



## Land and Environment Court New South Wales

<b>Medium Neutral Citation:</b>	<b>Toga Penrith Developments Pty Limited v Penrith City Council [2022] NSWLEC 1017</b>
<b>Hearing dates:</b>	3, 6-8 December 2021
<b>Date of orders:</b>	14 January 2022
<b>Decision date:</b>	14 January 2022
<b>Jurisdiction:</b>	Class 1
<b>Before:</b>	Morris AC
<b>Decision:</b>	<p>The orders of the Court are:</p> <p>(1) The applicant is to pay the respondent's costs thrown away as a result of the amendments made to the application as agreed or assessed pursuant to the provisions of s 8.15 of the Environmental Planning and Assessment Act 1979.</p> <p>(2) The appeal is dismissed.</p> <p>(3) Development Application DA20/0148 for the construction of a mixed use development with three level basement car park at Lot 300 in DP 1243401 and known as 634-638 High Street and 87-93 Union Road, Penrith is refused.</p> <p>(4) The exhibits, other than exhibits F and 1, are returned.</p>
<b>Catchwords:</b>	DEVELOPMENT APPLICATION – mixed use development – incentive clause to provide additional floor space – whether a design competition has been held in relation to the development -whether value of community infrastructure is sufficient – whether development exhibits design excellence – whether clause 8.2 of Penrith Local Environmental Plan applies to the development
<b>Legislation Cited:</b>	<p>Environmental Planning and Assessment Act 1979 ss 8.7, 8.15</p> <p>Penrith Local Environmental Plan 2010 cl 2.3(2), 2.7, 4.3, 4.4, 4.5, 7.1, 7.4, 7.5, 7.7, 7.8, 8.2, 8.3, 8.4, 8.7</p> <p>State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004</p> <p>State Environmental Planning Policy (Infrastructure) 2007 cl 104</p> <p>State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development</p>
<b>Cases Cited:</b>	CC Builders (NSW) Pty Ltd v Georges River Council [2017] NSWLEC 1064
<b>Texts Cited:</b>	<p>Penrith City Council, Community Infrastructure Policy, (April 2018)</p> <p>Penrith Development Control Plan 2014</p> <p>Apartment Design Guide</p>

	Director General's Design Excellence Guidelines
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Toga Penrith Developments Pty Limited (Applicant) Penrith City Council (Respondent)
<b>Representation:</b>	Counsel: R Lancaster SC (Applicant) J Lazarus SC (Respondent)  Solicitors: Addisons (Applicant) Dentons (Respondent)
<b>File Number(s):</b>	21/126870
<b>Publication restriction:</b>	Nil

## JUDGMENT

- 1 **COMMISSIONER:** Toga Penrith Developments Pty Ltd (Toga) lodged Development Application DA20/0148 with Penrith City Council on 25 March 2020 seeking consent for excavation and construction and operation of a mixed use development comprising of:
  - One storey basement parking;
  - Five Storey podium comprising of ground level commercial premises, vehicular access, loading dock and four levels of upper level parking;
  - Two residential buildings (with total storeys including podium of 14 & 38 levels) comprising 356 apartments;
  - Augmentation of services and landscape works;
  - Public domain works to be dedicated to Council.
- 2 Due to the value of the proposal, the Sydney Western City Planning Panel (Panel) is the consent authority. As the Panel had not determined the application within the prescribed period, Toga is appealing its deemed refusal pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

### The proposal

- 3 Since the application was lodged, a number of amendments have been made to the application, the most recent being on the last day of the hearing when leave was granted to the applicant to amend the application to delete a small two storey commercial building adjacent to the eastern site boundary. That application is the application before the Court and was lodged on the NSW Planning Portal on 21 December 2021.
- 4 On the first day of the hearing leave had also been granted to the plans on which the majority of evidence in the hearing had been based and reflected areas of agreement between the experts during joint conferencing (Exhibit F). The leave relating to both amendments was granted subject to payment of costs thrown away pursuant to s 8.15 of the EP&A Act.
- 5 The plans now propose construction of a mixed use development comprising:
  - three storey basement parking;
  - one, two and four storey podium comprising of ground level commercial premises, vehicular access, loading dock, first, second and third floor carpark and apartments;

- fifth level communal open space and apartments and upper level apartments;
- Two residential buildings (with a total number of storeys including podium of 13 & 34 levels) comprising 354 apartments;
- Augmentation of services and landscape works;
- Public domain works to be dedicated to Council including construction of a new north/south link public road.

### **The site and locality**

- 6 The site is legally described as Lot 300 in DP 1243401 and known as 634-638 High Street and 87-93 Union Road, Penrith. John Tipping Grove bisects Lot 300 into two portions and the application relates only to the eastern portion of the site (site). That portion has a frontage of 43m to High Street, 105m to John Tipping Grove and 23m to High Street and area of 5,407m<sup>2</sup>.
- 7 John Tipping Grove is a two lane road with on street parking, ending in a cul-de-sac to the north where it meets High Street.
- 8 The site is generally flat and contains limited vegetation. A single storey older style building with frontage to High Street stands on the northern portion of the site with the remainder vacant. The other portion of Lot 30 is used as a property sales office and car sales yard.
- 9 High Street acts as the central east-west spine through the Penrith CBD. Further to the north is the Penrith City Council complex including a library and the Council's administration and civic building. To the north-east of the site is the Joan Sutherland Performing Arts Centre and Westfield shopping complex.
- 10 Directly to the south of the site is Union Road, and a three-storey residential flat building and low scale (1-2 storey) villa-style housing. Further south is a recently completed six storey residential flat building.
- 11 Directly to the east of the site, north of Union Lane, is a future development site located at 85-101 High Street. That site is currently vacant. Union Lane currently terminates at the site's eastern boundary.
- 12 A recently completed 8-9 storey residential flat building with ground floor commercial premises and built to boundary of the site is located to the south-east between Union Lane and Union Street.
- 13 The site is approximately 680m south-west of Penrith Railway Station and is approximately 700m of the Nepean River. The Blue Mountains can be seen from the site.

### **Planning controls**

- 14 The site is zoned B4 Mixed Use under the provisions of Penrith Local Environmental Plan 2010 (LEP). The proposed development is permissible with consent.
- 15 Clause 2.3(2) of the LEP requires that the consent authority must have regard to the objective for development in a zone when determining a development application in respect of land within the zone. The Objectives of the B4 zone are:
  - To provide a mixture of compatible land uses.
  - To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.
  - To minimise conflict between land uses within the zone and land uses within adjoining zones.
  - To create opportunities to improve public amenity.

- To provide a wide range of retail, business, office, residential, community and other suitable land uses.

- 16 An earlier development consent has been granted for the site for remediation and demolition and it is for that reason that the application does not include demolition of the existing structures that would be required pursuant to the provisions of cl 2.7 of the LEP. The applicant relies on this consent to address mandatory provisions such as contamination and earthworks.
- 17 Part 4 of the LEP contains Principal development standards with cl 4.3 Height of Buildings, 4.4 Floor space ratio and 4.5 Calculation of floor space ratio (FSR) and site area relevant to the contentions in the case.
- 18 The site has a maximum height of 24m pursuant to the provisions of cl 4.3 and maximum FSR of 3:1 under cl 4.4.
- 19 Clause 5.6 of the LEP provides that where development that includes an architectural roof feature that exceeds, or causes a building to exceed, the height limits set by cl 4.3, that development may be carried out with consent and subject to the consent authority being satisfied of a range of matters. Those matters are not relevant to the case however, reference to the clause is made in other relevant provisions.
- 20 Part 7 of the LEP contains Additional local provisions with cl 7.1 Earthworks, 7.4 Sustainable development, 7.5 Protection of scenic character and landscape values, 7.6 Salinity, 7.7 Servicing and 7.8 Active Street frontages all relevant to the application. There are no contentions that apply to these provisions. Having regard to the evidence and information submitted with the application, and the previous consent referred to at [16] I am satisfied that these provisions have been satisfied.
- 21 Part 8 of the LEP contains Local provisions – Penrith City Centre. The site is within the area to which that part applies. Land to the south of the site on the opposite side of Union Street is outside the City Centre.
- 22 Clause 8.2 of the LEP is in the following form:
  - 8.2 Sun access
  - (1) The objective of this clause is to protect public open space from overshadowing.
  - (2) (Repealed)
  - (3) Despite clauses 4.3, 5.6 and 8.4, development consent may not be granted to development on land to which this Part applies if the development would result in overshadowing of public open space to a greater degree than would result from adherence to the controls indicated for the land on the Height of Buildings Map.
  - (4) This clause does not prohibit development that does not alter the exterior of any existing building.
- 23 Clause 8.3 Minimum building street frontage requires a minimum street frontage of 20 metres. The site meets this requirement.
- 24 Clause 8.4 Design excellence is relevant to the contentions and is in the following form:
  - 8.4 Design excellence
  - (1) Development consent must not be granted for development involving the construction of a new building, or external alterations to an existing building, on land to which this Part applies unless, in the opinion of the consent authority, the proposed development exhibits design excellence.
  - (2) In deciding whether development to which this clause applies exhibits design excellence, the consent authority must have regard to the following matters—
    - (a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,
    - (b) whether the form and external appearance of the development will improve the quality and amenity of the public domain,
    - (c) whether the development will detrimentally impact on view corridors,
    - (d) (Repealed)
    - (e) how the development will address the following matters—
      - (i) the suitability of the land for development,
      - (ii) existing and proposed uses and use mix,

- (iii) heritage issues and streetscape constraints,
  - (iv) the relationship of the development with other buildings (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,
  - (v) bulk, massing and modulation of buildings,
  - (vi) street frontage heights,
  - (vii) environmental impacts such as sustainable design, overshadowing, wind and reflectivity,
  - (viii) the achievement of the principles of ecologically sustainable development,
  - (ix) pedestrian, cycle, vehicular and service access, circulation and requirements,
  - (x) the impact on, and any proposed improvements to, the public domain.
- (3) Development consent must not be granted for any of the following development on land to which this Part applies unless an architectural design competition has been held in relation to the development—
- (a) development in respect of a building that is, or will be, greater than 24 metres or 6 storeys (or both) in height,
  - (b) development that has a capital value of more than \$1,000,000 on a key site identified on the Key Sites Map,
  - (c) development for which the applicant has chosen to have an architectural design competition.
- (4) Subclause (3) does not apply if the Director-General certifies in writing that the development is one for which an architectural design competition is not required.
- (5) Development consent may not be granted for the erection or alteration of a building to which this clause applies that has a floor space ratio of up to 10% greater than that allowed by clause 4.4 or a height of up to 10% greater than that allowed by clause 4.3, unless—
- (a) the design of the building or alteration is the result of an architectural design competition, and
  - (b) the concurrence of the Director-General has been obtained to the development application.
- (6) In deciding whether to give concurrence to the development application, the Director-General must take into account the matters set out in subclause (2) and the results of the architectural design competition.
- (7) In this clause—
- architectural design competition** means a competitive process conducted in accordance with procedures approved by the Director-General from time to time.

25 Clause 8.7 Community infrastructure on certain key sites also applies to the application. The site is identified as Key Site 10 and the clause is in the following form:

#### 8.7 Community infrastructure on certain key sites

- (1) The objectives of this clause are—
  - (a) to allow higher density development on certain land in the City Centre where the development includes community infrastructure, and
  - (b) to ensure that the greater densities reflect the desired character of the localities in which they are allowed and minimise adverse impacts on those localities.
- (2) This clause applies to land identified as a key site on the Key Sites Map.
- (3) Despite clauses 4.3, 4.4 and 8.4 (5), the consent authority may consent to development on land to which this clause applies (including the erection of a new building or external alteration to an existing building) that exceeds the maximum height shown for the land on the Height of Buildings Map or the floor space ratio for the land shown on the Floor Space Ratio Map, or both, if the proposed development includes community infrastructure.
- (4) The consent authority must not consent to the erection of a building on land to which this clause applies if the floor space ratio for the building exceeds the following floor space ratio—
  - (a) in relation to development on land identified as “Key Site 1”, “Key Site 2”, “Key Site 8” or “Key Site 9”—5.5:1,
  - (b) in relation to development on land identified as “Key Site 3” or “Key Site 10”—6:1,
  - (c) in relation to development on land identified as “Key Site 4”, “Key Site 7” or “Key Site 11”—5:1,
  - (d) in relation to development on land identified as “Key Site 5”—2:1,
  - (e) in relation to development on land identified as “Key Site 6”—2.5:1,
  - (f) in relation to development on land identified as “Key Site 12”—6:1.
- (5) In deciding whether to grant development consent under this clause, the consent authority must have regard to the following—

- (a) the objectives of this clause,
  - (b) whether the development exhibits design excellence,
  - (c) the nature and value of the community infrastructure to the City Centre.
- (6) In this clause, community infrastructure means development for the purposes of recreation areas, recreation facilities (indoor), recreation facilities (outdoor), recreation facilities (major), public car parks or public roads.

- 26 The effect of this clause is to permit the construction of a development up to a maximum FSR of 6:1 where that development includes community infrastructure. The application relies on these provisions as the FSR is approximately 6:1. This is discussed later in the Judgment.
- 27 On Day 2 of the hearing, the applicant sought leave to amend the application to refine the extent of Community Infrastructure offered. Leave was granted subject to costs thrown away pursuant to s 8.15 of the EP&A Act.
- 28 That offer is contained in a letter dated 3 December 2021 having regard to the Council's *Community Infrastructure Policy* (CIP) and is further made as an offer to enter into a Voluntary Planning Agreement (VPA) in a letter dated 6 December 2021 (Exhibit J).
- 29 The VPA would apply to the eastern part of Lot 300 (the site) and offers to provide:
- (a) Construction of north-south road works (N-S Road), with 50% of total value of those works attributed to the provision of community infrastructure in satisfaction of cl 8.7 of the LEP;
  - (b) Dedication of land as a new public road. That land is located along the eastern portion of the site and is the N-S Road referred to above.
- 30 The offer suggests that the construction costs of the new road are \$2,503,256 and, as 50% is claimed, an amount of \$1,251,628 applies. Toga submits the value of the land to be dedicated as public road is \$2,950,000 so the total value of the offer is \$4,201,628.
- 31 The Council submits the offer is inadequate.
- 32 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX), State Environmental Planning Policy (Infrastructure) 2007 (SEPP Infrastructure), and State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP65) are all relevant to the application.
- 33 A BASIX Certificate has been issued for the development as required under cl 3(1)(a) of SEPP BASIX.
- 34 The application was referred to Transport for NSW (TfNSW) for comment as required pursuant to the provisions of cl 104 of SEPP Infrastructure. TfNSW has provided in principle support for the location of the proposed traffic signals at the intersection of High Street and the proposed N-S Road dependent on the warrants being met and the design being to its satisfaction.
- 35 The parties have addressed to terms of SEPP65 and there are no contentions that the provisions of the policy have not been met other than design issues.
- 36 Penrith Development Control Plan 2014 (DCP) applies to the site with Section C1 Site Planning and Design Principles, C3 Water Management, C6 Landscape Design, C8 Public Domain and C10, Transport, Access and Parking all containing controls relevant to the application.
- 37 Section C10.5.1 Parking provides a set of principles to be used when assessing the need for car parking requirements in the City of Penrith. In Mixed Use zones, subclause 2 states that:

“on-site parking is to be accommodated in basement parking except to the extent provided for below:

Up to 25% of the required parking can be provided above ground, where: it is located at least 16 metres behind a building alignment that addresses a public street or public space and/or fronting a service lane with appropriate screening (refer to Figure C10.7 and C10.8).

Any additional parking provided above ground will count towards gross floor area for the purposes of calculating Floor Space Ratio."

- 38 Further provisions in subclause 3 apply and require onsite parking for the residential component in a mixed use development to be accommodated wholly in a basement parking area unless the applicant can demonstrate to Council's satisfaction that the site's unique conditions prevent the parking form being located in a basement structure. If on-grade parking is proposed, the location and adequacy of the parking area must not adversely impact on the amenity of the adjoining neighbourhood. The parking area is to be located on the side or rear of the site, and is not visible from the street and street frontage and is to be landscaped or screened so that cars parking in the parking area are not visible from adjoining buildings or the street/street frontage and allow safe and direct access to the building entry points.
- 39 Section C10.5.2 Access and Driveways includes a control at subclause 4 that new road reservations and rights-of-way shall be dedicated or created at no cost to Council.
- 40 Section E11 Penrith – Part A Penrith City Centre is particularly relevant to the application. The site is located within the City West Mixed Use Precinct under those provisions. The intended character of that precinct, which is to guide and inform future development is:
- "The precinct comprises the southern side of High Street, between Worth Street and the intersection to Mulgoa Road. This area is presently underdeveloped, with a number of apartment buildings having been approved or under construction immediately behind High Street.
- This area should be redeveloped, primarily as a high density residential precinct that will complement and bring additional activity to the adjoining civic and cultural precinct. It is envisaged that this area develop a live-work environment, which is promoted through the design and layout of residential buildings, and the location of compatible commercial and retail uses at the street level of such buildings.
- This precinct currently enjoys unobstructed views of the Blue Mountains escarpment. It is acknowledged that redevelopment will result in loss of such views however, where view corridors can be reasonably maintained from High Street, then the views should be retained.
- There is an opportunity to locate an urban space in this precinct that affords an "eat street" environment with connection to the adjoining civic and cultural precinct."
- 41 Section E11.2 Building form has a number of controls with those relevant to the application calling for the building to be built to the street alignment along the frontage to High Street with a height of between 16 and 20m and with a 2-3m setback to Union Road.
- 42 Section E11.3 Pedestrian Amenity is looking to encourage a high quality of urban design and pedestrian comfort in the public spaces of the City Centre and calls for active street frontages and positive building address to the street. Figure E11.18 identifies existing and desired links and identifies the N-S Road as a Desired new lane.
- 43 Provisions similar to those at C10.5.1(2) provide for parking to be in basement but contemplate surface and above ground parking where excavation is not possible due to a high water table. Where this is required the DCP seeks to minimise the impacts of such parking on the public domain and provides for such parking only above ground in the blocks between Belmore and Henry Streets. The site is not in that area and there is no evidence there is a high water table that would prevent the construction of additional basement levels. The diagrams that are included call for the parking to be sleeved with a minimum building floor plate of 16m depth or to be behind the building on a service lane.
- 44 Section E11.7 Controls for Special areas includes additional controls for special areas or precincts in the City Centre. The site is included in Precinct 1 (Figure E11.25) and calls for:

"Development of the site must adhere to the following design principles:

- 1) Rationalise the existing pattern of land ownership.

- 2) Relocate redundant public street to provide north-south connectivity and active 'eat street' adjoining the Civic and Cultural Precinct.
- 3) Provide high quality and activity public domain interface with new and existing public streets.

Development of the site should provide the following outcomes:

1) Streets and pedestrian connections:

- a) Closure John Tipping Grove between High Street and Union Road.
- b) A new public street providing direct connections between High Street and Union Road.
- c) Replace existing roundabout on High Street with a signalised intersection at junction of High Street and the new street.
- d) Potential extension of Union Lane to the west to provide access and additional street frontage.

2) Land ownership:

- a) Consolidation of existing land ownership patterns to allow orderly development of land.

3) Public domain interface:

- a) Active frontage/land uses along the new street and High Street.

4) Built form:

- a) Building built to the street alignment of the new street."

- 45 The identified 'eat street' is John Tipping Grove and the new public street is the proposed N-S Road which would, subject to TfNSW being satisfied the necessary warrants are met, be capable of signalisation. The proposal does provide for an active frontage along High Street and parts of the frontage to the N-S Road with plant rooms, loading bays, store rooms, a substation and switch room also along the frontage at ground level. The entire frontage to both John Tipping Grove and High Street contains active business uses.
- 46 The CIP is a Policy developed by the Council and its purpose is to provide guidance to the community, proponents and Council regarding an offer of Community Infrastructure as part of certain development within the Penrith City Centre.
- 47 Clause 2.2 of the Policy apply to the Principles of Community Infrastructure and list considerations that must be met as follows:
  1. "Community Infrastructure must be in the public interest and to the satisfaction of Council
  2. Community Infrastructure must be over and above current development standards and Council policies
  3. Community Infrastructure must contribute to the City Centre or to nearby locations and facilities likely to be used by City Centre occupants
  4. Community Infrastructure must be achievable, measurable, economically viable and socially and environmentally sustainable
  5. Community Infrastructure must be consistent with the themes within Council's Strategic Planning framework"
- 48 The Policy anticipates the Infrastructure can be by way of a monetary contribution, dedication of land or property, carrying out works or a combination of these.
- 49 A contribution rate was developed and is \$150/sqm of additional Gross Floor Area (GFA). In calculating this, the policy defines GFA as any Gross Floor Area above the maximum total Floor Area identified on the Floor Space Ratio map within the LEP. Non-residential development will not be required to provide a Community Infrastructure Contribution and non-residential floor area is excluded from the calculation of the value of the contribution. The value is indexed annually based on the CPI: All Groups (Sydney).
- 50 The CIP includes a list of Preferred Community Infrastructure Items. These include Public roads. In particular, intersection treatments and upgrades at High Street and Civic Centre and creation of new laneways or improvements to existing laneways.



It is common ground that the works proposed under the VPA satisfy the definition of Community Infrastructure. These works are also consistent with the two preferred items described above.

## **The contentions**

52 The contentions in the case are:

- (1) The provisions of cl 8.4(3) of the LEP have not been met because no architectural design competition has been held in relation to the development the subject of the application.
- (2) The Community Infrastructure Offer fails to satisfy cl 8.7 of the LEP and the CIP.
- (3) Because the development does not achieve the additional FSR provided for under cl 8.7 of the LEP, the height of the development exceeds the maximum building height permitted under cl 4.3 of the LEP and cannot be approved. No written request to vary the development standard has been submitted.
- (4) Similarly, the proposed development exceeds the 3:1 FSR development standard in cl 4.4 of the LEP as the provisions of cl 8.7 are not met.
- (5) The proposed development does not achieve the Design Quality Principles for Built form and scale set out in SEPP 65 and does not comply with the objectives and controls of Part E11 of the DCP that encourage consistent streetscapes, appropriate built form transitions, comfortable street environments for pedestrians and high amenity public spaces.
- (6) The proposed development does not satisfy the Public Domain Interface Objectives of the Apartment Design Guide (ADG) or the streetscape objectives and the streetscape objectives and controls outlined in Part E11 of the DCP.
- (7) The proposed development does not achieve the Design Quality Principles for Context and neighbourhood character set out in SEPP65 and is not consistent with the desired future character of the Precinct as outlined in Part E11 of the DCP.
- (8) The proposed development does not achieve the Design Quality Principles for Safety or Amenity set out in SEPP65 and will not provide high quality amenity for future occupants.
- (9) The proposal causes unacceptable overshadowing impacts to adjoining developments and in particular public open space and is therefore contrary to the provisions of cl 8.2 of the LEP.
- (10) The extent of landscaping is inadequate for the scale of the buildings.
- (11) The proposed development does not assure that the specific design principles and development outcomes outlined in Part E11A of the DCP will be met, in particular signalised intersection at junction of High Street and the N-S Road.
- (12) The development is not in the public interest and will establish an undesirable precedent in the locality.

## **Design Competition**

- 53 A design competition was held for the whole of Lot 300 in 2017 and in November 2017, the Competition Jury concluded that the team of SJB and Architect Prineas had designed the winning scheme.
- 54 The Council contends there has not been an architectural design competition in relation to the development. The competition that was held related to the whole of the site and the proposed development is not substantially the same as the winning entry.
- 55 The applicant says that there was a design competition and it was the 2017 competition. The proposal forms stage 1 of the development and although it has been amended from the form of the winning entry, the process followed throughout has been consistent with the outcomes of the Jury and the amendments made have at all times been undertaken in consultation with the Council's Design Integrity Panel (DIP), membership of which is the same as the Competition Jury.
- 56 The applicant submits that the major changes made from the winning entry were at the request of the Council to include provision for construction of the N-S Road. It submits that all changes and variations to the design occurred with the imprimatur of the DIP, all

amendments were discussed with the Council and the DIP and at no stage, did the Council suggest to the applicant that there was a need for a further competition to be held.

- 57 The applicant relies on the series of documents included in Exhibit D which include the Competition Brief, Jury Report, Winning Submission, Post Competition Design Review, Design Evolution and Design Excellence process by SJB Architects.
- 58 In addition, correspondence dated 6 March 2020, 11 May 2021, 28 September 2021 and 10 November 2021 on the letterhead of the Government Architect NSW and signed by the DIP Chair and noted by the two other panel members refers to an invitation to the DIP to review changes to the plans, the earlier document noting the evolution of the proposed design since completion of the Competition as being significant however determining the changes still represent design excellence and recommend the current panel members be retained for on-going review of design quality following submission of the development application.
- 59 The second letter states the DIP considers the design quality of the 6:1 FSR DA is superior to the previously approved 3:1 development for the site and is consistent with the intent and qualities of the original Design Competition masterplan. It again concludes the plans satisfy the Design Excellence provisions of the LEP.
- 60 The third letter supports further amendments which are said to “offer significant improvements which respond directly to design excellence considerations and should moderate or eliminate residual concerns expressed by Council”. That letter makes further suggestions to improve the eastern elevation of the building.
- 61 The final letter is almost the same as the third and makes identical recommendations regarding the eastern elevation.
- 62 The applicant also relies on the NSW Government Planning publication Director General’s Design Excellence Guidelines (Guidelines). In its Introduction, it states:
- “The Design Excellence provisions of the City Centre Local Environment Plan (LEP) may require or provide the opportunity for a landowner to hold an ‘architectural design competition’ for the design of a building or larger site containing more than one building. That process may lead to a design based ‘bonus’ in building height and/or floor space ratio (FSR) and in that circumstance this document provides the guidelines for such competitions. An architectural design competition has the potential to achieve design excellence and encourage innovation without delaying the development approval process. The key to success is to commence pre-planning at an early stage in the development process. The design competition should be undertaken prior to the lodgement of a formal development application. Design competitions can reduce the potential for delay in the development application process by providing more certainty of the final development outcome to both the landowner and the community.”
- 63 In regard to the Post Competition process, the Guidelines state:
- “Design Integrity
- To ensure that design quality continues from the development application stage through construction drawings and into physical completion of the building the competition jury will recommend a process to monitor design integrity.
- Generally, this will require the designer of the winning submission be nominated as the design architect. In some cases, the Jury may recommend
- a Design Integrity Panel monitor design excellence.
- Certification that the design is substantially the same and retains the design excellence exhibited in the winning submission will be required at key project milestones, including lodgement of the DA, issue of construction certificate and at completion of the project.”
- 64 SJB Architects with Architect Prineas were the architects preferred by the Jury at the conclusion of the Competition. The Conclusion to the Competition Jury’s Report (Tab 65, Exhibit 3), states:
- “The preferred proposal from SJB with architect Prentice best fulfils the planning, design, commercial, construction and cost objectives set in the architect brief. The jury considers that the design with further development as part of a future development application will achieve design excellence.
- Ground level open public space has been narrowed significantly due to the increased parking accommodated in podium beneath towers A +B. This area requires detailed landscape design to confirm it can still offer a high quality public space.

- Active frontages to the lane have been diminished due to additional parking being proposed to below towers C + D. Opportunities to reactivate this edge should be explored.
- Reconfiguration of tower D is recommended to avoid proposed internal courtyard.
- The increase in area to Block A + B podium terrace is positive and allows for improved privacy to apartments.
- Tower A wind shear needs to be addressed.
- The revised planning for retail pavilions is supported subject to design development ensuring transparent connections between podium retail and the public open space.
- All parking requires further development to confirm satisfactory efficiencies are achieved.

As agreed the panel believes these issues can be resolved by ongoing design review.”

65 SJB Architects remain the architects for the project and prepared the plans lodged with the application and those now before the Court.

### The evidence

66 A site view was conducted prior to commencement of the hearing.

67 One objector to the development, a resident of a dwelling in Union Road, provided evidence to the Court. Her concerns related to increased traffic in Union Road, overshadowing and demand for parking. She considered Penrith was not ready for such a high rise development and a building of that scale would be out of character in a site that is the Gateway to the Town Centre. There is a 6-8 storey height limit and any development should comply with that control.

68 Expert evidence was heard from:

	Applicant	Council
Urban Design	P Smith	G Morrish
Traffic	R Hazell	K Hollyoak
Planning	J Wynne	R Gordon
Valuation	P Dempsey	D Lunney

69 The traffic experts were not required for cross examination and advise that the plans now before the Court would provide for the future signalisation of the N-S Road at the time TfNSW considers the necessary warrants are met. Until that time, they have agreed on the design of an upgraded roundabout at that location saying that access to the roundabout should be egress only from the N-S Road until such time as the intersection is signalised.

### Urban Design

70 The initial Joint Report prepared by the Urban Design Experts (Exhibit 7) made a series of recommended changes to the plans that were before the Court at the commencement of the hearing and detailed those in marked up plans annexed to their report.

71 These recommendations formed the basis of the amended plans and the grounds for the applicant seeking leave to amend the application. Due to the late submission of the plans, the experts had not had an opportunity to review the plans and were directed to joint conference to determine whether the amended plans addressed any or all of the

contentions in the case. The Supplementary Joint Report (Exhibit 9) deals with this issue. Their final report (Exhibit 11) deals with a further contention raised by the Council in regard to whether a Design Competition had been held for the development.

72 In relation to the amended plans, the experts have considered whether the changes recommended in their original joint report, (Exhibit 7) had been incorporated. They agree that all of the changes were made with the exception of:

- Changes to the colours and materials board and therefore elevation.
- The relocation of services on the ground floor level below the planter near the ramp on Union Road intended to occur as per the mark ups attached to the joint report.
- The nomination of an 'active' use to the brown area shown on the plans at level 02, new roads under building o2.

73 They agree that the colours in the schedule can be amended by a condition of consent that requires replacement of the pink colours with more neutral colours.

74 A new issue became evident in the treatment of the unit on the podium level adjacent to the open space area facing John Tipping Grove where the indent from the podium has reduced the balcony for the apartment but the layout has not been amended to widen the terrace area to the south for this unit to compensate. As such, they recommend a condition should be added requiring the terrace paved area to be increased to a minimum of 2.4m in a southerly direction.

75 Subject to these conditions, they agree that the amendments resolve the areas of agreement identified in their primary report.

76 There are however a number of areas where these experts have not reached agreement. The main issue is the location of the above ground carparking areas within the podium of the buildings.

77 There is a total of 101 car parking spaces provided over the three podium levels. These include a total of 12 accessible parking spaces. The lower level basement contains a total of 105 spaces including 12 accessible spaces. At the hearing, it was agreed by the experts that it would be possible to accommodate all of the spaces currently located on the podium levels to one additional basement. There was no clarity as to whether or not the Council would accept parking below the N-S Road. The applicant submits the location of the parking is satisfactory in the podium.

78 Ms Morrish says the provision of podium parking is an unacceptable outcome and will prejudice the streetscape and vitality of the public spaces that is proposed along John Tipping Grove. She notes the site is identified as a key site and is one of the first to develop and says that whatever is supported on this site is liable to impact what occurs on other key sites in Penrith City. These developments introduce a completely new and much larger scale to the existing city centre. They need to be well designed and comply with the DCP goals. The DCP at clause 11.7.1 notes that this site is one of the identified sites that has importance in the city centre.

79 Given the prominence of this site and the major open space it is contributing to, Ms Morrish says the proposal should be providing at the very least full sleeving of the parking above ground with residential or other uses to all frontages i.e. the future public space and the new road. She notes that provision of sleeving would mean that podium parking would be difficult to achieve due to the building width but says that better option would be for an additional basement level to ensure a better built form outcome. She says that there are no reasons why an additional level of parking could not be built or alternatively, the area below the new road could be developed for parking under a stratum subdivision arrangement.

- 80 Ms Morrish said it is important to sleeve any above grade parking particularly along John Tipping Grove as this will be an important public space and its activity level and interaction with the first five storeys of the building is important both from a safety point of view and in creating a successful public space. It will be those people who sit on the balconies and interact, it's about attracting people to use the space, it's about safety and a strong passive surveillance. The proposed treatment of the podium parking of presenting a pretty blank wall, or at night time the lights in the car park, is not a good result. Better activity will ensure less crime and a vibrant retail and public space.
- 81 Ms Morrish lists the following benefits of having all of the parking in a basement:
- Eradication of one set of double driveways and ramps allowing a larger retail component on the ground level along Union Road which would improve the streetscape.
  - Allow the pedestrian link from Union Lane to be open air for the full height of the podium – improving the view line through from the land and the awareness of the public open space beyond in the future, increasing the impression of this link as 'public'.
  - This would also break up the long podium into two podiums associated with their towers and reduce it's dominance and length, creating a finer 'grain' to the area's visual permeability.
  - Delete all areas of exposed car parking in the podium to the new space and the new road and enable relocation of some apartments to those areas of the façade, providing more opportunities for articulation in the tower/s and improving the activity and passive surveillance offered by the podium floors to the land and public space.
- 82 Ms Morrish referenced the competition scheme which had two separate podiums and says this achieved a better urban design outcome than the current proposal. Relocating the parking into the basement to create a true full height break between the towers will achieve a better relationship for the development to the public domain in terms of amenity, urban form, modulation and bulk of buildings as well as improved pedestrian circulation and amenity and impact on the public domain. This is an important consideration of design excellence. The common open space could be relocated into other areas of the development, for example rooftops or where the tower sets back or by deletion of some of the units on the podium levels to create usable outdoor space with a northern orientation.
- 83 Ms Morrish says the removal of a double driveway and ramp system which serves the podium parking levels off Union Rd enables a retail or business tenancy to be provided in that location and removes the interruption of the footpath created by the additional driveway. This will achieve a better design outcome for the public domain and the building form as well as improvements in other areas of the building. The DCP has an objective of mitigating adverse impacts on the street rising from driveway access crossings. The design of vehicle access to buildings also influences the quality of the public domain. Overly wide and high vehicle access points detract from the streetscape and the active use of street frontages. The design and location of vehicle access to developments should minimise both conflicts between pedestrians and vehicles on footpaths. For that reason, she says the deletion of this driveway and having only two driveways to service the site would ensure design excellence is achieved.
- 84 Mr Smith says the competition layout only remains relevant in so far as it forms part of the background history and changes, in particular the relocation of the road to meet the DCP requirements, has informed the current layout. The DCP anticipates that parking

is not required to be entirely screened by active uses and Figure E11.23 permits above ground parking adjacent to a laneway.

- 85 He says the design of the façade is successful in that it conceals the car parking. It is not evident from the public space that car parking is located behind the screened façade. The batten screening of the façade is layered with depth and appears in a similar way to a screened balcony in a residential building with the visual and environmental impacts minimised. The two towers connected by a combined podium provides an opportunity for a generous communal open space area in a location that is protected from wind that would otherwise not be achievable if the podium was split into two parts.
- 86 The above ground car parking is naturally ventilated and reduces demand on building energy consumption compared to below ground car parking. The site has a narrow width with street frontages to all sides. Buildings of this kind have significant service areas that need to be accommodated. The proposal prioritises the active frontage to the new square and High Street being the primary retail street of Penrith. Locating private car parking under public roads is not considered best practice. It creates issues with respect to long term maintenance, limits opportunities for tree planting within the public domain and prevents provision of services through the street. Active residential uses are provided to High Street and Union Street and approximately 60% of the facade facing the square this provides sufficient active interface.
- 87 He considers the provision of the additional vehicle crossing off Union Rd is not detrimental to the proposal. This frontage of the site is to a street that is typically residential in character. The vehicle entry is small in proportion to the overall built form. The third vehicle entry provides an efficient way to manage vehicle movement within the site. Consolidating the entrance for above and below ground parking would likely result in greater footprint and would reduce the active users within the ground floor footprint due to greater internal circulation required. He concludes the proposal exhibits design excellence.
- 88 These experts disagreed that the amended proposal provides an equivalent quality and amenity standard relative to design excellence when considered against the winning competition scheme.
- 89 Mr Smith referenced an earlier development consent that had been approved for this site which included substantial above ground parking. He says the current proposal has been subject of continuous design excellence review, and recommendations incorporated into subsequent versions. This process has been led by the NSW government architect and includes members of the original competition jury. He says the current plans are based on a different street layout consistent with the Council's desire to achieve the N-S Road as detailed in its DCP.
- 90 He says there is little relevance in comparing the proposed development to the competition winning scheme. The competition has no status. There is more benefit in comparing the current proposal with the existing consent as this has a high level of probably being constructed should the current proposal not be approved. The proposal, including amendments as recommended by the urban design experts, provides for a development that has a substantially improved outcome when compared to the current consent on the site. It provides for a substantially more active facade, a greater number of apartments located in the podium, improved facade articulation and increased active uses at ground level on the new street.
- 91 Ms Morrish says the amended proposal still has a roughly 100m long podium form. The amendments suggested by the experts will assist in further reducing its visual impact and whilst this does represent an improvement over the original plans, it is not as

successful in creating a positive public domain impact as having two separate podiums which deliver a better response to human scale and existing buildings in proximity and fully sleeved above ground parking. The proposal covers over its pedestrian link with the podium whereas the competition winning scheme had a fully open and public connection along the new street which delivers a better outcome for the public domain and pedestrian connectivity. The third driveway and vehicle access created by the above ground car parking in the podium impacts the public domain and is a lesser result with adverse impacts in comparison to the competition scheme. The relocation of the road and changes in the proposal now create this issue with the blank walls of the adjacent site which were designed to abut a future development, not to be exposed in perpetuity. The concern is that the proposal in its current form has not achieved or maintained the same results in design quality and public domain outcome as the winning competition scheme in these areas.

- 92 In regard to the contention relating to whether a design competition has been held in relation to the development, the urban design experts analysed the proposal against the competition scheme. Their assessment is provided in Supplementary report, Exhibit 11.
- 93 They have an agreed list of key differences between the two schemes and address 33 changes. Mr Smith notes that the competition brief documents contemplated the development would be staged with up to 6 stages envisaged and that, at the request of the Council, the road alignment was changed from the original 'serpentine' layout to reflect the N-S Road in the DCP. He says the changes have been the subject of on-going review by the Jury Panel and is of the opinion that the competition process was not abandoned and remains relevant for the current development application.
- 94 Ms Morrish does not have the same involvement in the process that has occurred as Mr Smith has and concludes that many of the issues with the amended application stem from outcomes that are not a direct result of the change in alignment of the roadway. She says it would still have been possible to have had two podiums for the two towers, an open-air link instead of the road and to have had the parking in a basement extending to the same boundaries as the competition even with the changed road layout. Options and ideas to cover the exposed blank walls of the adjacent development could also have been developed.

## Planning

- 95 The planning experts agree that for consent to be granted, the provisions of cl 8.7 of the LEP must be satisfied as the FSR of the development exceeds the maximum allowed under cl 4.4. They agree that the VPA offer to construct and dedicate the N-S Road would satisfy the definition of community infrastructure however they do not agree whether the objectives of the clause are met or whether the nature and value of the community infrastructure is adequate. They defer to the Urban Design experts for evidence of whether the proposal exhibits design excellence.
- 96 The parties have filed calculations of the value of community infrastructure required under the CIP. There is no agreement on the way the calculations should be assessed. There is also a minor disagreement on the calculation of gross floor area however, the difference is only 21.7m<sup>2</sup> and is dependent on whether the above ground onsite detention tank is GFA or not. The applicant submits the area would be excluded from the calculation as it includes a mechanical fan/vacuum to prevent the build up of gasses. The Council submits the area is not 'plant rooms, lift towers and other areas used exclusively for mechanical services or ducting' and is therefore included in the calculation of GFA. I adopt the definition and the purpose of the area is for the storage

of stormwater. It is not a plant room and just because there is a pipe and fan or vacuum, it does not mean the area will be used exclusively for mechanical services or ducting.

- 97 With the deletion of a proposed freestanding commercial building, a late amendment to the application made to address the need for readvertising of the amended application, it is common ground that the FSR of the development would not exceed 6:1.
- 98 Ms Gordon has undertaken the calculations for the Council and uses the basis of the calculations being the difference between the 3:1 maximum FSR provided by cl 4.4 of the LEP and the 6:1 provided under the provisions of cl 8.7.
- 99 Ms Gordon calculates the maximum GFA at 3:1 as 16,221m<sup>2</sup> and the proposed FSR as 32,326.8m<sup>2</sup> or 5.98:1 including the area of the OSD room. Therefore, she says the area on which the community infrastructure value should be based in accordance with the CIP is 32,326.8m<sup>2</sup> – 16,221m<sup>2</sup> = 16,105.8m<sup>2</sup>.
- 100 The Court requested the parties calculate the value of the contribution based on the policy including the terms within that policy that state the value of the contribution will be indexed annually in accordance with indexation as per the CPI All Groups (Sydney). Ms Gordon says that increased the rate from \$150 per square metre to \$158.71 per square metre and calculates the payment for Community Infrastructure should be \$2,556,183.
- 101 Ms Gordon says, that in determining whether the value of the contribution is appropriate, regard has to be had as to whether the whole cost of the road dedication and construction should be assessed. It is her opinion that only 50% of the costs should be assigned to the calculation as the other half of the costs should be attributed to the development. That is because the development is required to meet the general requirement of Council's development control plans and engineering guidelines. Any community infrastructure must be over and above current development standards and Council policies. The southern portion of the road provides access to the proposed onsite basement carpark and loading dock, and the commercial nature of the uses at the ground floor level require that engineering works including footpaths and landscaping be provided.
- 102 Mr Wynne applies different calculations and says that it is appropriate to include the bonus provisions for design excellence under cl 8.4(5) of the LEP which provide for up to an additional 10% FSR. Therefore, he says the maximum FSR for the site is 3.3:1 and not 3:1. He also notes the CIP does not include commercial floor space in calculation of the value of the contribution and, with a GFA for commercial space of 1,100m<sup>2</sup>.
- 103 The applicant therefore submits the calculation of the value is based on the total GFA of the building being 32,305m<sup>2</sup> less than the commercial space resulting in a GFA of 31,205m<sup>2</sup>. The maximum FSR, based on the 3.3:1 applying the 10% bonus is 17,843m<sup>2</sup> so the additional GFA above the 3.3:1 is 13,362m<sup>2</sup>. Applying the indexed rate of \$158.16 per square metre. The applicant says the rate is \$2,113,334.
- 104 The applicant submits that under the wording of the policy, it does not automatically follow that the \$150 per square metre rate must be indexed. The CIP indicates at section 1.6 that it will be regularly reviewed and indexed annually, however, based on the evidence available, Council has not undertaken such a review. In the absence of such a review being undertaken by Council, the applicant is entitled to rely on representations made by Council and its experts during the course of the hearing that the applicable rate under the policy is \$150 per square metre of additional gross floor area.



The Council submits that the rate is to be indexed annually with the policy reviewed for housekeeping type amendments as required but for general market alignment, on a five year basis.

- 106 The planners agree that the maximum building height of 24m applies to this site unless the provisions of cl 6.7(3) of the LEP are applied. Under those circumstances, no height control would apply.
- 107 Ms Gordon says the height of the building proposed in the DA is not appropriate having regard to the objectives of cl 4.3 of the LEP because the proposal as currently designed does not satisfy objective (a) given that the buildings are not compatible with the bulk and scale of the existing and desired future character of the locality. The proposal will result in additional overshadowing impacts to adjoining and nearby dwellings and land zoned for public recreation purposes. The solar analysis has not demonstrated that shadow impacts on the surrounding locality had been minimised. Because she says that insufficient community infrastructure has been provided, she maintains the proposed development is not entitled to the additional height and density permitted by cl 8.7(3). As no written request to vary the provisions of the 24 metre height limit has been lodged in support of the application, it is her opinion that consent to the application cannot be granted.
- 108 Mr Wynne says the height of buildings proposed in the application are appropriate having regard to the objectives of cl 4.3. That is because the site is a designated key site where high density development is desired and anticipated. Amendment number 14 to the LEP initiated by Council and supported by urban design analysis, established a maximum FSR of 6:1 for the site but with no maximum height imposed. The proposal has been the subject of an architectural design competition which considered view impacts, loss of privacy and loss of solar access to existing development and public areas. The competition and subsequent design integrity reviews considered building heights and arrangements reflecting that proposed in the application, concluding the proposed heights are appropriate for this location. He says the shadow plans supporting the proposal indicate the impact on surrounding private and public land is acceptable and consistent with expectations arising from high density development at this location.
- 109 The experts agree that the maximum FSR for the site is 3:1 under the provisions of cl 4.4 of the LEP and that the application does not rely on cl 8.4(5) for an additional FSR of up to 3:1. The application is reliant on the provisions of cl 8.7 of the LEP for approval of a development of the scale proposed and therefore would not require variation to the development standard.
- 110 They also agree the proposal provides some car parking within the building podium, and that the DCP recognises that in some circumstances, a high water table affecting sites in the city centre may make excavation beyond one level of basement difficult and may necessitate locating parking above ground. In the cases where above ground parking is provided it is important to minimise the impacts of this on the public domain.
- 111 Ms Gordon considers that the design does not necessitate ground parking because the applicant has not demonstrated the site is constrained by the water table and it already includes 3 levels of basement parking, so an opportunity exists to expand the basement levels under the N/S Road. In cross examination both experts advised there was no evidence that the water table would prevent the construction of an additional basement level.
- 112 Ms Gordon considers that if any above ground parking is to be provided it should comply with the DCP controls. She says the proposal does not provide sufficient sleeving of the car park and the above ground parking should be screened by an active

edge to the public domain.

- 113 Mr Wynn considers the above ground parking is appropriate and that the proposal appears to minimise the extent of parking and provides appropriate screening and active edge to the podium parking area.
- 114 The experts are critical of many of the landscape elements provided to the public podium parking levels however they say these matters could be addressed through development consent conditions and demonstration that sufficient podium and planter soil volumes are provided to support the long term health of any future landscaping.
- 115 For the same reasons that she says the height of the building is not appropriate, Ms Gordon says the floor space of the building is also not appropriate. She says the bulk and scale of the proposal is not appropriate because the podium straddles the entire development site and creates a podium that extends for more than 100 metres. The podium is provided with insufficient depth to the proposed indents to sufficiently moderate the building length and scale, however she defers to the urban design experts in relation to these matters. She also considers the scale of the development relative to the resulting building site (that is after the road is dedicated), is not consistent with the desired future character of the area as the floor space ratio of the building relative to the building site will be in excess of 8:1.
- 116 In the initial report, prepared prior to lodgement of the amended plans, the experts agreed that the winning design competition masterplan has evolved in response to changing circumstances including addressing the requirements of the DCP to locate a new public road running north/south along the eastern boundary of the site. The evolution of the master plan was documented as part of the development application and was considered by the Design Integrity Panel in confirming that they are satisfied that the proposal satisfies the design excellence provision of the LEP.
- 117 Subject to the resolution of design issues at the street level and activation of the southern end of the north/south road, the proposal provides development consistent with the desired future character of the locality as articulated in section 11.1.3 of the DCP. They defer to the urban design experts for consideration of the suitability of the proposed design of the building related to the desired future character of the area, its interface with Union Road and the adjoining development to the South East, street activation and the requirement for an east/west through site link.
- 118 The experts agree that in midwinter, the development will overshadow an area of land to the southwest of the site which is zoned RE1 Public Recreation. They say the extent of overshadowing is limited to 9:00 AM only.
- 119 Ms Gordon says the shadow impacts of the proposal are unreasonable, in particular in relation to the front dwelling at No 82 to 84 Union Rd which is currently overshadowed by existing development between 9:00 AM and 11:00 AM midwinter and will be further overshadowed between 12 noon and 2:00 PM by the development. This means that the northern window openings of that dwelling would receive sunlight for one hour at 3:00 PM which is unsatisfactory and inconsistent with planning controls.
- 120 It is common ground that at 9:00 AM in midwinter the proposal will result in overshadowing of the public recreation land located at the southwestern corner of the intersection of Union Rd and John Tipping Grove to a greater degree than would result from a development that complied with the maximum 24 metre height of building control. Ms Gordon says the proposal does not satisfy cl 8.2 Sun access of the LEP. While the land zoned as public recreation is currently not embellished, any future plans for this public open space are currently unknown.

Mr. Wynne says the shadow impacts are not unreasonable or unnecessary because the site is a key site on which development to a density of 6:1 with no prescribed maximum height controls applying, it has been subject of the architectural design competition which considered view impacts, loss of privacy and loss of solar access to existing development and public areas and the proposal responds to the desired future built form of this surrounding contexts including being designed to comply with the ADG building separation requirements. Whilst the development results in some overshadowing to surrounding land, impacts are mitigated by the building design and are appropriate for the site's CBD context and level of solar access achieved to adjoining land.

- 122 In relation to the land zoned for public recreation, Mr Wynn says the parcel of land is relatively small (941 square metres), irregularly shaped and is effectively an island of site surrounded by major roads including Mulgoa Road to the west, Union Rd to the north and John Tipping Grove to the east. The exposure of the site to traffic utilising the surrounding roads diminishes the amenity, appeal and safety of the site for public uses. He says the site appears to be a residual parcel of land resulting from surrounding road construction. It is not fenced or embellished and there is no signage on the parcel indicating that it is available for public use. It is also not identified on the Council's online tracker of playgrounds and public reserves. The shadow plans revealed that the proposal casts a minor increase in shadow falling on the eastern edge of the parcel at 9:00 AM in midwinter relative to complying development with no effects outside of that time.

## Valuation

- 123 The experts agree that the dedication land that is the area of the N/S Road which is to be dedicated to the council, is 1509 square metres. They also agree the most commonly applied method of valuation to high density residential sites is a yield based valuation approach which is either to apply a market derived square metre rate to the potential growth floor area (PGFA) which could be yielded from a development of that site or to apply a market driven \$/potential unit site to the estimated number of units which could be yielded from a development of the site. Another method of valuation which is commonly applied is the hypothetical development method (HDM). In applying the HDM, a range of input values are required including, inter alia, the estimated yield from the development, the estimated realisation values, development costs and the required project hurdle rates. In his valuation report conducted in 2019 Mr Dempsey assumed an average or typical unit size of 88.7 square metres and a market value equivalent to \$48,000/potential unit site. On this basis, Mr Dempsey arrived at a value of the dedication land as \$5,280,000.
- 124 Applying at those rates the experts agree the PGFA basis would be equivalent to \$541/m<sup>2</sup>. To reflect market changes since 2019, the experts agree a market value of \$600/m<sup>2</sup> would now be appropriate.
- 125 In relation to the CIP, the experts note the contribution rate is \$150/m<sup>2</sup> PGFA. They understand this rate is intended to be equivalent to 50% of the value uplift resulting from the provision of bonus floor space. They agree this rate is conservatively low as at the current date. If expressed as a proportion or percentage of the \$/m<sup>2</sup> PGFA rates applied to the parent parcel, this rate would reflect either 28% of Mr Dempsey's 2019 valuation or 25% of a current value of \$600/m<sup>2</sup> PGFA.
- 126 The experts have been instructed that the transferable FSR potential of the dedication land has been transferred or exhausted as part of the applicant's development proposal. They agree that transferring the potential FSR from the land is a matter which

has materially decreased its market value. They do not agree however on the quantum of the decrease.

- 127 Mr Dempsey then considers a Discounted development value based on the fact that the applicant has transferred the FSR of the dedication land to the site. On that basis he says the calculated value is \$1,100,000. He then considers the cost penalty on the basis of the applicant having to provide an additional 40 parking spaces in a tanked basement carpark and construct the 140 apartments in high rise in lieu of mid-rise construction and says this amounts to \$5,933,176. He says that these costs could be offset by a hypothetical adjoining owner acquiring the dedication land and for that reason he determined the value on a cost penalty basis as \$2,950,000.
- 128 Mr Lunney says the value would be more reflective of around 10% of the value and therefore, based on Mr Dempsey's original valuation of \$5,290,000, he says the market value of the dedication land would be \$528,000 and noted that this was based on a greater land area than the area now proposed to be dedicated and says the actual value of the land would be \$490,000. He says there is inadequate information available to apply the cost penalty method of valuation.
- 129 Mr Lunney says there are a range of variables to be considered such as whether the higher units would attract a premium price because of views or whether an alternate development that did not rely on one high and one lower tower would be feasible.
- 130 Mr Lunney says, and Mr Dempsey agrees, that for a true assessment of the cost penalty, it would be necessary for details in relation to the applicant's actual proposed development of alternative developments which were contemplated and modelled including any pre sales, price lists or valuation of the proposed units upon completion, any internal feasibility studies undertaken by or on behalf of the applicant relating to the actual proposed development of alternative developments considered or any details or plans relating to alternative developments contemplated by the applicant. As none of this information was available the experts agree that a before and after method of valuation or determination as to whether a true or net cost penalty is suffered by the applicant by reason of the proposed new road and the loss of dedication land actually is relevant.
- 131 Mr Lunney says that the market value for high density development sites of the nature of the science subject site is typically assessed on a year basis by applying the\$/potential unit site rate or a dollar PGFA rate. Method of valuation acknowledges the value of such a site is a function of the floor space which could be yielded from a development of that site. In circumstances where the development yield is the same, with or without the dedication land, he considers that it would be double counting to exploit the development potential of the dedication land and separately claim dedication value for that land irrespective of the method of valuation applied to calculate the dedication value.
- 132 Mr Dempsey disagrees and says that the cost penalty of \$5,933,176 excluding GST compared to developing the same number of units on the parent parcel is a relevant consideration. For that reason, he says the value of the residual land must be negatively affected as a consequence of the cost penalty.
- 133 Mr Lunney agreed that apart from the Council being a potential purchaser of the land for road construction purposes, the owner of the adjoining land may be interested in purchasing the dedication land to increase the area available for open space on that site when it is redeveloped. He considered the value would remain low as the site has no development potential.

## **Conclusion and findings**

- 134 There are a number of jurisdictional matters in contention that must be satisfied for consent to be granted.

*Clause 8.2 of the LEP – Sun access*

- 135 The Council submits that because the development will overshadow the land zoned RE1 to the south west of the site at 9AM and that land is not currently overshadowed, the provisions of cl 8.2(3) prevent consent being granted.
- 136 The applicant submits that, pursuant to cl 8.1 of the LEP, the clause only applies to land within the Penrith City Centre (PCC) and because the RE1 land is not within the PCC the provisions of cl 8.2 do not apply. The applicant concedes the public open space is impacted to a greater extent because of the building height above 24m.
- 137 There is no dispute that the site is within the PCC and therefore, the provisions of Part 8 of the LEP apply. The difference between the parties is that the Council says the provisions of cl 8.2 apply to all public open space impacted by a development within the PCC that exceeds the maximum building height even if that public open space is outside the PCC. The applicant says the provisions only apply to public open space within the PCC and also questions whether the land is in fact public open space.
- 138 The terms of cl 8.2(3) reference the cll 4.3 Height of Buildings, 5.6 Architectural roof features and 8.4 Design Excellence and, despite the rights provided for by these clauses, consent cannot be granted to a development within the PCC if that development results in overshadowing of public open space to a greater degree than would result from adherence to the controls that apply to the development site.
- 139 Having undertaken a site view, I am satisfied that the land in question is public open space. It is planted a row of trees along its frontage to Mulgoa Road and acts as a buffer from that road to adjoining sites, including the subject site. The fact that it does not contain seating or playground equipment or has not been developed as a “park” does not prevent its use for passive recreation purposes and accordingly, I find that the land is “public open space” for the purposes of this contention.
- 140 It is common ground that the area of public open space will be overshadowed by that portion of the development that exceeds the 24m building height control at 9AM.
- 141 Because the clause applies to development on land within the PCC and the application relates to land within the PCC, the provisions of the clause apply to the application. I consider that the provisions of subclause (3) do not distinguish whether the public open space to be overshadowed has to be within the PCC, it is about development within the PCC. The objective of the clause is to protect public open space, any public open space. It is not confined to public open space within the PCC. I read the clause as applying to development on land within the PCC and therefore, because the application is on land within the PCC and the additional building height overshadows public open space, the terms of the clause apply and consent cannot be granted.
- 142 The applicant submits the extent of overshadowing is minor however there is no provision in the clause that provides for a minor impact, the fact that the impact occurs is all that is required and the operation of the clause prevents consent being granted.

*Clause 8.4 of the LEP – Design Excellence*

- 143 Clause 8.4(1) prevents consent being granted to a development within the PCC unless the consent authority is satisfied the development exhibits design excellence. In deciding whether development to which this clause applies exhibits design excellence, the consent authority must have regard to the matters listed in subclause (2).

Having regard to the Urban Design evidence in particular, I prefer the evidence of Ms Morrish. In this regard, there are a number of elements that I agree do not exhibit design excellence. In particular the design, materials and treatment of the podium carparking levels, the lack of interface between that podium and the planned 'eat street' along John Tipping Grove, and that poor amenity within the public domain that will result because that important interconnection will not occur.

- 145 I also agree that the number of ramps necessitated through the provision of the podium parking levels compromised active streetscapes along Union Road and the N/S Road.
- 146 The late amendment to the application in removal of the small commercial building, whilst not discussed in evidence, resulted in exposure of the sides of a newly completed apartment building without regard for other methods of improving the streetscape in this location. Whilst alone, this would not be a reason to conclude the development does not exhibit design excellence, it is an area that needs proper resolution. The two level commercial building originally proposed did not address that streetscape issue. I accept that this is an issue that arises from the earlier approval for this building failing take into account the future road link.
- 147 The podium level carparking, in particular the unbroken length results in excessive bulk and massing without appropriate modulation and the street wall height of this important building element, particularly because of its importance and prominence in relation to the 'eat street' along John Tipping Grove.
- 148 Having regard to the evidence and the planning controls relevant to the site, I cannot conclude, despite contrary conclusions of the Competition panel, that the development in the current form demonstrates design excellence. Accordingly, for that reason, consent cannot be granted.
- 149 The applicant filed a draft deferred commencement condition on 17 December 2021, after the hearing, however, the Court had directed the parties to file agreed conditions and FSR calculations by 13 December 2021. The following submission was made by the applicant:

"In the event that the Court finds (contrary to the primary submission of the Applicant) that it would not be acceptable for the proposed development to include above-ground car parking in the podium, the Applicant makes the alternative submission that it would be appropriate to grant consent subject to a deferred commencement condition to address the location of car parking, in the following terms:

Prior to the issue of a Construction Certificate, the Principal Certifying Authority (PCA) is to ensure that the plans and additional information listed below are submitted to and approved by the Manager of Development Services at Penrith City Council.

(a) Architectural plans prepared by the SJB (per Revision 8) shall be amended as follows:

a. Remove car parking from Level 01, Level 02 and Level 03. The amended plans must ensure that all parking in the development is accommodated in four (4) basement levels.

b. Provide for a podium of two (2) storeys between Buildings 1 & 2. The podium between Buildings 1 & 2 must contain Business Premises at ground and communal spaces at Level 1.

c. Ensure that the development comprises at least 398 car parking spaces (comprised of 51 visitor spaces, 10 commercial spaces, 9 service spaces, 2 car wash spaces and 326 residential spaces).

(b) This condition must be complied with (and the applicant must have received notification of the consent authority's satisfaction) within 24 months of the date of determination of this consent.

The Applicant is of the view that the condition is capable of being imposed and is appropriate in the circumstances (on the alternative basis noted above), for the following reasons.

The proposition of all parking being below ground has been the subject of consideration by the respondent and experts in joint reports and throughout the course of the hearing, and as such, the Court can be satisfied that essential aspects of the development have not been left for future determination.

That is, all relevant issues in respect of above ground parking, below ground parking and activated street fronts have been raised, assessed, considered and fully ventilated from an urban design perspective in the course of the proceedings. The draft deferred

commencement condition would result in the final determination of issues that have been appropriately addressed in the hearing.

If the development were to be amended in accordance with the draft deferred commencement condition above, the internal area of podium between the towers would be lowered and those sections amended to provide active uses where they adjoin the public domain. The street walls located directly beneath the proposed towers (predominantly presenting to High Street and Union Road) would be retained at their current height and configuration. This results in a podium with a 100% activated frontage along all four street frontages, which the applicant understands is the urban design outcome endorsed by the urban designers and sought by the respondent.

If the Court is minded to grant the consent subject to the deferred commencement condition set out above, it can lawfully do so, similar to it being done in *CC Builders (NSW) Pty Ltd v Georges River Council* [2017] NSWLEC 1064."

150 The Council opposes the condition and has made the following submission:

"The proposed condition seeks to amend the proposed development in numerous, highly significant ways, eg:

- a. removing all car parking from the podium, and relocating it (or redistributing it) to the basement
- b. construction of a fourth basement level
- c. reducing the number of podium levels between Buildings 1 and 2 from four to two
- d. altering the mix of uses on the ground and first levels of the podium
- e. increasing the overall car parking provision to 398.

These changes "result in uncertainty as to the precise form and materiality of the proposal and its relationship to adjoining developments" (*Oates v Northern Beaches Council* [2021] NSWLEC 1684 at [29]) and "there is a lack of finality in the development consent, as it leaves open the possibility that the development will be different to the proposed development to an extent that is not known" (*Gebran & Raad Developments Pty Ltd v Wollongong City Council* [2020] NSWLEC 1610 at [60]). The condition therefore could not be lawfully imposed having regard to the principles in *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 and *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277: "if a condition imposed upon a purported consent to a particular development application has the effect of significantly altering the development in respect of which the application is made, then the purported consent is not a consent to the application."

In any event, contrary to the Applicant's submission, the amendments the subject of the proposed conditions have not been considered by the Council or its experts, including by way of example any geotechnical or hydrological impact assessment."

151 I do not accept the applicant's submission and, whilst I agree that the deletion of the podium car park would be beneficial and go a long way to address the concerns regarding design excellence, there are a number of other issues, detailed above, that also require resolution.

152 I accept the Council's submission that the changes detailed would result in uncertainty as to the precise form and materiality of the proposal and its relationship to adjoining developments. There is nothing to guide the form the development would take in the area where the ramp to the podium is located, there is nothing that determines the interface between apartments and common open space on the lower level. There is nothing that would ensure the FSR of the proposal would be compliant with the 6:1 maximum and there is nothing to ensure the site can accommodate the additional basement level.

153 I distinguish this case from that in *CC Builders (NSW) Pty Ltd v Georges River Council* [2017] NSWLEC 1064 as that case dealt with a small and specific issue being the protection of trees on the site. There would be no material change to the development as a result of the conditions and nothing left for further determination or assessment.

154 For that reason, I would not accept the matter of design excellence can be addressed by a deferred commencement condition.

*Clause 8.4(3) Has an architectural design competition been held in relation to the development*

155 It is common ground that the provisions of cl 8.4(3) of the LEP apply because of the height and value of the proposed development.

Pursuant to the provisions of cl 8.4(7), an architectural design competition means a competitive process conducted in accordance with procedures approved by the Director-General from time to time.

- 157 It is also common ground that an architectural design competition was held that related to the whole of Lot 100. What is in dispute is whether that competition related to the development that is the subject of the application. The applicant says that it does, and the Council says it does not.
- 158 Having regard to the evidence, I am satisfied that the competition that was held for the whole of the site was an architectural design competition that was held in relation to the development. The history of the evolution of the design process from the announcement of the winning entry to the form of the application now before the Court is detailed above. It is apparent that the major change made was in response to the Council's insistence that the siting of the buildings be amended to reflect the DCP control for the construction of the N/S Road. At no time when this change was conveyed to and agreed by the applicant did the Council suggest that there would be a need to hold a second competition.
- 159 The applicant has continued to liaise with the DIP, membership of which is identical to the Competition Judging Panel, in relation to the changes made and followed recommendations of the Panel in preparing the plans that are now before the Court. Whilst the plans the subject of the application are very different from those that were the subject of the winning submission, I consider that the proper process, as detailed in the procedures approved by the Director-General, has been followed.
- 160 There is no test on whether a development application when lodged has to be the same or substantially the same as the winning entry. What is important is that the proper process has been followed and, in this regard, I am satisfied that it has based on the evidence before me.
- 161 Accordingly, I find that an architectural design competition has been held in relation to the development.

*Clause 8.7 of the LEP – Community Infrastructure.*

- 162 This clause is not a bar to consent but rather an enabling provision to allow for a building that exceeds the maximum building height and FSR development standards that apply to a site to which the provisions of the clause applies.
- 163 The consent authority may consent to development on land to which the clause applies (including the erection of a new building or external alteration to an existing building) that exceeds the maximum height shown for the land on the Height of Buildings Map or the floor space ratio for the land shown on the Floor Space Ratio Map, or both, if the proposed development includes community infrastructure.
- 164 It is common ground that the dedication and construction of the N/S Road satisfies the definition of community infrastructure. I agree.
- 165 In deciding whether to grant development consent under this clause, the consent authority must have regard to the following: the objectives of the clause; whether the development exhibits design excellence and the nature and value of the community infrastructure to the City Centre.
- 166 The objectives of the clause are to allow higher density development on certain land in the City Centre where the development includes community infrastructure, and to ensure that the greater densities reflect the desired character of the localities in which they are allowed and minimise adverse impacts on those localities.



Having determined the construction and dedication of the public road is community infrastructure, the first objective is met. I do not consider that the greater density proposed in this development does reflect the desired character of the locality. The Council's planning controls envisage the creation of an 'eat street' along John Tipping Grove and, for the reasons already given, I do not consider the development has adequate regard to these controls.

168 I have already concluded that the development does not exhibit design excellence when assessed against those controls.

169 In relation to the value of the Community Infrastructure and in particular the offer to dedicate land and construct the new road, I make no findings as to whether the value of the offer would be appropriate, however, I do consider that it would be consistent with the provisions of the CIP. The valuation evidence was submitted late and the Council, as a public authority, did not have the opportunity to properly consider the late offer made. There is a large difference in the valuations provided. That evidence demonstrated that application of the CIP would result in a value that is considerably less than anticipated by the Council when it prepared the policy due to the recent increases in property values.

170 Assessment of the value of infrastructure in accordance with the CIP is however relevant. Section 1.6 of the policy is in the following form:

"This Policy will be reviewed on an annual basis for any housekeeping amendments. The Community Infrastructure Contribution Rate will be regularly reviewed and indexed annually to ensure it remains in line with market conditions. Council will review the Community Infrastructure Contribution Rate in line with the Consumer Price Index (CPI). CPI is a general measure of price inflation for households, measuring the change over time as a basket of consumer goods and services. A market review will be undertaken at least every five years to confirm land values. This will also allow for the Community Infrastructure Contribution Rate to be realigned based on market take-up and development activity in the preceding five year period."

171 The last review of the CIP was in 2018 and accordingly, it is not due for review until 2023 unless housekeeping amendments are required. I consider that the rate should be adjusted as per the CPI and, the Council will undertake a market review some time around 2023. Therefore, the correct rate to be applied is the indexed amount. The applicant submits this is \$158.16 and the Council \$158.71.

172 Applying the applicant's rates that include the 10% bonus FSR contemplated under cl 8.4(5) of the LEP, and excluding the commercial floor space, that amount is \$2,113,334.

173 Applying the Council's rates that does not include the 10% bonus and does include commercial floor space, the amount would be \$2,556,183.

174 Having regard to the terms of the policy, I consider the proper calculation of the amount payable under the DIP would be based on the difference in the 6:1 and 3:1 FSR excluding the commercial floor space. That is because the application has not been lodged pursuant to the provisions of cl 8.4(5) of the LEP nor have the terms of that clause been met. The CIP clearly excludes commercial floor area from the calculation of the rate. Under the Heading of Community Infrastructure Contribution Rate on page 10 of the policy it states: "Non-residential development will not be required to provide a Community Infrastructure Contribution. Non-residential floor area is excluded from the calculation of the Community Infrastructure Contribution Value".

175 Accordingly, I assess the floor area as per the CIP as being the difference between the FSR of the development and 3:1 minus the commercial floor space. That is 32,305.1m<sup>2</sup> minus 16,221m<sup>2</sup> minus 1,100m<sup>2</sup>. That is 14,984.1m<sup>2</sup>.

176 As there is a slight difference in the parties' calculation of the indexed amount, I have averaged the amount and arrived at a rate of \$158.40.

177 Therefore, I calculate the value of community infrastructure required under the CIP is \$2,373,481.

- 178 The letter of offer from the applicant to the Council (exhibit E) and the letter of offer to enter into a Voluntary Planning Agreement (exhibit J) state the construction costs of the N/S Road are \$2,503,256. Ms Gordon for the Council did refute some of those costs and Mr Wynne also agreed that there would be items included that are not required. Allowing a discount of 10% as submitted by the Council that amount would reduce to \$2,252,930.
- 179 The applicant proposes that only 50% of the construction costs are claimed as community infrastructure, the remainder being attributed to the development. Its claim for value of the land in the documents is \$2,905,000 so it submits the value of the community infrastructure claimed would be \$4,201,628.
- 180 Whilst I agree with Mr Lunney that the calculation of the land value is considerably less than that suggested by Mr Dempsey, I am not convinced that the value is as low as \$100,000. As the experts had agreed that further information would be necessary to determine the true value and I have determined, for the reasons provided above, that consent cannot be granted, I defer the value of the road to the Council and applicant to resolve at a later stage. It is also important to understand whether the Council would accept construction of parking under the road. This would affect its value and it appears the Council has changed its position in relation to this issue.
- 181 The N/S Road is required by the Council to improve access and traffic circulation within the PCC. It must have a high community value as it will achieve the delivery of one of the Council's strategic planning initiatives at no cost to the community, other than a building of a height and scale contemplated under its planning controls.
- 182 Having found the design of the development does not satisfy the relevant provisions of the LEP and the necessary jurisdictional provisions have not been met, consent cannot be granted.
- 183 The Orders of the Court are:
- (1) The applicant is to pay the respondent's costs thrown away as a result of the amendments made to the application as agreed or assessed pursuant to the provisions of s 8.15 of the *Environmental Planning and Assessment Act 1979*.
  - (2) The appeal is dismissed.
  - (3) Development Application DA20/0148 for the construction of a mixed use development with three level basement car park at Lot 300 in DP 1243401 and known as 634-638 High Street and 87-93 Union Road, Penrith is refused.
  - (4) The exhibits, other than exhibits F and 1, are returned.

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**Sue Morris**

**Acting Commissioner of the Court**

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Decision last updated: 17 January 2022