



Land and Environment Court
New South Wales

Case Name: Urban Apartments Pty Ltd v Penrith City Council

Medium Neutral Citation: [2023] NSWLEC 1094

Hearing Date(s): 10-14 October 2022: Final submissions 20 November 2022

Date of Orders: 02 March 2023

Decision Date: 2 March 2023

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The appeal is dismissed
(2) Development application DA20/0167 seeking consent for construction of a part 5-storey, part 44-storey mixed use development including a 5-storey podium inclusive of 4 levels of above ground partially sleeved parking and one level of basement car parking at 614-632 High Street, Penrith, being Lot 10 in DP 1162271, is refused.
(3) All Exhibits are returned, except for Exhibits H, J, FF, GG, HH, JJ, KK, LL and 13.

Catchwords: DEVELOPMENT APPLICATION – mixed use development in B4 Mixed Use zone – residential apartment development – whether exhibits design excellence – whether community infrastructure is included – flood evacuation – whether variation to sun access development standard is justified -

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 7.4, 7.11, 8.7, 8.15
Environmental Planning and Assessment Regulation 2000, cl 55
Land and Environment Court Act 1979, s 39

Penrith Local Environmental Plan 2010, cll 4.3, 4.4, 4.6,
8.2, 8.4, 8.7
Roads Act 1993, ss 7, 9, 145
State Environmental Planning Policy (Planning
Systems) 2021
State Environmental Planning Policy No 65 – Design
Quality of Residential Apartment Development, Sch 1
Sydney Local Environmental Plan 2012, cll 6.14

Cases Cited: Agostino v Penrith City Council (2010) 172 LGERA 380;
[2010] NSWCA 20
Botany Bay City Council v Saab Corp (2011) 82
NSWLR 171; [2011] NSWCA 308
Initial Action Pty Ltd v Woollahra Municipal Council
(2018) 236 LGERA 256; [2018] NSWLEC 118
L & G Management Pty Ltd v Council of the City of
Sydney (2021) 252 LGERA 31; [2021] NSWLEC 149
L & G Management Pty Ltd v Council of the City of
Sydney [2021] NSWLEC 1084
North Sydney Municipal Council v PD Mayoh Pty Ltd
(No.2)(1990) LGRA 71
Toga Penrith Developments Pty Limited v Penrith City
Council [2022] NSWLEC 117
Wehbe v Pittwater council (2007) 156 LGERA 446;
[2007] NSWLEC 827

Texts Cited: City of Penrith's Community Infrastructure Policy
Penrith Development Control Plan 2014

Category: Principal judgment

Parties: Urban Apartments Pty Ltd (Applicant)
Penrith City Council (Respondent)

Representation: Counsel:
A Galasso SC with J Reid (Applicant)
A Pickles SC (Respondent)

Solicitors:
Mills Oakley (Applicant)
Dentons (Respondent)

File Number(s): 2021/355201

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** A mixed use development is proposed on a site known as 614-632 High Street, Penrith, within the Penrith central business district, and opposite what is known as the 'Civic Centre' comprising the Penrith City Library, and Joan Sutherland Performing Arts Centre.
- 2 To this end, development application No DA 20/0167 was lodged with Penrith City Council (the Respondent) by the Applicant in these proceedings, Urban Apartments Pty Ltd, on 1 April 2020.
- 3 The development broadly comprises:
 - (1) Basement car parking
 - (2) Ground floor level retail premises within a five-storey podium, that also contains car parking, and lobbies providing access to two towers described as Tower A and Tower B.
 - (3) Tower A is proposed to contain commercial premises on levels 1-3.
 - (4) Tower B is proposed to contain serviced apartments on levels 1-8, and residential apartments on levels 9-43. A sky garden is proposed on Level 38.
 - (5) A pedestrian lane is proposed to the eastern boundary of the site to provide access between Union Lane and High Street.
- 4 While the proposal refers to Tower A and Tower B, it is relevant to record that Tower A does not rise above the podium as a visible structure, while Tower B does, as a single taller tower.
- 5 The development the subject of the development application also proposes community infrastructure in the form of dedication of land as a road adjacent to the western boundary of the site and creation of a right of public access and an easement for passive recreation over land to the east of the site.
- 6 Given the capital investment value of the proposal, the relevant consent authority is the Sydney Western City Planning Panel (the planning panel), according to sch 6 of State Environmental Planning Policy (Planning Systems) 2021.
- 7 The Planning Panel resolved to refuse the development application on 17 May 2021, and a Notice of Determination was issued to the Applicant by the Respondent to this effect on 4 June 2021.

- 8 The Applicant now brings this appeal under Class 1 of the Court's jurisdiction, pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 9 The Applicant amended the development application on two occasions prior to the hearing:
- (1) By Notice of Motion dated 6 June 2022 (Exhibit J)
 - (2) By Notice of Motion dated 2 September 2022 (Exhibit H)
- 10 The Applicant sought to further amend the development application at the commencement of the hearing, by Notice of Motion filed 7 October, with leave granted to amend the notice of motion with the following plans and other documents:
- Amended architectural plans, later marked Exhibit A
 - Amended landscape plans, later marked Exhibit B
 - Amended clause 4.6 variation request for height of building, later marked Exhibit C
 - Amended clause 4.6 variation request for floor space ratio, later marked Exhibit D
 - Amended clause 4.6 variation request for sun access, later marked Exhibit E
 - Design Verification Statement, later marked Exhibit F
 - Other documents, including an amended acoustic impact assessment, and Stormwater concept plans, later marked Exhibit G (tabs 5 and 6 respectively).
- 11 The Applicant sought to further amend the development application a number of times throughout the hearing. The Respondent did not object to the amended plans and other documents being relied upon, subject to a reserve it sought in relation to expert review of the documents.
- 12 As the decision appealed against was a decision made by the planning panel, the Respondent is subject to the control and direction of the Panel in connection with the conduct of the appeal. The Respondent later advised that the planning panel delegated its authority in respect of cl 55(1) of the *Environmental Planning and Assessment Regulation 2000* (EPA Regulation).
- 13 In the interests of time, the Court granted the Applicant leave to rely upon the amended plans and other documents, but reserved its direction with respect to

lodgment of the material on the NSW Planning Portal, and costs pursuant to s 8.15(3) of the EPA Act pending the receipt of instructions by the Respondent from the planning panel.

- 14 The Court, exercising its power under s 39(2) of the *Land and Environment Court Act 1979* and exercising the function of Penrith City Council, as the relevant consent authority, agreed to the Applicant amending the development application in accordance with cl 55(1) of the EPA Regulation.

The site and its context

- 15 The Amended Statement of Facts and Contentions (Exhibit 1) identifies the site to be:

- (1) bounded by High Street to the north, and Union Lane to the South.
- (2) legally described as Lot 10 in DP 1162271, with the frontage to High Street of 82.845m to the north, the frontage to Union Lane of 90.79m to the south, and a western boundary that measures 46.43m.
- (3) located approximately 600m south-west of Penrith Railway Station, and 800m east of the Nepean River.

- 16 The site is located within the B4 Mixed Use zone, under the Penrith Local Environmental Plan 2010 (PLEP), in which commercial premises, serviced apartments and residential accommodation are permitted with consent, where consistent with objectives for development in the zone that are in the following terms:

- 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.

- 17 Two residential flat buildings are located to the south of the site, at 79-81 Union Road, and 83-85 Union Road, with secondary frontages to Union Lane.

- 18 The site is also identified as a Key Site pursuant to cl 8.7(2) of the PLEP, identified on Key Sites Map - Sheet KYS_006, and is within the Penrith City Centre.

The onsite view and public submissions

- 19 The hearing commenced with an onsite view, at which the Court, in the company of the legal representatives and certain experts, heard an oral submission from a resident of the residential flat building at 79-81 Union Road, whose concerns are recorded in notes agreed between the parties (Exhibit 13) to include the following topics:

- (1) The capacity for Union Lane to operate as a two-way street.
- (2) Overshadowing by the proposal of adjoining and nearby sites, including existing apartments and a childcare centre located in Union Lane.
- (3) Flood affectation of the local area.

- 20 It is relevant to record here that the development application was notified between 24 April – 8 May 2020, and nine submissions were received in response. Public submissions received by the Respondent, in response to the notification, are contained in the Respondent's bundle of documents (Exhibit 3, Tabs 39-54). Concerns expressed in the submissions may be summarised as follows:

- Solar access and overshadowing
- Impact on distant views to Blue Mountains
- Traffic and congestion, and loss of convenient on-street parking
- Excessive height and over development
- Construction impacts
- Loss of privacy
- Inconsistent with the existing character of Penrith.

- 21 During the onsite view, the Court was taken on to the subject site, and the full extent of Union Lane, and was taken on a walking tour around the block formed by Worth Street to the east, High Street to the north, John Tipping Grove to the west and Union Road to the south. Relevantly, this tour included a green open space at the intersection of Mulgoa Road and Union Road.

The contentions

22 The contentions in this matter are listed as they appear in Exhibit 1, as follows:

- (1) Contention 1 – Design excellence
- (2) Contention 2 – Community Infrastructure Offer
- (3) Contention 3 – Height
- (4) Contention 4 – Density, bulk and scale
- (5) Contention 5 – SEPP 65 Design Quality Principles
- (6) Contention 6 – Design considerations
- (7) Contention 7 – Context and character of the area – Penrith City Centre
- (8) Contention 8 – Flood Planning
- (9) Contention 9 – Traffic
- (10) Contention 10 – Transport, Access and Parking
- (11) Contention 11 – Waste Management
- (12) Contention 12 – Water and Stormwater management
- (13) Contention 13 – Overshadowing
- (14) Contention 14 – Landscaping
- (15) Contention 15 – ESD
- (16) Contention 16 – Public interest
- (17) Contention 17 – Economic and orderly Development
- (18) Contention 18 – Earthworks
- (19) Contention 19 – Crime Prevention Through Environmental Design
- (20) Contention 20 – Suitability of the site
- (21) Contention 21 – Restriction on the use of Land.

23 The Court was assisted in considering the contentions in this matter by expert evidence from the following experts, in the following disciplines:

- (1) In respect of acoustic engineering, Ms Carlie Fulton on behalf of the Respondent, and Mr Ben White on behalf of the Applicant conferred in the preparation of a joint expert report (Exhibit 4).
- (2) In respect of engineering, Mr Sam Haddad and Dr Daniel Martens on behalf of the Applicant, and Mr Kim Chan on behalf of the Respondent conferred in the preparation of a joint expert report (Exhibit 5).
- (3) In respect of Stormwater and Water Sensitive Urban Design (WSUD), Mr Sam Haddad on behalf of the Applicant, and Messrs Tim Gowing

and Mark Babister on behalf of the Respondent conferred in the preparation of a joint report (Exhibit 6).

- (4) In respect of Landscape, Mr Matt Coggan on behalf of the Applicant and Mr Matthew Taylor on behalf of the Respondent conferred in the preparation of a joint expert report (Exhibit 7) and a supplementary report (Exhibit 15).
- (5) In respect of flood evacuation, Mr Steven Molino on behalf of the Applicant and Mr Mark Babister on behalf of the Respondent conferred in the preparation of a joint expert report (Exhibit 8), and a supplementary report (Exhibit 14).
- (6) In respect of traffic and parking, Mr Tom Steal on behalf of the Applicant, and Mr Ken Hollyoak on behalf of the Respondent conferred in the preparation of a joint expert report (Exhibit 9).
- (7) In respect of town planning and urban design, Mr Peter Smith and Mr Adam Byrnes on behalf of the Applicant, and Ms Gabrielle Morrish and Mr Nathan Croft on behalf of the Respondent conferred in the preparation of a joint expert report (Exhibit 10).
- (8) In respect of waste, Mr Garry Dickens on behalf of the Applicant, and Mr Joshua Romeo on behalf of the Respondent conferred in the preparation of a joint expert report (Exhibit 11).
- (9) In respect of the heat island effect, Mr Peter Smith on behalf of the Applicant, and Ms Alexa McCauley on behalf of the Respondent conferred in the preparation of a joint expert report (Exhibit 12).

24 I note here that some experts opted to consider the contentions as a set of issues grouped differently to the contentions as expressed by the Respondent above.

25 In considering the issues in dispute in the circumstances of this matter, I must first consider whether the proposed development includes community infrastructure. If community infrastructure is not included in the proposal, the development the subject of the development application does not receive the benefit of the additional height and FSR at cl 8.7(3) and (4) of the PLEP, and I must determine whether the Court can be satisfied of those matters required of it by cl 4.6 of the PLEP in respect of height of building and FSR.

26 If community infrastructure is found to be included, I must then have regard to its nature and value to the city centre, and to design excellence, at cl 8.4, to which reference is made at cl 8.7(5)(b) of the PLEP.

- 27 In order to have regard to design excellence, I must first consider whether the proposed development exhibits design excellence within the terms of cl 8.4 of the PLEP.
- 28 That said, cl 8.2, which seeks to apply controls on sun access to public open space, applies despite cl 8.4 of the PLEP (subcl (3)).
- 29 Therefore, whether or not the proposal exhibits design excellence, I must consider the controls at cl 8.2. To do so, I must consider whether the controls at cl 8.2 are a development standard, and so subject to variation under cl 4.6 of the PLEP, or a prohibition on the addition of height beyond that permitted by controls indicated for the land on the Height of Buildings Map.
- 30 Only in the event that the provisions at cl 8.2 are a development standard may I then consider the written request prepared in accordance with cl 4.6 in respect of sun access.
- 31 For the Court to entertain the grant of consent, I understand that the proposal must be found, in the opinion of the Court, to exhibit design excellence, and overcome any barrier, be it a prohibition or development standard, found in cl 8.2 of the PLEP.
- 32 In the event that the proposal is found to exhibit design excellence, and overcomes any barrier at cl 8.2, the Court will then consider the additional merit issues in dispute, not otherwise considered in deciding whether design excellence is exhibited.

The relevant provisions of height and FSR are disputed

- 33 At the heart of this case is disagreement about the permitted building height and floor space ratio, that are both open to variation by provisions of the PLEP in respect of design excellence, community infrastructure and public space amenity.
- 34 Consistent with the standard form template for local environmental plans, the height and FSR provisions of the PLEP are found at cl 4.3, in respect of height, and cl 4.4 in respect of FSR.
- 35 However, cl 8.7(3) of the PLEP sets aside the provisions at both cll 4.3 and 4.4 where development is proposed on sites identified on the 'Key Sites Map', as is

the case here, if the proposed development includes community infrastructure, and only after regard is had to the following:

- (1) Firstly, the objectives of cl 8.7,
- (2) Secondly, whether the development exhibits design excellence, and
- (3) Thirdly, the nature and value of the community infrastructure to the City Centre.

36 That said, provisions at cl 8.2(3) of the PLEP act, in the words of the Respondent, as a 'brake on limitless height' if the development results 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.

37 I will deal with the provisions of cl 8.2 in more detail later.

38 For now, as the issue of community infrastructure is central to the height and FSR standards applicable to the site, it is helpful to include the provisions of cl 8.7 of the PLEP in full:

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.

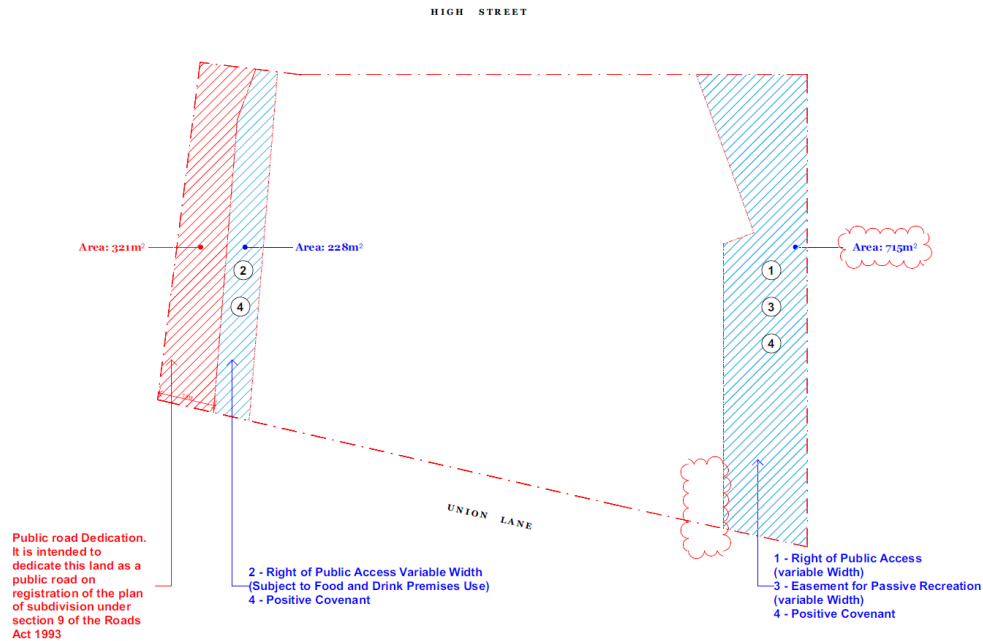
(6) In this clause, **community infrastructure** means development for the purposes of recreation areas, recreation facilities (indoor), recreation facilities (outdoor), recreation facilities (major), public car parks or public roads.

39 It is also helpful to restate here that the Applicant considers community infrastructure to be included as a part of the development at two locations on the site:

(1) A portion of land to the west of the site, adjoining what is shown to be a future road (‘the North-South road’), proposed to be delivered by development on the adjoining site at 87-93 Union Road, and adjacent to a colonnade proposed in this development to be the subject of a Right of Public Access and Positive Covenant which the Applicant proposes for the purposes of an ‘Eat Street’ (the Eat Street). I will refer to this portion of land as the West Link.

(2) A new through-site pedestrian link to the east (‘the East Link’) comprising landscaping, and providing access to the entry to serviced apartments proposed as part of the development.

40 The Applicant relies upon a draft plan of subdivision marked Exhibit NN, reproduced below, depicting the portions of land proposed as community infrastructure.



The West Link

- 41 To the west of the site, the proposal comprises two portions of land to be dedicated by plan of subdivision:
- (1) Firstly, an area of 321m² that the Applicant submits is to provide for completion of a new North-South road.
 - (2) Secondly, an area of 228m² in the form of a colonnade and landscape treatment referred to as the 'Eat Street', for which a Right of Public Access and Positive Covenant is proposed.
- 42 The proposed North-South Road is an aspect of the development for which consent has been granted on the adjoining site at 634-638 High Street (the Toga Development).
- 43 It is agreed that the North-South Road is predominantly within the adjoining site. However, the drawings depicting Stage 3 (Exhibit 9, Annexure C) show that a portion of the subject site is required to complete the North-South Road.
- 44 The North-South Road is designed to be delivered in 3 stages;
- Stage 1: Connects a portion of the proposed North-South Road to the existing roundabout on High Street.
 - Stage 2: at which time the intersection at the existing roundabout on High Street is signalised but, for whatever reason, not for use by pedestrians.
 - Stage 3: at which time the North-South Road is widened to two lanes, and the roundabout is signalised for use by pedestrians.

- 45 In general terms, it is sufficient for now to note that the traffic experts agree that completion of the proposed North-South Road will alleviate any constraints arising from the limitations of Union Lane.

The East Link

- 46 According to the Respondent, the East link is not identified in the Penrith Development Control Plan 2014 (PDCP) as a desired connection and serves only to add value to the Applicant's proposal, as it provides the means of access to the serviced apartments. It does not provide a connection to a local destination, does not connect to an onward link to Union Road and so is not a space that would attract pedestrians to recreate. Instead, it is more akin to a Mall, which is, in effect, a closed road.

- 47 Furthermore, the East link is depicted on Architectural and landscape plans to comprise elevated planting, that is necessary given the area is located on a concrete slab over the basement car park below, and immediately above subsurface rainwater storage and OSD, according to the Stormwater Plans (Exhibit HH).

- 48 Mr Byrnes considers the east link to be a common form of recreational space, in which a user can engage in either active or passive recreation, is activated by cafes, planting and other embellishments consistent with public open space in the Penrith city centre.

- 49 I note here that the Landscape Plans also depict the following elements:

- Art interpretation
- Nestled seating and tables
- Water feature and seating where the East Link meets High Street
- Planting
- Bicycle parking

- 50 I also note that Mr Hollyoak opines that the East Link, by virtue of the through site link it offers to pedestrians, may result in pedestrians crossing High Street at midblock locations without regard for their own safety, necessitating fencing.

- 51 While Mr Steal considers there to be no obvious desire line that would cause pedestrians to act contrary to their own life safety, the risk could be managed

by a condition requiring the Applicant to make an application to the Penrith Local Traffic Committee to erect fencing along the median of High Street between the intersections of High Street / Worth Street and High Street / Council Entry.

The Respondent's position

- 52 The Respondent's primary submission is that the development does not include Community Infrastructure as no dedication is offered by way of voluntary planning agreement (VPA), and the type of infrastructure proposed is at odds with that preferred by the Respondent.
- 53 The Respondent's preferred types of Community Infrastructure are tabulated in Section 2.5 of the City of Penrith's Community Infrastructure Policy (Exhibit 3, Vol 2, Tab 9) against those types defined at cl 8.7(6) of the PLEP.
- 54 The Respondent relies upon a history of correspondence in which the Respondent reiterates its concern at the nature and value of the infrastructure proposed by the Applicant. (Exhibit 3, Tabs 7-9)
- 55 A consistent thread in the correspondence is that the nature and value of the community infrastructure proposed is not in accordance with the definition of community infrastructure in cl 8.7(6) of the PLEP, and is not consistent with the types of community infrastructure set out in the Community Infrastructure Policy.
- 56 The purpose of the Community Infrastructure Policy is "to provide guidance to the community, proponent and Council regarding an offer of Community Infrastructure as part of certain development within the Penrith City Centre." (folio 891)
- 57 The infrastructure identified in the Community Infrastructure Policy is distinguished from that in the Respondent's Contributions Plan (Exhibit 3, Vol 2, Tab 10), at folio 896, in the following terms:

"Council utilises Local Infrastructure Contributions to deliver essential and basic infrastructure and facilities. This Policy relates to the provision of Community Infrastructure that is 'over and above' the base level that is being provided via development contributions. As a result, Local Infrastructure Contributions will still be required under Part 7, Subdivision 3 of the EP&A Act

and the relevant Development Contributions Plan in addition to an offer of Community Infrastructure.

Nothing in this Policy prevents a proponent from carrying out Works-in-Kind in lieu of a monetary contribution required under Part 7 Subdivision 3 of the EP&A Act.”

- 58 Where Community Infrastructure is provided, the Community Infrastructure Policy states that “A Planning Agreement will be required to put legal arrangements in place for the provision of Community Infrastructure made under this Policy.” (folio 896)
- 59 By way of comparison, the Respondent submits the circumstances are virtually identical to those in *L & G Management Pty Ltd v Council of the City of Sydney* [2021] NSWLEC 1084 (*L&G Management 1*) in which, firstly, the Applicant sought to dedicate land adjoining a public road, reflected in a draft plan of subdivision and, secondly, that the dedication of land in *L&G Management 1*, as here, was a pre-condition to the award of bonus floor space under a provision at cl 6.14 of the Sydney Local Environmental Plan 2012, in that case.
- 60 Again, likewise, the Applicant in *L & G Management 1* also submitted, as here, that a VPA is not required for the land dedication under the relevant terms as it is intrinsic to the development application.
- 61 However, as shown by Duggan J in her decision on appeal in *L & G Management Pty Ltd v Council of the City of Sydney* (2021) 252 LGERA 31; [2021] NSWLEC 149 (*L & G Management 2*), at [40]-[41]:

“[40] Where the grant of consent imposes a condition approving the development application, which application proposes the dedication of land, there must be power to impose such a condition whether the dedication was voluntary or not. The only power to impose such a condition is that available under ss 7.11 or 7.4, there being no residual power in s 4.17, contrary to the submission of L & G. As the DA, as formulated, could not be approved due to there being no relevant power engaged under s 7.11 or s 7.4 the Court had no power, as consent authority, to impose a condition reliant upon cl 6.14 of the LEP requiring the Proposed Dedication.

[41] L & G contended that the dedication could be effected by the granting of an approval in accordance with the development application without a condition that related to dedication. There is no substance to this submission, a consent cannot be granted to development proposed if there is no power to permit the consent to be granted. Merely because an applicant formulates a development application that exceeds the power of approval if a condition was imposed is not overcome by an approval to the development application absent a condition. The grant of the approval can only be made if the development it contains is development capable of being approved. In the

EP&A Act development that included the dedication of land free of cost can only be approved if the dedication is authorised by a provision of the EP&A Act and for the reasons outlined above, it is not and therefore the development application is incapable of approval.”

- 62 Furthermore, *L & G Management 2* also found, at [43], that the volunteering of land to be dedicated does not release the Applicant from such a proposal being ‘required’, whether or not the Applicant elects to offer it of their own accord, because:

“[43] ... Clause 6.14 of the LEP permits a developer to make an election in the event it is seeking to exceed the FSR controls in the LEP. That election is either reliant upon a cl 4.6 variation for the whole of the exceedance of the FSR control or in the alternative reliant upon cl 6.14 and the provision of public amenity benefits to the extent provided for in that clause and if an additional exceedance exists...to seek a variation under cl 4.6 for the remaining exceedance. Whilst the election as to which path is taken is left for the developer, the power to approve a building that exceeds the FSR provided for in cl 4.4 must be engaged either by cl 4.6, cl 6.14 or a combination of both. Therefore where a dedication forms part of the cl 6.14 bonus, that dedication is required in the sense that the development application is incapable of being approved where there is a reliance upon it to attract the bonus FSR. Absent dedication and the cl 6.14 bonus FSR a cl 4.6 variation for the total exceedance is required.”

- 63 In summary, the Respondent submits that there is no power to affect the dedication of land under the EPA Act without it being a requirement of a contributions plan or where a voluntary planning agreement is entered into by the parties for the dedication of that land.

The Applicant’s position

- 64 While the Respondent contends that no provision has been made for the dedication of land in the West Link, by way of a planning agreement or other means, the Applicant relies upon the provisions of s 9 of the Roads Act 1993 that relevantly provides:

9 Public road created by registration of plan

(1) A person may open a public road by causing a plan of subdivision or other plan that bears a statement of intention to dedicate specified land as a public road (including a temporary public road) to be registered in the office of the Registrar-General.

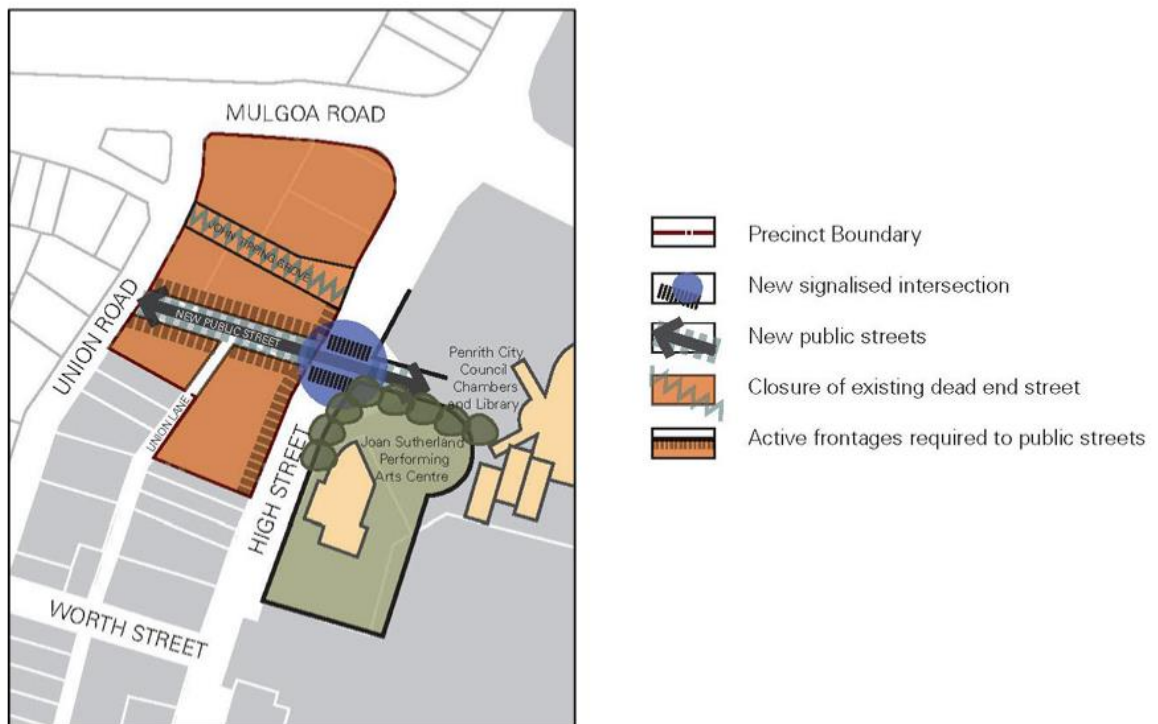
(2) On registration of the plan, the land is dedicated as a public road.

- 65 Next, as the proposed public road is within the Penrith local government area, s 145 of the Roads Act deems the road to be vested in fee simple in the appropriate roads authority.

- 66 The council of a local government area is the roads authority for all public roads within the area, but for any freeway or Crown road, and any public road for which some other public authority is declared by the regulations to be the roads authority (s 7(4)).
- 67 Accordingly, the area of land comprising the West Link is identified in Exhibit NN, and the mechanism by which the dedication is to be effected is also identified, for which no condition of consent is required, unlike the circumstances of L & G Management where the first instance judgment, and the appeal heard by Duggan J, found the Court had no power to impose a condition requiring the dedication of land.
- 68 Just as Duggan J set out the sources of power that would permit a condition of consent to require the dedication of land, in the circumstances of that case, at [40]-[41] of the judgment, the Applicant identifies s 9 of the Roads Act as such a power.
- 69 The Applicant submits that the land proposed to be dedicated under s 9 of the Roads Act answers the description of community infrastructure as understood in the definition of the PLEP at cl 8.7(6), and so sets aside the provisions of cll 4.3, 4.4 and 8.4(5), such that there is no height of buildings standard to conform to, and that the allowable FSR is 6:1.
- 70 Furthermore, absent a height standard that is exceeded, and given the proposal complies with an FSR of 6:1, the proposal has no need to rely upon written requests pursuant to cl 4.6 of the PLEP, although a written request to vary the height of building standard (Exhibit C) and that of the FSR (Exhibit D) are in evidence.
- 71 As to those matters at cl 8.7(5) to which the Court must have regard:
- (1) In respect of the objectives, that are in part declaratory, the proposal achieves higher density development, provides community infrastructure, and reflects the desired character of the locality in the manner identified by the NSW Government Architect, and minimises any adverse impact on the locality by virtue of the slenderness of the tower, bulk, massing and modulation of the podium, and the manner in which it responds to the flooding and traffic requirements of an area under transition.

- (2) In respect of whether the development exhibits design excellence, the development application is supported by evidence that design development has been completed under the auspices of a Design Integrity Panel (about which more will be said), is accompanied by certification to this effect, under the signature of the NSW Government Architect, Ms Abbie Galvin dated 28 April 2022 (Exhibit 10, Appendix E), and supported by the opinion of Mr Peter Smith.
- (3) In respect of the nature and value of the community infrastructure, the land adjoining the North-South Road, that is an aspect of the consent granted to the adjoining Toga development, is that road depicted on Figure E11.26 of the PDCP, re-produced below, proposed to be registered under s 9 of the Roads Act so that, on registration of the plan, the land is dedicated as a public road. Relevantly, the traffic experts agree the portion of the subject land comprising the West Link is essential to the completion of the North-South Road.

Figure E11.26: Precinct 1 Design Principles



- (4) In respect of the east link, it is a link encouraged by the Design Integrity Panel (DIP) to improve permeability by providing through-site links consistent with objective (a), Section 11.3.1 of the PDCP, and anticipates opportunities for future development to the east of the site, and is a place open to the public for passive recreation.

The development includes Community Infrastructure

72 While the proposition put by the Applicant in this case may appear identical in many respects to that put by the Applicant in *L & G Management 1* and *L & G*

Management 2, it is the means by which land is proposed to be registered, and so dedicated, that distinguishes this case from *L & G Management*.

- 73 In *L & G Management 2*, Duggan J deals, at [40], with the proposition advanced by the Applicant in that case, where land was required to be dedicated by a condition of consent, or in the alternative, by operation of s 4.15 of the EPA Act.
- 74 The reasons cited by Her Honour at [41] of the decision are those reasons as to why the power to impose a condition is only available under ss 7.11 or 7.4 of the EPA Act.
- 75 As Her Honour observed, at [40], the development application, as formulated in that case, could not be approved due to there being no relevant power engaged under s 7.11 or s 7.4 of the EPA Act. Accordingly, the Court had no power, as consent authority, to impose a condition reliant upon cl 6.14 of the LEP requiring the Proposed Dedication.
- 76 However, in this case, the Applicant does not rely upon a condition of consent for the dedication of land, but on s 9 of the Roads Act which provides for the opening of a road by registration of a plan of subdivision.
- 77 This is factually distinct from the proposal advanced by the Applicant in *L & G Management* in which land was proposed to be subdivided into lots and dedicated to the Council for the purpose of road widening at some point in the future. In that case, the opening of a road was not proposed, and s 9 of the Roads Act was not engaged.
- 78 I am persuaded by the Applicant that, in the circumstances of this case, the Applicant does not rely upon a condition requiring dedication pursuant to cl 8.7 of the PLEP, nor for consent for the dedication to rely on s 4.15 of the EPA Act. Instead, the dedication is given effect by a mechanism to which the Court was not, in *L & G Management 1* or *L & G Management 2*, directed.
- 79 I find the Applicant includes community infrastructure in two ways:
- (1) Firstly, by providing land for the purposes of a public road, which is a type of community infrastructure nominated in cl 8.7(6) of the PLEP. The means of providing the land for the purpose of a public road, is by the mechanism at s 9 of the Roads Act. That mechanism is, at subs (1),

by causing a plan of subdivision that bears a statement of intention to dedicate specified land as a public road to be registered in the office of the Registrar-General, and that, by operation of subs (2), is dedicated as a public road upon registration of that plan of subdivision.

- (2) Secondly, in the form of a recreation area in the location of the East Link.

80 In reaching this conclusion, I have also had regard to the nature and value of the community infrastructure to the City Centre, as I am required to do by cl 8.7(5) of the PLEP.

81 I find the portion of land forming the West Link essential to the completion of the North-South Road so as to achieve a road in a location that is similar or identical to that desired by the Respondent in Section E11.26 of the PDCP, and I accept the agreement of the traffic experts in this regard. So understood, the West Link, while small in area, is therefore of significant value in completing the North-South Road, and in achieving a portion of the intersection treatments and upgrades at High Street and Civic Centre identified at Section 2.5 of the Community Infrastructure Policy.

82 Next, while the East link is not in the precise location of that shown in Figure E11.18 of the PDCP, which is the focus of Section 11.3.1, Control 1, and does not connect with existing or proposed block lanes, shared zones, arcades or pedestrian ways, and is not opposite other such links, which is the focus of Control 3, I have considered the following:

- (1) Firstly, I note specific support by the DIP for the through-site link in the Minutes of the Design Review Panel Meeting dated 17 May 2012 (Minutes), and the level of comfort subsequently recorded in the minutes of the meeting dated 20 June 2019 (Exhibit O). I also note the Respondent's preferred type of Community Infrastructure, at Section 2.5 of the Community Infrastructure Policy includes creation of new laneways.
- (2) Secondly, the East Link conforms to the controls for pedestrian links set out at Section 11.3.1(7) of the PDCP insofar as the link is a minimum width of 4m, is clear of obstructions such as columns and stairs, provides direct and publicly accessible thoroughfare, and is open for its full length, with active frontages along the western edge.
- (3) Thirdly, while the East Link does not contain a children's playground, or an area used for community sporting activities, being two types of recreation areas provided for in the dictionary of the PLEP, those elements listed at [49] are consistent with the area being a public park,

reserve, garden or the like, which likewise comprise the definition. To this end, the landscape plans (Exhibit B) show soil depths ranging from four areas of deep soil, unencumbered by structure below, and where tree species are proposed, to raised planters of 0.5m and 1m in depth.

- 83 Accordingly, it is my preliminary view that the proposal includes community infrastructure, pursuant to cl 8.7 of the PLEP.

Whether proposed development exhibits design excellence

- 84 However, in accordance with cl 8.7(5), I must also have regard to whether the proposed development exhibits design excellence if the height and FSR provisions at cll 4.3 and 4.4 are to be set aside.

- 85 The Respondent contends that the proposed development fails to demonstrate design excellence as defined in cl 8.4 of the PLEP. In particular, the proposal lacks a high standard of architectural design, materials and detailing appropriate to the building type and location (cl 8.4(2)(a)), and the form and appearance of the proposed development will not improve the quality amenity of the public domain (cl 8.4(2)(b)).

- 86 The urban design experts tabulate their respective assessment of the proposal in respect of those provisions at cl 8.4 of the PLEP at Appendix B of the joint expert report (Exhibit 10), and agree that only certain provisions of cl 8.4 apply to the proposal, those being:

- 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, (Subcl (2)(e)(iv));
- Bulk, massing and modulation of buildings (Subcl (2)(e)(v));
- street frontage heights (Subcl (2)(e)(vi));
- environmental impacts such as sustainable design, overshadowing, wind and reflectivity (Subcl (2)(e)(vii));
- pedestrian, cycle, vehicular and service access, circulation and requirements, (Subcl (2)(e)(ix)); and
- the impact on, and any proposed improvements to, the public domain. (Subcl (2)(e)(x)).

- 87 While the particularising of those matters is unquestionably of assistance to the Court, for the reasons shown by Preston CJ in *Toga Penrith Developments Pty Limited v Penrith City Council* [2022] NSWLEC 117 (Toga), it is not sufficient

for the Court to form an opinion as to whether the proposed development does or does not exhibit design excellence by having regard to the evidence of the urban design experts alone.

88 Instead, cl 8.4 prescribes a framework for deciding whether a development exhibits design excellence (Toga, at [70]) and the Court must have regard to the particular terms of, and answer the particular questions raised by, the matters in the design excellence provisions (Toga, at [75]).

89 Clause 8.4 of the PLEP is in the following terms:

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 either or both of the following unless the design of the building or alteration is the result of an architectural design competition—

(a) a height of up to 10% greater than that allowed by clause 4.3,

(b) a floor space ratio of up to 10% greater than that allowed by clause 4.4.

(6) (Repealed)

(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.

90 Those issues set out at cl 8.4(2)(a), (b) and (c) are clearly reliant upon findings with respect to the issues within subcl 8.4(2)(e). For instance, whether the form and external appearance of the proposed development will improve the quality and amenity of the public domain, being a consideration required by subcl 8.4(2)(b) of the PLEP, is clearly inseparable from consideration of the impact on, and any proposed improvements to, the public domain (subcl (2)(e)(x)).

91 Furthermore, those matters set out at subcl (2)(a)-(c) are posed in terms of 'whether' the development the subject of the development application achieves certain things whereas those matters set out at subcl (2)(e) are posed in terms of 'how' the proposal addresses certain matters.

92 Accordingly, consideration of those matters at cl 8.4(2)(a), (b) and (c) of the PLEP, is clearly contingent upon those matters at cl 8.4(2)(e) of the PLEP.

93 However, that is not all. As is often the case, matters for consideration under the design excellence provisions at cl 8.4(2) of the PLEP are also separately contended. For example, the overshadowing of public space and neighbouring properties, which is the subject of contention 3, may be considered a function of bulk, massing and modulation at cl 8.4(2)(e)(v) of the PLEP, and is a kind of environmental impact to be considered at subcl (2)(e)(vii) of the PLEP. Taken together, these are all aspects to be considered in deciding whether the form and external appearance of the development will improve the quality and amenity of the public domain, which is a matter to which the Court must have regard, pursuant to cl 8.4(2)(b).

94 Likewise, character, bulk and scale, which is the subject of contention 4, is particularised, by the experts at least, as comprising street wall heights, that is an aspect of subcl (2)(e)(v), setbacks and urban form, being an aspect of subcl (2)(e)(iv), and vehicle access, which is an aspect of subcl (2)(e)(ix) of the PLEP.

95 For completeness, I will summarise the positions of the experts in respect of those issues that relate to the matters required to be considered under design excellence at cl 8.4 of the LEP.

96 The experts identify those relevant issues in the following topics:

- Height and overshadowing of public space and neighbouring properties
- Character, bulk and scale
- Above ground car parking
- Amenity

97 As I find sufficient overlap in the expert's evidence between Contention 3 and 4, I will address both contentions together.

An architectural design competition is not required

98 At the outset, it is relevant to record that the parties agree, as do I, the architectural design competition provided for in subcl (3) is obviated by virtue of a letter of waiver prepared by Mr Ben Hewett, Acting Government dated 20 November 2018 (Competition Waiver) (Exhibit L), under delegation of the Director General, consistent with subcl (4).

- 99 The Competition Waiver states the project was the winner of a Design Excellence Competition prior to changes to the PLEP, in respect of additional height and gross floor area, and that a panel comprising a representative of the Government Architects Office (GANSW), the Respondent, and the Applicant unanimously agreed that an amended scheme, presented by the Applicant on 25 February 2019, retained and further developed the design excellence awarded to the competition winning proposal.
- 100 Furthermore, the Competition Waiver states that the same design review panel (henceforth referred to consistently as the Design Integrity Panel or DIP), was to be retained through all future stages of the project to ensure design excellence is maintained.
- 101 The Applicant submits that the Competition Waiver, and subsequent correspondence, is not only the basis for the waiver in respect of an architectural design competition, but is also evidence of sustained engagement with the same design panel and that this is material to the Court's consideration of whether the proposal exhibits design excellence.
- 102 In a letter prepared by the NSW Government Architect, Ms Abbie Galvin, dated 13 December 2019 (Exhibit M), the evolution of the proposal is set out in the following terms:

"This letter confirms that, following a Design Competition waiver under Penrith LEP Clause 8.4, a Design Integrity Panel [DIP] was formed comprising Rory Toomey for GANSW, Brett Newbold for Council and Steve Kennedy for the Proponent.

The DIP's role has been to evaluate design quality of the evolving development proposal and conformity with the LEP's Design Excellence provisions, where appropriate to recommend design amendments that might improve the evolving development concept, and, finally, to advise Penrith City Council whether design excellence is exhibited in the final development proposal.

The DIP has met to review the evolution of this development concept on three separate occasions. After each meeting, advice and recommendations were provide to the Proponent and design team.

Overall the DIP has been impressed by the quality of the underlying design rationale as well as by the evolution of detailed design solutions which have responded comprehensively to the DIP's comments and recommendations.

With regard to development application plans, it is the DIP's unanimous conclusion that the final proposal exhibits design excellence according to considerations which are specified in LEP Clause 8.4

...”

- 103 The letter at Exhibit M also summarises the DIP’s opinion of conformity with design excellence provisions, itemised under the provisions at cl 8.4(2) of the PLEP.
- 104 In further support of the Applicant’s assertion at [101], the evolution of the proposed development is tendered in the form of the following design presentation packages:
- (1) Reference Proposal, dated May 2019 (Exhibit N)
 - (2) Design Review Panel Presentation #2, dated June 2019 (Exhibit P)
 - (3) Design Review Panel Presentation #3, dated August 2019 (Exhibit Q)
- 105 Minutes from the Design Review Panel meetings convened to review those design presentations at [103], are also in evidence. Minutes from the meeting dated 17 May 2019, 20 June 2019 and 22 August 2019 comprise Exhibit O.
- 106 The Applicant relies upon statements made in the Minutes to submit the design review panel was, relevantly;
- (1) open to a taller tower, and potentially to a single taller tower form, and
 - (2) support for the through-site East Link, subject to further investigation into a future connection to the eastern neighbour.
- 107 A further letter prepared by the NSW Government Architect, dated 28 April 2022 (Exhibit J, Tab 20) reiterates the development was subject to a Competition Waiver, was reviewed on those three occasions at [105], and that the design review panel “unanimously agreed the amended scheme retained and further developed the design excellence awarded to the competition winning proposal.”

Character, height, bulk, scale

- 108 The experts agree that the character of the Penrith City Centre is undergoing transformation, and that the desired future character statement of the relevant Precinct is set out in Section 11.1.3 of the PDCP.
- 109 The relevant character area, identified on Figure E11.2 of the PDCP, is the City West (Mixed Use), which is described in the following terms:

“5. City West (Mixed Use)

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.”

- 110 The experts for the Applicant, Messrs Smith and Byrnes set out in the joint report grounds for consistency with the area character statement, and the PDCP more broadly, summarised as follows:

- (1) The built form provides a streetscape consistent with street wall heights desired in the PDCP.
- (2) The East and West Links provide permeability between High Street and Union Lane.
- (3) The development includes a mix of residential, commercial and retail uses, consistent with the desire for a ‘live-work environment’.
- (4) While distinct from surrounding development, that distinction is consistent with the bulk and scale intended by the controls, and so is compatible with the intended character sought on key sites such as the subject site.

- 111 Ms Morrish considers it imperative that the development set an appropriate benchmark for development on key sites, but which is lacking because of:

- (1) The treatment and exposure of car parking above ground level, to both Union Lane and the East Link.
- (2) The width of vehicle access to car parking on Union Lane results in an inactive frontage and poor public domain.

- 112 Likewise, Mr Croft cites a lack of consistency with the existing or desired future character given the development proposes car parking above ground, compromising the ground floor layout, and by failing to deliver on infrastructure that is essential to the proper functioning of the proposal. Such infrastructure

includes the North-South Road, the signalised intersection on High Street, or even completing the connection between Union Lane and the future North-South Road.

- 113 The experts agree that the maximum height of the proposed development is 146.4m. The height permitted by the height of building standard at cl 4.3 is 24m, and a written request prepared in accordance with cl 4.6 of the PLEP is in evidence.
- 114 Having found that the proposed development includes community infrastructure, the cl 4.6 request is only required to be considered if the Court finds that the proposal either fails to exhibit design excellence, is inconsistent with the objectives of cl 8.7, once regard is had to those matters, or fails to overcome any barriers set by cl 8.2 of the PLEP.
- 115 Mr Croft is of the view that the scale of the proposed development is inconsistent with the Respondent's vision for the site, and the immediate locality. In particular, the proposal will overshadow habitable rooms and balconies of those apartment buildings at [17] with the result being some apartments will no longer receive 2 hours of sunlight.
- 116 The impact could be mitigated by a further setback of the podium from Union Lane, but that is prevented by the decision to locate car parking above ground, which adds to bulk and site coverage.
- 117 Furthermore, in addition to the overshadowing from development on the subject site, those apartments are also likely to experience overshadowing from the Toga Development.
- 118 Both planning experts rely upon architectural drawing DA412, which depicts the comparative overshadowing from, firstly, no development on the subject site; secondly, the competition winning scheme; and thirdly, the proposal before the Court. Each includes the effect of the Toga Development.
- 119 In contrast to the opinion of Mr Croft, Mr Byrnes cites Drawing DA412 as evidence that a single, taller tower has less of an impact on No 83-85 Union Road than the two towers depicted in the competition winning scheme, and the same impact on No 79-81 Union Road.

120 Where overshadowing does occur, Mr Byrnes considers it to predominantly affect lower parts of the apartment buildings that currently experience some 'self shadowing' as a result of setbacks and overhangs.

The podium

121 The proposed podium contains a variety of uses that are broadly described in the joint report as follows:

- To High Street, the uses include commercial uses, including communal open space for those uses, and serviced apartments.
- To the proposed North-South Road, the uses include commercial uses.
- To Union Lane, uses include above ground car parking and commercial uses. At the ground floor, uses also include retail uses.
- To the East Link, uses include serviced apartments, retail and above ground carparking.

122 The degree of amenity provided by those uses is contested, as is the height, bulk and scale of the podium that accommodates them.

123 In summary, the criticism in respect of amenity arising from the uses contained in the podium is centred on the location and quality of communal open space (COS). The COS is, according to Ms Morrish, token, and appears more a device to conceal the perimeter of the above ground car parking which itself is likely to cause noise and pollution to other uses, and nearby properties. This itself is disqualifying of design excellence given the relationship of the development with other buildings (existing or proposed) on neighbouring sites in terms of amenity (cl 8.4(2)(e)(iv)), or due to the impacts on the public domain (cl 8.4(2)(e)(x)).

124 The potential impacts resulting from above ground car parking is the subject of a separate contention that I consider at [159]-[198]. However, it is suffice here to record agreement between the experts that if the Court were to support the location of car parking, centralised in the podium, and substantially surrounded, or "sleeved", by serviced apartments and commercial uses, then those perimeter uses provide some level of passive surveillance to the public domain, and 'liveliness' to the facades by virtue of live-work activities.

125 That said, Ms Morrish questions the particular location and quality of the COS for reasons summarised as follows:

- (1) The COS on level 3 to the south of the podium, fronting Union Lane, lacks solar access, and is exposed to vehicle fumes and southerly winds. This includes the COS associated with serviced apartments, which is remote from the apartments it serves.
- (2) The COS located on Level 1, 2 and 3 to the north of the podium, fronting High Street is accessed by a narrow link, relates poorly to the commercial space and, except for level 3, is impacted by noise and fumes from the adjacent car park.

126 In respect of the bulk, height and scale of the podium, Mr Byrnes considers the podium suited to the scale of the site, and its location, bounded two existing streets, a future street and the East Link. It also reflects the image of 'Mixed use buildings in High Street' depicted at Figure E11.23 of the PDCP setback.

127 More particularly, the podium has a zero setback where it fronts High street, consistent with Figure E11.3 of the PDCP, and a height of between 16-20m, consistent with Figures E11.4 and E11.5 of the PDCP.

128 The result, in Mr Smith's opinion, is a High Street frontage in accordance with Section 11.3.2, Control 1, activated by a number of retail spaces that are virtually continuous to both High Street and to a future North-South Road.

129 Additionally, the development proposes improvements to Union Lane, including a 3.4m wide pedestrian footpath where one is currently lacking. While cl 7.8 of the PLEP, dealing with active street frontages, does not require an active frontage to Union Lane, approximately 48% of the frontage is activated in a manner complementary to residential uses, while also accommodating vehicle access in a location the experts agree is appropriate.

130 Likewise, while the East Link is not anticipated in the PDCP, it provides a publicly accessible link and sightline between High Street and Union Lane that will also benefit future development to the east of the site, and in Union Lane.

131 Such a link increases pedestrian permeability in a manner that is characteristic of development in other parts of the Penrith City Centre, and provides an opportunity for further landscaping that contributes positively to the public domain.

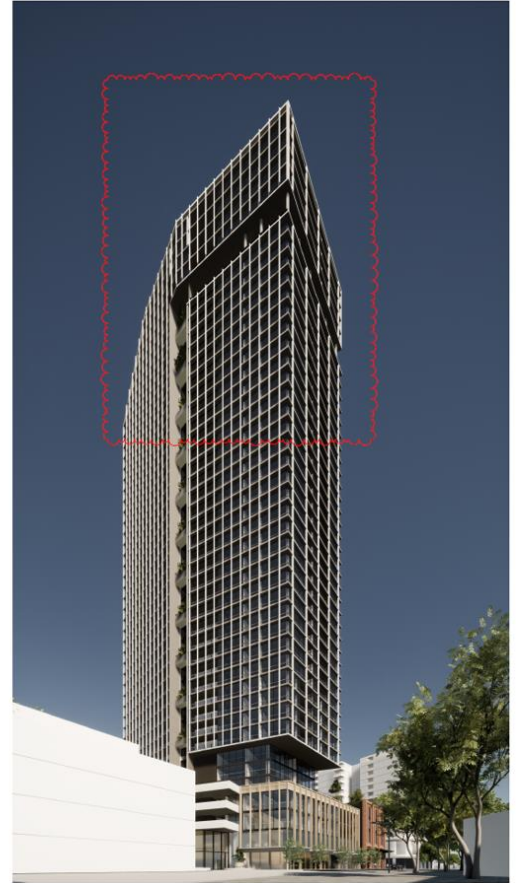
- 132 Ms Morrish acknowledges that the street wall height to High Street is within the allowed heights, but notes it is greater than the existing street wall height of 2-3 storeys that predominates along High Street, and greater than the 3-storey street wall height evident in the consent for the Toga Development to the west.
- 133 While the 4-storey street wall height may be appropriate on the subject site where it adjoins the site to the east, a portion of the podium rises to 5-storeys at the intersection with the North-South Road to the west. The rise in height of the podium at this location is not appropriate and creates a discordant street wall when the height of the podium of the Toga Development is understood.
- 134 The 5-storey podium returns to address the full length of the future North-South Road, which Ms Morrish considers a poor relationship when viewed against the 3-storey podium of the Toga Development.
- 135 Ms Morrish also argues that while no street wall height is nominated for Union Lane, it is reasonable for the 3 and 4-storey street wall height of the existing development to be adopted in the proposed development.
- 136 To do so would adhere to the design quality principles at Schedule 1 of State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development that seek, at Principle 1, development that “responds and contributes to its context” and, at Principle 2, development of “a scale, bulk and height appropriate to the existing or desired future character of the street and surrounding buildings”.
- 137 Instead, the podium height is most likely driven by the decision to include car parking in the podium, and not in a basement.

The Tower

- 138 The tower form is not rectilinear in plan, but rotates, or hinges, at the location of the central lift and vertical circulation core (the lift core).
- 139 The rotation, or hinge, at this location, produces an opening described by the experts as an ‘inset cavity’, that may otherwise be thought of as a large shadowline. The tower plan, at Level 7, is re-produced below.

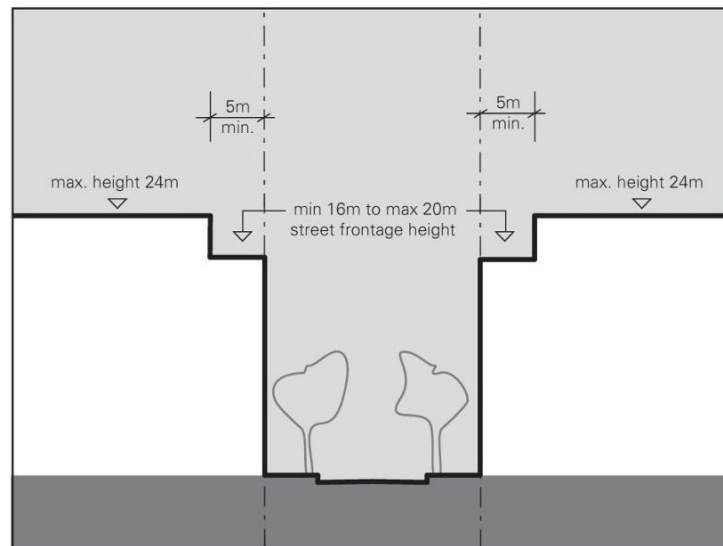


- 140 A minor inset cavity to the east accommodates a planter bed at every third level of the tower, above level 4, while a major inset cavity to the west accommodates a greater extent of landscape planters and an external terrace with BBQ facilities and the like at the same intervals.
- 141 The experts agree at par 4.92 of the joint report that the tower's form achieves a slender presentation to the north and south, that further articulation is not required and that an appropriate form is achieved. Likewise, the experts agree that the eastern and western elevations, being greater in length, are broken by the inset cavities to separate the form into 'two clear wings', and successfully emphasizes its verticality.
- 142 The effect of the 'hinge' in plan, and the inset cavities to the east and west is depicted in montages on drawing DA307 and DA308, reproduced below.



- 143 However, Ms Morrish qualifies the agreement at [141] by suggesting a far better outcome would be achieved if the tower was taller, subject to overshadowing issues, with a shorter north-south dimension and a deeper and wider inset cavity to the east which continued all the way to the top of the tower, and not terminate, as it does, at the underside of Level 39.
- 144 Absent the inset cavity continuing to the top, the upper levels are unbroken which conveys a sense the tower is 'top heavy'. Furthermore, as future development to the east is limited in height, the 'massive scale' of the tower's eastern elevation will be visible from the Penrith City Centre in perpetuity.
- 145 Relatedly, Ms Morrish believes the failure to observe a greater setback in the northern façade of the tower to the High Street frontage contributes to the dominance of the tower in the local area and because it is likely that all future development to the east will contribute to the character of High Street by observing the setbacks required in Section E11.2.3 of the PDCP.

- 146 The experts agree that, above a street wall height of 16-20m, a 5m setback is required by Section E11.2.3 of the PDCP, depicted in Figure E11.5, re-produced below:



STREET FRONTAGE HEIGHT TYPE A

- 147 Additionally, Ms Morrish identifies what she considers an inadequate setback to the east where the tower addresses the East Link. To the north of the lift core, where the tower rotates to the west, the setback at Level 3 and above is 2m.
- 148 To the south of the lift core, where the tower aligns with the north-south orientation of the East Link, the setback is zero from Level 6 and for the full height of the tower.
- 149 Such a relationship is a poor outcome when the provisions of State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development are understood, and will result in an overwhelming scale difference when viewed in context with future development to the east.
- 150 Mr Smith argues the proposal is consistent with the height and setback shown at [146], which is also likely to be observed in future development to the east. The setback evident in the tower form, at Levels 3-5, allows the tower form to be articulated as a separate element from that of the podium while leaving the podium expressed as a part of the evolving street wall to High Street.

- 151 The experts also differ on the degree to which materials and finishes nominated on the tower form are appropriate for a building of the scale proposed. Ms Morrish considers the reliance on painted finishes inappropriate as those elements will require regular maintenance such re-painting, and so cannot be regarded as a high standard of materials appropriate to such a building type.
- 152 However, Mr Smith notes the painted finishes nominated are mineral silicate paints that bond with the concrete substrate in a manner that imposes limited maintenance, are weatherproof and serve to protect the external façade.
- 153 Having considered the evidence of the experts, I do not accept that achieving the street wall height is compromised by the 5m setback between Levels 3-5. Whether or not a building in excess of 140m in height observes the 5m setback to High Street contributes little, in my view, to the scale or dominance of the tower in its overall setting. The setback control depicted at [146] does not provide guidance on the form and setback of development above the podium depicted in the Figure, but which is clearly envisaged by the removal of a height limit on the site by operation of cl 8.7.
- 154 Ms Morrish cites the probable setbacks of future development as a means of minimising the visibility of upper floors so that the street wall height is dominant. However, this ignores the radical departure in height and dominance envisaged by the unshackling of height permitted, with certain provisos, on this site. Whether or not the development on the subject site observes a 5m setback to High Street above Level 5, the development is of a very different scale and form than development to the east, a fact acknowledged by Ms Morrish at par 4.76 where she notes the ‘mass and form of the tower will be far more dominant than any other form in the street close to street level’.
- 155 Rather than ‘exacerbate the huge change in scale of this tower relative to the rest of High street’ as suggested by Ms Morrish, I find the likely contribution of an additional 5m setback to be negligible or minor to the change in scale otherwise clearly intended for the site when the photomontage image at Exhibit H, Tab 14, re-produced in part below, are considered.



- 156 The question then is, to what extent are the street wall height and setbacks, depicted in Figure E11.5, observed in this development, when the tower form is also understood?
- 157 I accept Mr Smith's evidence that the effect of the setback at Levels 3-5 assists in giving emphasis to the street wall height provided by the podium, and that no adverse impact otherwise arises, in the forms summarised by Mr Smith at par 4.91 of the joint report.
- 158 I do not agree with Ms Morrish that the tower setback above Level 5 will serve to undermine the immediate sense of enclosure provided by the street wall height that is consistent with the controls. The street wall provided by the podium differs in both finish and form from that of the tower. The finish of the podium in the location of the contested setback is identified on architecture drawing DA300 as polished bronze on metal substrate, while the dominant material in the tower is a light coloured fibre cement to the vertical elements, and horizontal concrete elements in dark painted finish.

Above ground car parking

- 159 While the contention on transport, access and parking is primarily addressed by the traffic experts in a joint expert report (Exhibit 9), the manner in which

parking is provided is also addressed by the urban design and planning experts.

160 As stated earlier, car parking is provided in the podium, and not wholly within a basement car park, is a contention pressed by the Respondent as a particular under density, bulk and scale (contention 4); due to it being contrary to the design quality principles (contention 5); under design considerations (contention 6), due to variance with the context and character of the area (contention 7), and as an aspect of transport, access and parking (contention 10).

161 The Traffic and Parking Impact Assessment (TPIA) prepared by McLaren Traffic Engineering & Road Safety Consultants dated 2 June 2022 (Exhibit J, Tab 25) nominates parking on the site to be provided as follows:

“Five levels of car parking containing 305 car parking spaces comprising of:

- 184 residential car parking space including 28 parking spaces for people with disabilities;
- 54 serviced apartment car parking spaces including six (6) parking spaces for people with disabilities;
- 36 residential visitor car parking spaces including one (1) parking space for people with disabilities;
- 20 retail car parking spaces including one (1) parking space for people with disabilities;
- Nine (9) commercial car parking spaces including one (1) parking space for people with disabilities;
- Two (2) car share parking spaces.
- Vehicular access to the ground level of the car park is provided via a proposed two-way driveway via Union Lane.
- Service vehicle access to the site is provided via a proposed two-way driveway via Union lane.”

162 The relevant architectural plans show 99 car parking spaces provided in the basement of the proposal; 54 spaces on the mezzanine level; 51 spaces on Podium Level 1; 51 spaces on Podium Level 2; 33 spaces on Podium level 3.

163 While the aggregate number of car parking spaces at [162] is at odds with the number of spaces nominated in the TPIA, the issues contested by the urban design and planning experts goes to the acceptability of car parking in the podium, above ground.

- 164 The urban design and planning experts agree that basement parking is common and possible to achieve in the Penrith City Centre, that it is not prevented by the proximity of the water table on this site, and that the impact of basement parking is the cost of tanking a basement.
- 165 Likewise, there is agreement that the above ground parking is not entirely 'sleeved' above the mezzanine level to the southern part of the East Link, the majority of Union Lane, and a small portion of High Street which opens to the northern COS.
- 166 Mr Smith asserts that the PDCP contemplates parking in a basement, at grade or above ground where the water table imposes difficulty in achieve greater than one level of basement.
- 167 While not exactly equivalent, Mr Smith cites a letter prepared by the SES letter dated 16 August 2022 (Exhibit 3, Tab 38) as evidence of flooding as a reason for above ground parking, which minimises the risk of damage to property and loss of life in the event of flood.
- 168 Additionally, Mr Smith refers to a feasibility assessment, prepared by Hill PDA dated 14 May (Exhibit U) to argue that costs associated with excavation would compromise project viability in an area of Sydney where property values are unlikely to recoup the additional development costs.
- 169 Where the above ground parking is not 'sleeved' by other uses, particularly to the south of the site fronting Union Lane, screening has been designed to conceal vehicles from view and is preferable to the alternative where residential or commercial uses in that location would likely emit a greater degree of light spill or acoustic impact on existing apartments in Union Lane.
- 170 As the PDCP specifically anticipates above ground parking, the above ground parking is well screened from High Street, and the proposed arrangement is consistent with Figure E11.23 that permits above ground parking adjacent to a lane, Mr Smith considers the parking arrangement acceptable.
- 171 It is Ms Morrish's evidence that the PDCP only anticipates above ground parking where the water table precludes excavation, which is not the case in

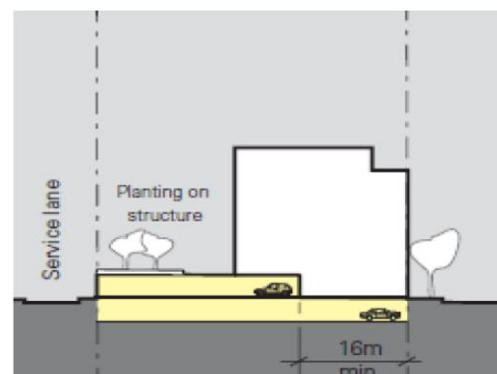
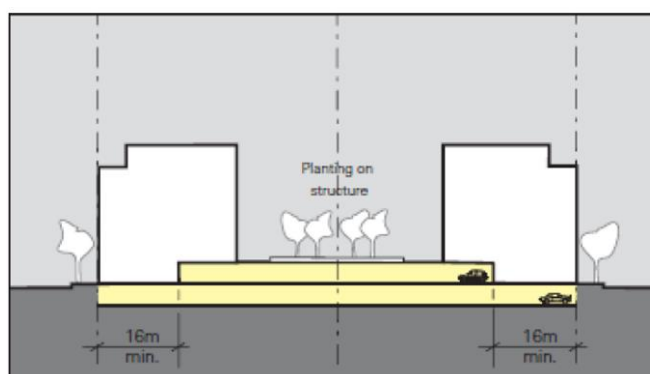
this proposal. Any additional basement parking can be protected by flood barriers and the like.

- 172 The risk of flood damage to basement areas, and the means by which flood protection can be achieved, applies whether one or multiple basement levels are proposed. Put another way, Ms Morrish observes that where one basement level is protected from flood, all basement levels would be.
- 173 Next, any reliance on Figure E11.23 is misguided for two reasons. Firstly, above ground parking is only considered where adjacent to a service lane, which Union Lane is not as the existing apartments on the south side of Union Lane contain residential uses on the ground floor which is not a characteristic of a service lane. Secondly, three or four levels, including mezzanine, of above ground parking are proposed, and not one as depicted in Figure E11.23.
- 174 The result is 3 levels of car parking in addition to the ground floor vehicle entry and loading zone. Screening will not block all noise, fumes or light from these levels, located 15m from the existing apartments to the south of Union Lane.
- 175 Ms Morrish notes lighting is also likely to be required 24 hours/day for personal safety, and the acoustic impact of vehicle movements is uncertain where future development to the east is certain to be within 10-11m of the south east corner of the site where parking is proposed. However, the conclusion of the acoustic impact assessment is predicated on a separation distance of 15m. Yet the only appropriate response for future development to the east, which will interface with the East Link, if consent were granted, is to provide openings and activation for passive surveillance and the like.
- 176 The same is preferred for the subject site. Instead, the car park screening presents blank walls to the East Link, which is a source of noise, light spill and acoustic impact.
- 177 Ms Morrish believes Union Lane will provide an important pedestrian and vehicular link between both the civic spaces to the west of the site and the site itself, and Penrith City Centre, augmenting the link provided by High Street.
- 178 Such a role is also evidently anticipated by the Applicant given its decision to locate retail uses on both the north and south ends of the East Link.

- 179 However, the south elevation presenting to Union Lane, and a portion of the East Link, is impoverished by a dominance of car parking access and screening.
- 180 Ms Morrish also argues that while no street wall height is nominated for Union Lane, it is reasonable for the 3 and 4-storey street wall height of existing development to be adopted in the proposed development
- 181 Section C10.5.1 of the PDCP provides city-wide car parking requirements. In Mixed Use zones, the controls at (2) relevantly provide:
- “a) On-site parking is to be accommodated in basement parking except to the extent provided for below:
- i) 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).”
- 182 Figures C10.7 and C10.8, cited above (and replicated in Section E11.4 of the PDCP as Figures E11.22 and E11.23) are re-produced below:

Figure E11.22

Figure E11.23



- 183 The experts also agree Figure E11.22 (left) is labelled ‘Above ground parking must be screened by an active edge to the public domain’, and Figure E11.23 (right) labels the laneway where parking is exposed as a ‘service lane’, and that only one level of parking is shown at, or above ground level.
- 184 Section C10.5.1, Control (3) contains additional provisions to residential development in the following terms:

“a) On-site parking for residential developments, including the residential component in a mixed use development, is 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 from being located in a basement structure.

b) If on-grade car 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:

- i) be located on the side or rear of the site, and is not visible from the street and street frontage;
- ii) be landscaped or screened so that cars parked in the parking area are not visible from adjoining buildings or the street/ street frontage; and
- iii) allow safe and direct access to the building entry points."

185 In addition to city-wide provisions at Section C10 of the PDCP, Section E11.4 of the PDCP deals with Access, Parking and Servicing, with the following relevant objectives:

"a) To facilitate the development of building design excellence appropriate to a regional city.

...

e) To minimise impacts on city amenity, the public domain and streetscape."

186 Section E11.4.2 of the PDCP deals with On-site parking options and relevantly provides:

"A. Background

On-site parking includes underground (basement), surface (at-grade) and above ground parking, including parking stations.

There are particular constraints in certain areas of Penrith city centre on the provision of car parking in underground structures. Due to the high water table, excavation on certain sites may become difficult beyond one level of basement parking. This may necessitate site design which locates the parking above ground. In these cases, minimising the impacts of above ground parking on the public domain is important.

B. Objectives

- a) To encourage economic growth in the City Centre.
- b) To enable the conversion of above ground parking to other future uses.
- c) To support the complementary use and benefit of public transport and non-motorised modes of transport such as bicycles and walking.

C. Controls

1) In addition to the parking requirements outlined in the Transport, Access and Parking Section of this DCP, Figures E11.22 and E11.23 contains additional options for car parking at Penrith City Centre.

2) On-site parking is to be accommodated in basement parking except in the blocks between Belmore and Henry Streets where above ground car parking may be permissible in the form illustrated in Figure 11.24 below.”

- 187 Ms Morrish and Mr Croft record their joint position at par 5.5 of the joint report that those options for above ground parking illustrated in Figures E11.22 and E11.23, re-produced at [182] are intended as guidance for sites where a high water table makes excavation for basement parking difficult.
- 188 The concern expressed at the above ground parking is, in essence, that it results in a podium height, bulk and scale that is excessive, and, accordingly, it imposes a number of unacceptable environmental impacts on neighbouring properties; primarily the existing apartment buildings to the south of Union Lane.
- 189 I do not accept that the height, bulk or scale of the podium is excessive. Isolating the podium as a form from that of the tower, I agree that the podium reflects the street wall height and setback that is required by Figure E11.5, at [146], where it fronts High Street.
- 190 Street wall heights to be observed in the Penrith City Centre are shown in Figures E11.4 and illustrated in greater detail in Figures E11.5 to E11.10. No street wall height or setback arrangement is shown for Union Lane.
- 191 Absent a street wall height nominated in the PDGP for Union Lane, Ms Morrish prefers the height of existing development to guide that of the proposed.
- 192 However, I accept Mr Smith’s position that the street wall heights, while varied, vary within the range depicted in Figure E11.5. Where the height varies to the higher end of the range it does so to give emphasis to the frontage to the future North-South Road, which is a commonly accepted device in architectural and urban design.
- 193 The frontage to Union Lane is shown in the elevations to include a variety of treatments, including face brick to the commercial uses on the south west corner of the site, landscape treatment in the form of vertical green wall and perimeter planting, and screening to above ground car parking.
- 194 Plant species selected for the southern elevation are agreed by the Landscape experts (Exhibit 7), and reflected in Landscape Plans (Exhibit B). Consideration

of access and management of the vertical green wall has been given in the Landscape Maintenance Plan (Exhibit LL). I conclude that landscaping to the southern elevation is viable and contributes positively to the public domain in Union Lane.

195 In arriving at this conclusion, I acknowledge what appears to be the agreement of the experts that the southern COS may not be actively utilised by occupants of the serviced apartments for whom it is intended, and has been removed in place of a non-trafficable section of terrace which softens an area of inactive façade, behind which car parking is located.

196 According to the Plan of Management (Exhibit H, Tab 10), maintenance will be undertaken on the landscaping in the area on a monthly basis, and residents of existing apartments to the south of Union Lane will receive the benefit of those areas of landscaping in any event, undisturbed by onlookers.

197 As to the possible environmental impacts of the above ground parking, I note the following:

- (1) The acoustic experts agree, at pars 20, 22, 24, 26, 28 that the acoustic performance of the proposed development will be within expected noise levels. This includes areas such as the northern COS which is adjacent to screening to the above ground car parking at Levels 1 and 2.
- (2) The acoustic experts also agree with the conclusion in the Supplementary Acoustic Information provided by White Noise Acoustics dated 30 September 2022 (Exhibit G, Tab 4) that, on the basis of structural screening on the mezzanine level, lack of traffic lanes and limited number of car parking spaces in the south east corner, maximum noise levels and LAeq(15min) noise levels in the East Link and future development to the east of the site will be acceptable.
- (3) Architectural drawing DA500 is a light spill diagram that depicts the separation distances between the subject site and existing apartments to the south of Union Lane, ranging between approximately 12.5m and 15.5m. Light spill from vehicle headlights, and presumably ambient lighting cited by Ms Morrish at [175], is moderated, by reference to the materials and finishes (DA309) and detailed sections (DA313) by colorback glass, which is opaque, or by reference to detailed section DA314, by a combination of perforated metal panel and angled louvres.
- (4) In respect of potential fumes from vehicle movements in the above ground car park, I accept that higher turn-over parking is in the basement, including retail, commercial, serviced apartments, visitors and service bays, and so I accept Mr Smith's argument, at par 5.38 of

the joint report that vehicle movements at Level 1 and 2 are likely to be infrequent.

- (5) I also note the proposed car park entry is located directly opposite the surface car park of Nos 83-85 Union Road, through which access is also gained to the basement car park at that address. Locating vehicle access adjacent such a like use is appropriate.

198 On the basis of the reasons set out above, I find:

- (1) The PDCP, at Section C10.5.1, Control 2(a), permits up to 25% of parking to be provided above ground, where located 16m behind the building alignment. While this is not uniformly achieved in the proposal, and greater than 25% of the parking is proposed to be in an above ground facility, the 'sleeving' is sufficient to conceal parking from High Street, the future North-South Road and the majority of the East Link. Where above ground parking is visible, it is to Union Lane where a combination of screening and landscaping is proposed.
- (2) Figure E11.22 and E11.23 provide qualified support for above ground parking where adjacent to a service lane. Service lane is not defined in the PDCP, or in the PLEP and no guidance is provided on Figure E11.26 as to the character or preferred treatment to Union Lane, or design principles that should be applied to Union Lane. Absent such guidance, I consider a distinction between a service lane and a lane is not material.
- (3) While excavation is not precluded by the water table, I accept that flood affection in the area is sufficient rationale for an alternative to basement parking to be provided, if it can be achieved without imposing impacts on the public domain or nearby properties.
- (4) For the reasons set out at [197], I find the potential impacts arising from light spill, acoustic and fumes to be within the range of tolerance that may be expected in an urban environment, separation distances are reasonable, and steps have been taken to mitigate those impacts.
- (5) As for overshadowing of existing apartments to the south, as the podium conforms to the height and setback desired by the PDCP, any overshadowing is overshadowing from a complying built form.
- (6) As such, impacts on city amenity, public domain and streetscape are minimised, in my view, consistent with objective (e), Section E11.4 and, due to floor to ceiling heights nominated on Level 1 and 2 of the above ground parking, the conversion of above ground parking to other future uses is enabled, consistent with objective (b), Section E11.4.2 of the PDCP.

Amenity – design considerations

199 In broad terms, the issues pressed by the Respondent as to amenity, largely unopposed by the experts on behalf of the Applicant, may be summarised as follows:

- (1) Storage areas for apartment owners are located on Basement 1, separate from resident parking located on the Mezzanine level, and on, Levels 1-3, despite the Apartment Design Guide requiring storage to be conveniently located and accessible. As a result of the separation, apartment owners may need to access storage cages by vehicle, but no provision is made for convenient parking for loading/unloading, and the location of some storage cages are not easily accessible.
- (2) Access to car parking from the lift core of Tower B on the mezzanine level is unsafe, as doors open directly into the path of vehicles.
- (3) Bicycle parking is located on the ground floor. Access to it is via a space located between car parking ramps that may bring bicycles users and vehicle drivers into conflict.

200 For the reasons stated at [93], embarking upon consideration of whether the proposal exhibits design excellence necessarily requires consideration of those aspects identified in subcl (2) of cl 8.4 PLEP, including relevantly, overshadowing that is the subject of a written request seeking to vary the standard for sun access at cl 8.2, and is a matter to be considered by cl 8.4(2)(e)(vii) of the PLEP.

201 Unlike those matters the subject of expert evidence summarised at [108]-[187] that are said by the Applicant to exhibit design excellence, the Applicant readily acknowledges that overshadowing occurs to an area of the public domain that is regulated by the provisions of cl 8.2 of the PLEP.

202 As I cannot be satisfied the development exhibits design excellence without considering height and overshadowing, which engages the written request in respect of sun access, I will now consider the written request.

Clause 8.2 is a development standard

203 Part 8 of the PLEP applies to land identified on the relevant map to be within the Penrith City Centre.

204 Clause 8.2 of the PLEP operates to set a jurisdictional precondition to the grant of development consent insofar as development consent is not to be granted to development on specified land if a specified jurisdictional fact is established (Toga, at [37]).

205 That said, cl 4.6 of the PLEP provides, at subcl (2), that development consent may be granted for development even though the development would contravene a development standard, if not expressly excluded by subcl (8).

- 206 For cl 4.6 of the PLEP to be engaged, the provisions at cl 8.2 of the PLEP dealing with sun access, must be a development standard.
- 207 A development standard is defined under s 1.4 of the EPA Act as a provision in relation to the carrying out of development that specifies requirements or fixes standards in respect of any aspect of that development.
- 208 Clause 8.2 is in the following terms:

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.

- 209 The Respondent submits that, for reasons similar to those in *North Sydney Municipal Council v PD Mayoh Pty Ltd* (No 2)(1990) 71 LGRA 222 ('PD Mayoh'), cl 8.2 is not a development standard that may be varied by operation of a written request prepared in accordance with cl 4.6, because it is not a provision that relates to the carrying out of development, but rather one that seeks to prohibit development that overshadows a public open space.
- 210 The Respondent identifies an area of public open space at the intersection of Union Road and Mulgoa Road, zoned RE1 Public Recreation ('the RE1 Land'), that is overshadowed by the proposed height of the development to a greater degree than would a proposal complying with the height of 24m depicted on the Height of Buildings Map.
- 211 The RE1 land is an open, unfenced area of grass, with a number of mature trees planted along the frontage to Mulgoa Road, and what appears to be a public footpath approximately following the alignment of Union Road.
- 212 The Applicant asserts the provision at cl 8.2 is a development standard because the provision fixes a standard in relation to an aspect of the development. Namely, that it should not overshadow the public open space, by

virtue of the development's location, siting, bulk, scale, design, external appearance, or because of the effects of the development on patterns of sunlight, daylight or shadows, being aspects of a development standard particularised in the definition.

- 213 The circumstances of this case are distinct from those in PD Mayoh because, in that matter, power to issue consent was found to be constrained by the nature of existing development on adjoining land as a matter of fact, not because of an impact imposed by development on the subject land as is the case here.
- 214 Greater assistance is to be had by relying upon a McLellan CJ in *Agostino v Penrith City Council* (2010) 172 LGERA 380; [2010] NSWCA 20 who observed, at [68], that “where a planning instrument permits the erection of a building but imposes a height control, provided the proposal is to erect a building to be used for a purpose permissible within the relevant zone, the height control will be amenable to variation under SEPP 1”.
- 215 I accept that the provision at cl 8.2 fixes a standard in a manner consistent with the definition of a development standard. While a numerical control is not specified at cl 8.2(3), the provision provides the means by which an objectively calculable quantum may be arrived at. Namely, that the degree of overshadowing, resulting from the development the subject of the development application, should not be greater than the overshadowing that would otherwise result from the standard at cl 4.3 of the PLEP.
- 216 The provision enables a calculation, in the first instance, and a comparison, in the second, to arrive at a conclusion as to the siting, bulk and scale of the proposed development and an assessment of its effects on patterns of sunlight and shadows that result.
- 217 Accordingly, the provision at cl 8.2 is capable of variation by cl 4.6 of the PLEP, if the contravention of the standard at cl 8.2 is justified.
- 218 However, the Applicant also contests whether the open space identified by the Respondent at [210] is a public open space for the purposes of cl 8.2. While the Applicant acknowledges the land identified by the Respondent is zoned

RE1, the land uses that are permitted with consent are not all synonymous with public open space and, to the extent some permitted uses are, no consent has been recorded for a use that is consistent with the designation of 'public open space'.

- 219 I am of the view that the RE1 land can be properly considered public open space. It is an unfenced area of open grass that, in part, accommodates a public footpath and is capable of use for passive or active recreation, seemingly, without restriction other than its proximity to a classified road, being Mulgoa Road which I do not understand to be a disqualifying trait.

The Sun Access standard is exceeded

- 220 The written request at Exhibit E asserts no new overshadowing of the RE1 land occurs at the winter solstice, but instead occurs between the following dates:
- 7 February – 16 April, for a period of 87 days of the year
 - 26 August – 13 November, for a period of 105 days of the year
- 221 The aggregate of overshadowing on 192 days is otherwise expressed as 53% of the year. However, the written request also states that the proposal does not overshadow the RE1 land at any time throughout the year after 10am.
- 222 The written request seeks a variation to cl 8.2 to permit overshadowing for up to 100% of the RE1 land, and for a short period of time on those days identified in a schedule contained at Annexure 1 of the written request.
- 223 The assessment of overshadowing in Annexure 1 also includes the degree of overshadowing attributable to the Toga Development.
- 224 The written request relies upon two of the five ways set out in *Wehbe v Pittwater council* (2007) 156 LGERA 446; [2007] NSWLEC 827 ('Wehbe') to demonstrate that compliance with the standard at cl 8.2 is unreasonable or unnecessary, and a method said to be additional to those in Wehbe.
- 225 The first way is to demonstrate that the objective of the standard, which is to protect public open space from overshadowing, is achieved, notwithstanding the non-compliance.

226 Secondly, the third Wehbe way, also relied upon in the written request, is to demonstrate that the underlying objective or purpose of the standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unnecessary or unreasonable.

227 As such, the written request identifies the following objectives, relevant to the height of buildings, that are undermined:

- (1) The objective of cl 8.2: to protect public open space from overshadowing.
- (2) Objective (a), cl 4.3: to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality.
- (3) The objectives of cl 8.7:
 - (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.

228 The proposed development departs from the standard as a result of the preferred urban form of a tall slender tower, over that of two smaller towers that would otherwise comply with cl 8.2(3), yet overshadow existing development to a greater degree.

229 Strict compliance with the standard at cl 8.2 is unnecessary in this case when regard is had to the objectives of cl 4.3, and to cl 8.7 which seeks greater density and height that necessarily produces longer shadows. In general terms, the written request sets out five grounds as to why strict compliance is unreasonable or unnecessary:

- (1) The purpose of the standard is to protect public open space within the Penrith City Centre from overshadowing. Penrith City Centre contains a number of areas of public open space and the proposal impacts a small parcel of land outside the Penrith City Centre, to a limited area, for a limited part of the day, on around 40% of the days of the year (notwithstanding the figure of 53% at [221]).
- (2) The development has been designed to follow the setback controls applying to a key site, which concentrates the building mass in a podium and single tower that is intended to limit the footprint of the building on the site, reduce the breadth of shadow impact to residences on the

southern side of Union Lane, and express the gross floor area in a tall slender tower. As a nominated key site, the bulk and scale of the development is intentionally to be distinct to surrounding development, and the proposal meets the bulk and scaled intended by the control.

- (3) The density and height are consistent with the character sought for the locality and has been guided by a Design Integrity process that has included design experts representation from the Government Architect NSW, Penrith City Council and the Applicant. The proposal represents a high quality outcome, confirmed through the Design Integrity process.
- (4) The overall design scheme, bulk, scale and height of the development is compatible with the intended character sought through the provisions for Key Sites that increase the FSR for the site and removes the applicable height control, that has led to a single tall tower with a narrow and fast moving shadow.
- (5) The built form, including its departure from the sun access control, is compatible with the desired role of the site in the Penrith CBD as a Key Site.

230 The written request argues that the following objectives are achieved in ways that may be summarised as follows:

- (1) In respect of the objective at cl 8.2 to protect public open space from overshadowing:
 - (a) No shadow arises from the proposal on public space within the Penrith City Centre which is relevant when the original terms of the planning proposal giving rise to the standard at cl 8.2 are understood. Instead, a portion of public open space that is not signposted as such is affected for parts of the day, for parts of the year, while the proposal provides new areas of public open space in the Penrith City Centre by dedicating land for uses that support public uses.
- (2) In respect of objective (a) at cl 4.3 to ensure buildings are compatible with the bulk and scale of the existing and desired future character of the locality:
 - (a) The PLEP provides for a FSR of 6:1 on sites identified as Key Sites 3 and 10, which includes the subject site. The desired character for these sites is determined by the removal of height limits, subject to appropriate management of adverse impacts.
 - (b) The PDCP envisages the City West Mixed Use Precinct, in which the site is located, will be developed as a high density residential precinct and that, as a consequence, views to the Blue Mountains escarpment will be lost. In recognising this impact, the PDCP anticipates buildings of significant height and density on sites such as the subject site.

- (3) In respect of objective (b) at cl 4.3 to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes:
 - (a) A requirement to minimise an impact does not mean an absence of impact for reasons set out in a stream of authorities.
 - (b) The DIP process encouraged a single taller tower on the grounds that it minimises those impacts required by the objective to be minimised. Such a view is supported by 3 dimensional views comparing the impact of a development of two smaller towers with the single taller tower form proposed.
- (4) Objective (c) at cl 4.3 is not relevant given the distance from the site of heritage items, and as no heritage conservation area is mapped in the vicinity of the site.
- (5) In respect of objective (d) at cl 4.3 to nominate heights that will provide high quality urban form to all buildings and a transition in built form and land use intensity, grounds are virtually identical to those at objective (a).
- (6) In respect of objective (a) at cl 8.7 of the PLEP to allow higher density development on certain land in the City Centre, where the development includes community infrastructure, the proposal includes the subdivision of land in order to open a new public road to the west of the site, and a public recreation area to the east. Together, the community infrastructure provides north-south connectivity, an 'eat street', is within close proximity to the Civic and Cultural Precinct opposite on High Street, and assists in delivering a new traffic route Union Road to High Street.
- (7) In respect of objective (b) at cl 8.7 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, the proposal reflects the desired character for the site and the locality, and minimises adverse impacts in the locality by:
 - Introducing the new East Link, that improves permeability in the Penrith City Centre and provides casual recreation space that is a potential location for public art.
 - Locating a lobby and café on the East Link to activate the area and provide passive surveillance
 - Sleeving and screening above ground car parking with active uses activates ground level spaces.
 - The proposed podium and single tall tower oriented north-south results in a fast-moving shadow compared to the wide and bulky shadow generated by a two-tower proposal.
 - Substantial areas of landscaping across the site provide an aesthetic quality to the building when viewed from public places and play a part in minimising the heat island effect prevalent in Western Sydney.

- 231 The written request also relies upon a third ground that is not derived from Wehbe, which is not exhaustive of the ways in which compliance with a standard may be shown to be unreasonable or unnecessary: *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 ('Initial Action') at [22].
- 232 The written request asserts that, just as a condition of consent may be considered manifestly unreasonable when the severity of the burden is disproportionate to the consequences attributable to the proposed development, it follows that the strict application of a standard will be unreasonable or unnecessary if the severity of the burden placed on the community by adherence to the standard is disproportionate to the consequences attributable to the proposed development.
- 233 The consequences of strict compliance would be a two tower form generating much greater overshadowing on the existing apartments south of Union Lane. This would result in longer periods of overshadowing to apartments, private open space, roof top terraces and ground floor open space, when compared to a taller tower, which the DIP agreed "led to improved solar access outcomes to neighbouring properties."
- 234 Strict compliance would reduce the amenity of existing residential apartments and associated areas, and would produce an urban form of diminished design quality when the advice of the DIP is taken into consideration.
- 235 In essence, the written request argues that the consequences of overshadowing on the RE1 land are minor while the adverse consequences of strict compliance on existing apartments to the south of Union Lane is severe.
- 236 The operational provision, at subcl 8.2(3), states overshadowing should not be greater than that resulting from conformity with the height standard at cl 4.3 of the PLEP. The overshadowing resulting from such conformity in development on the subject site is zero.
- 237 As shown by Preston CJ in *Initial Action*, in [25], the consent authority, or the Court exercising the functions and discretions of the consent authority on appeal, must form the positive opinion of satisfaction that the Applicant's

written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b), and that the Applicant bears the onus to demonstrate that those matters have been adequately addressed in the written request to enable the Court to form the requisite opinion of satisfaction.

238 For the reasons that follow, I am unable to form an opinion of satisfaction as to the adequacy of the written request in respect of demonstrating that compliance with the standard at cl 8.2 of the PLEP is unreasonable or unnecessary.

239 The written request relies upon three grounds.

240 I do not accept the ground, at [230(1)(a)], that as the RE1 land is outside of Penrith City Centre, the objective at cl 8.2 of the PLEP is achieved notwithstanding the non-compliance.

241 As shown by his Honour in Toga 2, at [43], there is no warrant to read this objective down so as to protect only public open space identified as being within the Penrith City Centre and not public open space generally from overshadowing by development on land in the Penrith City Centre.

242 As the circumstances of this case are virtually identical to the those in Toga 2, I adopt the reasons of his honour at [37]-[38], re-produced as follows:

“[37] Subclause (3) operates to set a jurisdictional precondition to the grant of development consent. It is a negative rather than a positive jurisdictional precondition. Development consent is not to be granted to development on specified land if a specified jurisdictional fact is established. The specified land is “land to which this Part applies”. This land is land identified as Penrith City Centre on the Clause Application Map. The specified jurisdictional fact is that development on this specified land “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.”

[38] By this structure, subclause (3) draws a distinction between the land on which development is to be carried out and the land which is overshadowed by that development. For the subclause to apply, the land on which the development is to be carried out must be land identified as Penrith City Centre on the Clause Application Map, while the land which is overshadowed by development on that land must be public open space. But the subclause does not expressly specify that the public open space that is overshadowed must also be land identified as Penrith City Centre on the Clause Application Map.”

243 That fact that no overshadowing arises from the proposal on public open space within the Penrith City Council cannot be said to adequately address the

objective as the objective applies to public open space whether it is within Penrith City Centre, or outside it.

- 244 Likewise, to argue that all public open space in Penrith City Centre is protected from overshadowing does not adequately address the objective of the standard, which applies to public open space affected by overshadowing from development, which, in the circumstances of this case specifically applies to the land identified as the RE1 land.
- 245 Whether or not the RE1 land is sign-posted as a park, does or does not have play equipment, fencing or other traits is irrelevant to consideration of compliance with the objective at cl 8.2, given the jurisdictional fact is the degree of overshadowing beyond that of adherence to controls at cl 4.3, and is not the nature of the public open space to which the control is directed.
- 246 I also cannot accept the written request adequately demonstrates that the underlying objective or purpose of the standard would be defeated or thwarted if compliance was required, as suggested at [226]. In advancing this ground, the written request identifies the objectives of cll 4.3 and 8.7 as those undermined by strict compliance with the standard at cl 8.2 in support of a single, taller tower on the site in preference to the proposal for two smaller towers. The reasons are, in effect, that the objectives of cl 4.3 seek development that is compatible with the desired future character of the locality. The desired character is to be found in the objectives of cl 8.7 that seek higher density development so long as adverse impacts are minimised.
- 247 However, the objectives of cll 4.3 and 8.7 are not the objectives of the standard that is sought to be varied. Rather, it is the objective at cl 8.2, which seeks to protect public space from overshadowing, that is the relevant standard that must be addressed.
- 248 The comparative analysis between the two-tower scheme, and that of a single taller tower, does indeed suggest improved solar access to apartments and associated spaces at 83-85 Union Road. However, that is not an outcome sought by the objective of the standard sought to be varied by the Applicant in this case. The objective sought to be varied is primarily in respect of the degree of overshadowing of the RE1 land in this case, and not the nature of solar

access to existing apartments, their private open space or communal open space, or to Union Lane as a public road.

- 249 A reference is made to cl 4.3 in the operative provision of cl 8.2(3), inasmuch as the degree of overshadowing permitted on the RE1 land is not more than the overshadowing that would result from development that complies with the standard at cl 4.3. However, the objective of cl 4.3 of the PLEP is not the objective of the standard sought to be varied.
- 250 Likewise, while the objectives of cl 8.7 seek higher density development on certain land in the Penrith City Centre that reflects the desired character, while minimising adverse impacts on their locality, the nature of those impacts to be minimised are not set out in cl 8.7. Accordingly, those impacts to be minimised are presumably to be found by reference to other standards, such as cl 8.2. The impact to be minimised, at cl 8.2, is the overshadowing of public open space that is not undermined by compliance with it.
- 251 Finally, I cannot accept the third ground advanced by the written request, that the burden of compliance with the standard is so disproportionate to the consequences attributable to the proposed development by its non-compliance that it should be regarded as manifestly unreasonable. Support for this ground is founded on the decision of *Botany Bay City Council v Saab Corp* (2011) 82 NSWLR 308; [2011] NSWCA 308 in which the Court of Appeal summarised the steps to be observed when assessing the validity of conditions of consent, otherwise referred to as the 'Newbury Test'.
- 252 Firstly, I consider the exercise of discretionary power to impose conditions of consent to be sufficiently distinct from the jurisdictional facts about which the Court must be satisfied under cl 4.6 of the PLEP to offer no assistance in deciding whether compliance with a development standard is unreasonable or unnecessary.
- 253 Secondly, the severity of the burden said to be borne by the community by requiring strict compliance is the longer overshadowing of existing apartments to the southern side of Union Lane, in preference to a limited and fleeting overshadowing of the RE1 land. Such an outcome is at odds with the single taller tower preferred by the DIP, recorded in its letter dated 13 December 2019

(Exhibit M), stating “The consolidation of the residential GFA into a single tower form has led to improved solar access outcomes to neighbouring properties.”

254 While I note, for the reasons outlined by Preston CJ in Toga 2, at [92], the Court is not bound or obliged to consider the advice of the DIP, it is permissible to do so. The Applicant relies upon the DIP to support the third ground by invoking its preference for the single tower over that of an alternative.

255 However, when regard is had to the material presented to the DIP, and the conclusions subsequently reached by the it, there is no evidence to support the proposition that the DIP considered the effect of the overshadowing on the RE1 land.

- (1) Having regard to the Minutes of the DIP in Exhibit O, and to the presentations made (Exhibits N, P and Q), the RE1 land is not identified as a constraint and, unlike cl 8.7 that is re-produced on p 7 of the initial reference scheme (Exhibit N), the provisions of cl 8.2 are not found.
- (2) Neither the RE1 land, nor the provisions of cl 8.2 are to be found under the sections titled ‘design drivers’ or ‘compliance’ in the initial reference scheme. Likewise, the Section titled ‘LEP Allowable envelope’ depicts the proposal as it was then, in its context, absent the RE1.
- (3) Finally, Page 6 of Exhibit P, headed ‘Understanding the site, Urban Context and Amenities’ in Presentation #2 dated 20 June 2019 does not identify the RE1 land. Green space/parks are identified as green in the legend, and a number of green spaces in the area are so coloured. The RE1 is not.

256 The consequence of all this is that while the written request relies upon the expressed preference of the DIP for a single tower, there is no evidence that the DIP turned its mind to, or reached a conclusion about, overshadowing of the RE1 land in expressing such a preference. Instead, the DIP appears to have considered, not unreasonably given the constraints identified in presentation material prepared on behalf of the Applicant, the amenity of existing apartments to the south of Union Lane.

257 What remains is a control that applies to the RE1 land, breached by the proposal, in respect of which the written request does not, in my assessment, demonstrate that compliance with the standard at cl 8.2 is unreasonable or unnecessary.

- 258 In failing to demonstrate that compliance is unreasonable or unnecessary, the written request also fails to provide the Court with satisfaction that the development is in the public interest because it is consistent with the objective of the standard at cl 8.2, pursuant to cl 4.6(4)(a)(ii).
- 259 Next, the written request sets out environmental planning grounds it asserts are sufficient to justify the contravention of the breach of the standard, pursuant to cl 4.6(3)(b) of the PLEP.
- 260 Achieving the planned intensity of the site is contingent upon permitting such a contravention, and failing to achieve the planned intensity of the site is at odds with the following planning goals:
- (1) The aims of the PLEP, cl 1.2(2), that relevantly provide:
 - (b) to promote development that is consistent with the Council's vision for Penrith...
 - (c) to accommodate and support Penrith's future population growth by providing a diversity of housing types, in areas well located with regard to services, facilities and transport, that meet the current and emerging needs of Penrith's communities and safeguard residential amenity,
 - (d) to foster viable employment, transport, education, agricultural production and future investment opportunities and recreational activities that are suitable for the needs and skills of residents, the workforce and visitors, allowing Penrith to fulfil its role as a regional city in the Sydney Metropolitan Region,
 - ...
 - (2) The relevant objects of the EPA Act, s 1.3, as follows:
 - (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,
 - ...
 - (c) to promote the orderly and economic use and development of land,
 - ...
 - (g) to promote good design and amenity of the built environment,
 - ...
 - (3) The objectives of the B4 zone, applicable to the site:
 - 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.

261 The written request also adopts grounds already advanced in the written request as environmental planning grounds, that are now summarised as follows:

- (1) There is a clear statutory planning intent to provide higher density development on the subject site, identified as a Key Site in the Penrith City Centre. The departure from the height standard, and the consequential shadow that results, facilitates the delivery of mixed use development consistent with the objectives of the key sites provision, at cl 8.7 of the PLEP.
- (2) The statutory planning intent to deliver community infrastructure through development of key sites is achieved. A single, tall and slender tower provides the opportunity for portions of the site to facilitate community uses such as the North South Road, and East Link, while reducing overshadowing to adjoining residential development and public spaces.
- (3) Beyond the contravention of the standard at cl 8.2 of the PLEP, no material adverse environmental planning consequences arise. The impact on the RE1 land does not lead to the entire loss of sun access, and the area receives sun on every day of the year.

262 While there is certainly a statutory planning intent for intensification of development on key sites in the Penrith City Centre, the control at cl 8.2 is also a clear statement on the constraints to be applied to that intensification. I do not understand the higher densities desired for key sites is to be achieved by setting aside the control at cl 8.2, rather, it should be assumed that the control has work to do and so should be read in conjunction with the provisions at cl 8.7.

263 In fact, while cl 8.7(3) sets aside the provisions of cll 4.3, 4.4 and 8.4(5) in permitting a consent authority, or the Court, to grant consent to development that exceeds the height and FSR shown on the applicable maps, the provisions of cl 8.2 are not.

264 I accept the statement made by the written request that beyond the contravention of cl 8.2, no material adverse environmental impacts arise from the single, taller tower on the site.

265 However, as the written request fails to establish grounds on which compliance with the control at cl 8.2 are unreasonable or unnecessary, it is the impact caused by the breach of cl 8.2 that is the subject of the written request, and it cannot be said that an absence of other impacts, beyond the impact the

subject of the breach, are environmental planning grounds sufficient to justify the contravention.

266 I also acknowledge the consistent conclusions drawn by the DIP, comprising a representative of the Respondent and the Applicant and the GANSW, that the proposal has, in the words of the Government Architect at [102]: "...responded comprehensively to the DIP's comments and recommendations [and that] it is the DIP's unanimous conclusion that the final proposal exhibits design excellence according to considerations which are specified in LEP Clause 8.4."

267 However, as shown at [255], there is no evidence the DIP was presented with material relevant to either cl 8.2 or the RE1 land.

268 As I cannot be satisfied that the written request is consistent with the objectives of the standard at cl 8.2, I cannot be satisfied that the proposal is in the public interest. I am also unable to form the opinion of satisfaction required by cl 4.6(3)(b) of the PLEP that there are sufficient environmental planning grounds to justify the contravening of the development standard.

269 Accordingly, the Court is unable to uphold the written request. As such, the power to grant consent is not enlivened.

270 It also follows in my mind, on the basis of the impact on the amenity of the RE1 land, that I am not able to be satisfied that the form and external appearance of the development will improve the quality and amenity of the public domain, which is a matter to which I must have regard in finding whether the proposal exhibits design excellence, pursuant to cl 8.4(2) of the PLEP.

271 Whether the development exhibits design excellence is also a matter to which the Court must have regard when considering whether the additional height permitted by cl 8.7(3) of the PLEP applies to the land the subject of this development application, pursuant to cl 8.7(5) of the PLEP. The duty on the Court does not rise further than 'to have regard'. However, given the Court is unable to uphold the written request, it is a moot point. Even if the Court were to entertain a greater height and FSR than permitted by cll 4.3 and 4.4, the control at cl 8.2 is not set aside by cl 8.7(3), and, its contravention has not been justified.

272 For the same reason, I have not considered the written requests in respect of an exceedance of the height standard and FSR standard as neither deals with the non-compliance with cl 8.2 and so the conclusion at [269] is undisturbed.

Conclusion

273 Given my conclusion at [269], it is unnecessary for the Court to consider matters in respect of flooding, traffic, the Restriction as to use, and the disputed conditions of consent.

274 The Respondent submits that the amendments made to the development application are more than minor, and so seeks costs thrown away in accordance with s 8.15(3) of the EPA Act.

275 When the scope of amendments made subsequent to those amendments contained in the Notices of Motion at [9], and in Exhibits FF-LL, I consider the amendments minor, notwithstanding the number of documents those minor amendments were agreed to affect.

Orders

276 The Court orders that:

- (1) The appeal is dismissed
- (2) Development application DA20/0167 seeking consent for construction of a part 5-storey, part 44-storey mixed use development including a 5-storey podium inclusive of 4 levels of above ground partially sleeved parking and one level of basement car parking at 614-632 high Street, Penrith, being Lot 10 in DP 1162271, is refused.
- (3) All Exhibits are returned, except for Exhibits H, J, FF, GG, HH, JJ, KK, LL and 13 .

T Horton

Commissioner of the Court

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