



Statement of Environmental Section 4.55(1A)

ESQ STAGE 2B – BUILDING D AND E
MULGOA ROAD, PENRITH

12 AUGUST 2021



QUALITY ASSURANCE

Project:	<i>Section 4.55(1A)</i>
Address:	<i>'ESQ1818' Stage 2B – Mulgoa Road, Penrith</i>
Lot /DP:	<i>Lots 51 -53 & 55 in DP1246141</i>
Council:	<i>Penrith City Council</i>
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Document Management

<i>Prepared by:</i>	<i>Purpose of Issue:</i>	<i>Date:</i>
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Integrated Development (under S4.46 of the EP&A Act). Does the development require approvals under any of the following legislation?

Coal Mines Subsidence Compensation Act 2017	No
Fisheries Management Act 1994	No
Heritage Act 1977	No
Mining Act 1992	No
National Parks and Wildlife Act 1974	No
Petroleum (Onshore) Act 1991	No
Protection of the Environment Operations Act 1997	No
Roads Act 1993	No
Rural Fires Act 1997	No
Water Management Act 2000	No

Concurrence

SEPP 64- Advertising and Signage	No
SEPP Coastal Management 2018	No
SEPP (Infrastructure) 2007	No
SEPP (Major Development) 2005	No
SREP (Sydney Harbour Catchment) 2005	No

CONTENTS

EXECUTIVE SUMMARY	5
SITE AND LOCALITY DESCRIPTION	6
PANTHERS PENRITH PRECINCT	6
DEVELOPMENT SITE	7
ZONING CONTROL	8
DESCRIPTION OF AMENDED PROPOSAL	9
ASSESSMENT OF PLANNING ISSUES & CONTROLS	13
S.4.55(1A) ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979	13
WATER MANAGEMENT ACT	13
STATE ENVIRONMENTAL PLANNING POLICY (BASIX) 2004	13
STATE ENVIRONMENTAL PLANNING POLICY NO. 55 – REMEDIATION OF LAND	14
STATE ENVIRONMENTAL PLANNING POLICY – (VEGETATION IN NON-RURAL AREAS) 2017	14
STATE ENVIRONMENTAL PLANNING POLICY – (INFRASTRUCTURE) 2007	14
SYDNEY ENVIRONMENTAL PLANNING POLICY NO. 65 – DESIGN QUALITY OF RESIDENTIAL APARTMENT DEVELOPMENT AND THE APARTMENT DESIGN GUIDE	15
SYDNEY REGIONAL ENVIRONMENTAL PLAN 20 – HAWKESBURY NEPEAN RIVER (NO 2 – 1997)(SREP 20)	18
PENRITH LOCAL ENVIRONMENTAL 2010	19
BUILDING HEIGHT DEPARTURE	23
PENRITH DEVELOPMENT CONTROL PLAN 2014 PART C – LAND USE CONTROLS	31
PENRITH DEVELOPMENT CONTROL PLAN 2014 PART E – KEY PRECINCTS	35
CONCLUSION	38

TABLE OF FIGURES

Figure 1: Aerial Map Extract of Panthers Penrith Precinct Site (Source: Six Maps) ..6
Figure 2: Aerial Map Extract of Subject Site (Six Maps)..... 7
Figure 3: Zoning Map Extract (Source: Penrith LEP 2010) 8
Figure 4: Zoning Map Extract (Source: Penrith LEP 2010) 19

EXECUTIVE SUMMARY

This Statement of Environmental Effects has been prepared in support of a Section 4.55(1A) modification that seeks amendments to the approved plans associated with Building D and E associated with Stage 2B of the ESQ development.

DA18/0999 approved on the 22nd August 2019 with the following description of development:

Mixed Use Residential & Retail Development – One (1) x Five (5) Storey Mixed Use Building comprising 1,225m² of Retail Floor Space & 82 Apartments & seven (7) Residential Flat Buildings comprising Four (4) or Five (5) Storeys containing 246 Apartments, Demolition Works, Earthworks & Associated Excavation, New Road, Rehabilitation of Existing Riparian Corridor, Stormwater Drainage and Associated Landscaping

It is noted that this modification was lodged in December 2020 in addition to other 4.55 modifications for the other stages of the parent site. It was deemed by council to be too much to be assessed at once, and therefore, council requested that the applicant withdraw this application to allow for the progression of the other applications. It is now considered that an appropriate time frame has passed to relodge the 4.55 modification.

The current modification is proposing to undertake modifications to the approved design scheme under DA18/0999 of Building D and Building E, including minor RL changes, general layout changes, inclusion of additional adaptable units, general layout changes and the amalgamation of units resulting in changes to the unit mix with a total reduction in yield by 2 dwellings.

The development is substantially the same development and the changes, when considered across the size and extent of the development as approved, are of minimal environmental impact.

For full detail on the changes see the plans that have amendments clouded in red, a full description of changes is provided within the description of proposal section of this report.

After a review of the amended plans and consideration of the relevant planning controls, it is recommended that Council grant consent to the modification application with appropriate amendment to consent conditions – namely condition 1 of consent to reflect the amended plans.

SITE AND LOCALITY DESCRIPTION

The subject site is legally described as Lots 51-53 & Lot 55 in DP1246141, however it is more commonly known as 2, 8, & 10 Retreat Drive and 123 Mulgoa Road, Penrith.



PANTHERS PENRITH PRECINCT

The development site resides within the Panthers Penrith Precinct associated with the Riverlink Precinct.

The Panthers Penrith Precinct is located within 2km radius of Penrith City centre and is approximately 68.1ha in area. The large site is bounded by Council land (Carpenter's Site) to the north, Mulgoa Road to the east, aged care accommodation and residential land uses to the northeast, Ladbury Avenue residential lots and Nepean River to the west and Jamison Road to the south, as illustrated by an aerial map extract below.

Figure 1: Aerial Map Extract of the Panthers Penrith Precinct Site (Source: Six Maps)



-  Panthers Penrith Precinct
-  Development Site

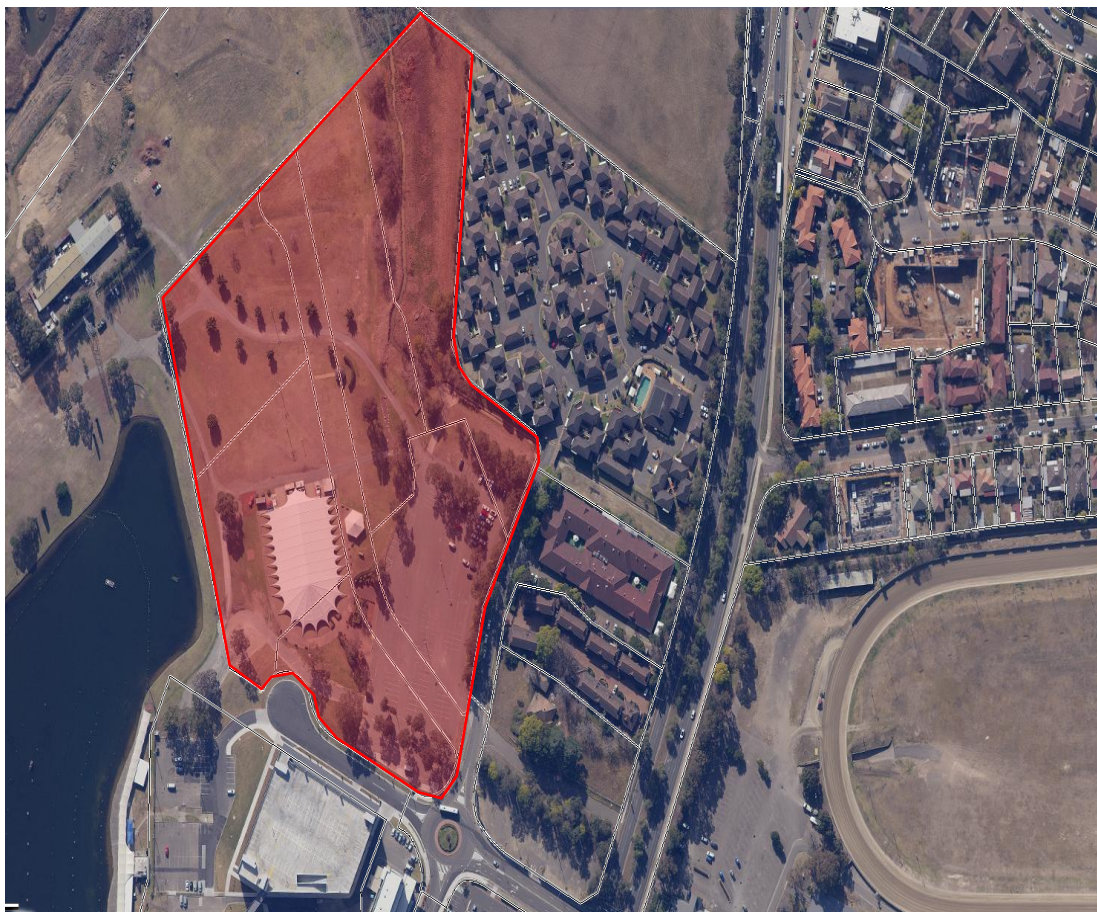
DEVELOPMENT SITE

Bounding Retreat Drive to the east, Ransley Street to the south, Peachtree Creek to the west and aged care accommodation and residential land uses, the development site can be best described as a large predominantly vacant land parcel with a total area of 39,817m².

The development site is predominantly vacant but includes a pavilion building, gazebo, at-grade car park and access roads.

An aerial extract of the development site is provided below.

Figure 2: Aerial Map Extract of Subject Site (Six Maps)



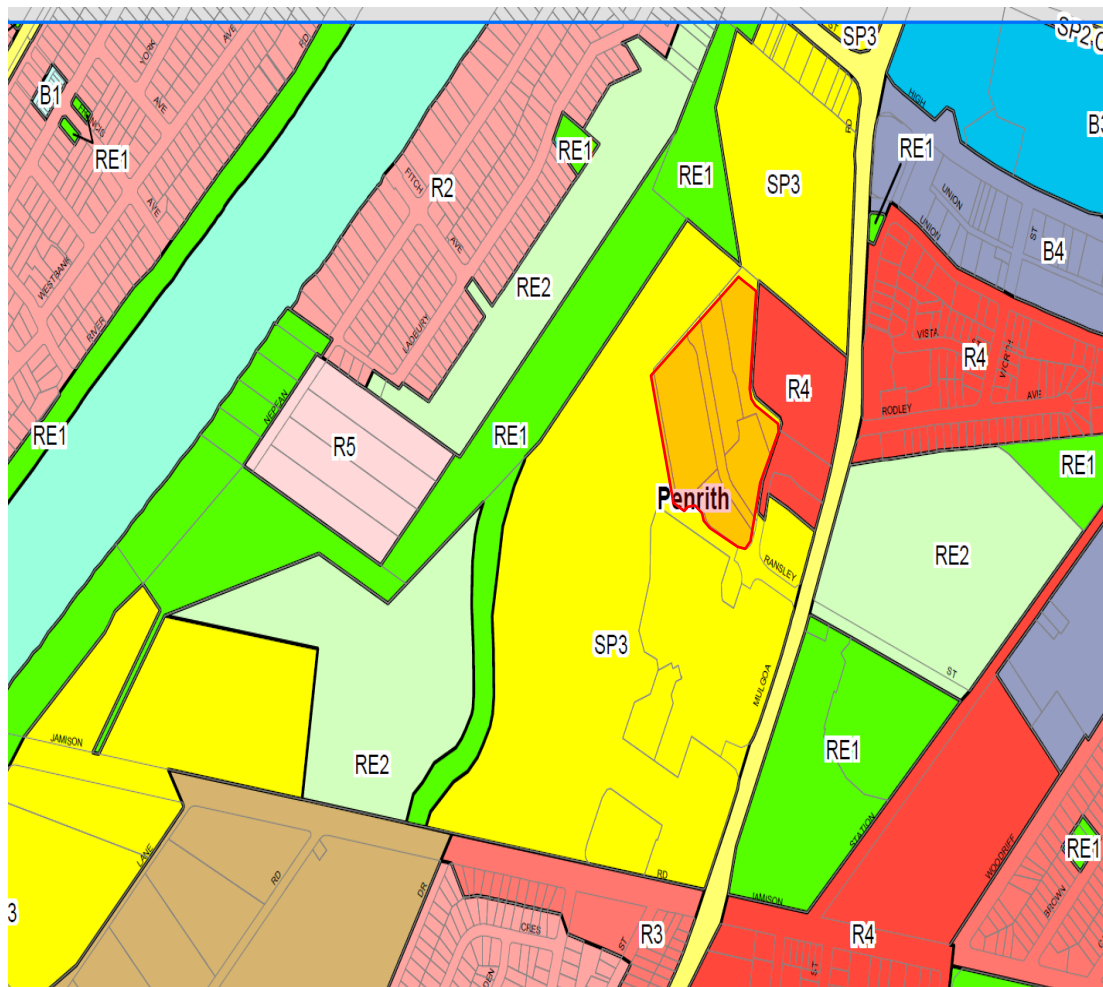
 Development Site

ZONING CONTROL

As outlined in the following page, the development site is zoned SP3 – Tourism under the provisions of the Penrith Local Environmental Plan 2010 and is subject to a split building height of 15m and 20m and a maximum FSR of 1:1.

The development site also subject to Clause 2.5 – Additional Permitted uses which permits particular land referred to in Schedule 1, Clause 22 of the Penrith LEP 2010 including multi dwelling housing, office premises, residential flat buildings, retail premises and senior housing.

Figure 3: Zoning Map Extract (Source: Penrith LEP 2010)



 Development Site

DESCRIPTION OF AMENDED PROPOSAL

The current modification is proposing to undertake modifications to the approved design scheme under DA18/0999 of Building D and Building E, including minor RL changes, general layout changes, inclusion of adaptable units, general layout changes and the amalgamation of units resulting in changes to the unit mix. The proposal also adjusts the finishes and materials to the buildings to reflect the further design evolution in the progression to the Construction Certificate phase.

The development is substantially the same development and the changes, when considered across the size and extent of the development as approved, are of minimal environmental impact. For full detail on the changes see the plans that have amendments clouded in red, with the current Section 4.55(1A) modification seeking to alter the following elements of the consent:

Basement:

- general layout changes
- removal of security gates
- RL levels increased to achieve min. clearances for the sewer & basement
- relocation of adaptable unit car spaces
- The total number of parking spaces is unchanged- noting that in relation to visitor parking 13 of the 19 visitor parking spaces are on the street as per the DA consent.

Ground:

- inclusion of adaptable units
- building D West raised RL 27,500 to 27,650
- building D East raised RL 27,500 to 27,650
- building E raised RL 26,750 to 27,650
- level change to landscape and pool area to allow for truck clearance.
- New access entry pathway from Retreat Drive
- Removal of Stairs from Retreat Drive

Level 1:

- inclusion of adaptable units
- building D West raised RL 27,500 to 27,650
- building D East raised RL 27,500 to 27,650
- building E raised RL 26,750 to 27,650
- level change to landscape and pool area to allow for truck clearance.
- New access entry pathway from Retreat Drive
- Removal of Stairs from Retreat Drive

Level 2:

- inclusion of adaptable units
- inclusion of adaptable units
- building D West raised RL 33,700 to 33,850
- building D East raised RL 33,450 to 33,850
- building E raised RL 32,950 to 33,850
- units 305a & 305b to be 2 separate 1B units as per GF and L1 approved sketch

Level 3:

- inclusion of adaptable units
- building D West raised RL 36,800 to 36,950
- building D East raised RL 36,550 to 36,950
- building E raised RL 36,050 to 36,950
- Unit Amalgamation (6 Units become 3)

Level 4:

- inclusion of adaptable units
- building D West lowered RL 41,000 to 40,300
- building D East raised RL 39,650 to 40,050
- building E raised RL 39,450 to 40,350
- skylight added to D.507

Roof Plan:

- skylight added

Elevations Building D:

- Lift over-run increased as with level changes
- Lift overrun encroachment into the 20m height plane by 624mm at its highest point.

Elevations Building E:

- building E raised entire building RL by 900mm

Compliance:

- Amalgamation of the units resulting in a change of solar and cross flow ventilation results but compliance is still achieved with the 70%/60% requirements.

Unit Mix

A decrease in the total unit yield from 328 to 326 with modification to the overall breakdown of unit mix to:

- 1 studio (no change);
- 110 x 1 beds (+ 1)
- 184 x 2 beds (- 3)
- 30 x 3 beds (- 1)
- 1 x 4 beds (+ 1)

Public Art

No change to the public art strategy under consideration by Council.

Stormwater Management

No change to the stormwater management arrangements approved under DA18/0999.

Riparian Corridor Rehabilitation and Restoration

No change to the riparian corridor rehabilitation and restoration arrangements approved under DA18/0999.

Modifications to Condition of Consent

It is requested that relevant conditions of consent be amended with the following Conditions to be amended as follows for the reasons set out below.

Condition 1

To be updated to reflect the updated plans submitted with this application

ASSESSMENT OF PLANNING ISSUES & CONTROLS

S.4.55(1A) ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

Pursuant to S.4.55 of the Act, Council may consider an application to amend a development consent provided that it is of minor environmental impact and is substantially the same development.

The application is substantially the same as the approved development, with the development concept continuing to incorporate a Mixed Use Residential & Retail Development of comparable size and scale to that approved.

The extent of changes are minor in the scheme of the total development, with changes limited to Building D and E (Stage 2B) as noted previously in this report the primary changes are:

- A decrease in the total unit yield from 328 to 326 with modification to the overall breakdown of unit mix to:
 - 1 studio (no change);
 - 110 x 1 beds (+ 1)
 - 184 x 2 beds (- 3)
 - 30 x 3 beds (- 1)
 - 1 x 4 beds (+ 1)
- Inclusion of adaptable units
- Minor adjustment to building RLs.
- Minor changes to facades to Building D and E.
- Lift overrun increased levels.

These changes are considered to be of minimal environmental impact relative to the approved scheme- and the 'impact' of the changes are not likely to be fundamentally altered relative to what was previously approved. Accordingly, they would be considered to be both substantially the same development and of 'minor environmental impact'.

WATER MANAGEMENT ACT

The original proposal involved carrying out of development within 40m of waterfront land including the realignment of an existing creek, however section 91 of the Water Management Act 2000 has been addressed via DA18/0999.

STATE ENVIRONMENTAL PLANNING POLICY (BASIX) 2004

An updated BASIX Certificate is being prepared and will be submitted to Council under separate cover prior to determination for the application.

STATE ENVIRONMENTAL PLANNING POLICY NO. 55 – REMEDIATION OF LAND

Potential contamination has been addressed via DA18/009 noting that a Stage 1 Contamination Assessment was undertaken by Ground Technology which concluded that the site was suitable for residential development and no remediation action plan was required.

Considering that the current modification is limited to undertaking low-scale changes to the overall design scheme approved under DA18/0999, and as such no further contamination investigation is required.

STATE ENVIRONMENTAL PLANNING POLICY – (VEGETATION IN NON-RURAL AREAS) 2017

The SEPP seeks to protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and to preserve the amenity of non-rural areas of the State through the appropriate preservation of trees and vegetation.

Considering that the current modification is limited to undertaking low-scale changes to the overall design scheme approved under DA18/0999 there will be no changes to the approved landscape arrangements.

STATE ENVIRONMENTAL PLANNING POLICY – (INFRASTRUCTURE) 2007

Assessment against the Infrastructure SEPP 2007 has been undertaken via DA18/0999.

Considering that the current modification is limited to undertaking low-scale changes to the overall design scheme approved under DA18/0999, no further concurrence with the RMS other than that undertaken as part of the previous DA is required.

SYDNEY ENVIRONMENTAL PLANNING POLICY NO. 65 – DESIGN QUALITY OF RESIDENTIAL APARTMENT DEVELOPMENT AND THE APARTMENT DESIGN GUIDE

It is noted that the proposal is technically captured by the ADG as it applies to modification applications.

A brief discussion against the ADG matters is provided below, noting that despite the minor reconfiguration to the internal layout to some of the units and changes to the overall unit mix, the development continues to be compliant with the requirements of the ADG.

Part 3 Siting the Development			
3D Communal and Public Open Space	<u>Design Criteria:</u>		
	Communal open space has a minimum area equal to 25% of the site	No changes.	N/A
	50% of the principal COS should receive 2 hours of sunlight between 9am and 3pm	Continues to comply as per DA18/0999.	Yes
	<u>Design Criteria:</u>		
	Minimum dimension of 3m	N/A	N/A
	Direct, equitable access should be provided to communal open space areas from common circulation areas, entries and lobbies	No changes.	N/A
	Where communal open space cannot be provided at ground level, it should be provided on a podium or roof	No changes.	N/A
Facilities are provided within communal open spaces and common spaces for a range of age groups, incorporating some of the following elements:	No changes.	N/A	
	<ul style="list-style-type: none"> seating for individual or groups barbecue areas 		

	<ul style="list-style-type: none"> play equipment or play area swimming pools, gyms, tennis courts or common rooms 		
3E Deep Soil Zones <i>Design Criteria:</i>			
	A deep soil zone equivalent to 7% of the site must be provided	No changes.	N/A
3F Visual Privacy			
Buildings separation up to 4 storeys (up to 12m)	12m between habitable rooms (6m) 6m between non-habitable rooms (3m)	Has been addressed via previous DA, noting no change to the building separation arrangements approved under DA18/0999.	No changes.
Part 4 – Designing the Building			
4A Solar Access <i>Design Criteria:</i>			
	Living rooms and private open space of at least 70% of units to receive 2 Hours Solar Access between 9am and 3pm Mid-Winter	Despite the minor changes to apartment internal layout and yield of stage 2B, the proposed development will continue to comply with solar access requirements. Building D and Building E overall provide adequate solar access to 67/95 units= 70.5%.	TBC
	A maximum of 15% of apartments receive no direct sunlight between 9am and 3pm Mid-Winter	7/95 units (7.3%) achieve no sun.	Yes
4B Natural Ventilation <i>Design Criteria:</i>			
	60% of units are cross ventilated in a building up to 9 storeys	Despite the minor changes to apartment internal layout and yield of stage 2B, the development will continue to comply with natural ventilation requirements. In relation to the Stage 2B changes 67/95 units comply which is 70.5%.	Yes
	Overall width of cross over or cross through apartments is < 18m	Continues to comply	Yes

4C Ceiling Height	<u>Design Criteria:</u> 2.7m for habitable and 2.4m for non-habitable	Complies	Yes
4D Unit Sizes	<u>Design Criteria:</u>		
1 bed	50m ²	Notwithstanding the changes to apartment internal layout to some of the units and an overall decrease to the overall unit yield, all units continue to comply with the unit size requirements.	Yes
2 bed	70m ²		
3 bed	90m ²		
+5m² for each unit with more than 1 bathroom	Every habitable room must have a window in an external wall with a total minimum glass area of not less than 10%	Every habitable room continues to be provided with a window.	Yes
Bedroom sizes			
Master		Continues to comply	Yes
Normal		Continues to comply	Yes
Living room/dining areas have a minimum width of:			
3.6m	10m ²	Continues to comply	Yes
4m	9m ²	Continues to comply	Yes
4E Private Open Space			
Balcony Sizes			
1 bed	8m ² & 2m depth	Continues to comply	Yes
2 bed	10m ² & 2m depth	Continues to comply	Yes
3 bed	12m ² & 2.4m depth	Continues to comply	Yes
Ground level / podium apartments	N/A	Continues to comply	N/A
4F Common circulation and space	<u>Design Criteria:</u>		
Common circulation units per plate	8 – 12 unit per plate	Continues to comply with ADG requirements.	Yes

4G Storage	<u>Design Criteria:</u>		
	1 bed: 6m ³	Continues to comply	Yes
	2 bed: 8m ³	Continues to comply	Yes
	3 bed: 10m ³	Continues to comply	Yes
4H Acoustic Privacy	<u>Design Criteria:</u>		
	Adequate building separation is provided within the development and from neighbouring buildings/adjacent uses	Has been addressed via previous DA.	N/A
	Windows and door openings are generally orientated away from noise source		
	Noisy areas within buildings including building enters and corridors should be located next to or above each other and quieter areas next to or above quieter areas.		
4K Apartment Mix	<u>Design Guidelines:</u>		
	A variety of apartment types is provided	Modification is to undertake minor changes to the overall unit yield and unit mix, however the development continues to provide a variety of unit types.	Yes

SYDNEY REGIONAL ENVIRONMENTAL PLAN 20 – HAWKESBURY NEPEAN RIVER (NO 2 – 1997)(SREP 20)

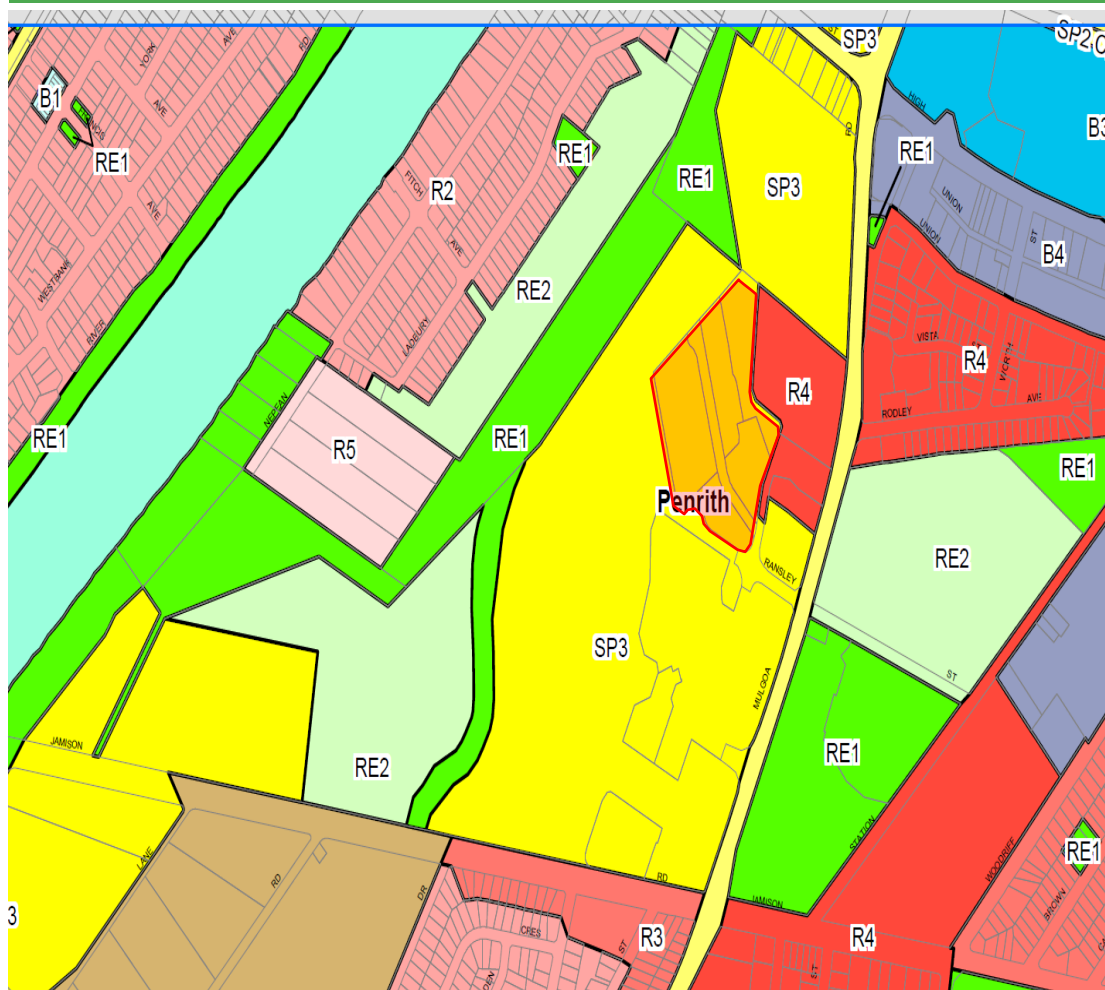
Has been addressed via DA18/0999.

PENRITH LOCAL ENVIRONMENTAL 2010

As outlined below, the subject site is zoned SP3 Tourist under the provisions of the Penrith Local Environmental Plan 2010 and is subject to a split building height of 15m and 20m and a maximum FSR of 1:1.

The development site continues to be subject to Clause 2.5 – Additional Permitted uses which permits particular land referred to in Schedule 1, Clause 22 of the Penrith LEP 2010 including multi dwelling housing, office premises, residential flat buildings, retail premises and senior housing.

Figure 4: Zoning Map Extract (Source: Penrith LEP 2010)



 Development Site

The table below provides detail on the development standards relevant to the current proposal.

Penrith Local Environmental Plan 2010			
Clause	Control	Comment	Complies
Zoning	SP3 – Tourist	The approved land uses continues to be permissible as per Clause 2.5 – Additional Permitted uses which permits particular land referred to in Schedule 1, Clause 22 of the Penrith LEP 2010 including multi dwelling housing, office premises, residential flat buildings, retail premises and senior housing.	Yes
Part 2 Permitted or Prohibited Development			
2.3	Zone Objectives and Land Use Table	The proposal remains consistent with the zone objectives of the SP3 – Tourist zone and will provide additional retail and residential opportunities within the Penrith Panthers Precinct.	Yes
2.7	Demolition	No additional demolition works proposed.	N/A
Part 4 Principal Development Standards			
4.3	Height of Buildings	Penrith Local Environmental Plan 2011 Maximum Building Height Map Sheet HOB_006 indicates that the site is subject to a split maximum building height of between 15m-20m. The application proposes to increase RL levels in order to achieve minimum clearances for the sewer & basement. See the discussion at the end of this table.	Yes
4.4	Floor Space Ratio	Penrith Local Environmental Plan 2011 Maximum FSR Map Sheet FSR_006 indicates that the site is subject to a maximum FSR of 1:1. The development does not propose any changes to FSR.	N/A
Part 5 Miscellaneous Provisions			
5.10	Heritage Conservation	Has been addressed via previous DAs.	N/A

Part 7 Additional Local Provisions			
7.1	Earthworks	No additional earthworks are proposed.	N/A
7.2	Flood Planning	Has been addressed via previous DAs, noting no change to the approved flood mitigation measures approved under DA18/0999. It is noted that minor changes are proposed to the building RLs. However, the proposal provides minimum habitable floor levels of RL 27.65 AHD.	Yes
7.3	Development on Natural Resource Sensitive Land	The site is not identified on the Natural Resources Sensitive Map. Not applicable.	N/A
7.4	Sustainable Development	<p>The proposal satisfied the LEP in that:</p> <p><i>(a) conserving energy and reducing carbon dioxide emissions,</i> <i>(b) embodied energy in material and building processes,</i></p> <p>Has been addressed via previous DAs.</p> <p><i>(c) building design and orientation</i> <i>(d) passive solar design and day lighting,</i> <i>(e) natural ventilation</i></p> <p>The current modification is to undertake minor changes to the approved design scheme associated with the approved mixed use development, noting that the development will continue to comply with the solar access and natural ventilation requirements of the ADG.</p> <p><i>(f) energy efficiency and conservation,</i> <i>(g) water conservation and water reuse,</i></p> <p>Has been addressed via previous DAs.</p> <p><i>(h) waste minimisation and recycling</i></p> <p>Has been addressed via previous DAs, noting no change to the existing waste management arrangements.</p> <p><i>(i) reduction of vehicle dependence,</i></p> <p>Has been addressed via previous DAs.</p> <p><i>(j) potential for adaptive reuse.</i></p>	N/A

		Has been addressed via previous DAs.	
7.5	Protection of Scenic Character and Landscape Values	Has been addressed via previous DAs.	N/A
7.6	Salinity	Has been addressed via previous DAs.	N/A
7.7	Servicing	Has been addressed via previous DAs.	N/A
Part 9 Penrith Panthers Site			
9.1	Objectives	The approved development continues to be consistent with the objectives of Part 9 in that it will continue to deliver a mix of retail and residential land uses within the precinct.	Yes
9.3	Density of Retail Premises	Has been addressed via previous DA, no changes.	N/A
9.4	Minimum Lot Size for Outlet Centres for Community Title Schemes or Strata Plan Schemes	Not applicable to the current application.	N/A
9.5	Campus Style Office Development	Not applicable to the current application.	N/A
9.6	Development Control Plan for Land to which this Part Applies	Part B, Section E13 of the Penrith DCP 2014 has been adopted.	Yes

BUILDING HEIGHT DEPARTURE

The amended proposal increases the height of Building D, clearly shown in the comparison of the elevations provided below.



Shows the approved DA (elevation East D).



Shows the proposed modification (elevation East D).

Accordingly, the departure is limited to the lift overrun of Building D.

The lift overrun will Lift encroachment into the 20m height plane by 624mm at its highest point. The exceedance is not visually apparent as it is contained at the centre of the site. The departure is a function of the topographical cross-fall of the site with only a portion of the building exceeding where the ground level (existing) rises. The variation is also a due to the development having to raise the RLS in order to accommodate the required clearances for sewer and the basement. No habitable floor area exceeds the maximum height limit.

It is noted that the proposal will not result in any unacceptable additional overshadowing impacts to adjoining properties, especially to land parcels that bound the site to the south and therefore, the non-compliance with the maximum height control is considered appropriate.

Clause 4.6 Does Not Apply

The consideration of development standards pursuant to Section 96 amendments has been an ongoing issue dealt with in the Land and Environment Court. It is important to note that the Court has consistently described the section 96 modification provision of the Act as “beneficial and facilitative” (as is Section 4.55).

It is designed to assist the modification process rather than to act as an impediment to it; “It is to be construed and applied in a way that is favourable to those who seek to benefit from the provision” (see *North Sydney Council v Michael Standley & Associates Pty Limited* 1998).

Consistent with this philosophy it is noted that a Council can approve a section 96 modification application even where it would contravene a development standard. In such cases, neither a SEPP1 nor Clause 4.6 variation is required.

In *North Sydney Council v Michael Standley & Associates Pty Ltd* the judgement identified that section 96 is a ‘free-standing provision’. This means that a section 96 “*modification application may be approved notwithstanding the development would be in breach of an applicable development standard were it the subject of an original development application.*”

It is clear that Section 96/4.55 authorises the development to be approved irrespective of any breach of development standards. The tests for a section 4.55 are different to that of a development application, as it includes that of “substantially the same”. Accordingly, a determination pursuant to Section 4.55 does not require a SEPP1 or Clause 4.6 variation to give Council power to approve.

Sutherland Shire Council argued it in *Gann v Sutherland Shire Council* that it is illogical for a developer to have the opportunity to gain consent for a compliant development by virtue of a Development Application and then be granted opportunity to ignore development standards via the former section 96 modification processes.

The Court noted:

“This does not mean that development standards count for nothing. Section 96(3) still requires the consent authority to take into consideration the matters referred to in s 79C, which in turn include the provision of any environmental planning instrument. That is, any development standard in an environmental planning instrument must be taken into consideration by the consent authority, but the absolute prohibition against the carrying out of development otherwise than in accordance with the instrument in s 76A(1) does not apply.”

Having regard to the above discussion, we note that section 96/4.55 authorises the approval of modifications to be given by the consent authority where there is a breach of a development standard.

Neither Clause 4.6 nor SEPP1 are applicable to a Section 96/4.55 modification, as these are only relevant during the development application and assessment stage. However, a consent authority is still to have regard to the control and the merit, or otherwise, of supporting a variation to a control.

As set out above a detailed Clause 4.6 variation is not legally required for the modification application.

However, the following reasons indicate that the departure to the height control is acceptable for the revised development and the discussion below follows the general provisions of Clause 4.6 to provide a merit assessment- noting that no Clause 4.6 variation is actually required- only consideration of the merit of the height breach.

Land and Environment Case Law

The decision by Chief Judge Preston in a judgement dated 14 August 2018 in the matter of *Initial Action Pty Ltd v Woollahra Council* confirmed that the absence of impact was a suitable means of establishing grounds for a departure and also confirmed that there is no requirement for a development that breaches a numerical standard to achieve a 'better outcome'.

However recent developments in the law in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 have set out to confirm that the approach taken in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 ('Al Maha') is also relevant.

In simple terms *Al Maha* requires that a Clause 4.6 will have only adequately addressed Clause 4.6(3) if the consent authority is satisfied the matters have been demonstrated in the Clause 4.6 request itself- rather than forming a view by the consent authority itself.

This Clause 4.6 request demonstrates the matters if Clause 4.6 (3).

The key tests or requirements arising from recent judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is "consistent with" the objectives of the development standard and zone is not a requirement to "achieve" those objectives. It is a requirement that the development be compatible with the objectives, rather than having to 'achieve' the objectives.
- Establishing that 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' does not always require the applicant to show that the relevant objectives of the standard are achieved by

the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in Wehbe v Pittwater.

- When pursuing a clause 4.6 variation request it is appropriate to demonstrate environmental planning grounds that support any variation ; and
- The proposal is required to be in ‘the public interest’.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the building height standard;
- Demonstrating consistency with the SP3 zoning; and
- Satisfying the relevant provisions of Clause 4.6.

Consideration of Clause 4.6

Clause 4.6 of the Penrith Local Environmental Plan 2010 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

(4) Development consent must not be granted for development that contravenes a development standard unless—

- (a) the consent authority is satisfied that—*
 - (i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- (b) the concurrence of the Planning Secretary has been obtained.*

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

Each of these provisions is addressed individually below.

Clause 4.6(3) & Underlying Objectives of the Standard

Compliance unreasonable or unnecessary

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control, and the objectives of the zone, are achieved despite the non-compliance to the numerical development standard as set out above, which satisfies Wehbe Test 1.

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved. The objectives of the building height development standard are stated as:

- (1) *The objectives of this clause are as follows:*
- (a) *to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,*
 - (b) *to ensure development is consistent with the landform,*
 - (c) *to provide appropriate scales and intensities of development through height controls.*

The current development proposal is predominantly consistent with the building height with the exception of the lift overrun and the proposal remains consistent with the objectives based on the following:

- The development proposal is consistent with the intent of the maximum height control as the minor non-compliance solely resulting from the lift overrun, which is located in the centre of the building to reduce its visual impact on the streetscape and potential overshadowing.
- The proportion of the building that protrudes above the height limit contains no habitable floor space, reinforcing that the breach to the height standard does not result in the development representing an overdevelopment of the site but rather from the topographical fall and clearance requirements for sewerage.
- The proposal has been designed to ensure that privacy impacts are mitigated that the proposal will not obstruct existing view corridors.
- Detailed shadow analysis demonstrates that the property to the south retains reasonable solar access.
- The proposal will provide a high-quality urban form that relates well to the context of the site in terms of the natural topography and adjoining development.
- The development proposal is consistent with the intent of the maximum height control and will provide an attractive building that addresses the streetscape. Furthermore, the development does not present an attempt to attain additional

development yield on the site given compliance with the FSR control applying to the site.

- Non-compliance is minor in nature with the majority of the building being compliant with the building height control with only the lift core exceeding the height limit where the natural ground level changes, noting that its impact to the streetscape is negligible as it will be visually unnoticeable when viewed from the street level.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances. The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

Clause 4.6(3) & Environmental Planning Grounds

As outlined above the proposal remains consistent with the underlying objectives of the control. In addition to the above it is noted that the development, including the departure to the height control enables the following to occur which demonstrates environmental planning grounds to support the numerical non-compliance.

- The proportion of the building that protrudes above the height limit contains no habitable floor space, reinforcing that the breach to the height standard does not result in the development representing an overdevelopment of the site but rather from the topographical fall and sewerage requirements.
- Detailed shadow analysis demonstrates that the property to the south retains reasonable solar access.
- The development proposal is consistent with the intent of the maximum height control and will provide an attractive building that addresses its street frontages. Furthermore, the development does not present an attempt to attain additional development yield on the site given compliance with the FSR control applying to the site.

The demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

Clause 4.6(4)- Public Interest and Objectives of the Zone

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the public interest as it remains consistent with the objectives of the building height control. In addition, the proposal is consistent with the objectives of the SP3 Zone, being:

- *To provide for a variety of tourist-oriented development and related uses.*
- *To provide for diverse tourist and visitor accommodation and activities that are compatible with the promotion of tourism in Penrith.*
- *To create an appropriate scale that maintains important views to and from the Nepean River as well as to the Blue Mountains escarpment, while also*

improving important connections to the Penrith City Centre and the Nepean River.

The proposal is consistent with the objectives of the SP3 zone, insofar as the development is not antipathetic to the zone objectives (per *Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21*).

The development is consistent with the zone objectives noting that:

- The development will continue to provide tourism and visitor accommodation.
- The development will not affect views to and from the Nepean River as well as to the Blue Mountains escarpment, while also improving important connections to the Penrith City Centre and the Nepean River.

Clause 4.6(5)

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the Environmental Planning and Assessment Regulation 2000.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The points contained in Clause 4.6 (5) are a matter for consideration by the consent authority however the following points are made in relation to this clause:

- The contravention of the height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal
- There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the control is acceptable in the circumstances given the underlying objectives of the control are achieved and it will not set an undesirable precedent for future development within the locality as any future development on another site would require consideration of the relevant merits and circumstances of the individual application.

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose.

PENRITH DEVELOPMENT CONTROL PLAN 2014 PART C – LAND USE CONTROLS

All relevant Council controls have been identified and considered in the following compliance table.

Penrith Development Control Plan 2014 Part C – Land Use Controls Compliance Table			
Clause	Controls	Comments	Complies
C1 Site Planning and Design Principles			
1.1	Site Planning	<u>1.1.1 Site Analysis</u> A Site Analysis has been prepared as part of the previous DA.	N/A
		<u>1.1.2 Key Areas with Scenic and Landscape Values</u> The subject site is not located within the Scenic and Landscape Values Map under the Penrith LEP 2010. Not applicable.	N/A
1.2	Design Principles	<u>1.2.2 Built Form – Energy Efficiency and Conservation</u> Has been addressed via previous DA, noting that an Ecologically Sustainable Development Report accompanied the previous DA which addressed provision relating to energy efficiency in the built form.	N/A
		<u>1.2.3 Building Form – Height, Bulk and Scale</u> No change to the bulk or scale of the existing buildings on site, noting that the current modification is to undertake minor changes to the approved design scheme approved under DA18/0999. The RLs are to be raised to accommodate sewer and basement due to the site being flood prone. See the discussion at the end of the report for detail.	Yes
		<u>1.2.4 Responding to the Site's Topography and Landform</u> Has been addressed via previous DA, noting that the that the current modification is to undertake minor changes to the approved design scheme approved under DA18/0999.	N/A
		<u>1.2.5 Safety and Security (Principles of Crime Prevention through Environmental Design)</u> No change to the safety measures adopted under DA18/0999.	N/A

Clause	Controls	Comments	Complies
		<u>1.2.6 Maximising Access and Adaptability</u> The development will continue to provide appropriate equitable access to the site in accordance with the relevant controls and Australian Standards.	Yes
C2 Vegetation Management			
2.1	Preservation of Trees and Vegetation	No change to the landscape scheme approved under the previous DA.	Yes
2.2	Biodiversity Corridors and Areas of Remnant Indigenous Vegetation in Non-Urban Areas	Subject site is not identified as being within a Natural Resource Sensitive Land under Penrith LEP 2010. Not applicable.	N/A
2.3	Bushfire Management	Has been addressed via previous DA.	N/A
C3 Water Management			
3.2	Catchment Management and Water Quality	No change to the approved stormwater arrangements approved via previous DA.	Yes
3.5	Flood Planning	Has been addressed via previous DA. It is noted that minor changes are proposed to the building RLs. However, the proposal provides minimum habitable floor levels of RL 27.65 AHD.	N/A
3.6	Stormwater Management and Drainage	No change to the approved stormwater arrangements approved via previous DA.	N/A
3.9	Water Sensitive Urban Design	No change to the approved stormwater arrangements approved via previous DA.	N/A
C4 Land Management			
4.1	Site Stability and Earthworks	No additional earthworks are sought as part of this modification.	N/A
4.3	Erosion and Sedimentation	No additional earthworks are sought as part of this modification.	N/A
4.4	Contaminated Lands	Has been addressed via previous DA.	N/A
4.5	Salinity	Has been addressed via previous DA.	N/A

Clause	Controls	Comments	Complies
C5 Waste Management			
		Waste continues to be designed to comply with the required Council standards despite the minor changes.	Yes
C6 Landscape Design			
		No change to the landscape scheme approved under the previous DA.	Yes
C7 Cultural and Heritage			
7.1	Heritage	Has been addressed via previous DA.	N/A
7.2	Aboriginal Cultural and Heritage	Has been addressed via previous DA.	N/A
7.3	Significant Trees and Gardens	Has been addressed via previous DA.	N/A
C8 Public Domain			
8.1	Pedestrian Amenity	Has been addressed via previous DA.	N/A
8.5	Public Art	No change to the public art strategy approved under DA18/0999.	N/A
C9 Advertising and Signage			
		Not relevant to the current application	N/A
C10 Transport, Access and Parking			
10.2	Traffic Management and Safety	Minor changes but continues to comply	Yes
10.3	Key Transport Corridors	Has been addressed via previous DA.	N/A
10.5	Parking, Access and Driveways	<p>The development proposes to retain the same number of car parking spaces as the approved DA and proposes 2 less apartments.</p> <p>Stage 2B is provided with 126 spaces, being 116 residential and 12 visitor spaces.</p> <p>DCP parking rates: Original 25 x 1 bed = 25 53 x 2 bed= 53 19 x 3 bed= 36 Total= 114 resident spaces 97/5= 19.4 visitor Total of 133.4 spaces Proposed 26 x 1 bed = 26</p>	Yes

Clause	Controls	Comments	Complies
		<p>50 x 2 bed= 50 18 x 3 bed= 36 1 x 4 bed= 2 Total= 114 resident spaces 95/5= 19 visitor Total of 133 spaces.</p> <p>The revised proposal requires the same amount of car parking spaces. Hence the modification is appropriate.</p>	
C11 Subdivision			
		No subdivision is proposed as part of this application and as such the controls contained under C11 Subdivision does not apply to the current development.	N/A
C12 Noise and Vibration			
		Has been addressed via previous DA noting that an Acoustic Report accompanied the previous DA which concludes that the development comply with all applicable regulations in regard to noise.	N/A
C13 Infrastructure and Services			
		Has been addressed via previous DA noting that a Utility Servicing Report accompanies the previous DA.	N/A

PENRITH DEVELOPMENT CONTROL PLAN 2014 PART E – KEY PRECINCTS

All relevant Council controls have been identified and considered in the following compliance table.

Penrith Development Control Plan 2014 Part E – Key Precincts Compliance Table			
Clause	Controls	Comments	Complies
E13 Riverlink Precinct: Part B - Panthers Penrith Precinct			
13.6	Panthers Penrith Precinct Vision	The approved development will continue to be consistent with the vision for the Panthers Penrith Precinct in that it will provide a mix of retail and residential land uses whilst delivering high quality landscape and public domain scapes and continue to achieve architectural excellence.	Yes
13.7	Urban Framework	<p><u>13.7.1 Structure Plan</u></p> <p>No change has been addressed via previous DAs noting that the current application is limited to undertaking minor changes to the design scheme of an approved mixed use development.</p> <p>The development will continue to retain view corridors down Ransley Street to the lake front and the Blue Mountains beyond whilst also maintaining view corridors across the site between the existing club and Panthers Stadium, as per DA18/0999.</p>	N/A
		<p><u>13.7.2 Landscape Structure</u></p> <p>No change to the landscape scheme approved under the previous DA. It is noted that the current application will have no impact on the riparian corridor rehabilitation and restoration arrangements approved under DA18/0999.</p>	N/A
		<p><u>13.7.3 Sub Precincts</u></p> <p>Has been addressed under the previous DA, noting that current modification will have no change to the envisaged character, range of indicative uses and key controls relevant to both the 'Ransley Street Precinct' and 'Mulgoa Road Precinct'.</p>	N/A

Clause	Controls	Comments	Complies
		<p><u>13.7.4 Views</u> Has been addressed under the previous DA, noting that the development proposes a minor increase to the RLs of buildings, which will not result in the loss of views.</p> <p><u>13.7.5 Public Art Strategy</u> No change to the public art strategy.</p>	N/A
13.8	Connectivity	<p><u>13.8.1 Street Design and Character</u> Has been addressed as per DA18/0999, noting that the current application is limited to undertaking minor changes to the approved design scheme.</p> <p><u>13.8.2 Pedestrian and Cycle Network</u> Has been addressed via previous DA.</p> <p><u>13.8.3 Public Transport</u> Has been addressed via previous DA.</p> <p><u>13.8.4 Traffic, Parking and Site Access</u> Has been addressed via previous DA, noting that the current application is limited to undertaking minor changes to the approved design scheme.</p>	N/A
13.9	Built Form	<p><u>13.9.1 Street Alignment, Wall Height and Setbacks</u> No change to the street alignment, wall height and setback approved under the previous DA, noting that the current application is limited to undertake minor changes to the approved design scheme approved under DA18/0999</p> <p><u>13.9.2 Active Street Frontages</u> Has been addressed under DA18/0999, noting that the current application is limited to undertake minor changes to the approved design scheme.</p> <p><u>13.9.3 Awnings</u> Has been addressed under DA18/0999, noting that the current application is limited to undertake minor changes to the approved design scheme.</p>	N/A

Clause	Controls	Comments	Complies
		<p><u>13.9.4 Building Depth and Bulk</u> Has been addressed under the previous DA, noting that no changes to the bulk or scale of the approved buildings as per D18/0999</p> <p><u>13.9.5 Building Articulation</u> Has been addressed under the previous DA, noting that no changes to the design scheme including façade presentation and articulation of the built form of the approved buildings as per D18/0999.</p> <p><u>13.9.6 Architectural Excellence</u> No change, noting that the current application is limited to undertake minor changes to the approved design scheme.</p>	<p>N/A</p> <p>N/A</p> <p>N/A</p>
13.10	Delivery	<p><u>13.10.1 Flooding and Drainage</u> Has been addressed under the previous DA. It is noted that minor changes are proposed to the building RLs. However, the proposal provides minimum habitable floor levels of RL 26.4 AHD.</p> <p><u>13.10.2 Utilities</u> Has been addressed via previous DA, noting that the current application is limited to undertake minor changes to the approved design scheme under DA18/0999.</p> <p><u>13.10.3 Staging</u> Has been addressed via previous DA.</p>	<p>N/A</p> <p>N/A</p> <p>N/A</p>

CONCLUSION

Following a review of the relevant planning controls, it is concluded that the proposed modification application is an appropriate outcome on site and remains consistent with the design intent of the original proposal.

Having regard to the benefits of the proposal and taking into account the absence of adverse environmental, social or economic impacts, the application is submitted to Council for assessment and granting of development consent. Think Planners Pty Ltd recommends the approval of the modification including the amendment of relevant conditions identified previously in this statement.