14 July 2022

Our Ref: AKL:JCD001/4001

Department of Planning and Environment
4 Parramatta Square, 12 Darcy Street,
PARRAMATTA NSW 2150
ATTN: Minister for Planning and Homes

Dear Minister

**Response to Submission – DA22/1839 – lodged on behalf of Sydney Trains for a Digital Advertising Sign at George Street Rail Overpass, The Rocks**

## 1. Introduction

1.1 We refer to the submission lodged on behalf of the City of Sydney Council (**Council**) dated 4 May 2022 (the **Submission**) in response to DA22/1839 for the removal of two static advertising signs and replacement with a digital advertising sign (**Proposed Development**) lodged on behalf of Sydney Trains (**DA**) to the Department of Planning and Environment (**DPE**). The Submission raises concerns that the proposed development does not adequately address several clauses of the *Sydney Development Control Plan 2012* (**SDCP 2012**).

1.2 Section 4.15 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**EPA Act**) relevantly provides:

> *"**4.15 Evaluation** (cf previous s 79C)*
>
> *(1) Matters for consideration—general In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—*
>
> *(a) the provisions of—*
>
> *(i) any environmental planning instrument, and…*
>
> *(iii) any development control plan, and…*
>
> *that apply to the land to which the development application relates"*

1.3 Accordingly, the SDCP 2012 will be a matter for consideration pursuant to the EPA Act. The key question is how much weight it should be given in the context of the DA.

## 2. Executive Summary

2.1 In our view, the SDCP 2012 should be given little weight by the Minister in determining the DA, for the following reasons:

(a) the Proposed Development achieves permissibility by the provisions of the *State Environmental Planning Policy No 64 – Advertising and Signage* (**SEPP 64**) and

SEPP 64 has detailed provisions relating to development for advertising in transport corridors;

(b) the *"Transport Corridor Outdoor Advertising and Signage Guidelines, November 2017*" (the **Guidelines**) published by DPE contains detailed requirements and planning considerations for advertising in transport corridors;

(c) SDCP 2012 is to be applied flexibly in accordance with the provisions of the EPA Act and recent case law; and

(d) clause 3.16.7.2(2) and 3.16.7.2(9) of the SDCP 2012 as specifically raised in the Submission arguably conflicts and is inconsistent with the relevant provisions of SEPP 64 and the Guidelines.

## 3. SEPP 64 Provisions

3.1 For completeness, we note that the provisions of SEPP 64 have been transferred into *State Environmental Planning Policy (Industry and Employment) 2021* (**Industry and Employment SEPP**) and SEPP 64 is now repealed. The DA and accompanying Statement of Environmental Effects (**SEE**) prepared by Urbis refers to SEPP 64, as does the Submission. As there has been no substantive change in the text of the relevant provisions of SEPP 64 since the commencement of the Industry and Employment SEPP, we will refer to the provisions of SEPP 64 in this letter for consistency with the SEE and the Submission.

3.2 According to the SEE, the Proposed Development is permissible pursuant to clause 16 of SEPP 64, which provides:

> ***"16 Transport corridor land***
>
> *(1) Despite clause 10 (1) and the provisions of any other environmental planning instrument, the display of an advertisement on transport corridor land is permissible with development consent in the following cases—*
>
> *(a) the display of an advertisement by or on behalf of RailCorp, NSW Trains, Sydney Trains, Sydney Metro or TfNSW on a railway corridor…"*

3.3 Clause 13(2) and clause 16(3) of SEPP 64 are relevant to the assessment of advertisements in transport corridors. In summary, the Minister must not grant consent to the DA unless:

(a) the DA is consistent with the objectives in clause 3(1)(a) of SEPP 64 (per clause 13(2)(a));

(b) the DA has been assessed in accordance with the assessment criteria in Schedule 1 to SEPP 64 and the Guidelines (per clause 13(2)(b));

(c) The Minister is satisfied that the proposal is acceptable in terms of—

(i) design, and

(ii) road safety, and

(iii) the public benefits to be provided in connection with the display of the advertisement (per clause 13(2)(b));

(d) if a design review panel was appointed by the Minister, the advice of the design review panel has been considered (per clause 16(3)(b)); and

(e) the Minister is satisfied that the advertisement is consistent with the Guidelines (per clause 16(3)(c).

## 4. Legislation

4.1 Section 3.42(1) of the EPA Act outlines the purpose and status of development control plans generally:

> *"**3.42 Purpose and status of development control plans** (cf previous s 74BA)*
>
> *(1) The principal purpose of a development control plan is to provide guidance on the following matters to the persons proposing to carry out development to which this Part applies and to the consent authority for any such development—*
>
> *(a) giving effect to the aims of any environmental planning instrument that applies to the development,*
>
> *(b) facilitating development that is permissible under any such instrument,*
>
> *(c) achieving the objectives of land zones under any such instrument.*
>
> *The provisions of a development control plan made for that purpose are not statutory requirements..."*.

4.2 The following section of the EPA Act applies to inconsistencies between DCPs and EPIs:

> *"**3.43 Preparation of development control plans** (cf previous s 74C)*
>
> *…(5) A provision of a development control plan (whenever made) has no effect to the extent that—*
>
> *(a) it is the same or substantially the same as a provision of an environmental planning instrument applying to the same land or*
>
> *(b) it is inconsistent or incompatible with a provision of any such instrument..."* (our emphasis)

4.3 Section 4.15(3A) of the EPA Act provides:

> *"**(3A) Development control plans***
>
> *If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority—*
>
> *(a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and*
>
> *(b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and*
>
> *(c) may consider those provisions only in connection with the assessment of that development application.*
>
> *In this subsection, standards include performance criteria."* (our emphasis)

## 5. Case Law

5.1 The recent decision of the Chief Judge of the Land and Environment Court in *Tomasic v Port Stephens Council [2021] NSWLEC 56* (**Tomasic**) provides a succinct statement of the current legal position at [34] and [35] concerning the weight to be given to a development control plan:

> *34 "It is well established that the provisions of a development control plan need to be taken into consideration, in determining a development application, as a 'fundamental element' in or a 'focal point' of the decision-making process: Zhang v Canterbury City Council (2001) 51 NSWLR 589; [2001] NSWCA 167 at [75], [77]. The Court, exercising the function of the consent authority to consider and determine the development application, is required to 'take into consideration' any development control plan of relevance to the development the subject of the development application: s 4.15(1)(a)(iii) of the EPA Act. A provision of the development control plan that is 'directly pertinent' to the development and the development application is entitled to 'significant weight' in the decision-making process, although it is not determinative: Zhang v Canterbury City Council at [75].*
>
> *35 Other factors will also increase the weight to be given to a development control plan. Three factors were identified in Stockland Development Pty Ltd v Manly Council (2004) 136 LGERA 254; [2004] NSWLEC 472 at [87]:*
>
> > *A development control plan adopted after consultation with interested persons, including the affected community, will be given significantly more weight than one adopted with little or no community consultation.*
> >
> > *A development control plan which has been consistently applied by a council will be given significantly greater weight than one which has only been selectively applied.*
> >
> > *A development control plan which can be demonstrated, either inherently or perhaps by the passing of time, to bring about an inappropriate planning solution, <u>especially an outcome which conflicts with other policy outcomes adopted at a State, regional or local level, will be given less weight than a development control plan which provides a sensible planning outcome consistent with other policies</u>."* (our emphasis)

5.2 In accordance with the principles stated in *Tomasic*, a development control plan which conflicts with other policy outcomes adopted at state level will be given less weight than a development control plan which provides a sensible planning outcome consistent with other policies.

5.3 We also refer to two key Court of Appeal cases on the topic of inconsistency between planning instruments: *Castle Constructions Pty Ltd v North Sydney Council (2007) 155 LGERA 52*; [2007] NSWCA 164 (**Castle Constructions**) and *Hastings Point Progress Association Inc v Tweed Shire Council* [2009] NSWCA 285 (**Hastings Point**). The key passages from these decisions were recently discussed by Acting Commissioner Bindon in *Gorgees v Fairfield City Council* [2021] NSWLEC 1238 (**Gorgees**):

> 59 *In Castle Constructions the New South Wales (NSW) Court of Appeal was asked to consider whether there was an inconsistency between two provisions within the same EPI, the North Sydney LEP 2001. At paragraph [41] Tobias JA states:*
>
> *"[41] It was ultimately common ground that the term 'inconsistency' in cl 28A was to be construed in the manner adopted by Kirby P in Coffs Harbour Environment Centre Inc v Minister for Planning & Anor (1994) 84 LGERA 324 at 331 where he observed that the term 'inconsistency' in s 36 of the EPA Act was to be construed having regard to the ordinary meaning of that word. His Honour therefore rejected an argument that the term ought to be approached in a manner similar to that adopted when considering the operation of s 109 of the Australian Constitution. He considered that s 36 concerned, to the extent of any inconsistency, which of at least two laws enacted by or made under the same legislature was to prevail. The resolution of that dispute required only that the word 'inconsistency' be give its ordinary natural meaning without the gloss which had necessarily developed around the meaning of the word in a constitutional setting. The President continued in those terms:*
>
> *'Upon that basis, there will be an inconsistency if, in the provisions of one environmental planning instrument, there is "want of consistency or congruity"; "lack of accordance or harmony" or "incompatibility, contrariety, or opposition" with another environmental planning instrument.*

> *60 In Hastings Point Mc Coll JA at [5] confirmed this interpretive approach. His honour stated at para [5]:*
>
> *"It is unnecessary, in my view, to engage in a semantic analysis of the meaning of the word 'inconsistency'. In the present case it carries its plain meaning - whether cl 8 of the TLEP 2000 and cl 17 of the SEPP - SL could operate concurrently."*
>
> *61 At paragraph [55] of Castle Constructions His Honour considered whether there was an "inconsistency in substance as distinct from mere form" and looked to the objectives of the controls in question to assist in that regard."*

5.4 In *Gorgees*, Commissioner Bindon accepted that the principles from *Castle Constructions* and *Hastings Point* are applicable to a situation where the provisions of a state environmental planning policy conflict with the provisions of a DCP.

**6. Application to the DA**

6.1 In our view, the provisions of SEPP 64 as well as the Guidelines are the primary source of assessment criteria for the display of advertisements in transport corridors. The Guidelines are comprehensive, and the SEE has undertaken a detailed assessment of the Proposed Development against the SEPP 64 criteria and the Guidelines.

6.2 Furthermore, we note that Figure 1 on page nine of the Guidelines clearly delineates the approval process for development which requires consent by the Minister and development which requires consent from the relevant local Council. For development in transport corridors where the Minister is the consent authority, SEPP 64 and the Guidelines are the primary source of assessment criteria, not the local planning controls.

6.3 As such, it appears there is a clear intention in the SEPP 64 provisions and the Guidelines that local planning controls, such as the SDCP 2012, are largely irrelevant to the assessment of advertising in transport corridors.

6.4 In our view, the relevant provisions of the EPA Act indicate that the "principal purpose" of a DCP is to provide "guidance" as to certain matters to the persons proposing to carry out relevant development and to the consent authority for any such development (s3.42 of the EPA Act). Such provisions of a DCP are expressly stated not to be statutory requirements (s3.42 of the EPA Act) and any standards are to be considered flexibly (s4.15(3A) of the EPA Act).

6.5 Section 3.42(b) of the EPA Act indicates that a development control plan is only to facilitate development that is permissible under the applicable environmental planning instrument. As the current DA only achieves permissibility through SEPP 64, we query how much weight should be given to a development control plan which primarily relates to permissible development in accordance with a local environmental plan.

6.6 The principles stated in *Tomasic* and *Gorgees* reinforce the position that a development control plan which conflicts or is otherwise inconsistent with policy outcomes at a state level and the provisions of the state environmental planning policy are to be afforded significantly less weight.

6.7 In our view, the provisions of the SDCP 2012 referenced in the Submission which relate to "public benefit" arguably conflict and are incompatible with the "public benefit" policy outcomes sought in SEPP 64.

6.8 The objectives of Section 3.16.7.2 of the SDCP 2012 are to provide guidance on advertisement structures and third-party advertising, and to ensure that there is public benefit derived from such signs. The SDCP 2012 does not directly apply to signs in transport corridors.

6.9 The objects of SEPP 64 include "to ensure that public benefits may be derived from advertising in and adjacent to transport corridors." This is further articulated in clause 13(2)

and 16(3)(c) of SEPP 64. Page 48-49 of the Guidelines provides detailed guidance on what will constitute a public benefit for advertising in transport corridors on behalf of Sydney Trains.

6.10 There is therefore arguably a "want of consistency or congruity" or "lack of accordance or harmony" between the public benefit obligations stipulated under SEPP 64 and the public benefit requirements in the SDCP 2012.

6.11 Accordingly, it may be inappropriate for the Minister to apply the public benefit test in accordance with SEPP 64 and the Guidelines and also apply the public benefit requirements in clause 3.16.7.2(9) of the SDCP 2012 for the reasons set out above. What is clear, is that the Minister will need to be satisfied that there will be acceptable public benefits provided by the DA in accordance with SEPP 64 and as further articulated in the Guidelines.

6.12 In light of the above, SDCP 2012 should be afforded little weight in accordance with the current case law on this matter and the incongruity that arises in seeking to apply the SDCP 2012 to the DA.

Please do not hesitate to contact us if you have any questions in relation to this submission.

Yours faithfully

Per: 

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