



 DEVELOPMENT ASSESSMENT PANEL REPORT	
Application No.	REV/2024/0009
Address	28 Francis Street ENMORE NSW 2042
Proposal	Section 8.2 Review of DA/2023/0715, determined 12/12/2023 to remove one tree from the rear of the site
Date of Lodgement	15 March 2024
Applicant	Mr Timothy R Stainton
Owner	Mr Timothy R Stainton Ms Katherine C Benjamin
Number of Submissions	N/A – Notificaiton not required
Cost of works	\$0.00
Reason for determination at Planning Panel	Refusal
Main Issues	Tree removal
Recommendation	Refusal
Attachment A	Reasons for refusal
Attachment B	DA/2023/0715 - Assessment Report & Reasons for Refusal
Attachment C	Draft Conditions of Consent in the event of IWLPP Approval
	
LOCALITY MAP	
Subject Site 	Objectors  

1. Executive Summary

This report is an assessment of the application submitted to Council for Section 8.2 Review of DA/2023/0715, determined 12/12/2023 to remove one tree from the rear of the site at 28 Francis Street ENMORE NSW 2042.

The main issues that have arisen from the application include:

- One (1) *Celtis sinensis* (Chinese celtis), being a prescribed tree is proposed to be removed.

The reasons provided by the applicant do not justify the removal of the subject tree and therefore the application is recommended for refusal.

2. Proposal

The proposal seeks to remove One (1) *Celtis sinensis* (Chinese celtic) located within the rear yard of the subject site.



Figure 1: Subject Tree

3. Site Description

The subject site is located on the western side of Francis Street, between Enmore Road to the north and Lynch Avenue to the south. The site consists of one (1) allotment and is generally rectangular in shape with a total area of 190.11sqm and is legally described as Lot 2, Deposited Plan 588923. The site has a frontage to Francis Street of approximately 6.2 metres.

The subject site is not listed as a heritage item; however, it is located within a heritage conservation area. The property is not identified as a flood prone lot.

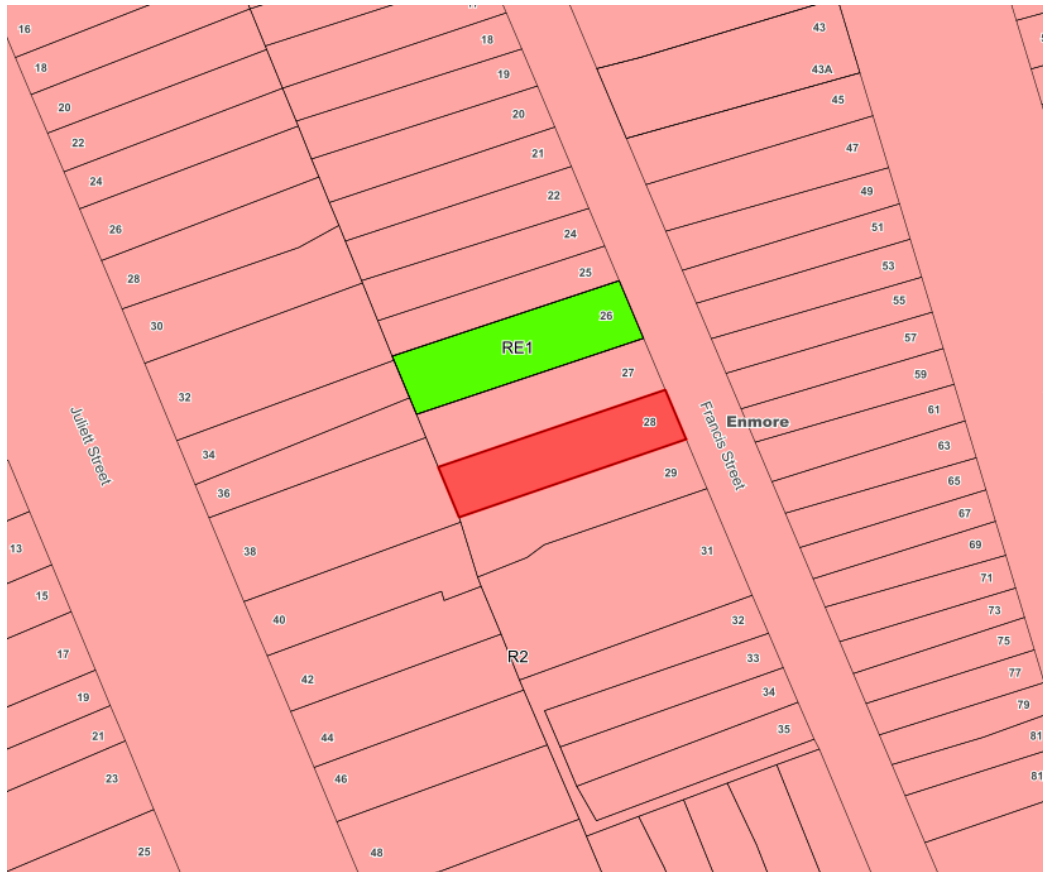


Figure 1: Zoning Map - Subject site highlighted in red. Source: IntraMaps

4. Background

Site history

The following application outlines the relevant development history of the subject site and any relevant applications on surrounding properties.

Subject Site

Application	Proposal	Decision & Date
DA/2023/0715	One (1) Tree Removal on-site	Refused – 12/12/2023

5. Section 8.2 Review

The application was lodged under Section 8.2 of the *Environmental Planning and Assessment Act 1979 (EPA Act 1979)*.

Requirement	Proposal
8.2 Determinations and decisions subject to review	
<p>(1) The following determinations or decisions of a consent authority under Part 4 are subject to review under this Division—</p> <ul style="list-style-type: none"> (a) the determination of an application for development consent by a council, by a local planning panel, by a Sydney district or regional planning panel or by any person acting as delegate of the Minister (other than the Independent Planning Commission or the Planning Secretary), (b) the determination of an application for the modification of a development consent by a council, by a local planning panel, by a Sydney district or regional planning panel or by any person acting as delegate of the Minister (other than the Independent Planning Commission or the Planning Secretary), (c) the decision of a council to reject and not determine an application for development consent. 	<p>The subject application relates to the review of a determination of an application for development consent by Council.</p>
<p>(2) However, a determination or decision in connection with an application relating to the following is not subject to review under this Division—</p> <ul style="list-style-type: none"> (a) a complying development certificate, (b) designated development, (c) Crown development (referred to in Division 4.6). 	<p>The subject application does not relate to any of the applications noted in Clause 2.</p>
<p>(3) A determination or decision reviewed under this Division is not subject to further review under this Division.</p>	<p>Noted.</p>

8.3 Application for and conduct of review	
(1) An applicant for development consent may request a consent authority to review a determination or decision made by the consent authority. The consent authority is to review the determination or decision if duly requested to do so under this Division.	Noted.
(2) A determination or decision cannot be reviewed under this Division— (a) after the period within which any appeal may be made to the Court has expired if no appeal was made, or (b) after the Court has disposed of an appeal against the determination or decision.	The original application was determined on 12 December 2023. Pursuant to Section 8.10(1)(b)(i) of the <i>Environmental Planning and Assessment Act 1979</i> , an appeal may be made to the Court 12 months after the date of determination. The subject application was lodged on 15 March 2024 and has been reported to Council staff for determination prior to the expiry of the appeal period (12 June 2023).
(3) In requesting a review, the applicant may amend the proposed development the subject of the original application for development consent or for modification of development consent. The consent authority may review the matter having regard to the amended development, but only if it is satisfied that it is substantially the same development.	No amendments have been made to the proposed development.
(4) The review of a determination or decision made by a delegate of a council is to be conducted- (a) by the council (unless the determination or decision may be made only by a local planning panel or delegate of the council), or (b) by another delegate of the council who is not subordinate to the delegate who made the determination or decision.	The original DA was determined by Council by way of refusal. Given that a refusal is recommended for this review application. A determination of the Local Planning Panel is to be conducted.
(5) The review of a determination or decision made by a local planning panel is also to be conducted by the panel.	NA.
(6) The review of a determination or decision made by a council is to be conducted by the council and not by a delegate of the council.	NA.
(7) The review of a determination or decision made by a Sydney district or regional planning panel is also to be conducted by the panel.	NA.

(8) The review of a determination or decision made by the Independent Planning Commission is also to be conducted by the Commission.	NA.
(9) The review of a determination or decision made by a delegate of the Minister (other than the Independent Planning Commission) is to be conducted by the Independent Planning Commission or by another delegate of the Minister who is not subordinate to the delegate who made the determination or decision.	NA.

The Section 8.2 Review application is supported by additional documentation including a document titled Reply to Notice of Determination – Refusal, that responds to the reasons for refusal and is addressed below:

Reasons for Refusal

1. ***The proposal will be inconsistent with Section 2.1 of SEPP (Biodiversity and Conservation) 2021 as follows:***
 - a. ***To protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and***
 - b. ***To preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.***

Applicant's Response:

- a. *S2.1 of the SEPP sets out the aim of the Chapter, rather than a substantive restriction or prohibition against which the Application should be determined. The Council is still required to apply the substantive provisions of the Act, which it does not appear to have done by merely relying on the aims of the Chapter as the sole ground on which the Application was refused under the SEPP.*
- b. *No consideration has been given to S2.7 of the SEPP, which deal with clearing that does not require permit or approval with regards to risk to human life or property.*
- c. *Council did not conduct site inspection for the neighbouring properties to determine whether damages to property has been done.*

Council's Assessment:

The removal of the tree has been assessed having regard to the matters for consideration under Section 4.15 of the *Environmental Planning and Assessment Act 1979*, in accordance with 4.15 (a)(i) the objectives and controls under the *State Environmental Planning Policy (Biodiversity and Conservation) 2021* and the *Inner West Local Environmental Plan 2022* have been considered along with the objectives and controls contained within *Marrickville Development Control Plan 2011* as per 4.15 (a)(iii).

Section 2.7 of the *SEPP (Biodiversity and Conservation)* does not apply to the subject application as approval is required to remove the subject tree.

A site inspection was conducted at No.28 Francis Street, where the tree is proposed to be removed from and not from the adjoining properties. Onus is on the applicant to provide sufficient evidence of any damage to structures or infrastructure. No information has been submitted to this effect. Minor damages to above ground structures could be remedied and pruning of the tree could be explored, Removal of the tree for the reasons provided by the applicant is not supported.

2. ***The proposal does not satisfy Section 4.15(1)(a) of the Environmental Planning and Assessment Act 1979 in the following manner:***
 - a. ***The proposal is inconsistent with the Inner West Local Environmental Plan 2022 as follows:***
 - i. ***Section 1.2(2) – Aims of Plan: aims (h) and (i), as it will result in adverse environmental impacts on the local character of Inner West and will not prevent adverse and cumulative environmental impacts.***

Applicant's Response:

"The Council has failed to provide any evidence or reasoning as to how the retention of the weed in the property prevents adverse social, economic and environmental impacts. The lack of evidence or reasoning suggests that removing the weed would not, in fact, cause any adverse social, economic or environmental impacts."

The retention of the tree would result in adverse economic impacts such as costs to the neighbouring property from the destabilisation of the fence, pergola and house, and costs to rate payers as a result of the adverse impacts to the pipes."

The Council has additionally failed to take into consideration the nature of the weed in question and how the retention of it has the potential to lead to adverse environmental impacts as it outcompetes native trees and shrubs, reduces habitat and food for native animals, invades disturbed bushland and riparian areas; and has potential to invade agricultural land.

The weed is located in the backyard of the property and is not visible from the street and does not contribute or enhance the visual appearance of the street. Further to this, a search of the property on realestate.com.au indicates that the subject tree was planted during the Relevant Period which cannot be considered to form part of its 'heritage significance'.

Council's Assessment:

The Chinese Celtis is a prescribed tree and is not exempt from protection under Council's DCP controls. It is considered that the Chinese Celtis species is common throughout urban areas in Sydney, particularly throughout the Inner West LGA. Therefore, the removal of the tree without valid reason would result to undesirable environmental impacts towards the local character of the Inner West.

The tree does not result in any impacts on native vegetation in the local area, habitat or food for native animals or the like given its location in an urban area.

The application can only be assessed based on the existing circumstances. As such any future development or potential for future damage cannot be considered as part of the assessment without supporting documentation which demonstrates such circumstances.

Further to this, Council's assessment indicates that the removal of the mature, healthy and established tree, fails to protect the existing tree canopy cover, nor does it enhance and sustainably manage the urban forest of the Inner West.

3. *The proposal is inconsistent with the Marrickville Development Control Plan 2011 as follows:*

a. Part 2.20 – Tree Management, and O4 as it will not maintain the urban landscape so trees continue to make a significant contribution to its quality, character, and amenity; and Objective O5 as it will not maintain and enhance the amenity of the Inner West Local Government Area through the preservation of appropriate trees and vegetation.

Applicant's Response:

The weed in question is located within the backyard of the property and is not visible from the street, therefore it does not contribute to the quality or character of the urban landscape. Further to this, given the damage the weed is causing to the neighbouring property and the major pipe system located on the property, the weed is certainly not contributing to the amenity of the neighbourhood.

The Chinese Celtis is a weed and therefore it is questioned how it is considered to be 'appropriate tree and vegetation' that maintains and enhances the general enjoyment of the Inner West.

Council's Assessment:

The Chinese Celtis is a prescribed tree and is not exempt from protection under Council's DCP controls. It is considered that the Chinese Celtis species is common throughout urban areas in Sydney, particularly throughout the Inner West LGA. The tree's contribution towards the quality and character of the urban landscape is not limited to what can be seen from the street. The impacts of the trees when viewed from the living areas and/or private open spaces of individual properties and its contribution to outlook and the wider canopy cover of the area are also considered when assessing against the quality and character of urban landscapes.

4. The proposal is considered to result in adverse environmental impacts on the built environment pursuant to Section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979.

Applicant's Response:

S4.15(1)(b) of the EPA Act provides that in determining a development application, a consent authority is to take into consideration the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

The Council has not provided a detailed explanation how the removal of the weed will have an adverse environmental impact in the locality. Given the nature of the weed, it risk resulting in adverse environmental impacts.

Council's Assessment:

Objective O4 of Part 2.20 of the MDCP 2011 consists of provisions which requires any development to consider the management of urban landscape to continue to make a significant contribution to its quality, character and amenity. During the site inspection, the subject tree has been evaluated to be in good health and contributes to the urban forest canopy of the Inner West. Its contribution to the Inner West is reliant on its canopy coverage. As such, the removal of the mature, health and established tree fails to protect the existing tree canopy cover, nor does it enhance and sustainably manage the urban forest. Therefore, its removal would result to adverse environmental impacts.

5. The proposal is not considered to be in the public interest pursuant to Section 4.15(1)(e) of the Environmental Planning and Assessment Act 1979.

Applicant's response:

The report and notice of determination do not explain how removal of the weed is against public interest.

Council's Assessment:

Upon assessment of the tree, it is considered that with its removal, 100sqm of canopy cover from the urban forest will be removed which would generally takes years to recover. The reasons provided for its removal have not been substantiated and therefore it cannot be supported. Therefore, its removal would result to adverse environmental impacts and is not in accordance with public interest.

6. Assessment

The following is a summary of the assessment of the application in accordance with Section 4.15 of the *Environmental Planning and Assessment Act 1979 (EPA Act 1979)*.

A. Environmental Planning Instruments

The application has been assessed and the following provides a summary of the relevant Environmental Planning Instruments.

State Environmental Planning Policies (SEPPs)

SEPP (Biodiversity and Conservation) 2021

Chapter 2 Vegetation in non-rural areas

The *Biodiversity and Conservation SEPP* requires consideration for the protection and/or removal of vegetation and gives effect to the local tree preservation provisions of Part 2.20 of the MDCP 2011.

The application seeks the removal of One (1) *Celtis sinensis* (Chinese celtis) located within the rear yard of subject site. The applicant has applied for the removal of the tree for the following reasons:

1. *The tree is a risk to human life or property*
2. *The branches of the weed are impeding the roof of the neighbour's pergola;*
3. *The roots of the weed are causing damage to the neighbour's deck and foundations of the neighbours principal dwelling;*
4. *The root of the tree is a threat to the pipes of the subject site and the neighbouring properties.*
5. *The branches of the tree caused damage to the boundary fencing.*

Following a site inspection of the property on 1 May 2024, and consideration of the applicant's request, the following assessment is made:

- At the time of the inspection the tree was observed to be in good health and to have good structure;
- The tree contributes significantly to the local landscape and has high ecological and amenity significance;
- Any impact from branches of the tree on the above ground structures may be addressed by pruning. During the assessment of the original application, the applicant was contacted, and it was requested that the application be amended to propose pruning of the tree, rather than removal. However, the application was not amended to reflect the recommendation by Council. As such, the application was refused.
- It was advised that consent to the pruning of small branches could be given, to achieve a building clearance of 2.5m from adjacent building and maintain canopy structure,

would be considered sufficient to alleviate impacts on the adjoining property whilst maintaining the tree.

- Controls C8 and C9 - Part 2.20 *Tree Management* of the MDCP 2011 provides assessment criteria which requires supporting documentation which demonstrates that the subject tree is the cause of damage to property and potential risk to human life. In this instance, no documentation has been provided. Further to this it has been established in **Barker v Kyriakides [2007] NSWLEC 292**, that dropping of leaves, flowers, fruits, sap, seeds or small elements of deadwood (or other natural processes) are not justification for tree removals.
- It is a reasonable expectation when living in urban areas that there will be some amount of debris from street and private trees and along with this an expectation that owners will maintain their own gutters and property to accommodate this.
- There has been no evidence of abnormal deadwood, obvious defects, or past significant branch drop to warrant removal of the tree.
- It is acknowledged that tree roots can sometimes be associated with plumbing issues, in this instance, no supporting evidence has been provided to demonstrate any issues and it has not been demonstrated that any problems are not able to be remedied in conjunction with retention of the tree.
- The onus is on the applicant to demonstrate to Council any structural impacts or issues with the health of a tree when requesting removal. No such information has been provided.
- The Chinese celtis is a prescribed Tree. Although the species is acknowledged to be a weed in some areas and is listed on the NSW Government 'weedwise' website, it is not listed as a biosecurity priority for the Sydney region, therefore its status as a prescribed tree on the Council DCP is confirmed. The species is common throughout urban areas in Sydney, particularly throughout the inner west LGA and make a positive contribution to the urban forest of the area.

An assessment of the proposal against the abovementioned provisions has identified the following:

- Section 2.1 (a) & (b) of *Biodiversity and Conservation SEPP*: The proposed development does not protect the biodiversity values of trees nor preserves the amenity of the area. In this regard, the reason given for supporting its removal is that this tree located within the rear yard of the subject site and causes damage to the structures within the site and the adjoining properties. It is noted that this is not a consideration for removal of a high value tree, particularly without any evidence of such damage.
- The tree is not deemed to result in any danger and or property damage in accordance with Section 3.1 of Part 2.20 *Tree Management* of the MDCP 2011.

Therefore, the applicant has not provided adequate Arboricultural reasons to justify the removal of the tree at this time.

In light of the above, the proposed tree removal is not supported as it fails to preserve the amenity of non-rural areas of the State through the preservation of tree and other vegetation.

Inner West Local Environmental Plan 2022

The application was assessed against the following relevant sections of the *Inner West Local Environmental Plan 2022 (IWLEP 2022)*.

Part 1 – Preliminary

Section	Proposed	Compliance
Section 1.2 Aims of Plan	The proposal satisfies the section as follows: <ul style="list-style-type: none"> The proposal will not prevent adverse social, economic and environmental impacts, including cumulative impacts as the removal of the tree will result to the loss of significant canopy of the urban forest which would impact the local character of the Inner West. 	Yes

Part 2 – Permitted or prohibited development

Section	Proposed	Compliance
Section 2.3 Zone objectives and Land Use Table	<ul style="list-style-type: none"> The application proposes removal of one (1) Celtis Sinensis (Chinese celtis), which is permissible with consent in the R2 Low Density Residential zone. The proposal is not consistent with the relevant objectives of the zone, as the proposal will not maintain the character of built and natural features in the surrounding area. 	No

Part 5 – Miscellaneous provisions

Section	Compliance	Compliance
Section 5.10 Heritage conservation	The subject tree in question does not have heritage significance within the Heritage Conservation Area (HCA) and as such, its removal could be supported from a heritage perspective.	Yes

B. Development Control Plans

Marrickville Development Control Plan 2011

The application was assessed against the following relevant parts of the Marrickville Development Control Plan 2011 (MDCP 2011).

Part 2 – Generic Provisions

Control	Assessment	Compliance
Part 2.20 Tree Management	<ul style="list-style-type: none"> • See discussion within <i>SEPP (Biodiversity and Conservation) 2021</i>. • The removal of the tree would result to the loss of at least 100sqm of canopy cover from the urban forest which would take a significant time to re-establish. • Insufficient evidence has been provided to demonstrate the extent of the damage to property and risk to human life as required by C8 and C9 of Part 2.20 Tree Management of the MDCP 2011 and Section 2.7 of the <i>SEPP (Biodiversity and Conservation) 2021</i>. It should be noted that, damages to outbuildings, garden structures, walls or landscape structures is listed as being generally considered as insufficient justification for tree removal. 	No

Part 9 – Strategic Context

Control	Assessment	Compliance
Part 9.15 Enmore Park (Precinct 15)	<ul style="list-style-type: none"> • The proposal raises no issues that will be contrary to the provisions of this part of the DCP. 	Yes

C. The Likely Impacts

These matters have been considered as part of the assessment of the development application. It is considered that the proposed development will have significant adverse environmental, social or economic impacts upon the locality.

D. The Suitability of the Site for the Development

The proposal is of a nature in not keeping with the overall function of the site. The premises are in a residential surrounding and amongst similar uses to that proposed.

E. Submissions

The development application was not required to be notified in accordance with Council's Community Participation Plan.

F. The Public Interest

The public interest is best served by the consistent application of the requirements of the relevant Environmental Planning Instruments, and by Council ensuring that any adverse effects on the surrounding area and the environment are appropriately managed.

This has not been achieved in this instance.

7. Section 7.11 / 7.12 Contributions

The cost of works is under \$250,000, as such Development Contribution is not applicable.

8. Referrals

The following internal referrals were made, and their comments have been considered as part of the above assessment:

- Heritage Specialist; and
- Urban Forest;

9. Conclusion

The proposal does not comply with the aims, objectives and design parameters contained in the *SEPP (Biodiversity and Conservation) 2021*, *Inner West Local Environmental Plan 2022* and *Marrickville Development Control Plan 2011*.

The proposal does not comply with the aims and controls contained within the relevant environmental planning instruments and Development Control Plan. The applicant has not provided adequate Arboricultural reasons to support removal of the Chinese Celtis on the site which is in good health, contributes significantly to the local landscape and has high ecological and amenity significant, and its removal would be contrary to the public interest.

Given the above, it is recommended that the application be refused for the following reasons

The application is considered unsupportable and in view of the circumstances, refusal of the application is recommended.

10. Recommendation

- A. That the Inner West Local Planning Panel exercising the functions of the Council as the consent authority, pursuant to s4.16 of the *Environmental Planning and Assessment Act 1979*, refuse Development Application No. REV/2024/0009 for Section 8.2 Review of DA/2023/0715, determined 12/12/2023 to remove one tree from the rear of the site at 28 Francis Street ENMORE NSW 2042 for the following reasons:
1. The removal of the tree would be inconsistent with Section 2.1 of *SEPP (Biodiversity and Conservation) 2021* as follows:
 - a. It would fail to protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and
 - b. The removal would fail to preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.
 2. The removal of the tree would be inconsistent with aims (h) and (i) of the *Inner West Local Environmental Plan 2022* as it will result in adverse environmental impacts on the local character of Inner West and will not prevent adverse and cumulative environmental impacts.
 3. The proposal is inconsistent with the Marrickville Development Control Plan 2011 as follows:
 - a. C8 and C9 – *Application Assessment Criteria*: insufficient supporting evidence has been provided to Council which demonstrates that the subject tree is a danger to human life and to the surrounding properties and as such the proposal would fail to meet objectives O4 and O5.
 4. The proposal is considered to result in adverse environmental impacts on the built environment pursuant to Section 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979*.
 5. The proposal is not considered to be in the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*.

Attachment A – Reasons for Refusal

Attachment A – Reasons for Refusal

1. The removal of the tree would be inconsistent with Section 2.1 of *SEPP (Biodiversity and Conservation) 2021* as follows:
 - a. It would fail to protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and
 - b. The removal would fail to preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.
2. The removal of the tree would be inconsistent with aims (h) and (i) of the *Inner West Local Environmental Plan 2022* as it will result in adverse environmental impacts on the local character of Inner West and will not prevent adverse and cumulative environmental impacts.
3. The proposal is inconsistent with the Marrickville Development Control Plan 2011 as follows:
 - a. C8 and C9 – *Application Assessment Criteria*: insufficient supporting evidence has been provided to Council which demonstrates that the subject tree is a danger to human life and to the surrounding properties and as such the proposal would fail to meet objectives O4 and O5.
4. The proposal is considered to result in adverse environmental impacts on the built environment pursuant to Section 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979*.
5. The proposal is not considered to be in the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*.

Attachment B – Original Development Assessment Report and Notice of Determination



Development Assessment Report

Application No:	DA/2023/0715	Assessing Officer:	Iain Betts
Date of lodgement:	31 August 2023	Cost of works:	\$0.00
Heritage Significance:	HCA	Notification:	No notification required in accordance with Council's Community Engagement Strategy
Permissible:	Yes	Submissions:	Nil
Applicant:	Mr Timothy R Stainton		
Owner:	Ms Katherine C Benjamin Mr Timothy R Stainton		
Subject Site:	28 Francis Street ENMORE NSW 2042		
Site Location:	<p>The subject site is located on the western side of Francis Street in Enmore.</p> <p>A single storey dwelling house with attic level is located on the site. A large Chinese Celtis tree is located at the rear of the site located adjacent to the northern boundary.</p> <p>Surrounding land uses are predominantly single and two storey dwelling houses.</p>		
Proposal:	Removal of Chinese celtis tree at rear of site		
Relevant Background:	<p><u>Property History:</u></p> <p>There is no recent relevant property history pertaining to the application.</p> <p><u>Application History:</u></p> <ul style="list-style-type: none"> On 31 October 2023, Council e-mailed the applicant advising that tree removal was not supported, however, could support tree pruning subject to the application being amended to seek tree pruning rather than removal. On 13 November 2023, Council forwarded correspondence to the applicant by letter reiterating the matters raised in Council's e-mail dated 31 October 2023 and requested that the application be amended to allow tree pruning. Council's letter outlined the extent of pruning that could be permitted as follows: 		



	<ul style="list-style-type: none"> ○ The pruning of small branches, epicormic growth and dead wood to achieve a building clearance of 2.5m from adjacent building and maintain canopy structure; ○ Pruning must not exceed 15% total live canopy in order to achieve the desired results, while retaining the main structural branches, size and shape of the tree; and ○ Pruning wounds for live branches must not exceed 100mm in diameter. <p>The applicant was given 14 days to amend the application to seek consent for tree pruning.</p> <ul style="list-style-type: none"> ● On 15 November 2023, Council spoke to the applicant regarding the matters raised in its letter dated 13 November 2023 and sent e-mail correspondence confirming these discussions and how to proceed – i.e. amend the application to allow tree pruning or withdraw the application. ● On 23 November 2023 and 4 December 2023, Council e-mailed the applicant requesting an update as to how the applicant wished to proceed with the application. ● On 8 December 2023, the applicant requested that the application proceed to determination as lodged i.e. assess the proposal as a tree removal application. <p>Given the above, and that tree removal remains sought, the assessment of the proposal has proceeded. Refusal of the application is therefore recommended.</p>
Key Issues:	<ul style="list-style-type: none"> ● Adverse environmental impacts relating to the removal of a healthy tree ● The applicant has not provided adequate Arboricultural reasons to justify removal of the tree
Recommendation:	Refusal



1. Assessment

The following is a summary of the assessment of the application in accordance with Section 4.15 of the *Environmental Planning and Assessment Act 1979 (EPA Act 1979)*.

A. Environmental Planning Instruments

The application has been assessed and the following provides a summary of the relevant Environmental Planning Instruments.

State Environmental Planning Policies (SEPPs)

SEPP (Resilience and Hazards) 2021

Chapter 4 Remediation of Land

Section 4.16 (1) of the SEPP requires the consent authority not consent to the carrying out of any development on land unless:

- “(a) it has considered whether the land is contaminated, and*
- (b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and*
- (c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.”*

In considering the above, there is no evidence of contamination on the site. There is also no indication of uses listed in Table 1 of the contaminated land planning guidelines within Council's records. The land will be suitable for the proposed use as there is no indication of contamination.

SEPP (Biodiversity and Conservation) 2021

Chapter 2 Vegetation in non-rural areas

The SEPP concerns protection/removal of vegetation and gives effect to the local tree preservation provisions of Council's DCP.

One *Celtis sinensis* (Chinese celtis) is located within the rear yard of the property adjacent to the northern boundary which is sought to be removed. The applicant has applied for the removal of the tree for the following reasons;

1. *"Roots are damaging neighbours decking.*
2. *The tree is considered a weed.*
3. *In summer it attracts a large amount of loud bats that defecate in areas in which children play."*

Following a site inspection of the property on 11 October 2023, and consideration of the applicant's request, the following assessment is made:



- At the time of inspection the tree was observed to be in good health and to have good structure;
- The tree contributes significantly to the local landscape and has high ecological and amenity significance;
- Council was not able to observe the neighbour's property and was not provided with any photographs to support the claim that the tree is damaging the neighbours deck. Additionally, it has not been demonstrated that damages cannot be repaired in conjunction with tree retention.
- The presence of animals in trees does not justify intervention with the tree as well as the dropping of leaves, flowers, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering removal of or intervention with an urban tree. It is a reasonable expectation that property owners/tenants maintain their properties.
- The tree is not considered a priority weed within the Inner West and significantly contributes to multiple characteristics within the local urban landscape.

Therefore, the applicant has not provided adequate Arboricultural reasons to justify removal of the tree at this time.

In light of the above, the proposed tree removal is not supported given it would be inconsistent with the provisions of Section 2.1 of the SEE as follows:

2.1 Aims of Chapter

The aims of this Chapter are—

- (a) to protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and
- (b) to preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.

Inner West Local Environmental Plan 2022 (IWLEP 2022)

The application was assessed against the following relevant sections of the IWLEP 2022.

Part 1 – Preliminary

Control	Proposed	Compliance
Section 1.2 Aims of Plan	For reasons discussed in the assessment above under SEPP (Biodiversity and Conservation) 2021, the applicant has not provided adequate Arboricultural reasons to support removal of the Chinese celtis on the site which is in good health, contributes significantly to the local landscape and has high ecological and amenity significance. Given the above, the proposal is not considered to meet the following Aims of Plan: 2(h) to prevent adverse social, economic and environmental impacts on the local character of Inner West.	No



Control	Proposed	Compliance
	2(i) to prevent adverse social, economic and environmental impacts, including cumulative impacts.	

Part 2 – Permitted or Prohibited Development

Zone Objectives	Proposed	Compliance
Section 2.3 Zone Objectives – R1 General Residential	<p>The site is zoned R2 – Low Density Residential, and the proposed tree removal is permissible development in the zone.</p> <p>The objectives of the R2 General Residential zone are as follows:</p> <ul style="list-style-type: none"> • To provide for the housing needs of the community within a low density residential environment. • To enable other land uses that provide facilities or services to meet the day to day needs of residents. • To provide residential development that maintains the character of built and natural features in the surrounding area. <p>The proposal raises no issues that will be contrary to the zone objectives.</p>	Yes

Part 4 – Principal Development Standards

No change.

Part 5 – Miscellaneous Provisions

Control	Proposed / Discussion	Compliance
Section 5.10 Heritage Conservation	<p>The subject site is located in the Enmore Park Heritage Conservation Area. The site itself is not heritage listed, however, is located in the vicinity of a number of heritage items on Julliett Street (Nos 40-46 – group of semi-detached cottages – local significance) and Edgeware Road (Nos 43A, 45 and 47 - Group of mid-Victorian gothic houses – local significance).</p> <p>The site contains a contributory dwelling within the Heritage Conservation Area.</p> <p>The tree in question is visible from the public domain, including on both Francis Street between the existing dwellings at Nos. 27 and 28 Francis Street, and on Julliett Street between the existing dwellings at Nos. 38 and 40 Julliett Street, the latter (i.e. No. 40) of which is a heritage item (see above). Concern is raised that the removal of a healthy tree that contributes to the local landscape will have negative impacts on the Heritage Conservation Area and the setting of the heritage item at No. 40 Julliett Street</p>	No



Control	Proposed / Discussion	Compliance
	contrary to the objective of Section 5.10(b) of the LEP which reads: <i>b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views.</i>	

Part 6 – Additional Local Provisions

No Additional Local Provisions apply to the proposal.

B. Development Control Plans

Marrickville Development Control Plan 2011 (MDCP 2011)

Part 2 – Generic Provisions

Control	Proposed / Discussion	Compliance
2.18 Landscaping and Open Space	While the proposal will not reduce gardens and landscaped area on the site (in the form of gardens or lawns), the proposed removal of the prescribed tree in question, which is in good health, contributes significantly to the local landscape and has high ecological and amenity significance, will be contrary to the following objectives and controls of Part 2.20 of the DCP: <ul style="list-style-type: none"> • O4 - To manage the urban landscape so trees continue to make a significant contribution to its quality, character, and amenity; and • O5 - To maintain and enhance the amenity of the Inner West Local Government Area through the preservation of appropriate trees and vegetation. 	No
2.20 Tree Management		

Part 8 – Heritage

Control	Proposed / Discussion	Compliance
9.15 Enmore Park	The proposal raises no issues that will be contrary to the provisions of this part of the DCP.	Yes

C. The Likely Impacts

These matters have been considered as part of the assessment of the Development Application. For reasons discussed above, it is considered that the proposed development will have adverse environmental impacts upon the locality.

D. The Suitability of the Site for the Development

The proposal raises no issues that are contrary to the test of site suitability.



E. Submissions

The application not required to be notified in accordance with Council's Community Engagement Strategy and no formal submission was received.

During the assessment of the application, Council received correspondence from an adjoining property owner addressed to the Mayor regarding the tree, raising the following issues

Issue: The tree continues to grow rapidly, overshadowing, dropping leaves, blocking drains and lifting up the side fence at No. 27 Francis Street.

Comment: Concerns relating to the tree growing rapidly, dropping leaves, blocking leaves and uplifting fences are not adequately Arboricultural reasons to justify removal of the healthy tree in question.

Issue: Lack of response received by the applicant and neighbour from Council regarding the application.

Comment: The applicant has been kept updated regarding the processing of the application since lodgement and been given a number of opportunities to amend the proposal to facilitate tree pruning which Council could support. Council does not support tree removal in this instance for reasons outlined previously in this report.

The application was not required to be notified in accordance with Council's Community Engagement Strategy.

F. The Public Interest

The public interest is best served by the consistent application of the requirements of the relevant Environmental Planning Instruments, and by Council ensuring that any adverse effects on the surrounding area and the environment are appropriately managed.

The proposal to remove a health tree without adequate Arboricultural justification, and which contributes significantly to the local landscape and has high ecological and amenity significance as proposed, would be contrary to the public interest.

2. Section 7.11 / 7.12 Contributions

Section 7.12 levies are not payable for the proposal.

3. Referrals

Referrals	Summary of Response
Urban Forest	Council's Urban Forest Advisor does not support proposed tree removal for reasons discussed in the assessment above under <i>SEPP (Biodiversity and Conservation) 2021</i> .



4. Recommendation

The proposal does not comply with the aims and controls contained within the relevant environmental planning instruments and Development Controls Plan. The applicant has not provided adequate Arboricultural reasons to support removal of the Chinese celtis on the site which is in good health, contributes significantly to the local landscape and has high ecological and amenity significance, and its removal would be contrary to the public interest.

Given the above, it is recommended that the application be refused for the following reasons:

1. The proposal will be inconsistent with Section 2.1 of *SEPP (Biodiversity and Conservation) 2021* as follows:
 - a. To protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and
 - b. To preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.
2. The proposal does not satisfy Section 4.15(1)(a) of the *Environmental Planning and Assessment Act 1979* in the following manner:
 - a. The proposal is inconsistent with the *Inner West Local Environmental Plan 2022* as follows:
 - i. Section 1.2(2) - *Aims of Plan*: aims (h) and (i), as it will result in adverse environmental impacts on the local character of Inner West and will not prevent adverse and cumulative environmental impacts.
 - ii. Section 5.10 - *Heritage Conservation* and Objective (1)(b) where the development does not conserve the heritage significance of the Conservation Area.
3. The proposal is inconsistent with the Marrickville Development Control Plan 2011 as follows:
 - a. Part 2.20 - *Tree Management*, and O4 as it will not maintain the urban landscape so trees continue to make a significant contribution to its quality, character, and amenity; and Objective O5 as it will not maintain and enhance the amenity of the Inner West Local Government Area through the preservation of appropriate trees and vegetation.
4. The proposal is considered to result in adverse environmental impacts on the built environment pursuant to Section 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979*.
5. The proposal is not considered to be in the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*.



NOTICE OF DETERMINATION – REFUSAL

Issued under Section 4.16(1)(b) of the *Environmental Planning and Assessment Act 1979*

Development Application No.	DA/2023/0715
Applicant	Mr Timothy R Stainton
Land to be developed	28 Francis Street ENMORE NSW 2042
Proposed development	Development Application - one (1) Tree Removal on-site
Cost of development	\$0.00
Determination	The application was determined by Delegation to Staff and consent was refused .
Date of refusal	12 December 2023

Reasons for refusal

1. The proposal will be inconsistent with Section 2.1 of *SEPP (Biodiversity and Conservation) 2021* as follows:
 - a. To protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and
 - b. To preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.
2. The proposal does not satisfy Section 4.15(1)(a) of the *Environmental Planning and Assessment Act 1979* in the following manner:
 - a. The proposal is inconsistent with the *Inner West Local Environmental Plan 2022* as follows:
 - i. Section 1.2(2) - *Aims of Plan*: aims (h) and (i), as it will result in adverse environmental impacts on the local character of Inner West and will not prevent adverse and cumulative environmental impacts.
 - ii. Section 5.10 - *Heritage Conservation* and Objective (1)(b) where the development does not conserve the heritage significance of the Conservation Area.

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Document Set ID: 38452900
 Version: 1, Version Date: 13/12/2023

3. The proposal is inconsistent with the Marrickville Development Control Plan 2011 as follows:
 - a. Part 2.20 - *Tree Management*, and O4 as it will not maintain the urban landscape so trees continue to make a significant contribution to its quality, character, and amenity; and Objective O5 as it will not maintain and enhance the amenity of the Inner West Local Government Area through the preservation of appropriate trees and vegetation.
4. The proposal is considered to result in adverse environmental impacts on the built environment pursuant to Section 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979*.
5. The proposal is not considered to be in the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*.

Right of appeal

If you are dissatisfied with this decision, Section 8.7 of the *Environmental Planning and Assessment Act 1979* gives you the right to appeal to the Land and Environment Court in accordance with the timeframes set out in [Section 8.10](#) of the *Environmental Planning and Assessment Act 1979*. In addition to the above, third party appeal rights are set out in the *Environmental Planning and Assessment Act 1979* and may be applicable.

Section 8.2 of the *Environmental Planning and Assessment Act 1979* provides that the applicant may request the Council to review the determination. Section 8.2 does not apply to complying development, designated development, a determination made by Council under Section 4.2 in respect of Crown applications, or a decision that is already subject to a Section 8.2 review.

For further information please contact **Iain Betts** on **02 9392 5296** or iain.betts@innerwest.nsw.gov.au.



Adele Cowie
Team Leader Development Assessment

Attachment C – Draft Conditions of Consent in the event of IWLPP Approval

Attachment C – Draft Conditions of Consent in the event of IWLPP Approval

CONDITIONS OF CONSENT

Terms and Reasons for Conditions

Under section 88(1)(c) of the EP&A Regulation, the consent authority must provide the terms of all conditions and reasons for imposing the conditions other than the conditions prescribed under section 4.17(11) of the EP&A Act. The terms of the conditions and reasons are set out below.

1. The development is consistent with the objectives of the zone;
2. The development is generally consistent with the development controls;
3. The development will not unreasonably compromise the amenity of nearby properties;
4. The development is compatible with the character of the area;
5. The development is considered suitable for the site; and
6. Approval is considered to be in the public interest.

GENERAL CONDITIONS

Condition	
1.	<p style="text-align: center;">Consent of Adjoining Property and Owners</p> <p>This consent does not authorise the applicant, or the contractor engaged to do the tree works to enter a neighbouring property. Where access to adjacent land is required to carry out approved tree works, Council advises that the owner's consent must be sought. Notification is the responsibility of the person acting on the consent. Should the tree owner/s refuse access to their land, the person acting on the consent must meet the requirements of the <i>Access To Neighbouring Lands Act 2000</i> to seek access.</p> <p>Reason: To meet the requirements of the <i>Access to Neighbouring Lands Act 2000</i>.</p>
2.	<p style="text-align: center;">Other works</p> <p>Works or activities other than those approved by this Development Consent will require the submission of a new Development Application or an application to modify the consent under Section 4.55 of the <i>Environmental Planning and Assessment Act 1979</i>.</p> <p>Reason: To ensure compliance with legislative requirements.</p>

**BUILDING WORK
BEFORE BUILDING WORK COMMENCES**

Condition	
3.	<p>Tree Protection</p> <p>No trees on public property (footpaths, roads, reserves etc.) are to be removed or damaged during works unless specifically approved in this consent. Prescribed trees protected by Council's Tree Management Controls on the subject property and/or any vegetation on surrounding properties must not be damaged or removed during works unless specific approval has been provided under this consent. Any public tree within five (5) metres of the development must be protected in accordance with AS4970—<i>Protection of trees on development sites</i> and Council's Development Fact Sheet—<i>Trees on Development Sites</i>. No activities, storage or disposal of materials taking place beneath the canopy of any tree (including trees on neighbouring sites) protected under Council's Tree Management Controls at any time. Reason: To ensure that trees to be retained are protected.</p>

DURING BUILDING WORK

Condition							
4.	<p>Works to Trees</p> <p>The tree detailed below can be pruned or removed.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: center;">Tree No.</th> <th style="text-align: center;">Botanical/Common Name</th> <th style="text-align: center;">Location</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">1</td> <td><i>Celtis sinensis</i> (Chinese celtis)</td> <td>Rear Yard</td> </tr> </tbody> </table> <p>All tree works shall be undertaken by an arborist with a minimum Level 3 in Arboriculture, as defined by the Australian Qualification Framework and in compliance with Australian Standard AS 4373—<i>Pruning of amenity trees</i> and Safe Work Australia's Guide to Managing Risks of Tree Trimming and Removal Work.</p> <p>Any works in the vicinity of the Low Voltage Overhead Network (including service lines—pole to house connections) shall be undertaken by an approved Ausgrid vegetation contractor for the management of vegetation conflicting with such services.</p> <p>Reason: To identify trees permitted to be pruned or removed.</p>	Tree No.	Botanical/Common Name	Location	1	<i>Celtis sinensis</i> (Chinese celtis)	Rear Yard
Tree No.	Botanical/Common Name	Location					
1	<i>Celtis sinensis</i> (Chinese celtis)	Rear Yard					
5.	<p>Tree Protection</p> <p>No trees on public property (footpaths, roads, reserves etc.) are to be removed or damaged during works unless specifically approved in this consent. Prescribed trees protected by Council's Tree Management Controls on the subject property and/or any vegetation on surrounding properties must not be damaged or removed during works unless specific approval has been provided under this consent. Any public tree within five (5) metres of the development must be protected in accordance with AS4970—<i>Protection of trees on development sites</i> and Council's Development Fact Sheet—</p>						

	<p>Trees on Development Sites. No activities, storage or disposal of materials taking place beneath the canopy of any tree (including trees on neighbouring sites) protected under Council's Tree Management Controls at any time. Reason: To ensure that trees to be retained are protected.</p>
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BEFORE ISSUE OF AN OCCUPATION CERTIFICATE

	Condition
6.	<p>Certification of Tree Planting</p> <p>Within one month of planting of the new tree, Council is to be provided with evidence in the form of an image of the planted tree/s and a copy of a purchase invoice to confirm that:</p> <p>A minimum of 1 x 100 litre size tree, which will attain a minimum mature height of 8 metres, must be planted in a suitable location within the property (at least 1 metre from any boundary and 1.5 metres from any structure) and allowing for future tree growth. The purchased tree must meet the requirements of AS2303—<i>Tree stock for landscape use</i>. Trees listed as exempt species from Council's Tree Management Development Control Plan, which include fruit trees and species recognised to have a short life span, will not be accepted as suitable replacements.</p> <p>Trees required by this condition must be maintained and protected until they are protected by Council's Tree Management DCP. Any replacement trees found damaged, dying or dead must be replaced with the same species in the same container size within one month with all costs to be borne by the owner.</p> <p>The replacement tree/s must be planted within one month of removal.</p> <p>Reason: To ensure appropriate landscaping is undertaken.</p>