



Maddocks

Lawyers
Angel Place
Level 27, 123 Pitt Street
Sydney NSW 2000
Australia

GPO Box 1692
Sydney New South Wales 2001

Telephone 61 2 9291 6100
Facsimile 61 2 9221 0872

info@maddocks.com.au
www.maddocks.com.au

DX 10284 Sydney Stock Exchange

Advice

To Julian Urquhart
Senior Development Manager
Greenland (Sydney) Lachlan's Line Macquarie Park Development Pty Ltd
Julian.Urquhart@glgroup.com.au

Date 7 August 2017

Subject **Draft Conditions of Consent for 25-27 Epping Road, Macquarie Park**

Questions The Council has proposed as a deferred commencement condition that Greenland enter a planning agreement (**VPA**) on terms offered by Greenland. Greenland has offered a bank guarantee in the amount of \$900,000 to the Council so that the deferred commencement condition is deleted and made an ordinary condition rather than a deferred commencement condition. You have asked us to consider whether or not Council is able to accept security prior to that VPA having been exhibited or executed.

Summary of advice *Below is a summary of our advice. Please read it in conjunction with the detailed advice that follows.*

In our view, it is lawful for Council to impose a condition that requires a bank guarantee (or other security) to secure the works in kind offered by Greenland which are proposed to be included in a VPA which is yet to be drafted, exhibited or executed because:

- it is expressly authorised by section 80A(6) of the *Environment Planning & Assessment Act 1979* (**EP&A Act**); and
- the security offered by Greenland is consistent with the Council resolution dated 9 May 2017.

We have included at point 6 in this advice, suggested amendments to the conditions of consent.

Contact **Our Ref:** MJW:6682618.001

Michael Winram
61 2 9291 6228
michael.winram@maddocks.com.au

Michael L. Wong

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Detailed analysis

Background

1. Greenland made a development application for development on both Lots 104 and 105 in DP1224238 (Lachlan's Line, North Ryde). The proposed development includes:
 - 1.1 Lot 104
 - (a) Area – c12,500sqm
 - (b) c580 residential apartments
 - (c) c5,200sqm of retail space
 - (d) a c2,500sqm Community Facility (subject of the VPA between Urban Growth and Ryde City Council)
 - (e) Lachlan's Square (public space in-front of the Community Facility)
 - 1.2 Lot 105
 - (a) Area – c3,000sqm
 - (b) c300 residential apartments
 - (c) c750sqm of retail space
 - (d) Laura's Place (pedestrian connection between Jarvis Circuit and Central Park located to the north of Lot 105)
2. The Council has issued draft conditions of consent that include a deferred commencement condition that requires a VPA be entered that transfers to Greenland the stratum of land beneath a portion of Jarvis Circuit to enable the construction of a vehicle access tunnel between Lots 104 and 105 and works in kind by Greenland to the value of \$900,000 for the construction and fitout for the Community Facility on Lot 104 in DP1224238.
3. In order for the proposed deferred commencement condition to be deleted and redrafted as an ordinary condition of consent, Greenland has offered the Council a bank guarantee in the amount of \$900,000. This amount reflects the value of the works-in-kind offered to the Council as part of the VPA. You have asked us to consider whether or not Council is able to impose a condition of consent that requires Greenland to provide security prior to that VPA having been exhibited or executed?

Legal analysis

4. **A condition requiring security for the provision of the public works is authorised by section 80A(6) of the EP&A Act**
 - 4.1 Section 80A(1)(h) of the EP&A Act states that a condition of development consent may be imposed if it is authorised to be imposed under subsections (5) to (9) of section 80A.
 - 4.2 Section 80A(6) of the EP&A Act states (emphasis added):

- (a) making good any damage caused to any property of the consent authority as a consequences of the doing of anything to which the consent relates,
- (b) **completing any public work** (such as road work, kerbing and guttering, footway construction, stormwater drainage and environmental controls) **required in connection with the consent**,
- (c) remedying any defects in any such public work that arise within 6 months after the work is completed.

5.4 Greenland's offer of a bank guarantee for \$900,000 (being the value of the proposed works-in-kind) is consistent with the Council's resolution that Greenland agree to the provision of sufficient security for the public benefits within Greenland's offer dated 24 February 2017.

5.5 Because the Council has already accepted Greenland's offer to enter into a VPA, we see no reason why the security could not be provided in advance of the actual VPA being drafted, exhibited and entered.

6. **Amendments to conditions of consent**

6.1 We have reviewed the draft conditions of consent provided by the Council.

6.2 Deferred commencement condition 1(a) can be deleted, and a new general condition 2 be inserted as follows:

2. Voluntary Planning Agreement

(a) Prior to the issue of a Construction Certificate for the Community Facility Work (as defined in the North Ryde M2 Site Planning Agreement referred to in condition 3), a Planning Agreement (as defined pursuant to Section 93F of the *Environmental Planning and Assessment Act 1979*) must be entered with Council for the delivery of the public benefits identified within the letter of offer from Urbis on behalf of Lachlan's Line Macquarie Park Development Pty Ltd dated 24 February 2017, and in accordance with the terms accepted by Council at its ordinary meeting 26 April 2017, No. 3/17 in respect of the offer.

(b) Pursuant to Section 80A(1) of the *Environmental Planning and Assessment Act 1979*, the Planning Agreement the subject of condition 2(a), must be lodged for registration on the title of the property within 1 month of signing the Planning Agreement.

(c) Prior to the issue of the first Construction Certificate, a bond in the amount of \$900,000 by way of cash deposit or unconditional bank guarantee in favour of Council must be provided to the Council to secure the public benefits to be delivered in accordance with the Planning Agreement identified in condition 2(a). The bond must be returned by the Council upon practical completion of the public benefits identified within the letter of offer from Urbis on behalf of Lachlan's Line Macquarie Park Development Pty Ltd dated 24 February 2017, and in accordance with the terms accepted by Council at its ordinary meeting 26 April 2017, No. 3/17 in respect of the offer.

Contact

Please contact Michael Winram on 02 9291 6228 or email michael.winram@maddocks.com.au if you have any other queries.