

DATE OF DETERMINATION	21 October 2021
PANEL MEMBERS	Garry Fielding (Chair), Sandra Hutton, Stephen Davies, Allan Renike
APOLOGIES	None
DECLARATIONS OF INTEREST	Russell Turner declared a non-pecuniary conflict of interest having voted on this application in his capacity as Councillor.

Public meeting held by teleconference on 12 October 2021, opened at 2.30pm and closed at 3.05pm.

MATTER DETERMINED

PPWES-40 – Orange – DA234/2018(1) at 129-133 Sale Street Orange for the demolition of local heritage listed item (as described in Schedule 1)

PANEL CONSIDERATION AND DECISION

The Panel considered: the matters listed at item 6, the material listed at item 7 and the material presented at meetings and briefings and the matters observed at site inspections listed at item 8 in Schedule 1.

Development application

The Panel determined to approve the Crown development application referred to it under section 4.33 of the *Environmental Planning and Assessment Act 1979* and pursuant to section 4.16 of the *Environmental Planning and Assessment Act 1979*.

The decision was unanimous.

REASONS FOR THE DECISION

The matter was referred to the Western Regional Planning Panel under Section 4.33(2) of the *Environmental Planning and Assessment Act*. On 16 February 2021, the Panel determined to refer the development application to the Minister for Planning and Public Spaces, as the Panel recommended partial approval of the application through draft conditions proposed by Orange City Council (Council), but not agreed to by the Crown, Health Infrastructure. The agreement not reached related to the demolition of one of the buildings on the site (Caldwell House), a listed local heritage item. The reasons and consideration of the Panel at that time are provided in the Record of Determination dated 16 February 2021. The Panel's decision sought to preclude both remediation and demolition of Caldwell House to enable further consideration of remediation options, post remediation risk management and adaptive reuse opportunities of the wider site with a retained Caldwell House under the available heritage incentive clauses, where retention could be a motivation, rather than demolition and disposal with no risk.

On 15 September 2021, the Department of Planning, Industry and Environment (DPIE), on behalf of the Minister, requested the Panel reconsider the application having regard to Clause 12 of SEPP 55 and the independent assessment report prepared by DPIE.

Whilst the Panel at its meeting on 16 February 2021 did consider in detail the merits of the application and the issues of contamination, remediation, demolition and heritage, it accepts that the provisions of Clause 12 of SEPP 55 were not addressed in the Council assessment report considered by the Panel, nor by the Panel in its deliberations.

The Panel has now considered DPIE's independent assessment report, together with oral and written submissions by Council (including Council's legal advice), and the differing advices around characterisation

of the development, the category of remediation work having regard to SEPP 55, and the merits of the application. The Panel has also benefited from legal advice provided by the DPIE which, together with Council's legal advice, has been published on the Planning Portal in the interests of open and transparent decision making.

In determining to approve the application the Panel is satisfied that:

- Contamination is a mandatory consideration for the consent authority;
- The development application is for both remediation (asbestos removal) under SEPP 55 and for demolition;
- Based on the legal advice provided by DPIE the proposed remediation may be regarded as category 1 remediation works arising from clause 9(e)(iv) of SEPP 55, as the site is an area for environmental protection (i.e. groundwater vulnerability). The Panel accepts the broader reading of this clause referred to in the Department's legal advice and the DPIE independent assessment report and is therefore satisfied that clause 12 of SEPP 55 applies;
- Under clause 12 of SEPP 55 and in the specific circumstances (noting the extent and nature of contamination), there is a more significant risk of harm to human health in not allowing remediation, and therefore the Panel must not refuse consent for the remediation (asbestos removal); and
- In the specific circumstances and based on the application, there is a reasonable link between remediation works and demolition, notwithstanding the possible options and motivations of the Panel to otherwise have the building (Caldwell House) retained.

In summary, the Panel accepts that it is not appropriate to prevent or refuse remediation of the friable asbestos within Caldwell House (and the Panel has now formed the view it is prevented from refusing that aspect), and that, due to the nature of the contamination and remediation required, demolition of Caldwell House can also not be easily separated or prevented. The separation of remediation activities from demolition activities is a further challenge in the circumstances, where Health Infrastructure will not accept any post-remediation risk to human health, meaning demolition is the outcome of remediation.

Notwithstanding the granting of approval, the Panel has and continues to unanimously support the motivation and efforts of Council and the community to retain Caldwell House for not only its social and cultural values (which are able to otherwise be captured through interpretation and other actions identified in recommended conditions of consent under the demolition scenario) but also its aesthetic and streetscape values.

Whilst the outcome of the Panel decision provides for remediation and demolition of Caldwell House, the Panel has a view that Health Infrastructure should not immediately proceed to demolition of Caldwell House. Noting Health Infrastructure's motivation is to dispose of the site and have no residual risk, the Panel nonetheless encourages Health Infrastructure to provide a further and final opportunity to identify any third party that has the motivation to fully investigate the remediation and retention of Caldwell House. Any motivated party may be assisted by the LEP's conservation incentives currently available to the site to achieve a viable building retention and reuse outcome, and may have an appetite to manage any post-remediation risk rather than eliminate it. Whilst this preference cannot be incorporated into the planning decision, this view will be shared with Health Infrastructure and others through this record and correspondence from the Panel Chair.

The Panel also notes that the triggers for category 1 remediation works, as relied upon in the independent assessment report, could also be interpreted more narrowly and avoid the determinative application of cl 12 of SEPP 55. Whilst the Panel has not accepted the narrow interpretation in this instance, there is benefit in the legislation improving clarity and certainty in the descriptions that identify Category 1 remediation works to aid applicants, the community and decision makers. The draft SEPP (Remediation) provides a policy opportunity to do this.

CONDITIONS





The development application was approved subject to the conditions in the independent assessment report, attachment 2, agreed to by Health Infrastructure, the Crown.

CONSIDERATION OF COMMUNITY VIEWS

In coming to its decision, the Panel considered written submissions made during public exhibition and heard from all those wishing to address the Panel. The Panel notes that issues of concern included:

- Loss of important local heritage item.
- Inadequate consideration of remediation options that do not require demolition.

The Panel considers that concerns raised by the community have been adequately addressed in the assessment reports and that no new issues requiring assessment were raised during the public meeting.

PANEL MEMBERS	
 Garry Fielding (Chair)	 Sandra Hutton
 Stephen Davies	 Allan Renike

SCHEDULE 1		
1	PANEL REF – LGA – DA NO.	PPSWES-40 – Orange – DA234-2018(1)
2	PROPOSED DEVELOPMENT	Demolition of a Heritage Item (all buildings, structures and vegetation to be removed) and Category 1 Remediation (asbestos removal).
3	STREET ADDRESS	129 – 131 Sale Street Orange
4	APPLICANT/OWNER	Health Administration Corporation
5	TYPE OF REGIONAL DEVELOPMENT	Crown development referred under section 4.33 of the EP&A Act
6	RELEVANT MANDATORY CONSIDERATIONS	<ul style="list-style-type: none"> • Environmental planning instruments: <ul style="list-style-type: none"> ◦ State Environmental Planning Policy 55 – Remediation of Land ◦ State Environmental Planning Policy (Infrastructure) ◦ Orange Local Environmental Plan 2011 • Draft environmental planning instruments: Nil • Development control plans: <ul style="list-style-type: none"> ◦ Orange Development Control Plan 2004 • Planning agreements: Nil • Provisions of the <i>Environmental Planning and Assessment Regulation 2000</i>: Nil • Coastal zone management plan: Nil • The likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality • The suitability of the site for the development • Any submissions made in accordance with the <i>Environmental Planning and Assessment Act 1979</i> or regulations • The public interest, including the principles of ecologically sustainable development
7	MATERIAL CONSIDERED BY THE PANEL	<ul style="list-style-type: none"> • Council assessment report: 7 October 2020 • Council assessment memo: 16 October 2020 • Applicant submission: 30 October 2020 • Council supplementary memo (Economic Viability Study: 2 February 2021 • Council supplementary memo: 11 February 2021 • Independent Assessment Report: 15 September 2021 • Council submission (legal advice): 8 October 2021 • Independent assessment memo: 11 October 2021 • Department of Planning, Industry and Environment legal advice: 15 October 2021 • Written submissions during public exhibition: 10 • Unique submissions received by way of objection: 10 • Verbal submissions at the public meeting 2 November 2020: <ul style="list-style-type: none"> ◦ Community members: Euan Greer, James Nicholson ◦ On behalf of the applicant: Rachel Mitchell, Ian Gardner • Verbal submissions at the public meeting 12 October 2021: <ul style="list-style-type: none"> ◦ Community members: Euan Greer, Anne Salter, James Nicholson ◦ On behalf of the applicant: Rachel Mitchell, Amanda Bock ◦ On behalf of Council assessment: Mark Hodges
8	MEETINGS, BRIEFINGS AND SITE INSPECTIONS BY THE PANEL	<ul style="list-style-type: none"> • Site inspection: 2 November 2020 <ul style="list-style-type: none"> ◦ <u>Panel members</u>: Garry Fielding (Chair), Sandra Hutton, Stephen Davies, Allan Renike ◦ <u>Council assessment staff</u>: Andrew Crump, Mark Adamson • Final briefing to discuss council's recommendation: 2 November 2020

		<ul style="list-style-type: none"> ○ <u>Panel members</u>: Garry Fielding (Chair), Sandra Hutton, Stephen Davies, Allan Renike ○ <u>Council assessment staff</u>: Andrew Crump, Mark Adamson ● Panel deliberations (Electronic determination): 16 February 2021 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Garry Fielding (Chair), Sandra Hutton, Stephen Davies, Allan Renike ● Final briefing to discuss independent assessment report recommendation: 12 October 2021 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Garry Fielding (Chair), Sandra Hutton, Stephen Davies, Allan Renike ○ <u>Independent assessment staff</u>: Kim Johnston ○ <u>Council assessment</u>: Mark Hodges, Paul Johnston ○ Secretariat staff: Jane Gibbs, Amanda Moylan, Kim Holt
9	DEPARTMENT INDEPENDENT RECOMMENDATION	Approval
10	DRAFT CONDITIONS	Attached, Attachment 2, to the Department independent assessment report