

# Council Assessment Panel Minutes

**19 February 2024**

## **Our Vision**

*A City which values its heritage, cultural diversity,  
sense of place and natural environment.*

*A progressive City which is prosperous, sustainable  
and socially cohesive, with a strong community spirit.*

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City of  
Norwood  
Payneham  
& St Peters

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**VENUE** Council Chambers, Norwood Town Hall

**HOUR** 7.00pm

**PRESENT**

**Panel Members** Mr Terry Mosel  
Mr Mark Adcock  
Mr Ross Bateup  
Ms Jenny Newman  
Cr Christel Mex

**Staff** Geoff Parsons, Manager Development Assessment  
Kieran Fairbrother, Senior Urban Planner  
Ned Feary, Senior Urban Planner  
Marie Molinaro, Urban Planner  
Tala Aslat, Planning Assistant

**Staff**

**APOLOGIES**

**ABSENT**

**1. COMMENCEMENT AND WELCOME**

**2. APOLOGIES**

**3. CONFIRMATION OF THE MINUTES OF THE MEETING OF THE COUNCIL ASSESSMENT PANEL HELD ON 17 JANUARY 2024**

Moved by Mr Bateup and Seconded by Ms Newman  
Carried

**4. DECLARATION OF INTERESTS**

Cr Christel Mex declared conflict of interest for Item 5.1

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The following items were brought forward:

**6. DEVELOPMENT APPLICATIONS – DEVELOPMENT ACT**

**7. REVIEW OF ASSESSMENT MANAGER DECISIONS**

**8. ERD COURT APPEALS**

Mr Parson provided an update in respect of the following appeals:

- DA 23004961 - 114A Osmond Tce, Norwood – Hearing in March 2024
- DA 23010962 - 1 Kensington Road, Norwood – Hearing in February 2024
- DA 21008794 - Penna Ave / Provident Ave / Glynburn Road, Glynde – Consent orders Issued

**5. DEVELOPMENT APPLICATIONS – PDI ACT**

**5.1 DEVELOPMENT NUMBER 24000067 – CITY OF NORWOOD PAYNEHAM & ST PETERS –  
188 O G ROAD, FELIXSTOW**

<b>DEVELOPMENT NO.:</b>	24000067
<b>APPLICANT:</b>	City of Norwood Payneham & St Peters
<b>ADDRESS:</b>	188 O G RD FELIXSTOW SA 5070 188 O G RD FELIXSTOW SA 5070 188 O G RD FELIXSTOW SA 5070
<b>NATURE OF DEVELOPMENT:</b>	Variation to Development Applications 22017508 and 23024217 comprising the removal of Tree 2 (a significant Flooded Gum)
<b>ZONING INFORMATION:</b>	<p><b>Zones:</b></p> <ul style="list-style-type: none"> <li>• Housing Diversity Neighbourhood</li> </ul> <p><b>Overlays:</b></p> <ul style="list-style-type: none"> <li>• Affordable Housing</li> <li>• Future Road Widening</li> <li>• Hazards (Flooding)</li> <li>• Heritage Adjacency</li> <li>• Hazards (Flooding - General)</li> <li>• Local Heritage Place</li> <li>• Prescribed Wells Area</li> <li>• Regulated and Significant Tree</li> <li>• Stormwater Management</li> <li>• Traffic Generating Development</li> <li>• Urban Transport Routes</li> <li>• Urban Tree Canopy</li> <li>• Water Resources</li> <li>• Airport Building Heights (Regulated)</li> <li>• Advertising Near Signalised Intersections</li> </ul>
<b>LODGEMENT DATE:</b>	9 Jan 2024
<b>RELEVANT AUTHORITY:</b>	Assessment panel/Assessment manager at City of Norwood, Payneham and St. Peters
<b>PLANNING &amp; DESIGN CODE VERSION:</b>	P&D Code (in effect) Version 2023.19 - 21 December 2023
<b>CATEGORY OF DEVELOPMENT:</b>	Code Assessed - Performance Assessed
<b>NOTIFICATION:</b>	No
<b>RECOMMENDING OFFICER:</b>	Kieran Fairbrother Senior Urban Planner
<b>REFERRALS STATUTORY:</b>	Nil
<b>REFERRALS NON-STATUTORY:</b>	Nil

**CONTENTS:**

<b>APPENDIX 1:</b>	Relevant P&D Code Policies	<b>ATTACHMENT 3:</b>	Applicant's Responses
<b>ATTACHMENT 1:</b>	Application Documents	<b>ATTACHMENT 4:</b>	Instrument of Delegation to the CAP
<b>ATTACHMENT 2:</b>	Subject Land Map	<b>ATTACHMENT 5:</b>	Approved Site Plan

## DETAILED DESCRIPTION OF PROPOSAL:

By way of development authorisation 22017508, the Applicant obtained planning consent for the “demolition of existing swimming pools, pavilion and minor structure and the construction of new swimming pools, pavilion, plant room, pool enclosure and shade structures”. Several variations to the proposal were then made and approved as part of development authorisation 23024217. For both of these Development Authorisations, the Applicant sought to retain the tree that is the subject of this application and were able to demonstrate how the proposed development could occur without impacting the tree.

Now, the Applicant seeks removal of this significant tree for several reasons including, but not limited to, construction efficiencies, costs savings, the ability to use the space under the tree as recreation space, and preventing potential damage to the new swimming pool.

## SUBJECT LAND & LOCALITY:

### Site Description:

**Location reference:** 188 O G RD FELIXSTOW SA 5070

<b>Title ref.:</b> CT 5386/506	<b>Plan Parcel:</b> D42573 QP23	<b>Council:</b> THE CITY OF NORWOOD PAYNEHAM AND ST PETERS
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**Location reference:** 188 O G RD FELIXSTOW SA 5070

<b>Title ref.:</b> CT 5859/643	<b>Plan Parcel:</b> D58460 AL100	<b>Council:</b> THE CITY OF NORWOOD PAYNEHAM AND ST PETERS
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**Location reference:** 188 O G RD FELIXSTOW SA 5070

<b>Title ref.:</b> CT 5744/453	<b>Plan Parcel:</b> F40075 AL16	<b>Council:</b> THE CITY OF NORWOOD PAYNEHAM AND ST PETERS
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Shape:	irregular
Frontage width:	approx. 133m to O G Road / approx. 120m to Payneham Road
Area:	approx. 49 hectares
Topography:	relatively flat
Existing Structures:	swimming pools and associated amenities buildings and other ancillary structures
Existing Vegetation:	several large trees, some of which are regulated or significant, and other lower-lying plants and grasses

The development site does not comprise the whole of these three allotments, however, as roughly demonstrated in **Attachment 2**.

### Locality

The development site has a direct frontage to O G Road and sits between a public library to the north and a large car parking area and commercial building to the south, characterising the east side of O G Road as one of a distinctly commercial character. The western side of O G Road, however, is characterised by low-rise residential living. A creek and large recreational field border the development site to the east, both of which extend from Turner Road through to Payneham Road.

Thus, the locality has a mixed character, with medium-density residential housing to the west separated from the open expanses of space to the east.

### **CONSENT TYPE REQUIRED:**

Planning Consent

### **CATEGORY OF DEVELOPMENT:**

- **PER ELEMENT:**  
Tree-damaging activity: Code Assessed - Performance Assessed
- **OVERALL APPLICATION CATEGORY:**  
Code Assessed - Performance Assessed
- **REASON**  
P&D Code

### **PUBLIC NOTIFICATION**

- NOT REQUIRED

### **AGENCY REFERRALS**

Nil

### **INTERNAL REFERRALS**

Nil

### **PLANNING ASSESSMENT**

The application has been assessed against the relevant provisions of the Planning & Design Code, which are contained in Appendix One.

#### **Tree-Damaging Activity**

Performance Outcome 1.2 of Regulated and Significant Tree Overlay states:

*“Significant trees are retained where they:*

- (a) Make an important contribution to the character or amenity of the local area*
- (b) Are indigenous to the local area and are listed under the National Parks and Wildlife Act 1972 as rare or endangered native species*
- (c) Represent an important habitat for native fauna*
- (d) Are part of a wildlife corridor or a remnant area of native vegetation*
- (e) Are important to the maintenance of biodiversity in the local environment and/or*
- (f) Form a notable visual element to the landscape of the local area.”*

The arborist report provided by the Applicant (**Attachment 1**) states that the tree “appears to be popular with parrots”, with several hollows within the tree showing signs of birds pecking at the bark, thereby representing an important habitat for native fauna. The tree is set back approximately 90m from the closest street boundary, is set amongst other larger trees and bushes and is therefore not readily visible from the public realm outside of the subject land. Accordingly, the tree does not form a notable visual element to the landscape of the local area and it is debatable whether or not it makes an important contribution to the character of the area. Nonetheless, as with most healthy trees, the tree is considered to make an important contribution to the amenity of the locality of the area. The tree is consequently considered to be worthy of retention in accordance with Performance Outcome 1.2 above.

Whether or not removal of the tree is justified is therefore contingent upon satisfaction of either Performance Outcomes 1.3 or 1.4 of the Regulated and Significant Tree Overlay – where the latter considers circumstances where tree removal is sought in connection with other development, and the former considers the opposite.

Performance Outcome 1.4 of the Regulated and Significant Tree Overlay states:

- “A tree-damaging activity in connection with other development satisfies all of the following:*
- (a) It accommodates the reasonable development of land in accordance with the relevant zone or subzone where such development might not otherwise be possible*
  - (b) In the case of a significant tree, all reasonable development options and design solutions have been considered to prevent substantial tree-damaging activity occurring.”*

Although this application is only for the removal of the tree, it is still considered to be in connection with other development because the Applicant’s reasons for removal sufficiently align with the development proposed for the subject land that was approved as part of the earlier Development Authorisations. To put it another way, the Applicant would likely not be seeking the removal of the tree were it not for the proposed redevelopment of the land.

The first limb of PO 1.4(a) considers whether the proposed development of the land is reasonable in the context of the zone or subzone. Given that there is a valid development authorisation in place for the proposed development, the development can be considered reasonable, and this limb is therefore satisfied.

The second limb of PO 1.4(a), however, requires consideration of whether the development is *possible* without necessitating a tree-damaging activity. In this instance, the entirety of the construction works associated with the Development Authorisation are located outside of the Tree Protection Zone (TPZ) of the subject tree and the Applicant was able to demonstrate as part of the original development authorisation that the development is possible without removal of the tree being necessary.

However, it is now the Applicant’s submission that the retention of the tree will incur significant construction costs that were not understood when the earlier development applications were lodged and determined. Such additional costs have only now come to light as a result of the tender process undertaken for the project, and it is the Applicant’s submission that the incursion of these costs would be an unreasonable burden to place on the development.

In particular, the additional costs associated with the retention of the tree will arise predominantly from two circumstances. Firstly, the applicant suggests that to construct the buildings and amenities associated with the swimming pool, the existing pool will need to be backfilled to create an area from which cranes and other heavy vehicles and equipment can operate (because they are all excluded

from entering the TPZ of the significant tree). Following construction of those buildings, the existing pool area would then need to be re-excavated and the new swimming pool could begin construction. If the tree was able to be removed, this area currently occupied by the tree and its TPZ could be better used during construction for the storage of vehicles, equipment and work areas, enabling a more efficient construction program.

Secondly, and arguably more impactful, is the fact that site investigations have discovered a considerable volume of contaminated waste in parts of the site. This waste needs to be removed, treated and somehow disposed as part of the development of this land. Current EPA guidelines<sup>1</sup> provide that the best practice in this respect is for contaminated waste to be treated and contained on site through burial and capping. Uncontrolled fill cannot be stored under buildings or structures and so the only real area available on-site for the contaminated fill to be stored would be in the area currently occupied by the subject significant tree. If the subject tree has to be retained, then this waste will need to be disposed at an appropriate facility which comes at a considerable expense.

The Applicant has advised the author of this report that the exact quantum of these additional costs is “commercial in confidence” and therefore an exact figure cannot be provided to the Panel. However, these costs may no longer be confidential information by the time of the meeting at which the Panel will determine this Item, and so the Applicant may be able to provide further clarity to the Panel as to costs at the meeting, should the Panel wish to make such enquiries. Notwithstanding, the Applicant has advised that the cost is ‘in excess of \$1 million’.

It is the author’s construction of Performance Outcome 1.4 above, and specifically criterion (a), that the question of “*reasonable development*” as expressed within that criterion only requires consideration of whether the development is reasonable in the context of “*the relevant zone or subzone*”, and it does not extend further to require consideration of whether other factors associated with the development – such as cost – are reasonable or not. It is the author’s reading that the words “*in accordance with the relevant zone or subzone*” operate upon the words “*the reasonable development of the land*”, and the two are inextricably linked such that the phrase cannot be read and construed in any way except as a whole. In this context, the question of whether the costs associated with the retaining the tree are reasonable is not a question to be considered.

However, there is an argument that the question of the reasonability of such costs goes to determining whether the development is “possible”. On this point, Council administration sought advice from its solicitors, which will be provided to the Panel separately to this report. The phrase “*where such development might not other be possible*” should, in the opinion of Council’s solicitors, be read as imposing a degree of objective reasonableness. This test in the second limb of PO 1.4(a) therefore requires consideration of whether the expectations that would be made of the applicant – in respect of costs and other matters – in undertaking the development and retaining the tree are objectively reasonable to expect of a person.

What this test does not require, based on the advice received by Council’s solicitors, is specific consideration of the applicant’s specific circumstances – i.e. whether or not they specifically can afford to undertake the development in a manner that retains the tree, and therefore whether the development is possible. The overarching intent of PO 1.4(a) is to ensure development can continue to occur on land in a manner contemplated by the Code, and that the existence of a regulated or significant tree on that land should not prevent the development from proceeding if to do so would place an unreasonable burden on the person undertaking the development, even if that development would still be possible in a strict sense.

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<sup>1</sup> See Section 11.2 of the EPA’s *Guidelines for the assessment and remediation of site contamination* (2019), [https://www.epa.sa.gov.au/files/13544\\_sc\\_groundwater\\_assessment.pdf](https://www.epa.sa.gov.au/files/13544_sc_groundwater_assessment.pdf);  
See also: *Key Principles for the Remediation & Management of Contaminated Sites*, <https://www.nepc.gov.au/sites/default/files/2022-09/asc-nepm-key-principles-summary-remediation-management-final-draft.pdf>.



With this in mind, the additional costs that would be incurred if the tree were to be retained are considered unreasonable in the circumstances. The development is therefore not considered to be objectively possible in accordance with PO 1.4(a) of the Regulated and Significant Tree Overlay.

Performance Outcome 1.4 requires both criteria (a) and (b) to be satisfied for removal of a significant tree to be justified. By way of reminder, PO 1.4(b) states:

*“(b) in the case of a significant tree, all reasonable development options and design solutions have been considered to prevent substantial tree-damaging activity occurring.”*

Given the commentary above in relation to criterion (a) of PO 1.4, satisfaction of this criterion appears to be a foregone conclusion. Nonetheless, consideration must be given.

The removal of the subject tree is not necessitated by the design of the development, because the works are contained wholly outside the TPZ of the tree and have been designed to ensure the tree can remain protected and healthy. Rather, it is the undertaking of the construction work associated with the development that results in the contaminated material being uncovered; and it is the tree’s presence – in conjunction with the scale and siting of the approved development – that then necessitates the costly off-site disposal of this contaminated waste; and it is the tree’s presence that necessitates the bulk earthworks required and the inefficient and costly staging of the construction work.

So, when one considers what alternative development options or design solutions may exist to avoid the removal of the tree, only two options come to mind.

The first is to dramatically reduce the scale and siting of the already-approved development so the contaminated demolition material can remain on-site and a more efficient works schedule can be produced and undertaken. This option is not considered reasonable because it would be contrary to the intent of PO 1.4(a), which is that the existence of a tree should not, of itself, prohibit or seriously limit the reasonable development of the land.

The second alternative is to undertake the development as contemplated in the previous Development Authorisations – which was shown to be possible without necessitating the removal of the tree – but with the incursion of the additional expenses associated with the newly-discovered challenges. This option is not considered reasonable for the reasons outlined in earlier discussion.

Accordingly, Performance Outcome 1.4 of the Regulated and Significant Tree Overlay is considered satisfied, and the removal of the tree is justified in the circumstances.

Section 127 of the *Planning, Development and Infrastructure Act 2016* and Regulation 59 of the *Planning, Development and Infrastructure (General) Regulations 2017* together provide that:

- if a development authorisation provides for the removal of a significant tree, the authorisation must be subject to a condition that a prescribed number of trees be planted and maintained to replace the tree to be removed;
- in respect of a significant tree, three (3) replacement trees are prescribed;
- and, along with other criteria, the replacement trees cannot be planted within 10m of an existing swimming pool.

Where there is no opportunity for an applicant to plant the required replacement trees on-site in accordance with the regulations then an applicant may pay into an urban tree fund in lieu of the trees not able to be planted. In this case, however there is sufficient room along the eastern side of the development site for the planting of three replacement trees that will be more than 10m from the

swimming pool and so this will be required of the applicant if the Panel chooses to grant consent to this application (see Condition No 3).

Additionally, the applicant has advised of their intention to plant more than the required three (3) replacement trees as they intend on making this area a usable recreation area for the benefit of users of the facility. Accordingly, a reserved matter has been recommended (which the applicant is happy to accept) that requires a detailed landscaping plan to be provided to the satisfaction of the Assessment Manager prior to full development approval being issued.

## RECOMMENDATION

It is recommended that the Council Assessment Panel resolve that:

1. Pursuant to Section 107(2)(c) of the Planning, Development and Infrastructure Act 2016, and having undertaken an assessment of the application against the Planning and Design Code, the application is NOT seriously at variance with the provisions of the Planning and Design Code; and
2. Development Application Number 24000067, by City of Norwood Payneham & St Peters is granted Planning Consent subject to the following conditions and reserved matter:

### RESERVED MATTER Planning Consent

A detailed landscaping plan showing a suitable mix and density of trees, shrubs and groundcovers, and providing details for the on-going maintenance of the landscaping, shall be provided to the reasonable satisfaction of the Assessment Manager prior to Development Approval being granted.

*Note: Further conditions may be imposed on the Planning Consent following satisfaction of the above matter.*

Reason: to ensure that appropriate canopy cover, shade and amenity continues to be enjoyed by occupants and users of the facility following the loss of the significant tree herein approved for removal.

### CONDITIONS Planning Consent

#### Condition 1

The development granted Planning Consent shall be undertaken and completed in accordance with the stamped plans and documentation, except where varied by conditions below (if any), noting that all previous stamped plans and documentation, including conditions previously granted Planning Consent for Development Application ID No's 22017508 and 23024217 are still applicable except where varied by this authorisation.

#### Condition 2

Condition No 2 imposed on Planning Consent for Development Application ID No 23024217 is hereby deleted and replaced by the following:

With respect to Tree 1 and Tree 3 detailed in the Arboricultural Impact Assessment (AIA), dated 20 June 2022, prepared by Urbans Arboriculture, the following measures shall be undertaken in addition to the recommendations contained in the AIA:

- all service trenches shall avoid each tree's Tree Protection Zone (TPZ) where possible. Where this is deemed not possible, exploratory work for the service trenches shall be undertaken under the supervision of a level 5 arborist (or higher), with any structural roots of a diameter of 25mm or greater being retained where possible;
- the paving in the vicinity of Tree 1 be undertaken in accordance with amended plan 21-0255 (Drawing No. AA1221, dated 13/07/23) herein granted Planning Consent, and where excavation is required for the alignment of the paths and for stormwater or irrigation purposes it to be undertaken using boring or hydrovac excavation methods as appropriate under the supervision of a level 5 (or higher) arborist;
- physical tree protection barriers are to be installed with signage for the full duration of the works for the full extent of undisturbed TPZs (that is the areas of the TPZ within which no work is proposed), or to the largest extent possible, and not removed without consent of the Project Arborist;
- Irrigation must not be turned off between the months of October to May as the significant trees have developed a reliance on irrigation over time. Alternatively, supplementary watering shall be provided during this time; and
- any pruning should be undertaken by, or in the presence of, the Project Arborist, including any root pruning.

#### Condition No 3

Three (3) replacement trees, with a minimum mature height of 5 metres, shall be planted on the subject land as soon as is practical within 12 months of the removal of the significant tree herein approved. The replacement trees shall not be planted within 10 metres of a dwelling or in ground swimming pool and cannot be of a species identified in Regulation 3F(4)(b) of the Planning, Development and Infrastructure (General) Regulations 2017.

#### ADVISORY NOTES Planning Consent

##### Advisory Note 1

Appeal Rights - General rights of review and appeal exist in relation to any assessment, request, direction or act of a relevant authority in relation to the determination of this application, including conditions.

##### Advisory Note 2

No work can commence on this development unless a Development Approval has been obtained. If one or more Consents have been granted on this Decision Notification Form, you must not start any site works or building work or change of use of the land until you have received notification that Development Approval has been granted.

##### Advisory Note 3

This approval varies the original consent / approval to which it applies, but it does not extend nor vary the operative date of the original consent / approval. The consent / approval must be acted upon within the operative date applicable, unless extended by the relevant authority via separate submission.

Advisory Note 4

The Applicant is reminded of its responsibilities under the *Environment Protection Act 1993*, to not harm the environment. Specifically, paint, plaster, concrete, brick wastes and wash waters should not be discharged into the stormwater system, litter should be appropriately stored on site pending removal, excavation and site disturbance should be limited, entry/exit points to the site should be managed to prevent soil being carried off site by vehicles, sediment barriers should be used (particularly on sloping sites), and material stockpiles should all be placed on site and not on the footpath or public roads or reserves. Further information is available by contacting the EPA.

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*Cr Mex declared a conflict of interest for item 5.1 and left the meeting at 7:03pm*

*Mr Barnes answered questions from the Council Assessment Panel from 7:04pm until 7:50pm*

***Moved by Mr Adcock***

*That the Council Assessment Panel resolved to defer Development Application ID 24000067 to enable the following information to be submitted:-*

- *Further exploration and justification for the management and disposal of the contaminated soil including rationale as to why the removal of the significant tree is necessary to accommodate such; and*
- *Further information and justification regarding the consideration of all reasonable development options and design solutions to avoid the removal of the Significant tree in accordance with PO 1.4(b) of the Regulated Significant Tree Overlay.*

**Seconded by Ms Newman**

**Carried**

9. **OTHER BUSINESS**  
Nil

10. **CONFIDENTIAL REPORTS**

11. **CLOSURE**

The Presiding Member declared the meeting closed at 8.31pm

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Terry Mosel  
**PRESIDING MEMBER**

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Geoff Parsons  
**MANAGER DEVELOPMENT ASSESSMENT**