards South Creek, is affected by flooding. A new flood level was recently adopted by Council in April 2020. The new adopted flood level has been reflected in the Aerotropolis SEPP, although the preceding WSAP showed the previous flood level. The previous flood line boundary used the Probable Maximum Flood line (the PMF), while the new adopted flood level is the 1 in 100 year flood line (the 1 in 100 Annual Exceedance Probability flood), plus a 0.5 metre freeboard.

The proposed earthworks will occur above the flood planning level and will not alter the flood storage capacity and flood behaviour. Council's Engineer has reviewed the proposal from this perspective and the amended documents are acceptable in terms of flood planning.

Clause 7.5 Protection of scenic character and landscape values

Under this clause, development consent must not be granted for any development on land to which this clause applies unless the consent authority is satisfied that measures will be taken, including in relation to the location and design of the development, to minimise the visual impact of the development from major roads and other public places.

Given the level changes as a result of the proposed benching of the site, and the reliance on the use of batters to deal with site edges and interface treatments, it is not considered that the proposed development meets the objectives of this clause, which includes ensuring that development is located and designed to minimise visual impact. In particular, Elizabeth Drive will become a main and important route into the new Airport, and the Wianamatta - South Creek corridor will also be a central spine of open space in the area. The proposed levels as a result of the earthworks are not designed to recognise these aspects and generally turn their back on adjoining land.

Clause 7.9 Development of land in the flight paths of the site reserved for the proposed

The objective of this clause is to ensure that development in the vicinity of the proposed Badgery's Creek airport site:

- (a) has regard to the use or potential future use of the site as an airport, and
- (b) does not hinder or have any other adverse impact on the development or operation of an airport on that site.

It is difficult to ascertain whether the proposed development meets these objectives. A new operational waste facility will not meet the objectives, but it is understood the applicant does not intend to use the site as an ongoing or operational waste facility. However, the proposed development will have other adverse impacts on the development of an airport. This includes a poor design outcome in terms of the site contextual fit with the adjoining riparian corridor, Elizabeth Drive and other adjoining sites.

Section 4.15(1)(a)(iii) The provisions of any development control plan

Development Control Plan 2014

Provision	Compliance
DCP Principles	Does not comply - see Appendix - Development Control Plan Compliance
C1 Site Planning and Design Principles	Does not comply - see Appendix - Development Control Plan Compliance
C2 Vegetation Management	Does not comply - see Appendix - Development Control Plan Compliance
C3 Water Management	Complies
C4 Land Management	Does not comply - see Appendix - Development Control Plan Compliance
C5 Waste Management	Complies
C6 Landscape Design	N/A
C7 Culture and Heritage	Does not comply - see Appendix - Development Control Plan Compliance
C8 Public Domain	N/A
C9 Advertising and Signage	N/A
C10 Transport, Access and Parking	Does not comply - see Appendix - Development Control Plan Compliance
C11 Subdivision	N/A
C12 Noise and Vibration	Does not comply - see Appendix - Development Control Plan Compliance
C13 Infrastructure and Services	N/A
D5.1. Application of Certification System	N/A
D5.2. Child Care Centres	N/A
D5.3. Health Consulting Rooms	N/A
D5.4. Educational Establishments	N/A
D5.5 Parent Friendly Amenities	N/A
D5.6. Places of Public Worship	N/A
D5.7. Vehicle Repair Stations	N/A
D5.8. Cemeteries, Crematoria and Funeral Homes	N/A
D5.9. Extractive Industries	Does not comply - see Appendix - Development Control Plan Compliance
D5.10 Telecommunication Facilities	N/A
D5.11 Boarding Houses	N/A

Section 4.15(1)(a)(iv) The provisions of the regulations

The Regulations contain the triggers for Designated Development. Under Schedule 3 Clause 32(1)(d), the original proposal (as lodged) was classified as Designated Development as the works included the disposal of waste on land within 100 metres of a natural waterbody and the quantum of waste exceeded the 100,000 tonne trigger.

Schedule 3 of the Regulations also has a definition of "waste" being *"waste includes any matter or thing whether solid, gaseous or liquid or a combination of any solids, gases or liquids that is discarded or is refuse from processes or uses (such as domestic, medical, industrial, mining, agricultural or commercial processes or uses). A substance is not precluded from being waste for the purposes of this Schedule merely because it can be reprocessed, re-used or recycled or because it is sold or intended for sale"*.

The application has been processed in accordance with the requirements for Designated Development in the Regulations. In particular, the Department of Planning, Industry and Environment has been informed that the application has attracted submissions during the public exhibition period. The Department have responded by stating that the comments made in the submissions are to be considered by Council and the consent authority.

The concurrence authorities have also been notified of the amended application in accordance with Clause 55 of the Regulations.

However, the amended proposal has reduced the quantum of waste to be imported to the site. Therefore, it is considered that the amended application no longer meets the quantum requirement to be Designated Development.

Section 4.15(1)(b) The likely impacts of the development

Section 4.15 of the Act requires the consent authority to take into consideration "the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality".

Proposed Bulk Earthworks, Height of Fill, and Interface Treatments:

The proposed depth of the cut and height of the fill varies across the site, being no cut or fill in some parts, and up to approximately 9m in other parts. This will result in a significant change to the topography of the land and affect how the subject site will appear in the context of adjoining sites and the public domain, most notably, Elizabeth Drive to the south and the Wianamatta - South Creek riparian corridor to the east. It also has ramifications for how a future development will interact and connect to these adjoining spaces, both physically and visually. For example, the proposed development includes 1 in 4 batters as the edge treatment to the earthworks. When the site is further developed, it is likely that the batter will either be landscaped or require retaining walls. Either of these methods do not provide a connection and interaction between the site and the adjoining public open space and the significant level difference that will result will be difficult to design in such a way that a future, meaningful connection is provided. Although the proposal has been amended to pull back the area of the proposed earthworks 50m from the alignment of the South Creek riparian corridor, it is still unclear how that 50m setback area will be designed in the future to provide the connection and activation envisaged in the Aerotropolis planning package.

The applicant has provided a letter dated 12 October 2020 which relates to their argument for why the proposed development is consistent with the WSAP. The applicant states that the earthworks and benching arrangement do respond to the natural topography of the land as the proposed benches will tier down to the east towards South Creek, which will enable greater opportunities for future built form to benefit from views to these creek lines. This argument is not supported by Council staff. Although the three

proposed site benches will step down towards South Creek, this stepping is only relative to the preceding bench level and does not relate to the existing levels of the land, nor adjoining land.

The Penrith LEP contains controls relating to earthworks at Clause 7.1. These have been discussed above. The objectives of the earthworks LEP clause include ensuring that earthworks will not have a detrimental effect on features of the surrounding land. Consideration must also be given to the likely future use or redevelopment of the land, and the effect of the development on the existing and likely amenity of adjoining properties.

While some cut and fill is expected to be required on the site, the issue really relates to the height and amount of cut and fill, how the level changes are not handled from within the site and the resulting level and edge outcomes. In addition, no view analysis has been submitted showing the impact to and from views of South Creek. It is also a concern as to what the end warehouse building would look like in terms of height and scale, particularly near the eastern edge where the amount of fill is high.

The Aerotropolis related documents provide more detail about how desired future outcomes will be achieved. The documents emphasise a "landscaped-led approach" to design opportunities. It is accepted that the Aerotropolis SEPP and Draft Precinct Plan do not apply to this Development Application. However, consideration has been given to the Precinct Plan in order to provide guidance about the future character and appearance of the broader area, as well as other supporting documents such as the WSAP and Technical Reports.

With regard to earthworks and changes to the land, the following comments in the Draft Aerotropolis Precinct Plan and the Technical Report - Urban Design and Landscape Report are relevant (text in **bold** provided for emphasis):

Western Sydney Aerotropolis Plan (WSAP):

- Page 68: outlines a strategic outcome to provide an **appropriate and activated interface** with Wianamatta-South Creek;
- Page 68: allow enabling industries to facilitate construction of Aerotropolis to locate here with **appropriate interface treatments** to adjoining developments;
- Page 68: provide appropriate **landscaping along Elizabeth Drive** to reflect a major entry to the Aerotropolis, subject to aviation/airport safeguarding requirements;
- Page 68: **rationalise access points on Elizabeth Drive** and connect to the local road network to service private development; and
- Page 68: support Elizabeth Drive as a city serving road corridor **through an appropriate road layout** and subdivision pattern.

Draft Aerotropolis Precinct Plan:

- Page 10: mentions that the Precinct Plan builds on the Aerotropolis as it is today; the creeks and tributaries; **undulating topography** and view lines;
- Page 36: **respect topography** and ensure clear and legible **links between ridgetops and creek lines**;
- Page 40: With regard to the vision for Badgerys Creek Precinct, it states that new developments will be designed with an **appropriate interface** to surrounding major infrastructure and existing industries, including the existing resource recovery industries and new circular hub economies;
- Page 41: lists objectives, including architectural and landscape merit **responses to site topography** and landscape; **integrate** with the blue-green corridor; **integrate buildings alongside the creek lines** to create attractive places for workers;
- Page 45: mentions that a challenge in the Badgerys Creek Precinct is to respond to the affects of

- substantial extractive industry activity **affecting natural landscape and topography**;
- Page 45: mentions the opportunities for the Badgerys Creek Precinct to **"retain and enhance existing vegetation"** and **"respect and conserve heritage items"**;
- Page 64: states that the Wianamatta - South Creek Corridor is a natural core spine of the blue-green infrastructure system and provides a central element of the framework;
- Page 70: contains a requirement for the riparian corridor which states that you should **orient new development to integrate** with the Wianamatta - South Creek system;
- Page 81: Figure 18 shows **part of the development site as a green open space**, notated as an "urban park or pocket park";
- Page 118: with regard to land use and built form framework, it includes 'Principles Guidelines', one of which states to **"respect and enhance landforms by minimising major earthworks** and maintain and enhance green ridges"; "adopt a landscape-led approach that locates urban amenity and activity at an interface with creek-corridors"; and **"integrate built forms with existing landforms**, including proposed built forms and civil infrastructure that **minimise cut and fill**"; and "retain and enhance landscape qualities and features";
- Page 127: the map at Figure 30 shows a road running in a north-south direction along the eastern boundary of the site and connecting to Elizabeth Drive;
- Page 130: relates to the maximum building height for Badgerys Creek Precinct being 24 metres;
- Page 149: references the interface and management with existing uses. It requires consideration of the interface of new development with existing development to **create a suitable interface** and relationship through appropriate setbacks and building separation; and
- Page 150: refers to sites greater than 5,000 square metres in area being more fine grained.

Draft Technical Report - Urban Design and Landscape:

- Page 61: refers to the local character landscape as being relatively flat and open, only **gently undulating** with numerous small farm dams;
- Page 67: describes the existing character of the Badgerys Creek Precinct as "largely flat, the land falls away from a gentle ridge that lies largely central between the creeks", and "Elizabeth Drive bisects the precinct, and its east-west orientation provides drivers with a **good sense of the undulating topography** - being alignment perpendicular to the contours of the land";
- Page 106: refers to urban development **respecting landform**, connecting ridgetops to creeks; **large retaining between development lots** and flood lines should be avoided;
- Page 124: contains sections which show that **level differences are to be minimised**, states that roads and streets should as close as possible **align to existing topography**; surface levels within private lots are to adjoin ground levels set by public domain as close as possible to enable active and joint interface. In industrial areas, this can be achieved by setting an office and administrative building surface level to ground level of adjoining public domain. **Level difference is dealt internally within the site**, with **balanced cut and fill to minimise imported soil**;
- Page 146: shows Elizabeth Drive as a 60 metre wide primary arterial road and the private (SUEZ) road adjoining the site to the west as being 13-20 metres wide;
- Page 183: shows an indicative section through the 'ridge to Wianamatta principles';
- Page 185: shows an indicative section relating to 'activating enterprise areas';
- Page 236: shows a regional cycle path network in front the site on Elizabeth Drive but states that the cycle path is 'off-road';
- Page 245: refers to level differences between buildings and any adjacent parkland / street being minimised;
- Page 265: indicates a maximum building height of 24m;
- Page 281: shows an indicative Elizabeth Drive interface; and
- Page 282: refers to buildings not addressing Elizabeth Drive as a 'back interface', instead providing an attractive and landscaped interface that complements the intent of the Western Parkland City.

In addition, the 'Western Sydney Aerotropolis Discussion Paper of the Proposed State Environmental Planning Policy Draft - for public comment' would apply to the Development Application. The Paper has been prepared under the Environmental Planning and Assessment Act, 1979 to provide an explanation of the intended effect of the proposed SEPP. Sections 8.2 and 8.3 of the Paper discuss the development pathway for out-of-sequence development applications. In particular, it states that the *"key focus of the proposed planning pathway controls will be to ensure that development does not occur out of sequence or until precinct planning is completed and development exhibits design excellence"*.

Section 8.3 discusses what is required for applications submitted after notification of the proposed SEPP but prior to precinct planning being finalised. For this subject Development Application, Clause 8.3 may not technically apply because the Development Application was lodged before notification of the proposed SEPP. Notwithstanding this, Section 8.3 states that the consent authority cannot grant consent unless they are satisfied of certain matters that have occurred to prevent ad hoc and unplanned development. These considerations include requirements to consider whether the proposal is:

- consistent with the Western Sydney Aerotropolis Plan (WSAP);
- incompatible with land uses in any environmental planning instrument applying (or proposed to apply) to the land, or would result in fragmentation of landholdings;
- makes provision for or with respect to infrastructure services and does not hinder the orderly and coordinated provision of infrastructure across the Aerotropolis; and
- has the concurrence of the Secretary of the Department and relevant concurrences from State government agencies.

With regard to the above points, the concurrence of the Secretary is not required because the Aerotropolis SEPP does not apply to the Development Application. The potential future use of the land for warehouse and distribution centres is likely to be a compatible use in principle, but compatibility will also depend on the fine grain design of the site and buildings and particularly how the site connects with the public domain levels (which has been discussed above). With regard to the orderly provision of infrastructure and consistency with the WSAP, it is considered that the proposed development does not meet these objectives. The resulting interface with Elizabeth Drive is considered to be poor given that Elizabeth Drive will be widened and the finished levels are unknown at this time. The amended proposal has set back the proposed earthworks by 30m from the road but this is still not considered to provide ample room for future landscaped verges, possible cycle paths and interconnected levels.

In conclusion, when considering the impacts of the proposed development as a whole, including loss of vegetation, impact to heritage, significant changes to landform, resulting edge treatments and appearance and lack of connectivity to adjoining lands, it is considered that the proposal will result in negative impacts to the site, area and the future planning vision for the Aerotropolis.

Section 4.15(1)(c)The suitability of the site for the development

The site is suitable for a form of development that will align with the strategic vision for the Aerotropolis. The site has access to Elizabeth Drive which will be a major route into the airport and the SEPP has zoned the land for future employment uses. However, the current Development Application has not adequately demonstrated that the site is suitable for the development proposed. Details relating to remediation have not been provided, heritage matters have not been satisfactorily resolved, and further details relating to noise and air quality are required. Further, Transport for NSW have raised concerns about the proposed development on transport grounds. Therefore, the site is not suitable for the development as proposed.

In addition, consideration is given to whether the proposed development meets the Objects of the Act. Section 1.3 of the Act contains ten 'objects' and of these, it is considered that 5 objects are relevant to the proposed development. They are:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources;
- (c) to promote the orderly and economic use and development of land;
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats;
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage); and
- (g) to promote good design and amenity of the built environment.

The proposed development is not considered to meet the above Objects of the Act. The proposal does not promote the orderly development of land and does not have adequate regard for the strategic objectives for the Aerotropolis which go beyond basic land use. The strategic principles for the Aerotropolis include 'Connecting with Country' and 'landscaped-led design'. Although changes to the natural landform are inevitable to allow development to proceed, the Aerotropolis documents refer to respecting natural topography and connecting with South Creek.

Further, the draft Aerotropolis Precinct Plan shows at Figure 30 (page 127) that a road is located at the eastern end of the site, between the development site and the riparian corridor. This road is shown as running in a north-south direction and connecting with Elizabeth Drive. The proposed development would result in earthworks in the approximate location of where this road is shown.

In addition, the proposed loss of vegetation, impact to heritage, resulting land form and appearance of the site boundaries in context does not meet the objects stated above.

Section 4.15(1)(d) Any Submissions

Community Consultation

In accordance with the Act and Regulations, consideration has been given to submissions and external referrals.

The application was advertised, notified and publicly exhibited in accordance with the requirements for Designated Development, between 13 December 2019 and 31 January 2020. This includes notifying the Department of Planning, Infrastructure and Environment of the public submissions. A response from the Department was received on 9 March 2020 requesting that Council consider the comments made in the submissions as well as the draft documents (at that time) that relate to the Aerotropolis (WSAP, Discussion Paper and Draft DCP - Phase

1).

Council has received 4 public submissions which are outlined in the following table. The submissions were received in response to the original proposal. The amended application was not required to be re-notified. The submissions include both concerns, comments and statements of support.

Submitter and Comments Made: Department of Infrastructure, Transport, Cities and Regional Development (Federal) (Concerns)	Council Staff Response:
The Department does not feel it is appropriate to consider applications for development in advance of precinct planning work undertaken by the Western Sydney Planning Partnership.	Agreed - notwithstanding that a development application for works can be lodged under the current LEP and Infrastructure SEPP, the Stage 1 LUIIP sets out the process to be followed for "out-of-sequence" proposals, including that they must be submitted to, and assessed by, the Department through a planning gateway process. Notwithstanding this, it is not considered that the proposed development addresses the principles and objectives of the WSAP and Draft Precinct Plan.
The WSAP and Precinct Planning work will provide the detailed planning controls and guidance to ensure the protection and operation of the Western Sydney International (Nancy-Bird Walton) Airport.	Agreed - it is considered that the proposed development has not addressed the vision and principles outlined in the WSAP and draft Precinct Plan.
Council is encouraged to ensure that the applicant is familiar with the guidelines under the National Airports Safeguarding Framework and is aware that any matters concerning infringement of the Obstacle Limitation Surface (OLS) are to be referred to the Western Sydney Airport.	The applicant is aware of these requirements and any subsequent development application to construct buildings on the land will come under the procedural requirements of the Aerotropolis SEPP which is now made.

Submitter and Comments Made: Western Sydney Airport (Commonwealth government business enterprise established to construct and operate the Airport) - WSA (Comments and Concerns)	Council Staff Response:

WSA understands that Mirvac has previously considered a range of employment and light industrial uses on the site, however the current DA is for a Waste Management Facility and the submission is based on that proposed use.	This comment is acknowledged. Council's Planner has spoken with the author of the submission to provide further details about the proposal, including the intent of the applicant to not use the site as a waste management facility after the initial disposal of waste (imported material). However, it is also acknowledged that any development consent is bound to the land, not the individual.
Lack of consultation with WSA and consideration of potential aviation impacts. The SEARs state that during preparation of the EIS, the applicant must consult with surrounding landowners likely to be impacted by the proposal. The airport is approximately 800m from the site and the site is located directly under the future approach and departure flight paths. WSA was not consulted by the applicant. The EIS has not given consideration to the future aviation operations or considered the National Airports Safeguarding Framework, principles of which are contained in the WSAP and proposed SEPP.	Noted. The applicant amended the EIS following exhibition of the WSAP and Discussion Paper. The WSA was notified that an amended EIS was submitted.

Nature of proposed use and waste materials to be imported - potential land use conflicts that may arise from a new waste management facility located near the Airport and under a runway approach path, depending on the type of waste that can be imported to the site.	This concern relates to the future and ongoing use of the site being a waste management facility. It is understandable that this concern has been raised as the proposal is for a waste disposal facility. The concern relates to putrescible waste (food and organic matter) attracting wildlife and birds that could in turn lead to bird strikes which could harm the operations of the Airport. Gases can also be generated from waste and this could lead to gas plumes or gas burns. However, the applicant does not intend to use the site as a waste management facility in the common understanding of the phrase. The applicant would have accepted a time limited consent of 2 years and further restrictions on the type of waste to be imported. Limiting the use through conditions could have addressed this issue if the application were recommended for approval. In addition, the Aerotropolis SEPP prohibits a waste resource facility that includes organic or putrescible waste on the site as the site is partly contained within the 3km wildlife buffer zone (although the Aerotropolis SEPP does not apply).
The Airport's protected air space given that the land is subject to the Airport's Obstacle Limitation Surface (OLS). Part of the site sits within an OLS up to RL 125.5 (AHD) and part of the proposed earthworks will result in a finished landfill surface of RL 58.5 (AHD), which will not penetrate the OLS. However, more information relating to structures, stockpiles, machinery and equipment would be required to ascertain any impacts on the OLS.	This comment is also related to the ongoing use of the site as a waste management facility, although further information relating to any waste to be stockpiled could be obtained from the applicant. Given the OLS level being at RL 125.5, it is not considered necessary at this time to require further information about the height of stockpiles and machinery, and if the application were supported, conditions of consent could address this issue.
Environmental management - a Landfill Environmental Management Plan should be submitted.	Noted. This request is understandable given the terminology of the proposed use, but is not relevant to the actual works proposed.

Traffic impacts - it is unclear if the traffic assessment has taken into account cumulative impacts of major infrastructure such as the Metro Rail and M12 projects, widening of Elizabeth Drive, the M7 and The Northern Road	Agreed. Transport for NSW have raised concerns with the information submitted and this is discussed below.
Submitter and Comments Made: SUEZ Australia & New Zealand (Comments)	Council Staff Response:
The SUEZ submission should not be regarded as an objection. The proposed Mirvac waste management facility should not unduly limit the ongoing function of the SUEZ waste facility through the proximity of future sensitive receptors. Proposed land use changes should be assessed recognising SUEZ's ongoing operations. In this regard, SUEZ believes the proposal and any future industrial use to be fully compatible with the current (and expanded) SUEZ operations.	Noted. The submission has requested the need for ongoing discussions between landowners to ensure that future developments take into account the existing and approved expansion of the SUEZ facility.
SUEZ suggests that master planning for future development within Mirvac's property may consider potential synergies between their site's ultimate proposed land use and SUEZ's ongoing operations.	Agreed - the proposal includes a batter along the site's western boundary, where it adjoins the SUEZ site. This is not considered to be an adequate interface to the adjoining site.
Submitter and Comments Made: WestConnex (Support)	Council Staff Response:
The WestConnex project is a State Significant Infrastructure Project approved by the Department of Planning, Infrastructure and Environment. It involves a spoil export requirement of approximately 8,200,000 tonnes with spoil disposal activities forecast for completion in 2022. The WestConnex EIS stipulates a performance outcome for sustainability of 80% of usable spoil to be reused or recycled. WestConnex therefore support the subject site as a spoil disposal location and the site is also located on an approved spoil haulage route to the currently under construction Western Sydney Airport.	These comments are noted. It is acknowledged that the reuse of spoil is a good environmental outcome and that there is a current opportunity to accept waste from a large infrastructure project in Sydney. The acceptance of waste from this project is not the primary concern for the proposal. The concerns are related to what is done with the waste when it is received and placed on the subject site. It is the proposed earthworks and benching of the site that is the main concern outlined in this Report.

External Referrals

The application was also referred to a number of State agencies as well as the Western Sydney Planning Partnership. The comments received are summarised below.

Transport for NSW (TfNSW):

Transport for NSW commented on both the original and amended proposal, by letter dated 18 February and 17 November 2020 respectively. TfNSW have stated that they do not support the proposal in its current form. They state that the Construction Traffic Management Plan has not been amended as per their request to provide additional details in their first submission. In this regard, they have wholly reiterated the concerns raised in their first submission. This includes the following:

- A cumulative traffic study indicating the impacts from the development at surrounding road intersections; and
- That the traffic modelling should consider the cumulative traffic impacts in the context of any other known planning proposals and developments in the precinct, including the need for upgrades and the impact on Elizabeth Drive.

In addition, their most recent letter also states that the intersection of Elizabeth Drive and Martin Road has recently been given approval for a signalised T-intersection as part of the development consent to the south of Elizabeth Drive, and that this should be taken into account in any future traffic study.

With regard to the widening of Elizabeth Drive, TfNSW state that the site will be affected by the proposed widening of the road and that (if the road widening does proceed) the road corridor widening would be in the region of 30 metres. They then request a 30 metre setback from the current alignment of Elizabeth Drive to preserve the corridor. In this regard, the amended proposal has set back the earthworks 30 metres from Elizabeth Drive. However, the planning concern raised is that this setback would only allow the land to be reserved for the road widening. The treatment of the future interface with the widened road is still questionable and it is unlikely that there would be adequate space for suitable landscaping and consideration of levels between the widened road and the future development.

In addition, the Draft Precinct Plan and Technical Report show that Elizabeth Drive is intended to be a 60m wide primary road, with a signalised intersection at the corner of the unnamed road leading to the SUEZ resource recovery site (adjoining the subject site to the west).

Natural Resources Access Regulator (NRAR):

The proposed development requires approval under Section 91 of the Water Management Act 2000. In this regard, NRAR have provided their General Terms of Approval dated 10 February 2020. If the application were recommended for approval, the conditions requested by NRAR would be included in the consent. Before works commenced, a Controlled Activity Approval would then be required. The application was also referred in the Planning Portal to Water NSW in relation to the proposed dam dewatering. Water NSW rejected the referral stating that NRAR was the appropriate agency to provide comment.

Environment Protection Authority (EPA):

Under the Protection of the Environment Operations Act, 1997, the EPA may be required to issue a licence or a Resource Recovery Order or Exemption. In this case, the fill proposed to be imported to the site will only be either VENM or ENM (Virgin Excavated Natural Material or Excavated Natural Material). In this regard, the EPA have issued a letter dated 2 March 2020 stating that *"It does not appear that an Environment Protection Licence to perform the proposed activities at the premises is required"*.

Western Sydney Planning Partnership (WSPP):

The WSPP first provided comments on 15 May 2020 in relation to the **original** proposal. In this regard, the following comments were made (text in **bold** provided for emphasis):

- The site straddles the Badgerys Creek Precinct and Wianamatta-South Creek Precinct. The draft WSAP outlines principles for planning for each precinct. Badgerys Creek Precinct is identified for primarily employment generating uses while Wianamatta-South Creek has been primarily identified for biodiversity conservation and enhancement;
- Page 16 of the Discussion Paper acknowledges a **waste or resource management facility can be permitted with consent once the proposed rezoning occurs**. The portion of the site where the works will occur is proposed to be rezoned to 'Enterprise'. However, **approval for a waste management facility could be premature**;
- The size of the fill, **particularly in height, is substantial**. Elizabeth Drive will be a key entry boulevard traversing the Aerotropolis and is a potential road link into Western Sydney Airport. There is concern raised in relation to the **visual impact of a large amount of fill** being able to be seen from adjacent properties as well as from the South Creek corridor;
- The Partnership has an **implementation strategy for addressing interface with an activate open space corridor** through precinct planning of Wianamatta-South Creek. The precinct planning is yet to occur and the fill directly adjacent to the west of this precinct within this proposal **has not had the opportunity to benefit from precinct planning** inputs;
- Council should give due regard to the vision of the Aerotropolis as provided in the planning package which advocates a **landscape led approach to design** as well as **retaining a green, biodiverse landscape**; and
- The DA contains insufficient detail of the proposed future development and it is **difficult to determine whether the eventual development will be consistent with the vision** for Badgerys Creek Precinct and if it would be compatible with the future surrounding uses.

The WSPP provided further comments with regard to the amended proposal on 1 December 2020. With regard to the **amended and current** proposal, the following comments have been made by the Partnership (text in **bold** provided for emphasis):

- The proposed **waste disposal facility is consistent with the objectives of the Enterprise Zone**, but no outdoor processing, organic or putrescible waste would be permitted;
- Concerns about the amount of fill proposed for the site. The **footprint** of the proposed fill, **particularly in height and mass is substantial and considered excessive**;
- The proposal **does not meet the opportunities** listed on page 45 of the precinct plan in relation to "retain and enhance existing vegetation", and "respect and conserve heritage items";
- The proposal does not meet the design opportunities identified on page 36 of the precinct plan to "respect topography and ensure clear and legible links between ridgetops and creek lines". The levelling of the site and the extent of proposed fill which appears to be up to 10m in some locations, **does not respect the topography of the site**;
- The detailed design should **avoid or minimise impacts on known Aboriginal sites** and areas of PAD. The further investigation could be conditioned as part of a deferred commencement consent or similar. It is recommended the applicant consult with relevant key stakeholders and that this consultation informs the approach and final design of the waste management facility should it be supported by Council;
- The Partnership is concerned about the proposed impact on non-Aboriginal archaeological items of heritage significance which may be located within the site. In particular, the report by Extent Heritage (2020) (commissioned by the Partnership) notes that **archaeological remains associated with Exeter Farm have the potential to be State-significant**, despite the disturbance of the site. The Extent report has also recommended the site be considered for a heritage listing. Additional research and assessment is encouraged to be undertaken. The application should be referred to Heritage NSW for comment;
- **Unclear if revised plans will allow for an activated interface with Wianamatta-South Creek**. Unclear how the land in the 50m setback adjacent to the 1 in 100 year flood extent can be used in the

future and how the land in this location will be accessed. The 1 in 4 gradient batter immediately to the west is close to 40m wide;

- The Proponent should consider stepping down of the site more in line with existing natural ground levels. The **proposed benching arrangements are not appropriate for the site** and the **final levels can be stepped down much more** towards Wianamatta-South Creek to allow for views to locations from the creek line;
- The increased 30m setback to Elizabeth Drive for the filling work is noted. This **may support Elizabeth Drive as a city serving road corridor**;
- The revised proposal **may not be able to deliver and support the proposed layout as depicted in the draft precinct plan**. The proposed location of batters associated with the landfill **contradict the location of proposed roads**, open space and identified land uses as per page 127 of the draft precinct plan. The draft precinct plan shows an indicative precinct layout including a street network though the subject site including an Eastern Ring Road extension to the north of Elizabeth Drive as well as other industrial streets;
- While setbacks have been increased in the revised plans, the Partnership is still concerned regarding the **detrimental visual impact the excessive amount of fill** will have to the streetscape, adjacent properties and from the Wianamatta-South Creek corridor;
- The Partnership is extremely **concerned with the extent of clearing proposed** and strongly encourages the proponent to retain as much vegetation as possible on the site; and
- As the DA contains very few details of the proposed future development, **it is premature to determine whether eventual development will be consistent** with the vision for the Badgerys Creek Precinct.

Referrals

The application was referred to the following stakeholders and their comments have formed part of the assessment:

Referral Body	Comments Received
Building Surveyor	No objections
Development Engineer	No objections - subject to conditions
Heritage	Not supported
Environmental - Environmental management	Not supported
Environmental - Waterways	No objections - subject to conditions
Environmental - Public Health	No objections
Environmental - Biodiversity	Not supported
Traffic Engineer	Awaiting additional information

Development Engineer

The amendments made to the proposal have satisfied previous technical concerns raised by Council's Engineer. This includes setting the works back from the adopted 1 in 100 year flood line and altering the gradient of the batter to comply with Council's specifications (minimum 1 in 4). The applicant has indicated that the three proposed sediment basins will be temporary and only used for sediment and erosion control purposes. On this basis, Council's Engineer has raised no objection to the location of the temporary basins but has acknowledged that the final form of stormwater management and basin location/s for the entire development is unclear.

Council's Engineer has also commented that the batters are intended to be stabilised with placement of stripped topsoil, however, no landscaping or re-vegetation plans for long term stabilisation of the batter is included in the proposal.

Environmental - Biodiversity

The applicant submitted additional information to address the proposed loss of vegetation and biodiversity. The several comments / feedback received from Council's Biodiversity Officer has been relayed to the applicant and further information was then submitted to respond to Council staff's comments. However, Council's Biodiversity Officer has concluded that the proposed development is still not acceptable.

The remaining concerns from Council staff are as follows:

- The Biodiversity Development Assessment Report (BDAR) recommends a Vegetation Management Plan (VMP) for the riparian corridor, a Microbat Management Plan, and an Erosion and Sediment Control Plan. These documents are still outstanding and have been requested upfront given that vegetation clearance is proposed. The applicant has stated that these documents could be lodged post-development consent. This is not agreed;
- The documentation does not include evidence of consideration and analyses of alternative options to avoid and minimise biodiversity impacts. The applicant has stated that impacts to the good quality native vegetation within the riparian corridor have been avoided and they could provide this information. The information remains outstanding, however, it highlights the somewhat piecemeal approach to the proposed development as no works are proposed within the riparian corridor as part of this application to potentially offset the total loss of vegetation within the area of the proposed works;
- An adaptive management strategy is not documented in the BDAR, yet is a requirement of the Biodiversity Assessment Method (BAM). The applicant has responded to state that the strategy is only required for prescribed impacts that are infrequent or difficult to measure. The applicant's consultant does not believe that the removal of artificial dams, vegetation, exotic vegetation, and buildings warrants the requirement for an adaptive management strategy. Council's Biodiversity Officer does not agree and has suggested that the strategy focus on adaptive management of indirect impacts on the riparian corridor. It is also noted that the Aerotropolis Planning Package refers to a landscape-led approach and identifies the importance of the blue-green spine of the Wianamatta - South Creek corridor; and
- A full assessment of the application cannot be made as information relating to efforts taken to avoid impacts has not been submitted and therefore, pursuant to Section 7.16(2) of the Biodiversity Conservation Act 2016, an assessment of '*serious and irreversible impacts on biodiversity values*' cannot be made.

Council's Biodiversity Officer has concluded that the proposed development is not supported in its current form.

Environmental - Environmental management

Council's Environmental Health Officer maintains the following concerns with the amended proposal:

Noise and Vibration - The Construction Noise and Vibration Management Plan has not taken into account sensitive receivers being adjacent properties to the north-west and north-east. The Plan shows that there would be some considerable exceedance of noise criteria (approximately 15dBA) for residents located to the south. Although the report recommends mitigation measures, it has not demonstrated the level of reduction that will be achieved through implementing such recommended mitigation measures.

Air Pollution and Odour - The same concern regarding identifying the surrounding sensitive receivers is

raised with regard to the submitted Construction Air Quality Management Plan. Sensitive receivers located to the north-west and north-east should be taken into account, particularly as the report states that the majority of winds throughout the year blow from the south-west and west-southwest directions. In addition, Section 6.2.1 of the report states that further assessment is required given that there are sensitive receptors located within 350m from the site, less than 50m from the route to be used by construction vehicles, and within 500m from the site entrance.

Heritage

Council's external heritage consultant does not support the proposal and has recommended that the application be amended to be Integrated Development to allow a proper referral to the NSW Heritage Office. Both Aboriginal and non-Aboriginal heritage matters have been discussed throughout this report.

Traffic Engineer

Council's Traffic Engineer requested a Traffic Impact Assessment to be lodged in addition to the submitted Construction Traffic Management Plan. Further details relating to traffic issues are discussed in the Referrals section of the Report (above) in relation to the submission from Transport for NSW.

Section 4.15(1)(e)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 deemed to be in the public interest.

The subject site is identified as being located within the unzoned broader Western Sydney employment area under State Environmental Planning Policy (Western Sydney Employment Area) 2009 (WSEA SEPP) and is identified within the Land Use Infrastructure and Implementation Plan (Stage 1 LUIIP) as being subject to future strategic land use categorisation and detailed precinct planning.

Approval of a development that significantly changes the natural topography of the land by filling to the scale and height shown on the civil drawings, and creating level pads that do not interact with adjoining land, is in conflict with the purpose, aims and strategic objectives of the Stage 1 LUIIP and WSEA SEPP, as well as other planning documents including the WSEA SEPP, the Penrith LEP and the Penrith DCP.

The applicant has stated that the proposed development is 'shovel-ready' and could help stimulate the NSW economy, given the negative impacts of COVID-19 to the NSW economy. This was a matter raised with the Panel at the briefing in May and the Panel considered whether some reduced scope of works could strike an appropriate balance.

While economic stimulus is a valid consideration and is in the public interest, in this particular case, the scale of the proposed fill and resulting change to the natural topography of the land is too significant. This is particularly concerning when you consider the further detailed precinct planning that is taking place to guide future development of the surrounding sites and broader area, including widening Elizabeth Drive and focusing on creating a usable blue-green grid through South Creek.

Therefore, although there may be some public benefit in the short term in helping to stimulate the economy, the long term effect of carrying out the proposed works is considered to adversely impact the public interest, because the site may end up having significant engineered cut and fill to a height unlikely to be expected in the area.

Conclusion

Setting aside the planning definitions and terminology, and looking at the proposed development in the simplest sense, the proposal seeks to carry out earthworks on the site in the form of cut and fill. Some of the fill will be imported to the site from other infrastructure projects across Sydney. The land will be worked to create engineered levels which will result in three level benches being created. The three benches will each be at a lower level than the preceding one and will step down towards South Creek to the east of the site. The proposal has been amended by setting back the earthworks 50m from the edge of the riparian corridor to the east and 30m from Elizabeth Drive to the south. The amount of fill will be up to 9m in some parts of the site, most notably at the eastern edge adjoining the riparian corridor, and 1 in 4 batters are proposed as site edge treatments. The works will also require the removal of all vegetation from the area of the proposed earthworks and will necessitate the removal or salvage of Aboriginal cultural heritage (artefacts and deposits).

The subject site is located within the area identified as part of the new Western Sydney Aerotropolis. The strategic documents for the Aerotropolis became publicly available from August 2018, first with the Stage 1 LUIIP, then the WSAP, DCP Phase 1, and the Discussion Paper for the SEPP. Following the adoption of these documents came the Aerotropolis SEPP, and currently on exhibition is the draft Aerotropolis Precinct Plan and accompanying Technical Report for Urban Design and Landscape.

Although some of these statutory documents do not relate to the Development Application, because of Savings Provisions, the documents as a whole set the scene for the type of development anticipated to realise the strategic vision for the new Aerotropolis. These documents set out principles for development. They include a 'landscape-led' approach to design, 'connecting with country', and developing the blue-green spine of the area by activating and protecting the Wianamatta - South Creek corridor.

The more detailed planning for the Aerotropolis refers to the local character landscape being relatively flat and open, only gently undulating; respecting the natural topography of the land; avoiding large retaining between development lots; roads and streets should align as close as possible to existing topography; balance cut and fill to minimise imported soil; deal with level differences internally within the site; create a suitable interface; retain and enhance existing vegetation; and respect and conserve heritage items.

In addition, the Western Sydney Employment Area SEPP requires a site specific DCP for the site (or a waiver), neither of which has been lodged with the Development Application. The Infrastructure SEPP, although accepted as the means to overcome the prohibition in the LEP for part of the works (the importation of waste), is not considered to extend to the entirety of the proposed works, which is the earthworks (cut and fill). In addition, the aims and controls in the Penrith LEP and DCP have been taken into account and the proposed development is not considered to meet these objectives.

When all of this is considered, this planning assessment has concluded that the proposed works are unacceptable on planning grounds. The amount of cut and fill is excessive and does not relate to or respect the natural topography of the land. The proposed levels will result in a poor interface with adjoining lands, including Elizabeth Drive which is to be widened, and the Wianamatta - South Creek riparian corridor which is to form a central blue-green spine through the Aerotropolis. The proposed edge treatments are 1 in 4 batters which are likely to rely on landscaping or retaining walls in the future to deal with the level difference. This does not allow active and visual connection into and out of the site, something that is particularly important for the riparian corridor and Elizabeth Drive. The proposed development has also not adequately addressed loss of vegetation, remediation, and heritage impacts.

Although it is acknowledged that the site may be 'shovel-ready' and may help to stimulate the NSW economy, these factors do not overcome or outweigh the planning and merit based concerns raised with the proposal. The applicant has been provided with the opportunity to reduce the height of the fill, submit additional reports

(biodiversity, traffic and remediation) and amend the proposal to allow an Integrated Development referral to the NSW Heritage Office. Although some amendments to the proposal have been made, the overarching concerns about the substantial changes to the levels of the land have not been addressed. Nor have all the outstanding concerns regarding remediation, biodiversity and heritage reached an acceptable position.

The Development Application is therefore recommended for refusal.

Recommendation

It is recommended that Development Application DA19/0826 for works including the importation, placement and compaction of clean waste (soil); bulk earthworks (cut and fill); creation of level pads with batters on edges; removal of vegetation; demolition of structures; dam de-watering; construction of temporary sediment basins; and heritage salvage works at 1669-1723 Elizabeth Drive, Badgerys Creek be:

1. Refused for the reasons set out in this planning assessment report; and
2. That those making submissions, and referral comments, are notified of the determination.

CONDITIONS

Refusal

- 1 The proposed development, by virtue of the proposed substantial change to the natural and existing topography of the land, does not represent the orderly development of land and does not promote a better environment by the proper management of the State's natural resources, and is therefore contrary to the objects of the Environmental Planning and Assessment Act, 1979 at Section 1.3(a), (c), (e), (f), and (g), and Chapter C1 of the Penrith Development Control Plan.
- 2 The proposed development has not adequately addressed traffic and transport related matters as outlined in the two letters from Transport for NSW dated 18 February 2020 and 17 November 2020, and as a result, the proposal is unacceptable on transport and traffic grounds, taking into account the considerations at Clause 123(1)(d) of the State Environmental Planning Policy (Infrastructure) 2007, the Western Sydney Aerotropolis Plan, the Penrith LEP and Chapter C10 of the Penrith DCP.
- 3 Having regard to Section 4.15(1)(b) of the Environmental Planning and Assessment Act, 1979, the proposed development, by virtue of the scope of works, height of fill and depth of cut, interface treatments, and resulting significant change to the natural topography of the land, will have an adverse impact to the visual appearance of the site and area, including the contextual relationship to adjoining sites and adjoining public domain, and does not respect the natural topography of the land. The proposed development is therefore likely to derogate from the desired future character and appearance of the area, taking into account the strategic vision for the area contained in the various Aerotropolis and regional planning related documents and Clause 123(1)(c)(ii) of the State Environmental Planning Policy (Infrastructure) 2007.
- 4 The proposed development does not satisfy the requirements of Clause 18(1) of the State Environmental Planning Policy (Western Sydney Employment Area) 2009 in that a Development Control Plan, meeting the requirements outlined in Schedule 4 of the SEPP, has not been submitted, nor has a waiver been granted for such. Therefore, the consent authority must not grant consent to development on the land in the absence of either the required DCP or a waiver.
- 5 The component of the proposed development that best meets the definition of "earthworks" in the Penrith Local Environmental Plan 2010 is deemed to be prohibited in the RU2 - Rural Landscape Zone pursuant to that Instrument.
- 6 The proposed development does not address the interface with the Wianamatta-South Creek riparian corridor, does not provide a landscape led approach to design and development, and does not provide sufficient detail of the proposed future development so as to determine whether the eventual development will be consistent with the vision for Badgerys Creek Precinct and if it would be compatible with the future surrounding uses. The proposed development therefore does not meet the future vision for the Aerotropolis as provided in the Western Sydney Aerotropolis Planning Package and strategic documents for Western Sydney.

- 7 The proposed development, by virtue of the proposed loss of all vegetation from the area of the earthworks, does not meet the 'landscaped-led' approach to design outlined in the Western Sydney Aerotropolis Planning Package and will have an adverse impact to the character, appearance and biodiversity value of the area, which is contrary to the aims of the RU2 zone in the Penrith Local Environmental Plan 2010, objectives and requirements of the Biodiversity Conservation Act and Chapter C2 of the Penrith Development Control Plan. In addition, there is uncertainty as to whether part of the development site is intended to be a pocket park or urban park in the Aerotropolis planning documents and the proposed development does not align with this intention.
- 8 The proposed development, by virtue of the loss of both Aboriginal cultural heritage and non-Aboriginal heritage, is contrary to the aims and controls of Clause 5.10 of the Penrith Local Environmental Plan 2010 and Chapter C7 of the Penrith Development Control Plan, the objectives and principles of the Western Sydney Aerotropolis Planning Package which refers to a 'Connecting to Country' approach to development of lands, and is also contrary to the heritage report by Extent (2020) which suggests the existence of Aboriginal and non-Aboriginal areas of heritage significance that warrant further investigation.
- 9 The proposed development is likely to have an adverse impact on surrounding residential properties by way of noise and air pollution / odour and the documentation submitted with the Development Application does not adequately identify all the surrounding sensitive receivers, and does not meet the objectives and controls of Chapter C12 of the Penrith Development Control Plan.
- 10 The proposed development does not satisfactorily address the objectives and requirements of State Environmental Planning Policy No. 55 - Remediation of Land in that an amended Detailed Site Investigation would be required to address the recommendations made in the submitted Detailed Site Investigation report, as well as a Remedial Action Plan which outlines how the site can be remediated to make the site suitable for the proposed development.
- 11 The proposed development is inconsistent with the following aims, objectives and provisions of the Penrith Local Environmental Plan 2010:
 - (i) Clause 1.2 Aims of Plan - The proposal is inconsistent with the aims of the plan to promote development that is consistent with Council's vision for Penrith and to provide for the management, orderly and economic development, and conservation of land in Penrith;
 - (ii) Clause 2.3 Zone Objectives and Land Use Table - The proposal is inconsistent with the objectives within Zone RU2 Rural Landscape and does not complement the aims and objectives of the adjoining Zone E2 Environmental Conservation;
 - (iii) Clause 5.10 Heritage Conservation - The proposal is inconsistent with the objectives relating to Aboriginal cultural heritage and non-Aboriginal heritage;
 - (iv) Clause 7.1 Earthworks - The proposed amount and height of cut and fill will result in an adverse and significant change to the natural topography of the land; and
 - (vi) Clause 7.5 Protection of Scenic Character and Landscape Values - The bulky earthworks situated in various viewpoints along Elizabeth Drive and the Wianamatta-South Creek riparian corridor, results in adverse physical and visual impacts on the surrounding landscape.

12 Having regard to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act, 1979, the proposal is inconsistent with the following chapters and parts of the Penrith Development Control Plan 2014:

- B - Principles;
- C1 - Site Planning and Design Principles;
- C2 - Vegetation Management;
- C4 - Land Management;
- C7 - Culture and Heritage;
- C8 - Public Domain;
- C10 - Transport, Access and Parking;
- C12 - Noise and Vibration; and
- D5.9 - Extractive Industries.

13 Having regard to Section 4.15(1)(e) of the Environmental Planning and Assessment Act, 1979, the proposed development is not in the public interest, as the proposal fails to address transport and traffic matters, resolution of Aboriginal cultural heritage and non-Aboriginal heritage matters, loss of vegetation, remediation of the land, and consistency with the strategic vision for the Aerotropolis.

Appendix - Development Control Plan Compliance

Development Control Plan 2014

Part B - DCP Principles

Part B - DCP Principles

The key principles in Part B of the DCP relate to creating a sustainable city of Penrith. The DCP states that the principles and objectives will be satisfied by ensuring that any proposed development is in accordance with the development controls set out in the DCP. It is considered that the proposed development does not comply with the following Principles:

Principle 3: Recognise the intrinsic value of biodiversity and natural ecosystems, and protect and restore them;

Principle 5: Build on the characteristics of ecosystems in the development and nurturing of healthy and sustainable cities; and

Principle 6: Recognise and build on the distinctive characteristics of cities, including their human and cultural values, history and natural systems.

Part C - City-wide Controls

C1 - Site Planning and Design Principles

Clause 1.2.4 in Chapter C1 of the Penrith DCP refers to responding to the site's topography and landform. The proposed development will result in a substantial change to the site's topography and landform. For the reasons outlined in this report, those proposed changes are not acceptable and the proposal does not comply with this clause.

C2 - Vegetation Management

Clauses 2.1 and 2.2 in Chapter C2 refers to preservation of trees, vegetation and biodiversity corridors. The proposed development will result in a total loss of vegetation in the area of the proposed earthworks. For the reasons outlined in this report, those proposed changes are not acceptable and the proposal does not comply with this clause.

C4 - Land Management

Clause 4.1 and 4.2 in Chapter C4 refers to site stability, earthworks and landfill. For the reasons outlined in this report, the proposed development is not considered to comply with the objectives of the DCP in this regard.

C7 - Culture and Heritage

Clauses 7.1 and 7.2 in Chapter C7 refers to European and Aboriginal heritage. For the reasons outlined in this report, the proposed development is not considered to comply with the objectives of the DCP in this regard.

C10 - Transport, Access and Parking

For the reasons outlined in this report, including the submission from Transport for NSW, the proposed development is not considered to comply with the objectives of the DCP in this regard.

C12 - Noise and Vibration

For the reasons outlined in this report, including the comments from Council's Environmental Health Officer, the proposed development is not considered to comply with the objectives of the DCP in this regard.

D5 Other Land Uses

D5.9 - Extractive Industries

The DCP states that extractive industry includes the winning of sand, soil, gravel, rock, or similar materials from the ground and includes excavating. The DCP sets out considerations such as noise, dust, visual impact and location of the works in the context of surrounding land and vegetation. For the reasons outlined in this report, it is not considered that the proposed development, which involves excavation and extracting soil from the ground, meets the objectives of the DCP.