

10 June 2021

Att: General Manager
Penrith City Council

Dear Sir,

DA/20/0811: 8.3 REVIEW OF DETERMINATION

CONSTRUCTION OF AN ANCILLARY CAR WASH FACILITY AND SIGNAGE ASSOCIATED WITH AN EXISTING SERVICE STATION DEVELOPMENT

I refer to the above development and Council's refusal notice dated 25 February 2021 in relation to the abovementioned development application. Our client obtained copies of the assessment report to better understand the issues and concerns and following a review of that report and the reasons stated in the notice of refusal some amendments have been made to the scheme.

This letter primarily deals with the issue of Existing Use Rights which was identified by Council as a key concern associated with the proposal. However it also responds to the nominated grounds for refusal- noting a comprehensive response to the technical matters is contained in the additional reports and plans.

Revised Documentation

The resubmission includes:

- Revised Architectural Plans
- Revised Landscape Plan
- Revised Car Wash Stormwater Layout Plan;
- Revised Acoustic Report;
- Site Wastewater Treatment System Report

The information submitted as part of the Review Application has been prepared to address those areas of concern raised by Council. These are addressed further in this letter.

We would welcome the opportunity to engage with Council regarding the proposal which we see as a suitable and complimentary offering to the site.

Section 8.3 Environmental Planning and Assessment Act 1979

Section 8.3 of the Act provides a mechanism to enable an applicant to request that a consent authority review its original decision, which in this matter was a decision to refuse to grant consent to the development proposal. The relevant provisions of Section 8.3 provide:

- (1) *An applicant for development consent may request a consent authority to review a determination or decision made by the consent authority. The consent authority is to review the determination or decision if duly requested to do so under this Division.*
- (2) *A determination or decision cannot be reviewed under this Division—*
 - (a) *after the period within which any appeal may be made to the Court has expired if no appeal was made, or*
 - (b) *after the Court has disposed of an appeal against the determination or decision.*
- (3) *In requesting a review, the applicant may amend the proposed development the subject of the original application for development consent or for modification of development consent. The consent authority may review the matter having regard to the amended development, but only if it is satisfied that it is substantially the same development.*
- (4) *The review of a determination or decision made by a delegate of a council is to be conducted—*
 - (a) *by the council (unless the determination or decision may be made only by a local planning panel or delegate of the council), or*
 - (b) *by another delegate of the council who is not subordinate to the delegate who made the determination or decision.*

Section 8.5 provides:

- (1) *The regulations may make provision for or with respect to reviews under this Division, including—*
 - (a) *specifying the person or body with whom applications for reviews are to be lodged and by whom applications for reviews and the results of reviews are to be notified, and*
 - (b) *setting the period within which reviews must be finalised, and*
 - (c) *declaring that a failure to finalise a review within that time is taken to be a confirmation of the determination or decision subject to review.*

This review is made in accordance with the above provisions, namely:

- **within time – pursuant to Section 8.3** (i.e. within 12 months of the Notice of Determination noting the COVID-19 provisions extended the Appeal period from 6 to 12 months which means the review is also 12 months); and
- **in accordance with section 8.3(3)** – while amendments to the proposed development have been made (primarily additional information) for the purposes of the review, the proposed development is substantially the same and the amendments have been undertaken to respond to the grounds for refusal.

The applicant requests this review on the basis of the amended development and requests the Council to review its original determination and grant development consent to the proposed development.

Response to Refusal Grounds

The matters raised in the Notice of Refusal are addressed below.

1. **The application is not satisfactory for the purpose of Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 as the proposal is inconsistent with the following provisions of: Penrith LEP 2010:**
 - **Clause 2.3 Permissibility.**
 - **Clause 2.3 the objectives of the zone, specifically:**
 - **To ensure land uses are of a scale and nature that is compatible with the environmental capabilities of the land.**
 - **To maintain the rural landscape character of the land.**
 - **Clause 7.5 Protection of Scenic Character and Landscape Values.**
3. **The development application is not satisfactory for the purpose of Section 4.15(1)(a)(iv) of the Environmental Planning and Assessment Act 1979, in that the proposed use is not considered to comply with the existing use rights provisions within Part 5 of the Environmental Planning and Assessment Regulation 2000.**

We note that these grounds of refusal are linked and relate to permissibility and demonstration of Existing Use Rights (EUR).

Permissibility and Existing Use Rights (EUR)

The site is zoned RU4 Primary Production Small Lots and the proposed X Roads Cranebrook Carwash is proposed as part of the service station operations, located adjacent to the truck parking area on the western edge of the existing development.

The proposed service station and carwash would be most suitably captured by the definition of a 'service station' which is defined as:

service station means a building or place used for the sale by retail of fuels and lubricants for motor vehicles, whether or not the building or place is also used for any one or more of the following—

- (a) the ancillary sale by retail of spare parts and accessories for motor vehicles,
- (b) the cleaning of motor vehicles,
- (c) installation of accessories,
- (d) inspecting, repairing and servicing of motor vehicles (other than body building, panel beating, spray painting, or chassis restoration),

(e) the ancillary retail selling or hiring of general merchandise or services or both.

The 'place' is the site generally and the proposal involves the cleaning of motor vehicles which is expressly nominated in the definition. We also note that there is no separate definition of a 'carwash' in the dictionary.

We note that the assessment report noted the following:

A service station is a prohibited land use in the RU4 zone however, Council records show that consent was granted on 1 November 1976 for the redevelopment of an existing service station. Subsequent approvals have been granted for an ancillary convenience store, car repair station and fast food outlet. The service station has been operating from the property since. The Statement of Environmental Effects (SOEE) claims that as the service station benefits from existing use rights, the proposed car wash facility should also benefit from existing use rights, given the current definition for a service station (outlined above). While it is acknowledged that the current definition allows for 'the cleaning of vehicles', Council's records indicate that this service has not historically been provided at the site. Further, the plans show a 'dog wash' which is also considered a new use. The car wash and dog wash do not benefit from existing use rights and are therefore prohibited land uses in the RU4 zone. This is further discussed under the Environmental Regulations section of this report.

In response we note that:

- There is no doubt the existing service station has existing use rights by virtue of the prior DA consents applying to the land;
- The dog wash has been entirely removed as we concur this is prohibited and does not fit within the definition of a service station and would be a separate use.
- The proposed carwash is associated with the service station and it fits within the definition of a service station. Further we note and understand that there was a carwash bay on the site historically which is conveyed most clearly in some aerial photographs.



Image 1: Aerial Image from Google Earth. Image Date: 17th April 2006.



Image 2: Aerial Image from Google Earth. Image Date: 31st Oct 2018.

From the above Aerial Image 1- this is the oldest clearest image that can be found for the site. It shows the car wash bay at the rear of the original Service Station. Aerial Image 2- this is the most recent clearest image of the car wash bay.

This image was taken during the construction of the new Service Station in 2018. Throughout the construction of the new Service Station, the original Service Station remained in operation. Only once the new Service Station was completed did the original Service Station (and hence the Car Wash bay) get demolished. The new Service Station commenced trading on the 15th June 2020. Generally in order to maintain existing use rights the use must have not more than a maximum of 3 years being abandoned (noting COVID-19 amendments increased from 1 year to 3 years).

There has been less than 12 months since the original Service Station was demolished as well as the car wash bay- hence the carwash bay was a component of the original service station. Regardless the new service station is operating from the site.

Address of the Regulations and EUR

Part 5 of the Environmental Planning and Assessment Regulation 2000 sets out the framework for consideration of existing use rights. We note that there is no concern that the site benefits from existing use of rights for the service station and various uses occurring lawfully on the site.

Clause 41 sets out as follows:

41 Certain development allowed

(cf clause 39 of EP&A Regulation 1994)

(1) *An existing use may, subject to this Division—*

(a) *be enlarged, expanded or intensified, or*

(b) *be altered or extended, or*

(c) *be rebuilt, or*

(d) *be changed to another use, but only if that other use is a use that may be carried out with or without development consent under the Act, or*

(e) *if it is a commercial use—be changed to another commercial use (including a commercial use that would otherwise be prohibited under the Act), or*

(f) *if it is a light industrial use—be changed to another light industrial use or a commercial use (including a light industrial use or commercial use that would otherwise be prohibited under the Act).*

(2) *However, an existing use must not be changed under subclause (1)(e) or (f) unless that change—*

(a) *involves only alterations or additions that are minor in nature, and*

(b) *does not involve an increase of more than 10% in the floor space of the premises associated with the existing use, and*

(c) *does not involve the rebuilding of the premises associated with the existing use, and*

(d) *does not involve a significant intensification of that existing use.*

(e) *(Repealed)*

(3) *In this clause—*

commercial use *means the use of a building, work or land for the purpose of office premises, business premises or retail premises (as those terms are defined in the Standard Instrument).*

light industrial use *means the use of a building, work or land for the purpose of light industry (within the meaning of the standard instrument set out in the Standard Instrument (Local Environmental Plans) Order 2006).*

It is noted that the proposal does not seek consent for a 'change of use' - it seeks consent under (a) and (b) which is permitted under Clause 42 and 43 with an extract provided below.

42 Development consent required for enlargement, expansion and intensification of existing uses

(cf clause 40 of EP&A Regulation 1994)

(1) *Development consent is required for any enlargement, expansion or intensification of an existing use.*

(2) *The enlargement, expansion or intensification—*

(a) *must be for the existing use and for no other use, and*

(b) *must be carried out only on the land on which the existing use was carried out immediately before the relevant date.*

43 Development consent required for alteration or extension of buildings and works

(cf clause 41 of EP&A Regulation 1994)

(1) *Development consent is required for any alteration or extension of a building or work used for an existing use.*

(2) *The alteration or extension—*

(a) *must be for the existing use of the building or work and for no other use, and*

(b) *must be erected or carried out only on the land on which the building or work was erected or carried out immediately before the relevant date.*

44 Development consent required for rebuilding of buildings and works

(cf clause 42 of EP&A Regulation 1994)

(1) *Development consent is required for any rebuilding of a building or work used for an existing use.*

(2) *The rebuilding—*

(a) *must be for the existing use of the building or work and for no other use, and*

(b) *must be carried out only on the land on which the building or work was erected or carried out immediately before the relevant date.*

45 Development consent required for changes of existing uses

(cf clause 43 of EP&A Regulation 1994)

Development consent is required—

(a) *for any change of an existing use to another use, and*

(b) *in the case of a building, work or land that is used for different existing uses, for any change in the proportions in which the various parts of the building, work or land are used for those purposes.*

46 Uses may be changed at the same time as they are altered, extended, enlarged or rebuilt

(cf clause 44 of EP&A Regulation 1994)

Nothing in this Part prevents the granting of a development consent referred to in clause 42, 43 or 44 at the same time as the granting of a development consent referred to in clause 45.

In relation to the above the proposal:

- Seeks consent for the intensification and enlargement of the service station to broaden the car wash component (an expressly defined component of a service station use)- noting historically there has been a carwash element to the service station.
- Seeks consent for alteration or extension of buildings and works- which is for the existing use and no other use being the service station with the associated car wash component (noting removal of dog wash from the amended scheme) and is to be carried out on the land on which the land and work was carried out- i.e. the service station site.

Therefore the proposal satisfies the Regulations as to existing use rights and this enables a merit assessment of the application to be considered as the permissibility of the proposal is satisfied.

Objectives of Zone and Protection of Scenic Character and Landscape Values

Zone Objectives

In relation to the objectives of the zone Clause 2.3 requires 'regard' to be given to the zone objectives and in the case of existing use rights and in a context such as this it is our view that little regard should be given to the zone objectives- as they are simply not relevant to a development on the site of this nature as the site possesses no rural attributes. The refusal nominates two (2) objectives:

- *To ensure land uses are of a scale and nature that is compatible with the environmental capabilities of the land.*
- *To maintain the rural landscape character of the land.*

The amended application demonstrates the scale and nature of the proposal is compatible with the environmental capabilities of the land- i.e. stormwater, waste water and noise. This is through the amended material and documentation.

In relation to the rural character the 'land' does not maintain any rural landscape character- it is an atypical use and not in any way rural- which owes to the historical use and recent redevelopment. Hence this objective is not considered relevant to the land on which the proposed development is to be carried out.

Scenic Character and Landscape Values

Clause 7.5 of the LEP states:

7.5 Protection of scenic character and landscape values

(1) *The objectives of this clause are as follows—*

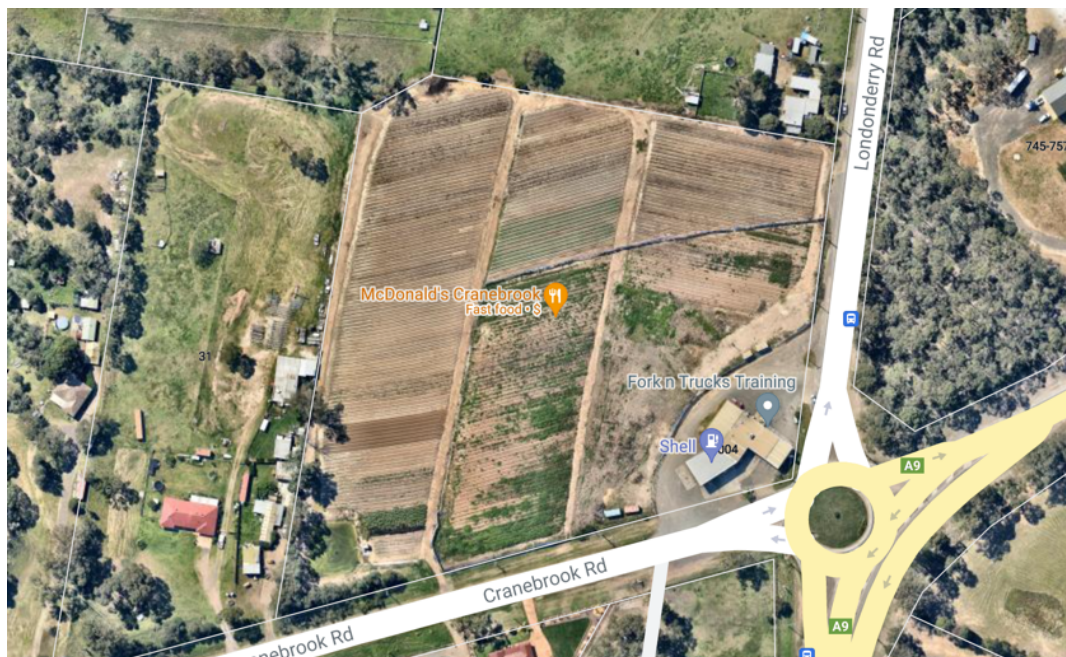
(a) *to identify and protect areas that have particular scenic value either from major roads, identified heritage items or other public places,*

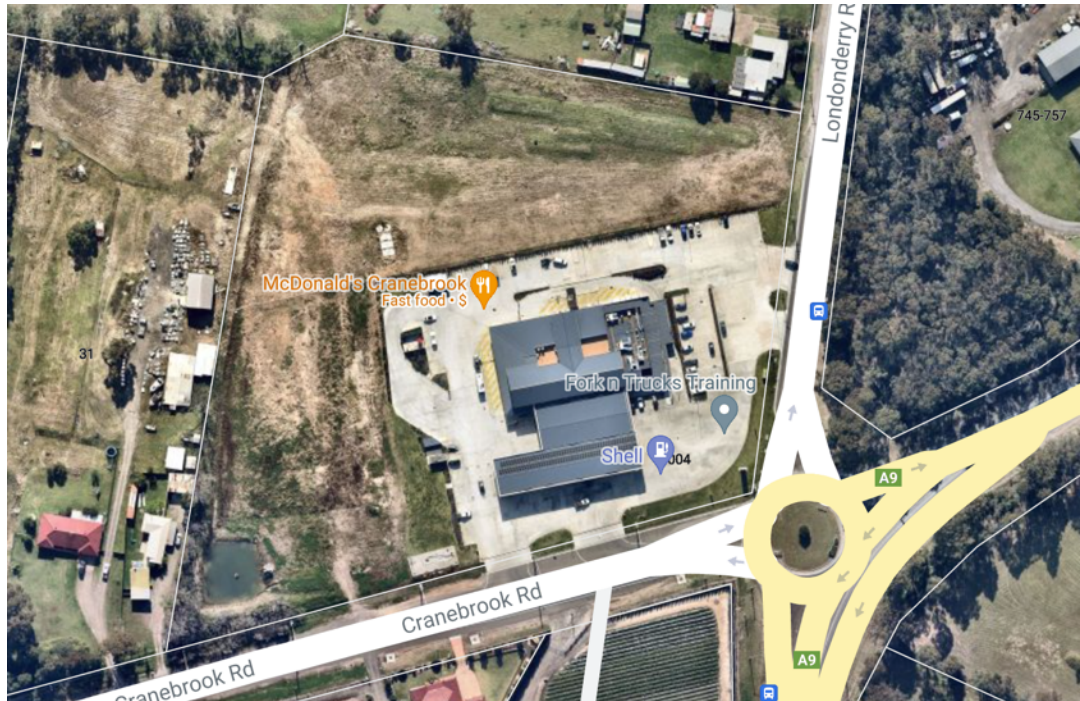
(b) *to ensure development in these areas is located and designed to minimise its visual impact.*

(2) *This clause applies to land identified as “Land with scenic and landscape values” on the Scenic and Landscape Values Map.*

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

Whilst the proposal is mapped as containing scenic character and landscape values this would likely arise from the prior state of the site when the mapping was done in 2015- see the aerial photographs below for the ‘before’ (2015) and ‘after’ (2021) development outcomes. The former site configuration possessed rural elements- which are clearly all now gone with the redevelopment of the site.





So whilst the Clause applies it has limited relevance and in relation to the provisions:

- The location and design concentrates the building in proximity to the existing built form;
- The setbacks are considered suitable with additional screen planting;
- The proposal, in and of itself, won't have any discernible visual impact relative to what is existing on the site.
- We note that the site is cleared of vegetation and adopts a series of built forms atypical in the RU4 zone which is reflective of the unique site attributes and the EUR such that the relevance of the clause is low in the context of what is on the site.

Therefore the Clause can be considered satisfied.

Additional material has been prepared by Tracey Michaels with regard to the built form and configuration.

2. *The application is not satisfactory for the purpose of Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 as the proposal is inconsistent with the following provisions of Penrith Development Control Plan 2014:*

- *C1 Site Planning and Design Principles;*
- *C3 Water Management;*
- *C6 Landscape Design;*
- *C12 Noise and Vibration;*
- *C13 Infrastructure and Services;*
- *D1 Rural Land Uses.*

These refusal grounds are dealt with in the revised material and reports, specifically in relation to landscaping, water management, and the acoustic report deals with the acoustic concerns raised.

But to respond to the issues and matters in the assessment report:

Wastewater

The Council report states that “It has not been demonstrated that the site is able to accommodate the additional wastewater loads generated by the development”.

The original SEE report, in multiple areas, stated where the on-site waste water treatment system (OWWTS) will be located, that the new OWWTS will operate similar to the existing WWTS, that the new OWWTS will operate with additional redundancy flow included, and that the area for the new OWWTS area has not been identified as being in a slope failure/slope instability risk area.

Please see the attached Site and Soil Assessment for On-Site Wastewater Management by Roberts Resources, dated 26th Nov 2020. This addresses this issue.

We note that in relation to the issue of bunding; a bunded driveway area has now been provided to the entry of the Auto Wash Bays which will assist in capturing effluent water. Further the acoustic roller doors (at the exits of the Auto Wash Bays) will be closed during the wash cycle meaning effluent water will be contained in these Auto wash bays. We note that the Plant Room is not bunded as it is an enclosed room. Bunding is show around the Oil Separator enclosure.

The Storage Shed does not require a bunded area as it does not house any item that requires bunding. The Self-Serve wash bays are also oversized in length (at 9.5M long, instead of 7M long). This additional wash bay length will ensure that the vehicle has a greater distance from the outside of the car to the outside of these Self-Serve wash bays and will provide additional protection for any waste water exiting these wash bays.

Typically, there is not a large amount of chemicals stored on a Car Wash site. All chemicals that require storage will comply with all NSW EPA, OH&S and other regulatory requirements. All chemicals are stored inside the Plant Room by the approved methods.

Stormwater Management

Concerns were raised regarding the OSD and water quality associated with the TMC Stormwater Design. The updated site plans show an overall reduction in site levels.

This has negated the need for any onsite retaining walls for the driveway areas and areas of fill will not exceed 1.5M in depth. All Wash Bay and Plant Room/Secure Store room floor levels have been reduced by 550mm. Driveway pavement levels have also been reduced by up to 550mm.

The entire Car Wash Stormwater design has been updated to act as a standalone treatment system acting independently of the remainder of the site. All of the roof rain water is captured in an oversized below ground rain water tank (Pit P5). This captured rainwater will be entirely re-used in the car washing cycle. An overflow pipe for this tank will be provided in the unlikely event that the tank was to overflow. A one way valve will be installed on this pipe into Pit P6 to prevent any driveway water from entering into Pit P5. The retention volume of this system has been determined by the InSite Integrated Water Management software program; and the computations can be found in the attached Civil calculations by TMC- page number 22 – 27 inclusive.

The stormwater detention requirements for the rainwater falling on the Car Wash driveway areas has been modelled also using the InSite Integrated Water Management software program; and the computations can be found in the attached Civil calculations by TMC- page number 28 – 33 inclusive.

The water quality aspects for the required stormwater treatment are to be achieved by a combination of SPEL Stormsacks (5 in total) and a SPEL Filter (1 in total). Refer to the Statement of Stormwater Treatment Design, Music model and product information in the attached Civil calculations by TMC- page number 34 - 58 inclusive.

Therefore this is considered resolved based on the amended plans.

Noise Impacts

Concerns were nominated in the Council report regarding the acoustic report. In relation to the issue of waste collection the original SEE noted (page 22) that the general waste is stored in the overall sites existing bin area and collected via existing arrangements- hence there is no separate waste arrangement and no change to the acoustic impact of this.

In response to the concerns a revised and updated Acoustic Report has been prepared by Eco Acoustics Pty Ltd that addresses these issues.

Landscaping and Landscaped Setback

Council report, page 4, states “While a 4.5M landscaped setback is provided for the Service Station, the proposed Car Wash is located adjacent to a concrete slab of a subsurface detention pit and only provides a 2.3M landscaped area. Further, the proposed location of the car wash conflicts with an area identified for the planting of *Eucalyptus Maculata* (Spotted Gum) on the stamped approved plans for DA110/1209.”

The plans on Sh 4 show an existing 17.5M long x 7.0M wide existing concrete slab area which contains the existing sub-surface detention system- which is already on site. The Detention system slab is setback 1.65M from the front site boundary, and the front façade of the main car wash building is setback 11M from the front site boundary. The distance between the Detention Pit slab and the Car Wash is 2.4M. The area over the Detention Pit slab cannot be landscaped. We can landscape around and in front of the detention pit slab. However, the concreted pit lid could be painted in a green colour to emulate a grassed area if deemed necessary.

On the updated Landscaping Plan provided (Sh: 7), we show new substantial trees of varying heights surrounding the proposed Car Wash area. This is consistent with the previously approved Service Station plans in layout and tree species to maintain consistency around the site. Landscaping is provided to the front of the site with the planting height varying from 2M to 10M high. The new planting needs to take into consideration the existing/new infrastructure i.e.: damage to sub-surface pipes/driveway pavement and the like.

The updated proposed landscaping plan and planting schedule itemises a comprehensive list of all of the necessary required information. This Landscaping Plan is consistent with the information and planting species contained on the originally approved Landscaping Plan. No consultation was made to amend the submitted landscaping design, to increase the number of trees, where the trees are located, to change the species of trees or to provide any additional information regarding the landscaping reporting aspects of the design.

The proposed landscaping plan for the Car Wash contains planting of trees which are designed to partially screen the building to minimise the impact from the adjoining roadway and nearby properties. This substantially improves the landscaping currently on site.

The proposed Landscaping Plan has been updated as the previously proposed retaining wall along the western side of the Car wash has been deleted. Additional landscaping is now provided in this area. In lieu of the deleted retaining wall the battered down area will now be a turf/grassed area similar to the current site.

4. *The application is not satisfactory for the purpose of Section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979 as it has not been demonstrated the likely impacts of the development can be satisfactorily mitigated. These impacts relate to local character, noise, wastewater and water management.*
5. *The application is not satisfactory for the purpose of Section 4.15(1)(c) of the Environmental Planning and Assessment Act 1979 as it has not been demonstrated through compliance with the relevant provisions that the site is suitable for the proposed development.*
6. *The application is not satisfactory for the purpose of Section 4.15(1)(e) of the Environmental Planning and Assessment Act 1979 as the proposal is not in the public interest.*

These refusal grounds relate to prior grounds for refusal- i.e. items 1-3- and given they have been substantially addressed these matters are considered resolved. These matters have been addressed above noting:

- The building location and design is suitable.
- The amended design and landscaping respond adequately to local character.
- The noise issue is addressed in the acoustic report.
- The wastewater and water management matters are addressed on the amended plans and the wastewater report.

The development is considered to be in the public interest noting:

- The development facilitates a suitable associated use with the service station which benefits from existing use rights;
- The development is permitted in the zone and the proposal has carefully considered the most appropriate location for the development and the inter-related issues of wastewater, stormwater, and acoustics.

Conclusion

I trust the above satisfactorily responds to Council 's issues and that any remaining concerns with the project can be conditioned to allow a report recommending approval of the application to be finalised.

Should you require any further information, I can be contacted on 9687 8899.

Jonathon Wood
Director
Think Planners Pty Ltd