

14 December 2017

Simba Developments Pty Ltd
C/- Allam Homes Pty Ltd
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Also by email: carmeno@allam.com.au

Dear Ms Osborne

Re: DA 935-2015 – Proposed Subdivision Lot 1 DP 588912 Marsh Road, Silverdale

We refer to your email dated 12 December 2017 requesting advice regarding the contents of the letter sent to Wollondilly Shire Council (**Council**) on 20 November 2017 (**Letter**).

We note that Simba has now actioned all of the items provided in Council's email dated 13 October 2017, as follows:

- Registration of DP 1236986 Linen Plan of subdivision to effectively separate the E2 zoned Environmental Land from the residential zoned development parcel.
- Submission of amended plans for application DA 935-2015 (**DA**) to reflect the new title details; and
- Revised draft planning agreement with the new property descriptions for the dedication of the future Reserves, works and ongoing maintenance.

In the Letter, Council was requested to confirm that it is working to expedite the submission of the DA Assessment report to the Sydney Western City Planning Panel (**Planning Panel**). In light of this, Simba requests advice on whether Council can and should commence the DA assessment process prior to the draft Voluntary Planning Agreement (**VPA**) being considered by the Council in February 2018.

Our advice:

Yes, Council can and should commence the DA assessment process. It would be inappropriate for the DA assessment to be delayed due to the assessment of the VPA because they are two separate processes. Awaiting assessment of the VPA is not a valid reason to justify delay in assessing a DA.

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Reasons for advice:

In our view, it is not necessary or appropriate for Council to delay the DA assessment process by deferring of the Planning Panel report until after Council consideration of the VPA in February 2018. Section 93I of the *Environmental Planning and Assessment Act 1979 (NSW) (the Act)*, makes it clear that the DA assessment and the VPA approval are two separate processes:

Section 93I(2) - precludes a consent authority refusing to grant development consent on the ground that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.

Section 93I(3) - a consent authority is able to require a planning agreement (or any agreement containing provisions similar to those that are contained in an agreement referred to in section 93F) to be entered into as a condition of development consent, but only if it requires an agreement that is in the terms of an offer made by the developer in connection with the development application or a change to an environmental planning instrument

The Department of Planning's *Development Contributions Practice Notes – Planning Agreements* (July 2005), reiterates the effect of Section 93I and indicates that there is a clear separation of the DA assessment from the VPA approval by invalidating any provision of a Council environmental planning instrument that attempts to avoid the effect of Section 93I. On page 4 of that document, under the heading 'Limitation on provisions of environmental planning instruments' it states:

'Section 93I(1) invalidates any provision of an environmental planning instrument made after the commencement of that section that expressly requires a planning agreement to be entered into before a development application can be made, considered or determined, or that expressly prevents a development consent from being granted or having effect unless or until a planning agreement is entered into.'

Therefore, any Council environmental planning instrument or policy that indicates a planning agreement must or should be made prior to a DA being assessed would be invalid due to the operation of Section 93I(1) of the Act.

In our view, it is clear that having regard to Section 93I(1) – (3) of the Act, Council is required to assess the DA regardless of the status of the draft VPA that is before Council. It would be wholly inappropriate for Council to refuse to assess the DA before the VPA is approved and Council should be working to expedite the submission of the DA Assessment report to the Planning Panel as there are no further matters preventing the determination of the DA.

We trust this advice answers the questions raised by Simba. Please do not hesitate to contact us if you require further advice or any clarification of the above.

Yours faithfully



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