

Our Ref: JEH:DLB:977869

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Dear Patrick

### Advice on interpretation of Penrith City Council's Community Infrastructure Policy

We refer to your email dated 11 March 2020 and your request for advice with respect to the interpretation of Penrith City Council's Community Infrastructure Policy (**Policy**).

#### 1. Background

- 1.1 We understand that Urban Property Group is proposing to submit a development application to carry out a mixed use development on land known as 614-632 High Street, Penrith (**Land**).
- 1.2 The Land is 4,715m<sup>2</sup> in size and is zoned B4 and is marked as Key Site 3 on the Key Sites Map under *Penrith Local Environmental Plan 2010 (LEP)*.
- 1.3 Clause 8.7 of the LEP is an incentive clause that permits higher density development on key sites by allowing consent to be granted in circumstances where the maximum height and/or the maximum floor space ratio that applies to the Land if the development includes community infrastructure and design excellence is achieved in accordance with clause 8.4. Key Site 3 in effect has a maximum floor space ratio of 6:1 under clause 8.7(4)(b).
- 1.4 We are instructed that the proposed development:
  - (a) Includes a Community Infrastructure Offer prepared by Think Planners dated 26 March 2020 (**CI Offer**) in accordance with clause 8.7 of the LEP;

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- (b) will comprise retail, commercial and residential components and the proposed gross floor area in respect of each of these uses is as set out on page 3 of the CI Offer;
- (c) will exceed the maximum building height of 24m allowable under clause 4.3 of the LEP;
- (d) has been the subject of an *architectural design competition* (as that term is defined by 8.4(7) of the LEP) and achieved design excellence in accordance with clause 8.4 of the LEP; and
- (e) is not a staged or concept development application,

**(Proposed Development).**

- 1.5 You have instructed us that Penrith City Council (**Council**) has raised some concerns with the calculation of the Community Infrastructure Contribution set out in the CI Offer with particular reference to clause 2.4 of the Policy.
- 1.6 You have sought our advice regarding the correct interpretation and application of clause 2.4 of the Policy with reference to the Proposed Development and the CI Offer.

**2. Community Infrastructure Policy**

- 2.1 Principle 4 of the Principles of Community Infrastructure in section 2.2 of the Policy provides that the value of the Community Infrastructure will be determined by the Community Infrastructure Contribution Rate.
- 2.2 Clause 2.4 of the Policy relates to the calculation of Community Infrastructure and relevantly states:

*"The Community Infrastructure Contribution Rate is \$150/sqm of additional Gross Floor Area.*

*Additional Gross Floor Area is defined as any Gross Floor Area above the maximum total Floor Area identified on the Floor Space Ratio map within the Penrith LEP 2010.*

*...*

*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.*

*Staged Development Applications may be prepared that includes the offer of Community Infrastructure. Where such proposals exceed height controls but do not access the additional FSR until later stages, the Community Infrastructure Contribution Rate will apply based on any additional Gross Floor Area above the existing maximum building height until the threshold for the additional FSR is reached. During the final stages of a development, the overall Community Infrastructure Contribution Value will be balanced based*

*the rate per Additional Gross Floor Area. Refer to Appendix 3 for an explanation of this calculation method.*

...

*Under the provisions of clause 8.4(5) of the Penrith LEP 2020, up to 10% of existing FSR or height may be permitted to achieve design excellence. Any additional FSR permitted under clause 8.4(5) is not subject to this Policy or the Community Infrastructure Contribution Value."*

### 3. Clause 2.3

While some parts of the Policy refer to types of physical works that may be suitable Community Infrastructure, clause 2.3 of the Policy provides that Council will consider certain types of Community Infrastructure including; a monetary contribution or dedication of land or property or the carrying out of works or a combination of all of the above.

### 4. Clause 2.4 analysis

4.1 "Additional Gross Floor Area" is defined in clause 2.4 of the Policy as "any Gross Floor Area above the maximum total Floor Area identified on the Floor Space Ratio map within the Penrith LEP 2010." "Gross Floor Area" is also defined.

4.2 We note the following in relation to the calculation of the Community Infrastructure Contribution Value:

- (a) The Land has a maximum floor space ratio of 3:1 pursuant to clause 4.4 of the LEP and the Floor Space Ration Map. As the site area of the Land is 4,715m<sup>2</sup>, the **maximum gross floor area permitted is 14,145m<sup>2</sup>**.
- (b) The Proposed Development includes a **total floor space of 28,276m<sup>2</sup>**.
- (c) The total floor space proposed includes **6,997m<sup>2</sup> of non-residential floor space**.
- (d) As design excellence has been achieved, the Land benefits from an additional amount of floor space equal to 10% of the maximum permitted floor area. Applying a maximum floor space ration of 3.3:1, **an additional area of design excellence floor space of 1,415m<sup>2</sup>** is permitted, bringing the maximum floor area permitted by the LEP on the Land 15,560m<sup>2</sup>.

4.3 Pursuant to clause 2.4 of the Policy, it is clear that the following floor space areas are excluded from the calculation of the Community Infrastructure Contribution Value:

- (a) the additional 10% of design excellence floor area permitted under clause 8.4(5) (**1,415m<sup>2</sup>**); and
- (b) the floor space areas in respect of the non-residential components of the proposed development (**6,997m<sup>2</sup>**).

- 4.4 Accordingly the Additional Gross Floor Area that will be the subject of the calculation of Contribution Infrastructure is 5,719m<sup>2</sup>. Having regard to the Community Infrastructure Contribution Rate of \$150/sqm, the Contribution Infrastructure Contribution Value is **\$857,850** (subject to indexation at the time of payment).

## 5. Staged Development Applications

- 5.1 The term 'Staged Development Application' is capitalised throughout the Policy but is not defined in the Policy, the LEP or the *Environmental Planning and Assessment Act 1979 (EPA Act)*.
- 5.2 We note that at the time of the adoption of the Policy by Council on 14 November 2016, the EPA Act did provide a definition for a staged development application in section 83B as follows:

'a **staged development application** is a development application that sets out concept proposals for the development of a site, and for which detailed proposals for separate parts of the site are to be the subject of subsequent development applications. The application may set out detailed proposals for the first stage of development.'

- 5.3 The EPA Act was subsequently amended on 14 August 2017 to delete this definition and provide a new definition for a 'concept development application'. Although some minor amendments were made, for the purpose of this advice, we note that the proposed Development is not a staged development application (as it was defined pre 14 August 2017) or a concept development application as it is now defined in the EPA Act.
- 5.4 In our view, the parts of the Policy which are expressed to apply to 'Staged Development Applications' plainly do not apply to the Proposed Development or the Calculation of the Contribution Infrastructure Contribution Value in accordance with the Policy as there is no 'later stage' proposed.
- 5.5 In these circumstances, the maximum height of the Proposed Development is completely irrelevant to the calculation of the Contribution Infrastructure Contribution Value and the amount is calculated in accordance with the clearly articulated box on the bottom of page 9 of the Policy.

## 6. Conclusion

- 6.1 Any part of the Policy which is expressed to apply to 'Staged Development Applications' does not apply to the Proposed Development or the Calculation of the Contribution Infrastructure Contribution Value in accordance with the Policy.
- 6.2 The additional 10% of design excellence floor area permitted under clause 8.4(5) and non-residential floor space areas in respect of the proposed development are excluded when calculating the Community Infrastructure Contribution rate. We support the calculation methodology outlined in the CI Offer which is consistent with the methodology set out in the Policy.

6.3 The Policy provides in clause 2.3 that a monetary contribution is a type of Community Infrastructure that will be considered by Council and therefore an offer of this nature is an appropriate Community Infrastructure offer.

Please contact Danielle Le Breton should you have any further questions or concerns.

Yours faithfully



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