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22 August 2019

Planning Panels Secretariat
320 Pitt Street
Sydney NSW 2000

By email: enquiry@planningpanels.nsw.gov.au

Dear Madam/Sir

Development Application No.: SPP-17-00047
Panel Reference: 2018SWC008
Proposed Development at 227 Railway Terrace, Schofields

1 Introduction

- 1.1 We act on behalf of Coles Group Property Developments Ltd, the Applicant for Development Application No. SPP-17-00047 (**Development Application**).
- 1.2 As the Panel may be aware, the Development Application is the subject of a Class 1 merit appeal to the Land and Environment Court, on the basis of Council's deemed refusal of the Development Application. Most recently, the Court granted the Applicant leave to amend the Development Application on 20 March 2019.
- 1.3 The appeal is listed for final hearing on 21-25 October 2019.
- 1.4 We refer to:
 - (a) the assessment report by Blacktown City Council (**Council**) dated 2 August 2019 (**Assessment Report**); and
 - (b) the draft conditions of development consent prepared by Council, being attachment 10 to the Assessment Report (**Draft Conditions**).
- 1.5 The purpose of this letter is to provide the Panel with:
 - (a) The Applicant's comments on Council's recommendation as set out in the Assessment Report;
 - (b) the Applicant's response to the Assessment Report, including in particular further details in relation to the requirements of Roads and Maritime Services (**RMS**) which have been omitted from the Assessment Report; and
 - (c) the Applicant's marked up version of the Draft Conditions, together with a brief explanation for the basis of those amendments (**Applicant's Conditions**).
- 1.6 We ask that the Panel resolve to grant consent to the Development Application subject to the Applicant's Conditions.

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- 1.7 If the Panel is not minded to consent to the Development Application subject to the Applicant's Conditions, the grant of any consent subject to Council's Draft Conditions is not satisfactory to the Applicant. In that event, the Panel should defer determination of the Development Application, and direct Council to revise the Draft Conditions in consultation with the Applicant, and in a manner that reflects the proposed development for which consent is sought by the Applicant.

2 Summary of Applicant's response

- 2.1 Council's assessment does not raise any merit matters of concern in relation to the proposed built form within the site.
- 2.2 Rather, Council's assessment and Draft Conditions seek impermissibly to alter fundamental aspects of the development application by requiring the inclusion of elements which the Applicant has disavowed, such as subdivision, road widening, dedication of land for roads, and embellishment of a proposed future town plaza largely to be located on land not owned or controlled by the Applicant.
- 2.3 The Applicant does not accept that any of these aspects are required as a result of the proposed development, nor are they contemplated as items in Council's contributions plan.
- 2.4 The Applicant has previously offered to enter into a voluntary planning agreement with Council to facilitate the delivery of some of these elements provided that an appropriate offset against monetary contributions could be agreed. Council rejected that offer.
- 2.5 In essence, the Council has converted its numerous contentions in the Land and Environment Court proceedings into conditions of consent requiring fundamental alterations to the proposed development.

3 Inaccuracies in the Assessment Report

- 3.1 The Assessment Report contains a number of inaccuracies or omissions, as described in more detail below. These matters are relevant to the Panel's consideration of the Development Application.

RMS requirements

- 3.2 The Assessment Report omits any reference to the following recent correspondence from RMS relevant to the assessment of the Development Application:
- (a) Letter from RMS dated 11 January 2019, a copy of which appears at Attachment 1 of this letter (**Attachment 1**); and
 - (b) Email from RMS dated 8 May 2019, a copy of which appears at Attachment 2 of this letter (**Attachment 2**).
- 3.3 This additional correspondence is relevant because:
- (a) it relevantly confirms that sets out RMS had reviewed and not identified any issues with the Applicant's traffic modelling submitted by the Applicant's traffic consultant to RMS, which demonstrated that traffic signal warrants had been demonstrated by this modelling (see Attachment 1); and
 - (b) it sets out RMS' comments arising out of RMS' review of the Applicant's amended plans filed with the Court in March 2018, and thereafter referred to RMS on 26 March 2019. These comments in Attachment 2 provide that the road within 20 metres of the stop line of the intersection of Railway Terrace and the Southern Access Road must be dedicated as public road in order to enable RMS approval of the proposed traffic signals at this intersection (see Attachment 2); and
 - (c) it clarifies that the reference in Attachment 1 to a 'civil design plan' for the intersection of Railway Terrace and Jacqui Avenue should in fact be reference to 'concept civil design plans'.

3.4 In this regard, we point out the following inaccuracies in the Assessment Report with respect to RMS' position:

- (a) In **Part 4 (Background)**, the correspondence from RMS in Attachment 1 and Attachment 2 to this letter has been omitted;
- (b) In **Part 7 (Key Issues)**:
 - (i) **paragraph 7.1.1** states that *'approval of the proposal in its current form would be premature in circumstances where RMS has raised concerns about the adequacy of road access proposed by the Applicant.'*

In our view this statement is misleading given that the concerns relating to the adequacy of the road access were raised in the RMS correspondence dated 12 June 2018 but not in Attachment 1 which was issued by RMS subsequently. RMS have raised no concerns with the traffic modelling or the road access in their latest correspondence;

- (ii) **paragraph 7.1.4** states that *'the Applicant has not demonstrated that the southern access road can meet the requirements of RMS and remain functional,'* and states that on this basis the entirety of the Southern Access Road should be dedicated to Council.

The Applicant undertook detailed traffic modelling as part of the amended Development Application, which included the Southern Access Road as a private road and therefore without public bus access. RMS' response to the amended Development Application is set out in Attachment 2, and confirms that just 20 metres of the road would require dedication as a public road. RMS otherwise made no further comments on the amended Development Application, which indicates that the Southern Access Road otherwise meets the requirements of RMS and will be functional, in the form proposed by the amended Development Application;

- (iii) **paragraph 7.1.5** states that *'traffic signals cannot be installed without approval from the RMS at the Railway Terrace and Jacqui Avenue intersection – until 'traffic signal warrants' are met.'*

The Applicant does not disagree with this as a statement of fact. However, we repeat our comments at paragraph 3.3(a) above and note RMS' advice that it had no concerns about traffic signal warrants being met;

- (iv) **paragraph 7.2.2** states that *'vehicle queues on Railway Terrace and Jacqui Avenue will extend past the site access driveways onto Railway Terrace and Jacqui Avenue. This will lead to unacceptable delays for motorists seeking to exit the development and is exacerbated due to the fact that Jacqui Avenue and Railway Terrace have not been provided with additional traffic lanes as is required.'*

The Applicant's traffic modelling confirms that the traffic impacts including the extent of any vehicle queuing is acceptable.

- (v) **paragraphs 7.4.3 and 7.4.5** refer to the provision of bus services.

The Applicant's amended DA proposes the Southern Access Road as a private road and therefore without public bus access.

3.5 The Applicant has demonstrated as part of the amended Development Application, and has satisfied RMS, that:

- (a) adequate provision is made to service the development by way of the Southern Access Road and Eastern Access Road as private roads, such that the conditions Council seeks to

impose in relation to the provision and dedication of these roads is unnecessary and unlawful as set out in more detail in paragraph 4 below; and

- (b) the warrants for traffic signals at the intersection of Railway Terrace and the Southern Access Road are capable of being met, and therefore condition 3.7.1(e) of the Draft Conditions is not necessary. The Applicant instead refers to condition 14.8.2 which requires installation of traffic signals at this intersection to be complete.

4 Proposed Conditions of Consent

4.1 Enclosed as Attachment 3 is a copy of the Applicant's Conditions. The Applicant proposes amendments to Council's draft conditions which fall broadly into two categories:

- (a) Category 1: a small number of amendments are proposed to conditions in relation to, for example, acoustic compliance and the requirements of the NSW Police, so as to accurately reflect the assessment and recommendations of the Applicant's consultants or the position agreed between the Applicant and the relevant referral agency on the matters the subject of the conditions. Where the reason for the proposed amendment is not self-evident, a note is provided; and
- (b) Category 2: amendments required so as to ensure the development consent, if granted by the Panel, does not contain conditions that are beyond power and otherwise unlawful.

4.2 We set out in the following paragraphs an explanation for the basis of the Category 2 amendments.

Conditions that have the effect of amending that for which consent is being sought

4.3 Council recommends the imposition a number of conditions which, when read together, have the effect of significantly altering the proposed development for which consent is sought. The NSW Court of Appeal has confirmed that imposing conditions that have this effect is beyond power.¹

4.4 The conditions which offend the principle established in *Mison* are those that seek to require the Applicant to:

- (a) Expand the definition of the development for which consent is sought (condition 3.1.2) by adding new elements including the construction of the eastern side of Pelican Road for which the Applicant does not seek consent, and by adding subdivision for which the Applicant does not seek consent (condition 3.2.1);
- (b) provide the Southern Access Road (also referred to by Council as Jacqui Avenue) at a width beyond what is proposed by the Applicant, and which exceeds the requirements of Council's Development Control Plan (**DCP**);²
- (c) widen Railway Terrace and dedicate a portion of the site for this purpose (conditions 1.2(ii) and 3.7.1(a);
- (d) dedicate the Southern Access Road and part of the Eastern Access Road (also referred to as Minerva Road) as public roads, contrary to the Applicant's proposal that those roads remain private roads (which will be capable of being traversed by the public to access the proposed development) and in a manner which is not contemplated or authorised by an adopted contributions plan (as to which see paragraph 4.8 and following);³ and
- (e) embellish the future 'town plaza', in an unspecified manner, on land which includes land not owned by the Applicant.⁴

¹ *Mison and Others v Randwick Municipal Council and Others* (1991) 23 NSWLR 734 (**Mison**).

² See for example condition 3.7.1(b), condition 7.6.7 and condition 14.8.1(ii) of the Draft Conditions which the Applicant proposes to amend.

³ See for example advisory note 3.7 (which is not a condition of consent), condition 3.1.2(b), condition 3.2.1 and condition 3.7.1(h) of the Draft Conditions, which the Applicant proposes to delete.

⁴ See condition 4.7 of the Draft Conditions, which the Applicant proposes to delete.

- 4.5 The means by which Council proposes to secure these significant alterations to the proposed development is to impose 'extensive conditions' which require the Applicant to amend the plans prior to any construction certificate being issued, as set out in condition 3.7, and by conditioning the delivery of those elements.
- 4.6 The Applicant proposes that these conditions be deleted or amended, as set out in the Applicant's amended Draft Conditions.
- 4.7 The Applicant also proposes the deletion of a number of 'advisory notes', the legal status of which is unclear.

Dedication of land other than in accordance with Council's Contributions Plan

- 4.8 The Draft Conditions seek to require the Applicant to:
 - (a) construct roads and dedicate them to Council, free of cost, for the purpose of:
 - (i) road widening of Railway Terrace;
 - (ii) a new public road described as 'Jacqui Avenue' (referred to in the Development Application as the Southern Access Road);
 - (iii) a new public road described as 'Minerva Road' (referred to in the Development Application as the Eastern Access Road); and
 - (b) require the Applicant to embellish the town plaza, which comprises land owned by the Applicant, but also land owned by Council and another private landowner, none of which is identified in Council's Contributions Plan.
- 4.9 Section 7.11(1) of the *Environmental Planning and Assessment Act 1979* provides that a consent authority does not have power to condition the dedication of land for infrastructure that is not identified in Council's Contributions Plan. Where, as here, the consent authority is the Panel not a Council, it is permissible for the Panel to depart from Council's Contributions Plan, however the Panel is required to have regard to the Contributions Plan before imposing the condition.
- 4.10 Council's Assessment Report seeks to rely on 'acknowledged and accepted convention' as the basis to justify the imposition of the relevant conditions. The Applicant does not accept that the proposed development requires the widening of Railway Terrace to provide an additional lane that Council has identified will be used for kerbside parking, nor that there is a lawful basis for Council to require the dedication of 'Jacqui Avenue'.
- 4.11 Section 7.11(2) requires that any such conditions may only require a reasonable dedication or contribution for the provision, extension or augmentation of the public amenities and public services concerned. For the reasons set out in this letter, the relevant conditions are unreasonable and offend s7.11(2).
- 4.12 The Applicant initially offered to enter into a planning agreement with Council to provide the works in question provided that appropriate offsets against monetary contributions were recognised which, as noted above, was rejected by Council. The Applicant then amended the Development Application to:
 - (a) propose to construct the roads referred to in paragraph 4.8(a) as private roads on land owned by the Applicant, with the effect that those roads service the proposed development and would be accessible to the public, but which are not to be dedicated; and
 - (b) set aside the part of the land within the Applicant's site which has been identified in Council's DCP (but not the Contributions Plan) as future town plaza, for future embellishment by Council.

5 Conclusion

- 5.1 The Applicant requests that the Panel embrace the Applicant's Conditions and grant consent the Development Application subject to those conditions.
- 5.2 If the Panel is not prepared to do so, then we ask that the Panel defer determination of the Development Application, and direct Council to revise the Draft Conditions in consultation with the Applicant, and in a manner that reflects the proposed development for which consent is sought by the Applicant.

Yours faithfully



Felicity Rourke

Partner

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Encl: Attachment 1: Letter from RMS dated 11 January 2019
Attachment 2: Email from RMS dated 8 May 2019
Attachment 3: Applicant's amended Conditions

Copy to: Peta Hudson, Senior Associate, Marsdens Law Group