

27 January 2016

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**Your reference:**  
**Our reference:**  
2832249

Dear Christian

**Advice on draft conditions of consent to Development Application No. DA 333/2015**  
**Property: Coopers Paddock, Governor Macquarie Drive, Warwick Farm NSW (Lot 42 in DP 1201607)**

We refer to our meeting on 13 January 2016 in relation to the draft conditions of consent (**Draft Conditions**) proposed by Liverpool City Council (**Council**) as part of any development consent granted to Development Application No. DA 333/2015 (**DA**).

**1 Instructions**

- 1.1 You have asked us to provide planning law advice in relation to the appropriateness of those Draft Conditions which relate to obligations which exist under the 'Planning Agreement – Inglis, Coopers Paddock, Warwick Farm' between Council and the Australian Turf Club Limited, having document reference no. 65 35 4369 JRT (**Planning Agreement**).
- 1.2 In particular, you have requested our advice in relation to the appropriateness of Draft Conditions No. 5, 6, 7 and 122.

**2 Advice**

- 2.1 In our view, it is inappropriate and unnecessary for obligations already contained within the Planning Agreement to also be separately imposed as conditions of a development consent.
- 2.2 Accordingly, we consider that Draft Conditions No. 5, 6, 7 and 122 should properly be deleted from the Draft Conditions.
- 2.3 Our reasons for forming this view are set out below.

Effect of s93H of the EP&A Act

- 2.4 The Planning Agreement has been registered on the title to the Property, and accordingly section 93H of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) applies.

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2.5 Section 93H(3) of the EP&A Act provides that:

*"A planning agreement that has been registered by the Registrar-General under this section is binding on, and is enforceable against, the owner of the land from time to time as if each owner for the time being had entered into the agreement."*

2.6 The Planning Agreement therefore runs with the land and is binding on the current registered proprietor of the Property (being The Trust Company Limited, as custodian of the Stockland Trust), as well as all future owners of the Property.

2.7 Accordingly, the obligations within Draft Conditions No. 5, 6, 7 and 122 are already in existence and binding on not only the parties to the Planning Agreement but also all future owners of the Land.

#### Enforcement mechanisms to secure performance of Planning Agreement obligations

2.8 In our view, Council can take comfort that it has sufficient enforcement powers under both:

- (1) the Planning Agreement; and
- (2) the EP&A Act;

to secure the performance of the obligations within the Planning Agreement, and in accordance with the timing requirements under the Planning Agreement, without needing to include those obligations within the Draft Conditions.

2.9 In particular, clause 9 of the Planning Agreement has the effect that:

- (1) Council may refuse to issue an Occupation Certificate for the Development in certain circumstances, including if the development contributions under the Planning Agreement have not been completed within the specified timeframes (clause 9.1); and
- (2) the Developer:
  - (a) must not make an application for the issue of an Occupation Certificate from a Principal Certifying Authority (**PCA**) if the development contributions under the Planning Agreement have not been completed (clause 9.2(2)); and
  - (b) must supply a copy of the Planning Agreement and ensure that the PCA is made aware of the Developer's obligations under the Planning Agreement when it does make an application for the issue of an Occupation Certificate from a PCA.

2.10 Similarly, sections 109H(2) and 109J(1(c1)) of the EP&A Act restrict the issue of an Occupation Certificate or Subdivision Certificate unless any preconditions to the issue of the certificate that are specified in a planning agreement have been met.

2.11 Clause 13 of the Planning Agreement also provides security for the performance of the obligations under the Planning Agreement by way of a bond or bank guarantee.

2.12 Further, section 123 of the EP&A Act provides a right for any person to bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the EP&A Act, which includes a contravention (or threatened or apprehended contravention) of a planning agreement.

2.13 Given the above, we consider that there already exists under both the EP&A Act and Planning Agreement sufficient security and enforcement powers for Council to ensure that the obligations within the Planning Agreement will be complied with and that there is no utility or added benefit in duplicating those obligations as conditions of consent.



Duplication and inconsistency

- 2.14 Not only do we consider that including obligations under the Planning Agreement as conditions of consent results in an unnecessary duplication of obligations, we are also concerned that this has the very real potential to create inconsistencies between the Planning Agreement and the conditions of consent.
- 2.15 For example, proposed Draft Condition 122 as currently drafted in the Draft Conditions is not consistent with the Planning Agreement in terms of the timing for performance of certain works. Draft Condition 122, as currently drafted, requires all works identified as part of the Planning Agreement to be completed prior to the issue of an Occupation Certificate. This does not accurately reflect the detailed timing provisions negotiated as part of the Planning Agreement – namely, the time for completion of the works in Schedule 3, Part 1, Items 1 and 2 of the Planning Agreement.
- 2.16 In our view, it is appropriate that the obligations are included in only one document. This will ensure that there is no inconsistency in relation to the performance of the obligations when regard is had to the provisions of the Planning Agreement as a whole. On the basis that the Planning Agreement has already been entered into, is registered on title and has been partly performed by the parties, it is appropriate that the obligations remain in this document but in this document only.

Potential for amendment of Planning Agreement

- 2.17 Finally, we understand that Stockland is in the process of liaising with Council in relation to the potential amendment of the Planning Agreement.
- 2.18 This presents a further reason as to why it is preferable for the obligations under a Planning Agreement to be separate from the conditions of any development consent – namely, that the Planning Agreement may be amended without the added requirement for any development consent to be modified under section 96 of the EP&A Act to reflect those amendments to the Planning Agreement.

**3 Conclusion**

- 3.1 For the reasons set out above, we are of the view that it is inappropriate and unnecessary for the existing obligations within the Planning Agreement to also be included as conditions of consent to the DA. The legislative regime that applies to planning agreements under the EP&A Act ensures that those obligations apply in perpetuity and will be complied with at the times specified in the Planning Agreement regardless of inclusion in any conditions of consent to the DA.
- 3.2 We therefore consider that Draft Conditions No. 5, 6, 7 and 122 should properly be deleted from the Draft Conditions.

Please let us know if you have any questions or would like to discuss any aspect of this advice.

Yours faithfully



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Norton Rose Fulbright Australia  
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