

10 July 2020

Panel Chair – Prof Helen Lochhead
Sydney South Planning Panel
320 Pitt Street
Sydney NSW 2000

Dear Prof Lochhead,

**Development Application PPSSH-3-Sutherland –
5 PRESTON AVENUE ENGADINE 2233 (DA19/0472).**

This letter has been prepared on behalf of the applicant White & Partners in relation to the above site and draft conditions of consent issued by Sutherland Shire Council.

We would like to thank Council for their work over the period of assessment and acknowledge their support for the proposal, culminating in a recommendation for approval. However, we would like to seek amendment / deletion of the following conditions:

Condition 2.a.iv

Request: Delete the condition.

The deletion of car space 1 on basement 1 could be replaced by the existing requirements of Condition 13 which requires car spaces to comply with the relevant Australian Standards.

Condition 8. Design and Construction of Works in Road Reserve (Council Design) – A. Design

Request: Delete the condition.

Condition 8.a.vii requires the proponent to construct (amongst other items) a new shared zone. It was never the intent of the proponent to provide this, as evidenced in the SEE (Ethos Urban, 29 May 2019) at Page 9, reproduced below, which identifies Council as the relevant authority to implement the Shared Way:

Engineering Matters in the Public Domain	
<i>Due to the width of Geebung Lane, the proposed footpath may need to be located within the property boundary and on Council Land.</i>	It is intended that Council will activate the shared way opportunity, with Geebung Lane being a one-way, southbound road.
<i>A shared zone opportunity has been identified on Geebung Lane and will need to be activated with this development.</i>	
<i>With respect to the land swap, there is an existing footpath pavement across the Geebung Lane frontage of the park. Transitions from this footpath will be required as part of the frontage works and can be dealt with via a condition of consent.</i>	

Whilst the description of the Proposed Development included:

- *Funding for the embellishment of Geebung Lane as a proposed new urban shared-way. This may take the form of a 'Works-in-Kind Agreement' or form part of a Voluntary Planning Agreement.*

No subsequent negotiations were undertaken between the proponent and Council to deliver this. As part of the VPA negotiated as part of the land swap that saw part of the road reserve of Geebung Lane (that is the entry point to the now Tavern Car Park) for part of the Engadine town park, negotiation occurred that saw the proponent deliver embellishment of the town park. At no point was there any discussion of works to Geebung Lane.

We are of the opinion that it is unlawful for Council to enforce this condition. We attached review prepared by Holding Redlich as Attachment A.

Condition 14.A.ii

Request: Delete part of the condition

vii) *Parking bays provided for adaptable units must ~~have the minimum clear dimensions of 3.8m wide by 5.4m long or~~ comply with AS2890.6*

The stated car space dimension is incorrect and should be deleted as the reference to compliance with the Australian Standard is sufficient.

Condition 20.i

Request: Delete the condition

The condition makes reference to providing an easement over the tavern land as “*recommended in the traffic report*” however the traffic report makes no such recommendation.

All sweep paths are within the lane road reserve as shown in Drawing TX.02 attached to this letter as Attachment B.

Further, as the DA is not for the Tavern land, we are unsure how a condition can be enforced on land beyond the boundaries of the subject site.

Condition 21.A.i

Request: Delete part of the condition and include new condition (iii)

i) ~~*both the residential parking and commercial parking (associated with Engadine Tavern at 42-50 Station St) must be made available on an unrestricted basis and free of charge at all times for residents and visitors' vehicles*~~

iii) the commercial parking associated with Engadine Tavern at 42- 50 Station St must be made available during operating hours of the Tavern and free of charge at all times for visitors' vehicles

We are of the opinion that there is a safety and security issue, as well as amenity impact if the condition remains as read. The revised condition seeks to control the use of the Tavern parking so it is only available during Tavern hours to reduce loitering of Tavern patrons after hours.

Condition 22.A.ii

Request: Delete the condition

The proponent's landscape architect has reviewed this condition.

There is simply not enough space to plant the massive canopy trees of *Syncarpia glomulifera - turpentine* which can grow up to a 15m diameter canopy, particularly when so close to the building as well as paths and walls. It is also close to the adjoining property where the canopy will hang over the boundary causing future issues with the neighbour's property, solar access and possibly infrastructure.

The proponent has concerns regarding ongoing maintenance and liability for future damage caused by these large tree's root systems, overhanging canopy and limb drop.

The condition has no basis as it is not referenced in the DCP and is therefore subjective opinion.

Condition 22.A.v

Request: Delete the condition

Again, we believe this is a subjective opinion of council.

We believe the path needs to stay as it currently located as it is on the opposite side to the ground floor units in order to reduce noise and privacy issues.

Condition 22.A.viii

Request: Delete the condition

This condition will impact on the courtyards for the ground floor units.

The proposal currently provides a 2m wide garden bed so that there is enough space for a useable courtyard. 2m is more than a sufficient width for growing large screening shrubs for privacy.

We trust that you consider the above requests to amend or delete the relevant conditions. We are happy to discuss these in more detail prior to, or at, the Panel Meeting. Please feel free to contact me on 0406428465 with any queries.

Yours sincerely,



Tom Goode
Director

tgoode@ethosurban.com

Cc: Ms Lauren Franks – Sutherland Shire
Mr George Ajaka – White & Partners.

Attachment A: Holding Redlich letter
Attachment B: Traffic Drawing TX.02

10 July 2020

Tom Goode
Director
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Partner Breellen Warry
Our Ref BZD 19750081

By email

Dear Tom

PPSSH-3-Sutherland – DA19/0472 | 5 Preston Avenue, Engadine (Site)

1. As you know, we act for George Ajaka of White and Partners, the Applicant in the for the proposed development of the Site which includes the “demolition and excavation of existing tavern carpark and construction of a residential flat development containing 60 units above a shared basement carpark comprising 80 residential spaces and 70 spaces to be used for the adjacent Engadine Tavern” (DA19/0475).
2. We have been instructed to advise in relation to the lawfulness of proposed conditions 8A(ii) and 8A(vii) prepared by Sutherland Shire Council (**Council**) ahead of the consideration of DA19/0475 by the Sydney South Planning Panel (**Panel**).
3. We understand that this advice will be provided to the Panel for its consideration.

Summary

4. We are of the view that proposed conditions 8A(ii) and 8A(vii) are unlawful and cannot be imposed because:
 - (a) as the reconstruction of Geebung Lane as a Shared Zone is not contained in the Contributions Plan, there is no power to require these works under s7.11 of the Environmental Planning and Assessment Act 1979 (**EPA&A Act**); and
 - (b) there is no power under s4.17 of the EP&A Act to impose the proposed conditions as there is no link between DA19/0475 and the need for the construction of the Shared Zone as required under the conditions.

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Detailed advice

Shared Zone Conditions

5. Condition 8 – Design and Construction of Works in Road Reserve (Council Design) provides a number of conditions providing that various works be undertaken in Council’s road reserve.
6. Conditions 8A provides the following conditions regarding a “shared zone”:
 - ii) *Grades - regrade footpath verge on Preston Avenue to final design levels including topsoil, turf and all associated soft landscaping. Regrade Geebung Lane as required to facilitate the "Shared Zone".*
 - vii) *Shared Zone - reconstruct Geebung Lane from the western boundary of 42-50 Station Street to Preston Avenue to accommodate a "Shared Zone". This includes a raised threshold and appropriate treatment to the satisfaction of Council. Construct any required drainage to facilitate the construction of the raised threshold.*

(Shared Zone Conditions)

7. Of note, we are instructed that the Applicant was never advised of this issue, and we understand that the traffic reports submitted with DA19/0475 do not find or recommend that such works are required to Geebung Lane. Furthermore, we are instructed that the Shared Zone Conditions would impose a significant cost on the Applicant.

Rationale for Shared Zone Conditions in the Assessment Report

8. The Sutherland Shire Council Assessment Report for DA19/0472 (**Assessment Report**) addresses the Shared Zone Conditions at Part 5 – Public Participation, saying that this is in response to issues raised in submission made by the public during the public exhibition periods.
9. Issue 9: Pedestrian Safety is discussed at Part 5 of the Assessment Report and says that this concern arises from increased traffic movement in the area and a change to the functionality of Geebung Lane. It goes on to say that Council’s Public Asset Engineer has advised that to:

“mitigate against the inability to force public footpaths across private land along Geebung Lane, Council’s Public Domain Design Manual has identified Geebung Lane as converting to a shared zone. This will ensure the safe movement of pedestrians around the site and is supported by Council’s Traffic Engineer. The conversion of Geebung Lane to a one-way road will also assist in the safe movement of pedestrians and will be an improvement to the existing movement of pedestrians along Geebung Lane.”
10. The Assessment Report then also provides an extract of Figure 4 being a plan extracted from Figure EN2 (C.3.4.3 Maps) Sutherland Shire’s *Public Domain Design Manual* (3rd ed. July 2019) (**PDDM**) that shows the “Shared Zone Opportunity” which covers the length of Geebung Lane, Engadine.

Relevant policy documents

11. This “Shared Zone Opportunity” has been taken out of section C.3.4.2 – Streetscape Guidelines for footpaths, which say that footpath types must be selected in accordance with Figure EN2. The PDDM is intended to provide guidance for the design of all public domain across the Council local government area. It is not intended to outline any schedule of works under a contributions plan,

nor does it reflect any requirements for DA19/0475 in the *Sutherland Shire Development Control Plan 2015 (SDCP 2015)*, which we would otherwise expect to see at Chapter 19: B3 Commercial Core – Engadine – Area 3: 5 Preston Avenue, Engadine.

12. All public domain works under the *Engadine Centre Section 94A Levy Plan 2008* have been completed and there were no works proposed in Geebung Lane under this plan. This plan has been repealed and replaced by the *Section 7.11 Development Contribution Plan 2016 (3rd Edition) (Contributions Plan)*. There are no public domain works in the Engadine Centre Precinct that are proposed as part of the Contributions Plan.

The Shared Zone Conditions cannot be imposed

13. In our view:
 - (a) because the reconstruction of Geebung Lane as a Shared Zone is not contained in the Contributions Plan, there is no power to require these works under s7.11 of the EPA&A Act; and
 - (b) there is no power under s4.17 of the EP&A Act to impose the Shared Zone Conditions. This is because there is no link between DA19/0475 and the need for the construction of the Shared Zone.
14. Section 4.17(1)(f) of the EP&A Act authorises a condition of development consent to be imposed if “it requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in section 4.15(1) *applicable to the development the subject of the consent*”.
15. In addition to the above, in order for a condition to be valid under s 4.17(1)(f) of the EP&A Act, the condition of development consent must:¹
 - (a) be for a planning purpose and not for any ulterior motive;
 - (b) fairly and reasonably relate to the subject development; and
 - (c) not be so unreasonable that no reasonable consent authority could have imposed it.
16. Unlike a situation where a subdivision requires the construction and dedication of roads and footpaths because the development requires the construction of this infrastructure, there is no need to reconstruct Geebung Lane from the western boundary of 42-50 Station Street to Preston Avenue to accommodate a "Shared Zone", including a raised threshold and any required drainage to facilitate the construction of the raised threshold. These works are not applicable to or required as a result of DA19/0475.
17. As was noted in *Fairfield City Council v N & S Olivieri P/L* [2003] NSWCA 41 at [23]:

“No doubt, if a particular work, required to be carried out pursuant to such a condition, can be characterised primarily as the provision of a public amenity, then its connection with the development may not be regarded to be sufficiently close.”
18. This means that the Shared Zone Conditions cannot be validly imposed under s 4.17(1)(f) of the EP&A Act because it requires work to be carried out that primarily benefits the wider public and are not connected to the proposed in DA19/0475.

¹ *Newbury DC v Secretary of State for the Environment* [1981] AC 578.

19. Furthermore, we note that:

- (a) s 7.11(1) of the EP&A Act authorises a condition to be imposed requiring the payment of a monetary contribution or the dedication of land free of cost “if a consent authority is satisfied that development for which development consent is sought will or is likely to require the provision of or increase the demand for public amenities and public services within the area”; and
- (b) s 7.11(5)(b) of the EP&A Act allows the consent authority to accept “the provision of a material public benefit (other than the dedication of land or the payment of a monetary contribution) in part or full satisfaction of a condition imposed in accordance with subsection (1)”.

20. However, a condition under s 7.11(1) of the EP&A Act can only be imposed if it is determined in accordance with a contributions plan: s 7.13(1) of the EP&A Act. As identified above, the Shared Zone works are not in the Contributions Plan, so there is no power under s 7.11(1) of the EP&A Act to impose the Shared Zone Conditions.

21. In summary therefore, we consider the Shared Zone Conditions to be outside the scope of the EP&A Act and cannot be imposed.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Holding Redlich', is written over a light blue horizontal line.

Holding Redlich

