

Our Ref: Richard Ung

Your Ref: A084-18 Crown Cemetery Development, Wallacia

26 March 2019

Independent Planning Commission NSW
c/ The Secretariat

By email

Dear Commission,

OBJECTION TO PROPOSED DEVELOPMENT

Introduction

We represent various owners (and businesses) of land located along Park Road, Wallacia. Our clients include Goldenfield Growers Pty Ltd, winners of the Sydney Markets Fresh Awards 2016 and finalists in the Sydney Markets Fresh Awards 2018.

In formulating these submissions, we have consulted with the Wallacia Progress Association, a public body representing the interests of the Wallacia community. Our submissions are not made on behalf of the Wallacia Progress Association however we expect there may be an overlap in some of the matters raised in submissions by them. We encourage the IPC to consider the Wallacia community's submissions as part of its deliberations. For example, there is much to be gleaned from community members who have lived through floods affecting the Nepean River and Jerrys Creek systems. Such knowledge is invaluable given a proper considerable health and environmental risk of the instant application is impossible to assess barring torrential or inclement weather patterns which permit the measurement and mapping of groundwater and underground water levels. The IPC may also inform itself through the work of benevolent public institutions such as Landcare who have operated in the Mulgoa Valley for many years and are in a strong position to inform the IPC of "on-the-ground" conditions of this particular site and more endemically in the Mulgoa Valley.

Scope of our submissions

These written submissions are addressed to the IPC in response to the invitation to the public to participate in the public meeting to be held at the Wallacia Hotel at 9am on Wednesday 27 March 2019. As oral submissions are naturally bounded by the IPC's time constraints, these written submissions supplement what will be raised in oral submissions and should be read together with and in conjunction to the writer's oral submissions at the upcoming public meeting.

Submissions are an interim submission

It is apprehended there will probably be a further round of submissions sought by the IPC or the Sydney Western City Planning Panel in the exercise of its powers as the consenting authority, bearing in mind the substantial amendments to the application involving, inter alia, the removal of the proposed crematorium, relocation of 1.5metre headstones, function hall arrangements, variations concerning the Park Road seagull access and potential egress via Mulgoa Road, etc. The application has evolved (and apparently continues to evolve) which makes it difficult for the Wallacia community and other stakeholders to confirm and assess the particulars of the application and its characteristics at any given time.

From the transcripts of the meeting between the IPC and Penrith City Council on 19 February 2019, it is evident there are considerable procedural and substantive issues which have been identified by the Council, which has been placed into a position where it must consider whether it will make submissions to the IPC as an objector or otherwise. These submissions take up many (but not all of) the concerns raised by the Council in that meeting and amplify them where relevant; those concerns are ventilated in the transcript and Council's preliminary assessment, and we presume Council will also make its own submissions and continue to give advice to the IPC on such matters. However, to be clear, we do not represent the Council, and we acknowledge Council may hold its own and revised views with regards to the issues addressed herein.

The Department's letter to the IPC dated 13 March 2019 indicates it consulted with key agencies and stakeholders but only referred to the support of Cemeteries and Crematoria NSW. Importantly, when the IPC met with Penrith City Council in Penrith on 19 February 2019, the transcript of the meeting records the Council's postulation (presumably because it was not involved in consultations) as to the Department's deliberations and the extent or lack of independent investigation and inquiry by the Department; this was also self-evident in how the Council was only made aware, by residents in January 2019, of the Department's assessment being published on the IPC website¹. This resulted in a highly unsatisfactory outcome where key stakeholders in a site of state significance were not active participants in the assessment process. The lack of consultation with Council is highly concerning given the objections raised by the Council and the

¹ See pages P-4 at [21-[26] in the transcript of the IPC meeting with Penrith City Council on 19 February 2019.

preliminary assessment of Council having regard to the fact it had made an information request which was then unanswered when the matter was referred to the Minister and delegated to the IPC.

In the circumstances, we make these interim submissions particularly in circumstances where it seems there is information asymmetry between the material available to key stakeholders and the public. It is apparent the Department was privy to information not available to Penrith City Council² (and presumably the regional panel) and there appears to be information not considered by the Department³.

1. **Procedural issues raised by Penrith City Council:** given the novelty of the administrative provisions which concern the IPC panel, the nature of the referral to the Minister (delegating his powers to the IPC) and the variations to the original application lodged in November 2017 with Council, there is a serious preliminary issue to be addressed as to whether the IPC as constituted in the present panel is properly seised with the authority to determine the Minister's referral⁴.
2. **Greater Sydney Commission review of new cemetery proposals expected to be completed mid-2019:** in her letter to the Chief Commissioner of the Greater Sydney Commission dated 25 February 2019, the Premier, the Honourable Gladys Berejiklian MP requested the Greater Sydney Commission provide advice and recommendations on the strategic planning considerations for the provision of new cemeteries, with a focus on the Greater Sydney Region. This was a request made under section 10(1)(a) of the *Greater Sydney Commission Act 2015* (NSW). In her referral letter, the Premier expressly stated, in part:

“Research by Cemeteries and Crematoria NSW has indicated that Greater Sydney requires additional land for burials and cremations to meet the needs of the Region. **However, this does not mean that cemeteries are appropriate in all locations, and strategic guidance is needed on the criteria that should be taken into account in assessing appropriate sites for cemetery proposals.**”

(our emphasis)

Moreover, the Premier expressed that the scope of work would necessarily involve the consultation of key stakeholders including local councils.

² See page v in the Department's *Wallacia Memorial Park | Crown Development Assessment Report (DA 17/1092)* where it refers to the applicant's Additional Information Response.

³ See page v in the Department's *Wallacia Memorial Park | Crown Development Assessment Report (DA 17/1092)* where it refers to 88 written submissions whereas the IPC website contains 128 written submissions, making it impossible to ascertain what the Department considered (or did not consider).

⁴ See pages P-9 to P10 in the transcript of the IPC meeting with Penrith City Council on 19 February 2019.

As you know, the Premier, the Member for Mulgoa, and the Liberal Party were recently re-elected into the State Government.

Given the Premier's formal request for advice from the Greater Sydney Commission on the strategic planning considerations for the provision of new cemeteries, it makes sense for the IPC to defer finalising its advice to the Sydney Western City Planning Panel pending the advice to be provided by the Greater Sydney Commission. At the time of writing these submissions we are three months away from the completion and delivery of the Greater Sydney Commission's advice to the Premier. Failure to integrate and harmonise the IPC's determination with the Greater Sydney Commission's advice could result in an outcome which is not consistent with broader planning policies and strategies.

- 3. Greater Sydney Commission review holding up gateway process for Penrith City Council planning proposal:** the Council was advised by the Department that the planning proposal to make cemeteries and crematoria prohibited uses in the Mulgoa Valley via the gateway process is not being considered further by the Department pending the completion of the studies and associated reviews⁵. Council's views have been made clear the present permissibility of cemeteries in the Penrith LEP was an anomaly and outside the strategic intent of the Council⁶. It is submitted the present Ministerial referral and expeditious and opaque nature of the Department's assessment is adversely affecting the proper course of intergovernmental interactions to give effect to Penrith City Council's planning proposal.

In the premises, as the Department saw fit to defer the progress of the Gateway process in respect of Council's planning proposal pending the State Government's review into new cemeteries, which was recently requested by the Premier, we submit the IPC's proper course of action is to await the advice of the Greater Sydney Commission which may then inform the IPC, the Department, and Council as to the most appropriate next steps to progress and finalise the gateway process.

- 4. Penrith City Council's review of its LEP & preparation of its LSPS:** the Council has just commenced very preliminary work on its Local Strategic Planning Statement (part of the intergovernmental review of the LEPs under the amended EP&A Act) so far as it concerns the Wallacia village and its environs⁷. It is unusual that the Department finalised its assessment using a process which did not involve an active consultation with Penrith City Council. The IPC's processes (and those of its delegees) should not bypass such a

⁵ See pages P-23 at [14]-[38] and P-24 at [6]-[27] in the transcript of the IPC meeting with Penrith City Council on 19 February 2019.

⁶ See page P-24 at [43]-[45] in the transcript of the IPC meeting with Penrith City Council on 19 February 2019.

⁷ See page P-24 to P27 in the transcript of the IPC meeting with Penrith City Council on 19 February 2019.

critical stakeholder in respect of the site under assessment.

Further, the IPC's work should consider the consequences of sterilising a public space⁸ with a geographic footprint greater than the entirety of the Wallacia township in circumstances where Wallacia will serve as the Penrith City Council's closest developed servicing point to the Badgerys Creek Airport. The consequences of utilising the site in the proposed development includes a substantial loss of public amenities to the Wallacia community (because there is no reasonable basis to believe, for example, residents of Strathfield and the surrounding suburbs of Rookwood use the necropolis for general public recreation; similarly it is difficult to envisage the local Wallacia community entering cemetery grounds (which are to be kept open permanently to facilitate 24/7 vigils) to partake in recreational activities amongst the grieving mourners and visitors to the cemetery) and extinguishes any future planning opportunities for a township which cannot expand in any other direction due to the Nepean River floodplain and the foothills of the Great Dividing Range.

The applicant indicates it may create 15 ongoing jobs for site of such large geographic dimensions (and this application is due to cover a development happening over the better part of one or more centuries). In our submission a consent authority, acting reasonably, must consider a more appropriate mixed use development which promotes the conservation of heritage assets, riparian zones and biodiversity, with the potential to generate more substantial and lasting social and economic benefit to the Wallacia community and the Greater Sydney Region (which do not create unquantified risks to the Wallacia community and all communities downstream in the Nepean-Hawkesbury River system) to be preferred over sub-optimal planning outcomes to secure burial space at a disproportionate cost and adverse impact to the Wallacia community, Penrith City Council locality, and the Western Parkland City.

Note also the work performed Ms Louise Baxter of realestate.com.au in her report dated 20 December 2018 which indicates Wallacia was Australia's second highest growth suburb in 2018⁹. Ms Baxter wrote, "*The Badgerys Creek airport development couldn't hurt, either – providing airport access for the region and an expected economic boost.*" A large-scale cemetery development in such close proximity to the Badgerys Creek Airport is not in the public interest having regard to the matters expressed above as it further represents the utilisation of valuable lands for sub-optimal planning outcomes. In our submission, the subject site was only purchased at a discount to its true market value by the applicant

⁸ See page P-26 at [15]-[25] in the transcript of the IPC meeting with Penrith City Council on 19 February 2019.

⁹ *Australia's top growth suburbs for 2018*, Louise Baxter, 20 December 2018 accessed from <https://www.realestate.com.au/news/australias-top-growth-suburbs-for-2018/> on 20 March 2019.

because any other purchaser/developer could not reasonably succeed in developing such an ecologically fragile and well-positioned site absent a co-ordinated planning and design effort by the Greater Sydney Commission, the Department, and all key stakeholders. For example, the Cities of Parramatta and Sydney have a competitive process by which key sites are open to tender and designed with the aims of delivering the highest quality developments in critical spaces; no such competitive process has taken place in respect of the subject site. This further reinforces the importance of the IPC's work being informed and guided by the advice of the Greater Sydney Commission which is yet to be completed.

We acknowledge there are competing purposes to which the subject site could be used i.e. there is a tension between conservation environmental and heritage factors on the one hand and economic or urbanisation factors on the other. That tension is of an intergenerational and strategic nature and must be considered by the IPC given the life cycle of a cemetery will span successive generations and the repurposing of land appropriated for cemetery space is typically unlikely to occur. We submit these are matters for the Penrith Local Council to investigate and consult with the community to form a view as to the formulation of the Council's LSPS as part of the revised planning and development framework under the EP&A Act. We submit care should be taken to avoid a situation where public consultation and strategic planning mandated under the amendments to the EP&A Act is taken away from the very consent authority and community most directly and adversely affected by the proposed development.

5. **Adequacy of the Department's assessment:** the Council has expressed significant reservations that the Department has essentially peer reviewed the Council's work (representing a preliminary assessment done on incomplete information¹⁰) without independently engaging planning experts to assess the merits of the application. The community could hardly be expected to reasonably form a concluded view on the merits of the application when the application itself appears to be subject to further amendment and has not progressed beyond a preliminary assessment. In the circumstances, we submit the IPC will likely be required to either refer the matter back to the Department for a more comprehensive assessment or otherwise direct the regional panel to carry out a more detailed assessment, this time, with the benefit of constructive feedback from Penrith City Council and the public.

6. **Human effluent and chemical leachate entering adjoining residential properties before ending up in the Nepean-Hawkesbury River system:** the applicant and Department acknowledge the groundwater studies have been conducted during dry

¹⁰ See page P-16 at [17]-[23] in the transcript of the IPC meeting with Penrith City Council on 19 February 2019.

seasons. Groundwater modelling has not been published for consideration. Site investigation and testing is not finalised in circumstances where the Council has made it clear part of the site drains via a Council easement and culvert under Park Road¹¹. Given the legislative framework for burials now contemplates re-usable burial space within a 25-year licensed arrangement, the development could result in multiple burials over the 88,000 spaces resulting in an unknown and unmodelled risk in the elevated levels of chemical contaminants and groundwater movement resulting in the discharge of human effluent and chemicals into residential premises and into the Nepean-Hawkesbury River system. This presents an unacceptable risk to the Greater Sydney Region, let alone the downstream residents of the Wallacia community. This underscores the Premier's comments in her letter that cemeteries are not appropriate in all locations.

7. **The visual impact aspect of assessment:** it seems the application was amended to remove and relocate the 1.5 metre headstones. This is a welcome amendment however we submit no proper consideration has been given to the issue of whether a cemetery, regardless of the majority of burials having lawn plaques and (questionable) tree screening, is of a high visual impact nature. To put the issue into objective perspective, the CCNSW report into burial space capacity identifies various localities in the Eastern Harbour City as affected by burial space shortage. There are a number of golf courses within that planning region; yet a reasonable consent authority would not consider converting any of the likes of the Royal Sydney, Woollahra, Northbridge, or Killara golf courses into so-called "low visual impact" lawn plaque cemeteries. We have not sighted any material to indicate whether any consideration is given to the visual impact from an aerial perspective given the material proximity to the Badgerys Creek Airport; for similar reasons, no reasonable consent authority would consider converting the Kogarah or Australian Golf Clubs around Mascot Airport into cemeteries. The site is highly visible and will only increase in visibility with the operation of Badgerys Creek Airport. In our submission, there does not appear to be any means by which the visual impact may be mitigated from an aerial perspective nor its physical proximity to adjacent residential and rural-residential land.
8. **Heritage:** it seems only preliminary work has been done from a Heritage perspective, even by the Council¹², to investigate and conserve the heritage aspects of the club house and in particular its significance to the participation of women in golf in Australia and internationally. We encourage the IPC and Council to contact the Wallacia Golf Club

¹¹ See page P-17 to P-18 at [46]-[47] and [1]-[12] in the transcript of the IPC meeting with Penrith City Council on 19 February 2019.

¹² See page P-25 to P-26 at [35]-[47] and [1]-[4] in the transcript of the IPC meeting with Penrith City Council on 19 February 2019.

members past and present to ensure adequate safeguards are in place to conserve the heritage elements of the site.

Interim conclusion

Given the instant application appears as if it will continue to require ongoing amendments, it is difficult to provide a final submission for the assistance of the Commission and the regional panel as the consenting authority.

In our view, there are material planning issues to be assessed with appropriate rigour and pessimism having regard to the catastrophic consequences arising from the destruction of critical habitats and the un-investigated contamination risks of the wider Nepean-Hawkesbury River system. These issues must be appropriately balanced against the Greater Sydney Region's need for new burial space, which we submit, could be achieved with the location of new cemeteries in sites with far more appropriate specifications without giving rise to a disproportionate externalisation on the affected communities and without creating unnecessary health ecological and environmental risks to the Greater Sydney Region. They must also be balanced against future competing uses for a site of state significance in proximity to the Badgerys Creek Airport.

The remarks of the IPC recorded in the transcript of the meeting with Penrith City Council on 19 November 2019 are encouraging as they reflect a genuine interest and concern in the IPC panel members to consult and engage actively with some of the most critical stakeholders in the process, that is Penrith City Council and its constituents, in contrast to the process adopted by the Department in finalising its assessment in December 2018.

There does not appear to be an easy way for the community (nor any stakeholder) to navigate the IPC's website with a view to identifying the present status of the application. As the IPC panel members expressed its concern that information was not reaching the public for comments, we recommend further work is done in an effort to make the process of navigating the IPC's uploaded documents more "user-friendly" for the public.

It appears to us that, having regard to procedural matters raised by the Council, and in the interests of transparency and public consultation, that the Commission's work cannot be undertaken in insolation to the advisory work in progress at the Greater Sydney Commission and the discharge of the ongoing statutory obligations of Penrith City Council to review its LEP and deliver a LSPS under the revised framework of the EP&A Act. We urge the IPC to defer its deliberations on the instant application before it to permit the Greater Sydney Commission to deliver the advice requested from it by the Premier in conjunction with liaising more closely with the Council in its strategic review of its LSPS.

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We welcome future opportunities to provide submissions to the IPC and the regional planning panel / consent authority in respect of the application.

Please note a copy of these submissions will also be forwarded to the Greater Sydney Commission in light of that Commission's work on providing advice to the Premier on strategic planning considerations for new cemeteries within the Greater Sydney Region.

Yours faithfully

Stratos Lawyers



Richard Ung
Legal Practitioner Director

Our Ref: Richard Ung

Your Ref: A084-18 Crown Cemetery Development, Wallacia

5 April 2019

Independent Planning Commission NSW
c/ The Secretariat

By email

Dear Commission,

OBJECTION TO PROPOSED DEVELOPMENT

SUPPLEMENTARY SUBMISSIONS

Further to our written submissions dated 26 March 2019 and the oral submissions of the writer at the public meeting held at the Wallacia Hotel on 27 March 2019, we provide the following supplementary submissions in opposition to the proposed development. These supplementary submissions also refer to the transcript of a preliminary meeting on 2 April 2019 between the IPC and Infrastructure Australia.

1 Commission to assess factors relevant to the surrounding areas in determining the matter before it

During the public meeting, the Commission heard the submissions from various speakers in opposition to the instant application on various grounds; we do not repeat those submissions other than to note the following matters:

- (a) Floodwaters and hydrological modelling: it is relevant for the Commission to consider the upstream and downstream of the Jerrys Creek system running through the subject land and in our submission the community has correctly identified the risks of historical modelling as prone to error due to urbanisation and increased runoff volumes.

Infrastructure Australia said (at page 5 at [9]-[15]):

So this area is - most of the property is subject to flooding inundation. The area that's near Jerry's Creek is most susceptible, ranging from what we call a one-in-10 chance per year right up to the Probable Maximum Flood, which is the worst sort of possible – reasonable possible flood, and that is almost to the extent of the whole property, but – so, obviously, the highest parts of the property are going to be inundated less frequently, very rarely, but the area down near Jerry's Creek would be flooded more frequently.

(our emphasis)

We submit it is relevant and prudent to consider catastrophic flooding impacts up to the Probable Maximum Flood level, and if that is pegged to 1867 floods, additional modifications to the flooding modelling must be adjusted for the increased urbanisation and expected runoff into the river streams and catchment areas ultimately impacting the flooding at Jerrys Creek and across the subject site. This is because irreversible consequences may arise with the inundation of "*almost to the extent of the whole property*" (i.e. across almost the entire area where burial sites will be located) should water contamination arise in connection with such flooding. It is observed that whilst it is not possible to predict when the next Probable Maximum Flood will occur, it has been over 150 years since the 1867 floods and there is always the possibility such an event could occur within the operational period of the proposed cemetery (i.e. over another hundred years and beyond).

We further submit that no mitigating effects of an increase in Warragamba Dam's levels may be factored into the Commission's deliberations because, as Infrastructure Australia stated in their meeting, there is no Environmental Impact Statement and no planning approval or business case (at page 4) and thus no basis for assuming the proposed rise in the dam's levels will ever occur, and even if there is an increase in the dam's levels, we draw the Commission's attention to Infrastructure Australia's comments (at page 5 at [31]-[35]):

...whereas with a probable maximum flood, no dam-raising would ever be able to fully – would capture that, but it would drop significantly the peak level. So whilst the – it might – it'll still flood, but it may drop it by about four metres or – depending which event it might be.

- (b) Traffic modelling: we submit it is necessary for any traffic modelling performed in respect of the site to be subject to sensitivity analysis in relation to an increased number of wakes (which we expect could and will happen from time to time and result in exponentially higher volumes of traffic in the local community) in addition to the increased flow of traffic from new developments in Silverdale and the proposed increase in the Warragamba Dam level.
- (c) Platypus population sighted downstream where Jerrys Creek and Nepean River meet: based on our discussions with local residents, we understand a platypus community has been sighted downstream from the subject site in the proximity of the location where Jerrys Creek meets the Nepean River. We submit it is necessary to assess the impacts of reducing riparian flows from the subject site on the viability of the platypus community as the excess retention of riparian flows may result in the loss of habitat.

2 Approved Shopping Centre development at adjacent site on hold due to concerns over the impact of the proposed cemetery development

To the west of the subject site (i.e. on the side where the golfing clubhouse is located) is the site colloquially known as “the Wallacia shops” having folio identifier 1/1169209 also known as 1-11 Park Road, Wallacia. This site sits adjacent to the subject land and the Wallacia Hotel.

On 1 September 2010, Penrith City Council approved a development application having reference number DA08/1327 for the erection of a shopping centre comprising of a supermarket and specialty shops. There is an associated construction certificate issued on 27 February 2015 having reference number CCP15/0138. Further information (albeit of a limited nature) is publicly available on the Council’s DA Tracker webpage:

<http://bizsearch.penrithcity.nsw.gov.au/eplanning/Pages/XC.Track/SearchApplication.aspx?id=219502>

We have not sighted the plans and development application submitted in respect of DA08/1327 however it is understood it comprises the construction of a two-storey shopping centre at that site and the publicly available information indicates the estimated cost of the works (presumably at the time the development application was lodged on 23 December 2008) was \$4,850,000. The cost of such works are presumably greater than that amount given the passage of time over a decade.

It is understood the applicant in respect of DA08/1327 is deferring further works at that site pending the determination of the application before the Commission; further, it is understood that applicant does not intend to proceed with the works approved in DA08/1327 in the event the cemetery receives development consent.

As it presently stands, the local community has no other choice but to travel to nearby suburbs to purchase their groceries. The residents of Wallacia have been awaiting the redevelopment of the Wallacia shops for many years; if the instant application is ultimately recommended and approved, it is likely the existing shops will languish in their present state and the local community will suffer

for the loss of additional amenities and services and the generation of new jobs and opportunities which a revitalised commercial core in the heart of the Wallacia village could provide. In our submission, this further reinforces the community's contentions that the proposed cemetery use is disharmonious with its surrounding environs and against the public interest.

3 Applicant's apparent acquiescence to awaiting the outcome of the Greater Sydney Commission's review

We understood the remarks of Mr Ben Salon of Mills Oakley, the applicant's legal representatives, during the public meeting, as indicative of the Applicant's contentment as to the deferral of the Commission's determination pending the delivery of the Greater Sydney Commission's advice to the Premier in respect of strategic planning considerations for the provision of new cemeteries. It is submitted this represents a sensible approach and is consistent with our written submissions dated 26 March 2019 and the Honourable Ms Tanya Davies MP.

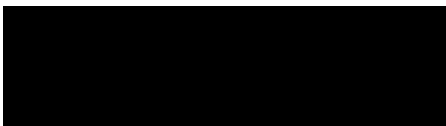
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We welcome future opportunities to provide submissions to the IPC and the regional planning panel / consent authority in respect of the application.

Please note a copy of these submissions will also be forwarded to the Greater Sydney Commission in light of that Commission's work on providing advice to the Premier on strategic planning considerations for new cemeteries within the Greater Sydney Region.

Yours faithfully

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Richard Ung
Legal Practitioner Director