

31 August 2020

Judith Portelli
Manager Development Assessment
Blacktown City Council
PO Box 63
BLACKTOWN NSW 2148

This letter provides Landcom's response to the Panel's deferred decision, the Urban Design Review (UDR) and Council's recommendations concerning the above-mentioned development application (DA).

Landcom continues to hold serious concerns regarding the Panel's approach to the assessment and determination of the DA.

Attachment 1 to this letter is the legal advice Landcom received from Lindsay Taylor Lawyers regarding the Panel's decision to defer determination of the DA and to require the UDR to be carried out (**Legal Advice**). The concerns raised in the Legal Advice have manifested in the recommendations in the UDR, and proposed conditions of consent. The recommendations and conditions of consent demonstrate a failure to:

- **properly apply the DCP applicable to the site**, contrary to s4.15(1)(a)(iii) and s4.15(3A) of the *Environmental Planning & Assessment Act 1979 (EP& A Act)* (see paragraphs 12 to 21 of the Legal Advice); and
- understand the role of the consent authority under s4.15 of the EP& A Act, which is to determine the DA before it, against the applicable planning controls, and **not to consider alternatives or whether some other development might be preferable** (see paragraphs 22 to 27 of the Legal Advice).

In addition, a number of the conditions of consent proposed are likely beyond power and invalid to the extent that they could result in the development approved being significantly different from that the subject of the DA (see *Mison v Randwick City Council* (1991) 23 NSWLR 734), improperly seek to impose additional development controls on future development through restrictions on title, are unrelated to the development proposed and subvert the purpose of the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP)*.

However, Landcom is, for reasons set out elsewhere in this letter and its attachments, eager to have the DA determined urgently and before the end of 2020.

Landcom is prepared to work with Council in order to attempt to meet some of the objectives of Council and the UDR, to the extent that is legally possible. Therefore, whilst Landcom cannot legally accept most of the conditions suggested in Council's recommendations (as to do so could jeopardise any consent granted) Landcom will agree to conditions to the following effect:

- To limit development on the battle-axe lots (Lots 101-106 and 122-127) to single storey development; and
- To submit design variations to the appearance of the abutting dwellings on Lot 128 to Lot 139 and Lot 201-212, provided that no variation is required to the setback (see the discussion in Landcom's response to Council's Recommendation D in **Attachment 2**).

Landcom considers it is able to agree to such conditions, in the terms discussed further in **Attachment 2**, as the variation to the DA required by those conditions is not such as to constitute a significant alteration, and Landcom considers that there is a better prospect of successfully defending the legality of the conditions.

Attachment 2 to this letter contains a summary table in response to Council's draft recommendations to outline Landcom's position, reasoning for this position and Landcom's willingness to resolve each individual matter.

A detailed response to the Panel's deferred decision and the subsequent UDR has been provided at **Attachment 3**.

As set out in the Legal Advice, Landcom is of the view that the UDR was unnecessary and irrelevant to the assessment of the DA, and resulted in unnecessary delay to the determination of the DA.

The swift determination of this DA is critical for the viability of this project noting that the contribution cap is proposed to be removed on 31 December 2020. Landcom requests Council's assistance in recommending that the Panel immediately determine the DA especially in light of the NSW Governments recommendation to fast track regionally significant development. However, if a satisfactory determination of the DA is not forthcoming Landcom may pursue other avenues.

Again, Landcom thanks Council for their support and commitment to the project. Please advise if you need any additional information or clarification.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Matthew Beggs', with a stylized, looping flourish at the end.

Matthew Beggs

Executive General Manager, Partnership and Business Development

ATTACHMENT 1

Lindsay Taylor Lawyers advice regarding the Panel's decision to defer determination of the DA

ATTACHMENT 2

Response to Council's Recommendations

Council recommendation	Landcom's response and legal comments
Recommendation A 1. <i>A single product is only permitted on proposed Lots 116 to 119 inclusive, i.e. dual occupancy or semi-detached dwelling products are not permitted.</i>	The Growth Centres SEPP and the Codes SEPP govern the permissible uses on the site. Use of the site is not a matter for the Panel to control by way of a restrictive covenant. Even if a condition of this type was imposed, it is likely beyond power and invalid. The Courts have generally refused to uphold attempts to impose such covenants on the basis that this is a matter for planning instruments. Control over the use of land is a planning objective which should not be governed by covenants. In addition, the imposition of such a condition demonstrates an impermissible application to the DA of standards more onerous than those in the applicable planning instruments and DCP. The Courts have consistently held that that is unlawful and contravenes s4.15(1) and (3A) of the EP& A Act. Any condition imposed on the consent to this DA cannot limit what can be constructed as complying development under the Codes SEPP. There is nothing in the Codes SEPP or in the EP& A Act which prevents development from being complying development if it is inconsistent with a condition of an earlier consent for the site (other than in one minor respect not relevant to the DA). On this basis, Landcom cannot support this recommendation to restrict future permissible land uses. Lots 116 to 119 include lots ranging in size from 402sqm to 455sqm with direct street frontage. Ultimately whether these lots could facilitate a future dual occupancy or semi-detached dwelling, being permissible uses on these lots, would be up to satisfying the relevant policies and development controls adopted at the time of any future development. Any type of restrictions imposed to sterilise these lots, including the requirement for BEPs would not be consistent with the requirements of the EP&A Act and Growth Centres SEPP and as such Landcom could not agree to this.
Recommendation B 2. <i>All battle axe lots be limited to a single storey product only, informed by Building Envelope Plans approved by Council as a result of a Deferred Commencement condition.</i>	As discussed above in respect of Recommendation A, a condition requiring a restriction on title with the sole purpose of controlling future permissible development (in a way different to the applicable planning controls) could not be legally imposed and would demonstrate a breach of s4.15 of the EP& A Act by the Panel. This recommendation therefore cannot be accepted by Landcom. Notwithstanding, the Growth Centres DCP and Codes SEPP already provide detailed controls for the development of the site including setbacks, private open space and controls around the location of garages. Therefore, the need for a BEP to be placed on title to identify these requirements is unnecessary. Further a deferred commencement condition to address the future built form of battle-axe lots would sterilise any progress over the site for bulk earthworks and civil works. This results in unnecessary delays to the

Council recommendation	Landcom's response and legal comments
	development of which the future built form has no bearing on the commencement of construction works to justify holding up the progression of these works. While the controls guiding the building footprint are already in place under the adopted DCP, Landcom is willing to accept a condition of consent relating to the battle-axe lots (Lots 101-106 and 122-127) requiring single storey development. This is offered however, on the basis that the development controls adopted under the site specific DCP for battle-axe lots are not amended as any 'squeezing' of the building footprint would impact upon the capability of a single storey building to be achieved on these lots. It has always been Landcom's intention to develop the battle-axe lots for single storey dwellings. As outlined within the SEE, Landcom included a delivery strategy on how the lots created under this DA would be delivered, including Landcom's intention to: • Invite builder partners to tender for the design and delivery of the built form. • Review all built form plans through Landcom's design review panel. The Landcom design review panel manages additional detail beyond the adopted planning controls including; all built form, landscaping, elevational colours and materials, location of air conditioning, bins, driveway finishes etc. to ensure quality outcomes are achieved. • Develop each of the four packs in groups to deliver these products holistically having regard to product consistency, buildability, streetscape, price and design. The selected building partner would construct these dwellings as approval by Landcom and Landcom would control the sales process to ensure the outcome. • Work with the selected builder on delivering the approved built form, in line with the approved plans, as endorsed by Landcom's design review panel. Products would then be sold as completed homes or with split contracts to the market by Landcom and the building partner. This delivery strategy has been successfully managed on several other projects within Blacktown City Council, other Growth Centre Precincts and other Local Government Areas where Landcom has worked with the Council to deliver Estates, including: • The Ponds

Council recommendation	Landcom's response and legal comments
	• Bungarribee (previously known as Bunya) • Thornton (North Penrith) • Macarthur Heights (UWS) • Oran Park • Edmondson Park
Recommendation C 3. <i>A deferred commencement condition be imposed on the consent requiring the applicant to submit Building Envelope Plans for the battle axe lots (and also on the 4 the lots fronting the increased verge to address the waste concerns).</i> 4. <i>The Building Envelope Plans are to include all building setbacks, height and location of PPOS in accordance with the guidelines as recommended by the review (under the site specific DCP section).</i> 5. <i>These Building Envelope Plans be imposed as an enduring requirement by a restriction on the title for the future purchasers of the lots similar to other BEPs proposed within the site for lots less than 300 sqm.</i> 6. <i>Alternatively, to ensure that no Complying Development Certificate approvals will prevail over these restrictions, the Building Envelope Plans could be conditioned to be constructed as part of this application and prior to the issue of any Subdivision Certificate.</i>	See the comments above in respect of Recommendations A and B regarding the inability to legally impose these conditions and the implications for the lawfulness of the Panel's assessment under s4.15 of the EP & A Act. A BEP is neither required under the Growth Centres SEPP or DCP for these lots, nor is it necessary in the present circumstances and therefore cannot be accepted by Landcom. Landcom has in place alternate arrangements as outlined above to control the building outcome over the site with the development as proposed and compliant with the Growth Centres SEPP and DCP requirements. The development of battle-axe lots will need to satisfy the relevant controls including amenity impacts of the applicable environmental planning instrument (EPI) that approval is ultimately sought under. The fact that BEPs haven't been considered as part of this subdivision DA does not negate the need for future applications to consider amenity impacts. Further, it cannot be assumed that without a BEP a bad outcome will be delivered on the site. However, there are already controls in place under the relevant EPIs to address building setbacks and private open space (among other things) that have been tested and apply to this site. These controls will appropriately guide the outcome of future development over these lots with no relevant or legal reason for imposing a condition for a BEP being registered on title noting any condition to this effect is likely to be invalid. In relation to the final recommendation for a condition of consent requiring the construction of future dwellings as part of this application, this recommendation could not be legally imposed. Not only have the building plans not been considered as part of this DA to enable a detailed assessment of impacts, it would not be in accordance with other requirements including SEPP(BASIX) which stipulates a BASIX certificate must be lodged with a DA. This recommendation instead appears to reverse the DA approval pathway by requiring the construction of future built form as part of this approval without knowing what will be built. In addition, it is inappropriate for a consent authority to prescribe what an applicant can seek consent for. The application before the consent authority must be determined, and the consent authority cannot require some other application to be made, or approve a development different to that for which consent was sought. The DA does not propose construction of residential accommodation on these lots. The assessment and determination of the DA cannot legally

Council recommendation	Landcom's response and legal comments
	require it to do so. Therefore, this recommendation is not a legal option that the Panel could consider.
Recommendation D 7. <i>A deferred commencement condition be imposed on the consent requiring the applicant to submit amended plans for the proposed abutting dwellings to 'Grima Street' and 'Road No.2 West' demonstrating following:</i> - o <i>varying front setbacks,</i> - o <i>varying roof lines and pitch,</i> - o <i>varying eaves overhangs,</i> - o <i>differing verandah and balcony treatments,</i> - o <i>different window sizes and proportions</i> - o <i>introduce a variety of 'sustainable' features</i> - o <i>varying front fencing and landscaping</i> - o <i>a wider range of materials and colour on the dwellings facades</i>	Landcom does not consider that a deferred commencement condition is necessary to resolve this matter as changes to the design elements should not impact upon the progress of civil works across the site. Furthermore, the condition as proposed is invalid, as it impermissibly defers consideration of the likely impacts of works, and compliance with the condition could result in a significantly different development to that for which consent was sought. Such conditions are invalid, and demonstrate a failure of the consent authority to meet its obligations to assess the application under s4.15 of the EP & A Act. Landcom is willing to provide for more variation within the design through a condition of consent which could be imposed as a 'Prior to Subdivision Certificate' requirement noting that the abutting dwellings can be registered ahead of the construction certificate. However, any condition imposed must be flexible and cannot require amendments to aspects of the development where Landcom has satisfied that particular standard in the DCP (i.e. front building setback, roof height and form) which would be contrary to the EP&A Act, and cannot result in significant alteration to the development proposed. This would be an attempt to impose a requirement which is more onerous than the requirements set out in the DCP and under s4.15(3A)(a) of the EP&A Act, any such attempt is expressly prohibited. Further, flexibility is required within the condition to determine what aspects could be massaged to achieve the intent of the UDR's comments noting that changes to the design would require more detailed analysis to consider how they impacted other elements of the development (i.e. engineering plans, site levels, solar access requirements, location of structural walls). The following draft condition is provided which allows for flexibility to work with Council to achieve the intent of the UDR comments, and result in only relatively minor alterations to the proposed development. These updated architectural plans would then be registered on title relating to the relevant lots requiring the construction of the approved plans. <i>"Prior to Subdivision Certificate condition</i> <i>Prior to the release of the subdivision certificate relating to Lot 128 to Lot 139 and Lot 201-212 containing abutting dwellings, updated designs shall be submitted to Council providing further variation in the building appearance. This can include, but is not limited to, changes to the following design aspects in order to achieve this variation:</i> a) <i>varying eave overhangs,</i> b) <i>exploring differing verandah and balcony treatments,</i> c) <i>consideration of different window sizes and proportions,</i> d) <i>varying front fencing and landscaping</i>

Council recommendation	Landcom's response and legal comments
	<i>e) incorporating a wider range of materials and/or colour within the facades."</i>
Recommendation E 8. <i>On battle axe lots, the rear building setback be required to be 4 m and this is to be reflected in a Building Envelope Plans for such lots as a condition of consent.</i>	Future development of the battle-axe lots is proposed to be undertaken in accordance with the relevant controls adopted for the site. A BEP is not required for these battle-axe lots under the Growth Centres SEPP and DCP. Also, under s4.15(3A) of the EP & A Act, a more onerous standard than proposed in the DCP (in this case in respect of setbacks) cannot be required. Landcom does not support conditions which have the effect of amending the DCP which under s 4.15 of the EP& A Act is to be the focal point of the assessment. Possible future controls that may or may not be adopted, are not relevant considerations under s4.15, regardless of their perceived merit and it would be a legal error for the Panel or Council to take them into account. In any case, the UDR accepts the 4m rear setback and notes that this could be reduced to 2m where amenity impacts have been considered which is in line with the site specific DCP. This assessment of impacts would be undertaken as part of the future built form application in line with the adopted policies. Any further 'squeezing' of controls beyond that adopted in the DCP, while not legally permitted under the EP&A Act, would instead likely result in the opposite effect of reducing the building footprint on the ground level and forcing the built form up. As a result, this recommendation is not supported, and instead any future development would need to address the relevant controls adopted for the site.
Recommendation F 9. <i>On proposed Lots 107,108, 121, 120, 114 and 115, the Principal Private Open Space area be increased from 16 m² to 20 m² and this is to be reflected in modified Building Envelope Plans for such lots as a condition of consent.</i>	The proposed recommendation within the UDR for the PPOS within Lots 107,108, 121, 120, 114 and 115, to be increased from 16 m² to 20 m² ultimately amends the main body of the DCP which currently applies to this development and throughout the Growth Centres. Without any detailed analysis of the impacts these changes would have on the site and future dwellings along with justified analysis driving the change, it is considered that the current controls applying within the Growth Centres generally, can and should continue to apply to this site. As previously highlighted within this response, under the EP&A Act a consent authority cannot require more onerous standards with respect to an aspect of the development than contained in the DCP. Further, there is no justification for the need to apply a more onerous control to this DA when the control was not altered as part of the site specific DCP. With limited time to consider how these broad brush changes impact designs on small scale residential lots, there would need to be a lot more design analysis undertaken in relation to the control for Council to consider amending on a broader scale and not just in relation to this DA. This is because the controls are interconnected with other development controls in the Growth Centres DCP and are tailored to the density of

Council recommendation	Landcom's response and legal comments
	developments required to be achieved over a site. Further, if Council determines there is merit in amending this private open space control generally following an analysis of the control, this needs to be done separately outside the DA assessment process.

ATTACHMENT 3

Response to the Panels deferred decision and Urban Design Review

Overview

Landcom lodged a Development Application (DA) on 26 September 2019 seeking approval for *Staged subdivision to create 88 Torrens title residential lots including construction of 24 abutting dwellings, civil works, landscaping works and associated works*.

Landcom is seeking Council's support in recommending the immediate determination of this DA by the Panel for the following reasons:

- The DA complies with the Growth Centres SEPP and adopted DCP. There is no legal reason preventing the determination of this DA. It is within the power of the Panel to determine it by granting of approval.
- The merits of the DA warrant its approval and the DA achieves the outcomes specified in clause 4.3 of the site specific DCP.
- If the DA is not determined either because some other alternative development is preferred, or because standards other than those in the Growth Centres SEPP and site specific DCP are considered appropriate, then this would constitute a legal error.
- The project will facilitate the delivery of Landcom's green liveable street to review how it contributes to reducing the urban heat island effect and delivers cooler streets in Western Sydney.
- The viability of the development is reliant on the date of determination noting the contributions cap is proposed to be removed on 31 December 2020 having significant impacts to the delivery of this project.
- The NSW Government has identified that locally and regionally significant DAs should be fast tracked in response to COVID-19 to provide immediate support for the industry. This includes the fast tracking and determination of this DA being regionally significant.

Comments on the Site Specific DCP

The DA was not lodged with the intention of developing a site specific DCP. However, following discussions with Council, it was agreed to quarantine the proposed new road design within a site specific DCP to facilitate the approval pathway and test its success and to gauge whether this road design could be replicated. Ultimately it will be Council's decision as to whether the road will be replicated as it requires amendments to the main body of the Growth Centres DCP. Following delivery of the road, Council will have an opportunity to consider the adoption of any controls more broadly at their discretion.

As a secondary purpose, the site specific DCP clarified certain controls relating to four-pack designs which are permissible under the Growth Centres DCP. These controls were not clear and were amended to clarify:

- setbacks on battle-axe blocks; and
- setbacks off the accessway for side loaded lots.

All other controls have been adopted from the main body of the Growth Centres DCP and are not proposed to be amended.

Detailed designs for the battle-axe blocks have not been prepared at this stage because:

- a) Each of the battle-axe lots exceeding 300m² and following, the Growth Centres SEPP and DCP apply and therefore do not trigger the need to submit building plans for these lots; and
- b) Various factors need to be considered in the final detailed design including; topography, drainage lines, sewer lower and potential for encasements, zones of influence, vehicle turning pathways, location of electricity and NBN lines, site levels and amenity impacts. These will be done in conjunction with Landcom's builder partner to ascertain the optimal outcome in terms of compliance, market acceptance and physical servicing of the land.

The detailed design of these dwellings will be worked through following this DA to ensure they appropriately respond to the site constraints and conditions and integrate within the street block. This is currently how other battle-axe lots in the Growth Centres are considered and there is no cogent planning or legal reason why these lots would be considered any differently.

The site specific DCP was adopted on 25 May 2020 and is now a relevant consideration in the assessment of this DA. In accordance with s4.15(3A) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*, if a proposed development complies with the standards in a DCP, a consent authority cannot require more onerous standards with respect to that aspect of the development.

Additionally, a consent authority is required to assess and determine the application lodged. Its role is not to consider alternatives, determine that an alternative development would be preferable or that a better result might be achieved by the application of controls other than those set out in a development control plan.

The Courts have stated on numerous occasions that it is the controls set out in a DCP which are to be the focal point of the consent authority's consideration. If the Panel fails to apply the DCP in this way it risks breaching the requirement in s4.15(1)(a)(iii) of the EPA Act to have regard to any DCP applying to the DA.

The fact that the DCP describes the site as 'Landcom Demonstration Precinct' does not have the effect that some higher standard is to be applied to the DA than to any other development application.

Panel's Recommendation and Urban Design Review (UDR)

A. Urban design

1. Housing typologies

- Missing Middle

The Panel and Urban Design Review (UDR) has focused heavily on ensuring this development delivers housing under the missing middle. This development will facilitate further missing middle housing typologies, by the creation of appropriate lots to accommodate such typologies. However, there is no legal requirement to include all missing middle typologies within the development and nor can the Panel force a developer to deliver specific products under the LRHC Code. This remains an option for the developer or purchaser of the land and cannot be mandated by a consent authority to include this type of product.

The development the subject of the DA is permissible and consistent with the site specific DCP and Growth Centres SEPP, and facilities, through the proposed subdivision, a range of missing middle typologies. The DA must be assessed as is, and the fact that it does not itself provide a broader range of missing middle housing typologies cannot, on either legal or planning grounds, be a reason to refuse consent.

- Laneways

The proposed development complies with the requirements of the Growth Centres SEPP and DCP and satisfies the minimum residential density for this site. There is no requirement under the site specific DCP for BEPs to be provided for the battle axe blocks. The DCP has already recognised this and requires a BEP only for lots between 250m² and less than 300m² to ensure amenity impacts are addressed.

Landcom explored numerous development options and layouts, including laneways. However, Council generally do not support laneways as public road assets. Further, Landcom would only provide a Community Title outcome where there is a genuine need because they can add additional costs and management for residents.

Landcom produced a design which adheres to the Indicative Layout Plan and satisfied the relevant requirements of the Growth Centres SEPP and DCP. Clauses 4.15(2)(b) and cl 4.6.2 in Schedule 1 of the DCP make it clear that battle axe blocks are an acceptable form of subdivision.

It is not a relevant consideration under s4.15 of the EPA Act for the Panel when determining a DA, whether some proposal other than that proposed in the DA (and which is consistent with the applicable planning controls) would be preferable. This is not the role of a consent authority. Landcom does not agree that the Panel can decide to pursue the laneway option as an alternative to the battle axe option in respect of this DA.

- Battle-axe lots

Four pack designs based around a shared driveway are permitted under both the site specific DCP and main body of the Growth Centres DCP. Landcom is aware of other examples where four pack developments have been recently approved within Blacktown Local Government Area.

While not a relevant consideration to the determination of this DA, we note that the UDR could not find any relevant examples where battle-axe lot development had been delivered similar to that proposed. Therefore, this development could provide an opportunity to further investigate this type of layout. Further, it is not the role of the consent authority to determine whether this

DA is acceptable based on comparisons with other examples. There is nothing in the EP&A Act, the Growth Centres SEPP or the DCP which requires this, nor which makes an assessment against test cases a relevant consideration.

2. Streetscape

- Green / liveable street

Landcom is encouraged by both the Panel and Council's support of the new road design to deliver a green liveable street. This street design is new within the Growth Centres and is proposed to be a pilot to demonstrate how streets can achieve greater landscaping, deep soil growth opportunity and street tree canopy to assist in reducing the urban heat island effect.

Currently, Landcom does not own the adjoining property to the west. However, if the DCP controls support the delivery of a green liveable street, Landcom would have no objection to replicating this road design where possible on this site. Similarly, Landcom is limited in what can be achieved in Grima Street because it does not own the entire road reserve. However, the component that it is able to be controlled has been designed to meet the relevant engineering standards and achieve the principles of the green liveable street where possible.

- Shared driveways

As noted by Council in response to the UDR, maintenance of the shared driveways would be managed through a Section 88B instrument. Landcom has considered the landscaping within these areas to ensure that they are low maintenance to assist future owners in managing these areas.

- Burdekin Road

In response to the UDR which recommended additional planting along Burdekin Road, Landcom notes that part of this southern boundary will ultimately be acquired by RMS. Following the acquisition of SP2 Infrastructure land, Landcom's development site will include a 1m wide strip of land. Intermittent trees have been proposed along this verge to contribute towards a green canopy within the area. However, as part of the redevelopment of Burdekin Road, RMS will deliver a landscaping strategy for the development and landscaping of this road verge.

3. Address and amenity

- Access to lots

The engineering plans lodged with the DA demonstrate and provide suitable access arrangements to each lot.

- Development of lots / future amenity

The development has been designed in accordance with the Growth Centres SEPP and DCP. This includes the lodgement of:

- Dwelling plans for all lots less than 225m²
- BEPs for all lots sized between 225m² and < 300m²

Lots with a land area of 300m² and above are not required to provide dwelling plans or BEPs under the Growth Centres SEPP. These lots are considered to be of a suitable size to enable the future built form designs to be massaged to suitably respond to amenity impacts. The applicable

controls specify when dwelling plans and BEPs are required, and they are not required for lots above 300m².

- Outlook and privacy

It is Landcom's intention to develop the battle-axe lots for single storey dwellings. As outlined within the SEE, Landcom included a delivery strategy on how the lots created under this DA would be delivered. This was provided to outline how Landcom would ensure the quality and control of future built form outcomes, landscaping and materials to successfully manage this, and includes a mix of options to:

- appoint builder partners to construct completed homes that Landcom will seek approval which would be sold on completion.
- appoint builder partners to work with Landcom on delivering house and land packages that would involve split contracts with future purchasers between Landcom and the builder.
- Endorse housing designs through Landcom's design review panel (or similar) before entering into a building contract with a nominated building.

This is similar to how other Landcom Estates have been established both within Blacktown and other Growth Centre LGAs.

4. Design guidelines

- Detailed design guidelines

The purpose of a detailed design guideline is to provide recommendations on various aspects of a building design including but not limited to landscaping, materials, colour palettes, letterboxes, etc. The preparation of detailed design guidelines is not a requirement to lodge with a DA under the Growth Centres SEPP or DCP.

It is Landcom's intention to prepare detailed design guidelines for the Estate, which would be a supplementary document for purchasers to understand what Landcom is seeking to deliver across the site and would be considered at the time plans are reviewed by Landcom's design review panel.

- Replication of the development

In response to the Panel's concerns about replication, the majority of the development with the key exception of the green liveable street, could be replicated under the main body of the Growth Centres DCP throughout the various growth centre precincts within the Blacktown LGA.

The purpose of the site specific DCP was to quarantine a new road design to facilitate the delivery of the green liveable street to one project to test its success. Ultimately whether this road design can be replicated will be Council's decision and will require amendments to the development controls in the main body of the Growth Centres DCP. Council will have an opportunity to review the delivery of this project and consider the adoption of any controls more broadly at their discretion.

- Future built form over battle-axe lots

We note the UDR request for the lodgement of building plans on battle axe lots and Council's recommendation for BEPs to form a restriction on title.

The battle-axe lots range in size between 359m² and 380m² and therefore do not require building plans or a BEP to be lodged over these lots under the Growth Centres SEPP.

While it is not proposed to lodge building designs or BEPs under this DA and nor is it triggered by the Growth Centres DCP, Landcom would be open to accepting a condition of consent limiting the future building height over battle-axe lots to single storey. Draft conditions are proposed under 'Recommendation B'.

5. Architecture

- Building design and appearance

Landcom is open to reviewing the appearance of the abutting dwellings as a condition of consent. However, the wording of this condition would need to be flexible for Landcom to explore different options noting the implications on; engineering plans, site levels, structural walls, amenity impacts (privacy and solar access), to ensure a measured approach.

The condition should not and cannot be worded with restrictive requirements such as varying the front setback which would be contrary to the EP&A Act as it would be an attempt to impose a requirement which is more onerous than the requirements set out in the DCP. Under s4.15(3A)(a) of the EPA Act, any such attempt is expressly prohibited.

A suggested condition has been provided under the heading 'Recommendation D'.

Notwithstanding the above, we note generally that the DCP supports replication in terrace style housing designs. Further the design and appearance of a development is very subjective with various examples of housing where replication has been used that is considered to be a good design outcome and highly desirable (i.e. Paddington terraces).

B. Servicing and subdivision

- Waste servicing

Landcom acknowledges there are benefits to providing a service laneway, however Community title should be done for a genuine reason and not for convenience. A community title scheme is created by the registration of a Community, Neighbourhood or Precinct plan and (much like a strata scheme) is managed by a body corporate consisting of all lot owners known as the Community Association. All common areas (including all roads, promenades and parklands) are referred to as Association property. Unit entitlement is based on site values which determines unit owners' voting rights and contributions to maintenance and insurance levies.

The management of a community title scheme can be complex and multi-tiered. Usually found in big developments and complexes, they can often span large areas of land and consist of a mix of commercial, residential and retail lots with conflicting interests. Much like in strata titles, everything is managed via tabled meetings. The community scheme committee deals with day-to-day issues and general meetings are held for larger issues which each individual lot owner may attend.

While there are some benefits in the use of a community title primarily targeted at larger developments, the disadvantages include:

- High community levies
- Standardised landscaping and buildings can mean restrictive rules and regulations for lots

- Regulations can be complex because of the varying lots (commercial, residential etc.) within the estate
- No part of your lot is covered by the Association's insurance.

The ILP and waste servicing complies with BCC standard engineering design and contemplated as part of the DCP. Landcom does not believe that the use of community title is a genuine need for the future residents and community based on the infrastructure provided (i.e. a road) to justify the additional costs in levies and unnecessary management complexities.

Whilst waste management is a matter that requires consideration and is assessed at the time a site is developed, changes may occur to controls which is why pre-emptive restrictions and limitations on the use of land are not reasonable and should not dictate development and unnecessarily, limit development on or sterilise the development of lots. Instead, having regard to the nature of these lots, their future development should be assessed on merit at the time they are developed to consider relevant impacts.

Four pack designs based around a shared driveway are permitted under both the site specific DCP and main body of the Growth Centres DCP. Landcom are aware of other examples where four pack developments have been approved within Blacktown LGA resulting in similar waste requirements that were able to be suitably managed (**Figure 1**). Upon review of 'The Grange' development along Richmond Road, it appears that the waste impacts of that development are similar to the Landcom DA with no overwhelming justification for the more onerous restrictions proposed as a result of waste impacts.



Figure 1 Four pack design previously approved by Blacktown Council

C. Site Specific DCP

It was never the intention of Landcom nor BCC that a site specific DCP would be written for this site. The site is small, consistent in size to many other landholdings in the area and has many impediments similar to others in the Growth Centres precinct. As such Landcom worked with all the existing controls applying to the site, addressed the same impediments, satisfied the minimum dwelling density to produce a compliant DA.

The primary objective of the site specific DCP was to facilitate the delivery of a new road design (green liveable street) to allow council to see if the allocation of assets in the road reserve could deliver a better outcome and address the urban heat island effect.

As a secondary function, Landcom reviewed some setback controls that applied to battle-axe lots to better tailor them to sites with a higher residential density requirement (i.e. 25dw/Ha) and clarified setbacks to driveways for lots with side loaded garages which were also included in the site specific DCP. No other changes to development standards and/or controls were proposed under the site specific DCP with all other controls stemming from the main body of the Growth Centres DCP.

The development is consistent with the adopted DCP. Any amendment of the DCP is a strategic matter for separate consideration by the Council after public consultation. It is not a matter for the Panel as part of this DA assessment. The Panel's role is to assess the application lodged and for which consent is sought. Section 4.15 of the EPA Act sets out the detailed matters to which the consent authority must have regard when considering the DA. Possible future controls that may or may not be adopted, are not such considerations, regardless of their perceived merit and it would be a legal error for the Panel or Council to take them into account.

In addition to the fact that changes to the controls are irrelevant to the determination of this DA, Landcom makes the following comments on the proposed changes.

- UDR recommendations to battle-axe lots

The proposed distance separation controls for buildings outlined within the UDR appear to have been prepared on the basis of more significant development over these battle-axe lots which is evident from the comparison made to residential flat buildings and the residential flat design code (now Apartment Design Guide). Landcom does not support any changes to the adopted DCP, based on the following:

- a) Landcom's intention is to build single storey dwellings on the battle-axe lots with the setback controls adopted under the site specific DCP imposed to respond to the surrounding development and facilitate a suitable building footprint.
- b) The controls recommended within the UDR are likely to have the opposite effect on amenity impacts by squeezing the development in with larger setbacks and therefore pushing the development vertically which potentially creates more overlooking and overshadowing impacts.
- c) Landcom considers the current adopted DCP controls achieve a better outcome to facilitate a single storey built form which would provide suitable separation based on the setbacks proposed to respond to the adjoining lots.
- d) Landcom notes the UDR recommendation to remove articulation zones to facilitate things such as entry porches. However, just because the lot doesn't front a public road does not mean these elements are not required. Articulation features such as entry

porches identify and emphasise the building entry to visitors and also provide protection from adverse weather when access the dwelling. They are still relevant considerations in the design of a dwelling.

- UDR recommendations to side loaded garages
 - a) The UDR recommends changes to controls contained in the main body of the DCP for product that relies on side loaded garages fronting a public road (i.e. a four pack housing design with shared driveway). There is no clear justification for this with the main body of the DCP specifying private open space requirements based on the dwelling density to be achieved over the site. This enables the POS to suitable respond to the density of the development being delivered.
 - b) Four-pack subdivisions are already permissible under the Growth Centres SEPP and DCP with examples of this type of development already approved by Council. The Growth Centres DCP contains relevant controls to provide for minimum POS and soft landscaped area which among other lots apply to sites with side loaded access adjoining battle-axe lots. It is therefore unclear why these controls are proposed to be changed for this site only.

Confidential

27 July 2020

Our ref: LAN20001

Chief Executive Officer
Landcom
Level 14, 60 Station Street
Parramatta NSW 2150

Attention: Rachel Gralton, Nicole Woodrow

Email

Dear Sir,

SPP-19-00010 108 Burdekin Rd, Schofields | Sydney Central City Planning Panel's deferral of determination of DA

Introduction

- 1 I refer to my correspondence and discussions with Rachel Gralton and Nicole Woodrow and their request that I provide advice in respect of the decision of the Sydney Central City Planning Panel (**Panel**) on 3 June 2020 to defer determination of the above development application (**DA**).
- 2 The decision to defer determination of the DA (**Deferral Decision**) was stated in the '*Determination and Statement of Reasons*' issued by the Panel to be for '*independent design review and further consultation with Council's waste servicing division*'.

Summary of Advice

- 3 The Deferral Decision demonstrates a significant misunderstanding by the Panel of its role in determining the DA under s4.15 of the *Environmental Planning & Assessment Act 1979* (**EPA Act**) which is likely to lead the Panel into legal error.
- 4 Landcom should request that the Panel proceeds to determine the DA as a matter of urgency, or Landcom will consider its options to progress the DA either by requesting the intervention of the Minister for Planning & Public Spaces (**Minister**), noting that Landcom can rely on the Crown development provisions of the EPA Act, or by lodging an appeal against a deemed refusal of the DA to the Land & Environment Court.
- 5 Landcom should also refer to the Information Sheet on Planning Reforms prepared by the Department of Planning, Industry and Environment (**DPIE**) which requires panels to determine DAs within 2 weeks of submission of an assessment report on the DA.

- 6 A wide ranging urban design review not only of the DA, but of the applicable planning controls is not only antipathetic to the scheme of the EPA Act, but undermines DPIE's reforms in respect of planning panels and the intent of the Planning Acceleration Program.

Reasons for Deferral Decision

- 7 The reasons for the Deferral Decision given on 3 June 2020 (**Reasons**) state that '*as the proposal is for a 'demonstration project'...the Panel considers urban design excellence to be essential*' and that these factors are not '*adequately demonstrated by the current Masterplan*'.
- 8 The Reasons seek further explanation of how the low rise medium density housing '*typology*' has been applied to the Masterplan and suggests comparisons to overseas and local housing projects.
- 9 It is noted that the '*Masterplan*' referred to in the Reasons is a site specific masterplan which forms part of Schedule 1 to the *Blacktown City Council Growth Centres Precinct Development Control Plan (DCP)*, being the provisions of the DCP regarding the Alex Avenue Precinct. That is, the Masterplan is not a part of the DA, but is part of the adopted DCP. The DA complies with and is entirely consistent with the DCP.
- 10 The Reasons note the Applicant's intention to provide design guidelines and seek an explanation of how motivated developers would be expected to take-up and apply the design guidelines.
- 11 The Reasons express concern with the DCP which encourages battle-axe blocks for the Alex Avenue Precinct and requests further independent urban design testing to determine if battle-axe blocks ought to be encouraged in that Precinct.

Advice

Failure to Properly Apply the DCP

- 12 The Reasons in the Deferral Decision indicate that the Panel is in danger of fundamentally breaching the requirement in s4.15(1)(a)(iii) of the EPA Act to have regard to any development control plan applying to the land to which the DA relates, and to consider that development control plan as a focal point for the assessment of the DA.
- 13 In *Zhang v Canterbury City Council* [2001] NSWCA 167 the NSW Court of Appeal held that an applicable development control plan '*had to be considered as a "fundamental element" in or a "focal point" of the decision making process and was entitled to significant weight in the decision making process*'.
- 14 In doing so the Court of Appeal found that the Commissioner of the Land & Environment Court had **committed a legal error** as a result of substituting his own standard for that in the duly adopted development control plan.
- 15 There are numerous other cases in which similar comments have been made, and Commissioners and other Court officers have been considered to have committed legal errors by attempting to substitute some other policy or standard in lieu of those in the applicable development control plan.
- 16 After discussing a number of such cases, the Court of Appeal in *Botany Bay City Council v Premier Customs Services Pty Limited* [2009] NSWCA 226 said:
'the Council however argued, in my view correctly (in light of Zhang and Ligon), that the Commissioner was not entitled to take the view that the standards set by the DCP were inappropriate for reasons of general policy'.

(my emphasis)

- 17 The Court of Appeal went on to repeat the words of McClellan CJ, as he then was, in *Stockland Development Pty Limited v Manly Council* [2004] NSWLEC 472; (2004) 136 LGERA 254 that:

*“consistency of decision-making must be a fundamental objective of those who make administrative decisions” and that “that objective is assisted by the adoption of development control plans and **the making of decisions in individual cases which are consistent with them**” (at [88]).*

(my emphasis)

- 18 The DCP is the development control plan which applies to the land to which the DA relates (**Site**). Schedule 1 of the DCP contains site specific provisions in respect of the Site.
- 19 Those site specific provisions, including the ‘*Precinct Masterplan*’ are required to be taken into account by the Panel and to be a focal point and a fundamental element of the decision making process, and the key controls against which the DA is assessed.
- 20 By requesting an urban design review of the Masterplan and the provisions of the DCP, the Panel is likely to commit a legal error in the determination of the DA, similar to the legal errors referred to in the above cases. The only purpose of the review could be for the Panel to consider urban design input into the appropriateness of the DCP or Masterplan provisions, which is not a relevant consideration, in substitution for considering the terms of the DCP itself, which is a mandatory relevant consideration. To do so would be a breach of the EPA Act and legal error which would vitiate any decision of the Panel.
- 21 Whether or not the Panel considers that the DCP should encourage battle-axe blocks for the Site or is otherwise appropriate, is irrelevant to the development assessment process. It was exclusively the role of the Council in adopting Schedule 1 of the DCP to determine whether that type of development was appropriate on the Site and in the Alex Avenue Precinct and the Panel’s role is to apply the Council decision (evidenced in the terms of the DCP itself) when assessing the DA.

Assessment of the DA Before the Panel

- 22 The Deferral Decision also fundamentally misconstrues the broader assessment role under s4.15 of the EPA Act.
- 23 The role of the consent authority under s4.15 is determine the development application before it, and in doing so to assess the matters set out in s4.15 **as are of relevance to that development application**.
- 24 The role of a consent authority under Part 4 is **not** to consider alternatives to the development described in the development application before it, or to consider whether some other development might be preferable. This is to be contrasted to the determination of development under other parts of the EPA Act, such as Division 5.1, which specifically requires consideration of feasible alternatives in any required environmental impact statement (see Schedule 2 of the *Environmental Planning & Assessment Regulation 2000*).
- 25 The Reasons indicate that the Panel is likely to fail to properly consider only the matters that are of relevance to the DA by:
- 25.1 focusing on the fact that the DA has been described as a ‘*demonstration project*’ and therefore assessing the development proposed in the DA in terms of how it can be applied or copied in future development applications not before the Panel;

- 25.2 requiring consideration of the DA against ‘test cases’ and overseas or local examples, rather than considering the appropriateness of the proposal in the DA itself; and
- 25.3 seeking to understand how future developers might react to or take up design guidelines, again, being matters outside the scope of the DA before the Panel.
- 26 I further note that the precedent that a proposed development might be considered to set can only be relevant to the determination of the development application for that development in very limited circumstances. Those circumstances include that the proposed development is objectionable in itself and that there is a sufficient likelihood of similar applications (see *Goldin v the Minister for Transport Administering the Ports Corporatisation and Waterways Management Act 1995* [2002] NSWLEC 75). Those preconditions are not met, and the fact that the DA is described as a ‘*demonstration project*’ cannot alter the assessment role under s4.15 or require the Panel to consider the possible making of similar applications in the future
- 27 The above indicates that the Panel is again likely to fall into legal error by misapplying s4.15 of the EPA Act and having regard to irrelevant considerations in its determination of the DA.

Procedural Errors in Panel Meeting

- 28 I also understand that Landcom is concerned about the conduct of the Panel at the meeting at which the Deferral Decision was made.
- 29 Council’s waste services officer was in attendance at the meeting in order to assist the Panel with advice on technical waste servicing matters.
- 30 During the course of the Panel meeting, I am instructed that the Council’s waste services officer was asked generally her view in respect of the development, and expressed a view as to whether or not the DA should be approved.
- 31 The *Sydney & Regional Planning Panels Operational Procedures* (dated 1 January 2020, which are to be updated effective from 1 August 2020) (**Procedures**) provide on page 35 for presentations by the Council assessment officer (or a representative) and other technical experts from the Council at a Panel meeting. The Procedures in respect of technical experts are that the chair may ask the Council’s technical experts for ‘**clarification of specific issues**’.
- 32 It states that ‘*other technical experts from the council/Department may also be present (such as traffic engineers) and the chair may ask for clarification of specific issues*’.
- 33 It is contrary to the Procedures for a technical expert such as Council’s waste officer to be asked more general questions in respect of the DA, as occurred at the Panel meeting.

DPIE Information Sheet on Planning Panels

- 34 DPIE has recently released the *Planning Panel Reforms Information Sheet (Information Sheet)*. It provides that from 1 August 2020 local planning panels and regional planning panels will be required:
- **to make determinations within two weeks of being provided an assessment report;**
 - **oblige panel chairs to work with council to ensure key issues are addressed during assessment in order to minimise deferrals by the panels at determination stage;**

- *require the panels to provide reasons for deferring a decision and set timeframes in which any additional information must be provided in order to finalise the determination.*

35 Whilst those reforms are not currently in force, it is clear that the Deferral Decision would be contrary to the new procedures in addition to being legally unsound.

Recommendations

- 36 I understand that Council has commenced the urban design review requested by the Panel.
- 37 Notwithstanding this, Landcom should press for the Panel to determine the DA without awaiting the outcome of that review. The review is not relevant to the assessment of the DA, will result in unnecessary further delay, and there is no legal basis for it to occur.
- 38 If there is to be any consideration of the urban design review, it must be limited to a consideration of the merits of the development the subject of the DA.
- 39 Under s4.7 of the EPA Act Council has certain consent authority functions of a Sydney District planning panel including *undertaking assessments of the proposed development*. What the Panel has requested goes beyond that function for the reasons outlined above.
- 40 Landcom should also consider either:
- 40.1 lodging an appeal against the deemed refusal of its DA to the Land & Environment Court; or
 - 40.2 requesting the intervention of the Minister.
- 41 As you know, Landcom is the Crown for the purposes of the Crown development provisions of the EPA Act, with the effect that conditions cannot be imposed on any consent granted to the DA, and the DA cannot be refused, without the consent of Landcom or the Minister. In those circumstances the approach of the Panel, and the additional expenditure and delays occasioned by the deferral of a decision to consider irrelevant information should be strongly resisted.
- 42 If you would like to discuss this matter further, please contact me on 02 8235 9703.

Yours Sincerely,



Megan Hawley
Partner

D: 02 8235 9703
M: 0433 766 644
E: megan.hawley@lindsaytaylorlawyers.com.au