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Confidential

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Email

Dear Kerrie,

Edmondson Park Precinct 3 | DA-82/2023 | Consistency with Concept Consent and relevance of VPA Condition

Introduction

1 Landcom is carrying out the development of certain land at Edmondson Park, pursuant to concept development consent MP10_0118 ('**Concept Plan**').

2 The Concept Plan was approved by the former Planning Assessment Commission in August 2011, pursuant to (now repealed) s 75O of the *Environmental Planning and Assessment Act 1979* ('**EPA Act**').

3 Accordingly, clause 3B of Schedule 2 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* ('**Transitional Regulation**') applies to the Concept Plan.

4 The Concept Plan has subsequently been modified on a number of occasions. We are instructed that the most recent modification to the Concept Plan is that known as 'Mod 13' (currently undetermined). We understand that modifications 1-9 have been determined, with the exception of 'Mod 5', and the application known as 'Mod 10' has been deferred.

5 The Concept Plan applies to an area of approximately 413ha known as Edmondson Park. Within that area is a precinct known as '**Precinct 3**', which is generally bounded by Campbelltown Road to the south, MacDonald Road to the east, and Zouch Road to the west.

6 Landcom has lodged development application DA-82/2023 ('**DA**'), which seeks development consent for the subdivision of Precinct 3.

7 The DA proposes the creation and dedication of public roads as shown on the draft subdivision plans prepared by Daniel James Hannigan (ref: 22-000141-DP).

Advice requested

8 To assist in responding to issues raised by the Council, Landcom has requested our advice as to:

8.1 which modification of the Concept Plan should be considered as the baseline in respect to the assessment of whether the DA is '*generally consistent with*' the Concept Plan;

8.2 whether the DA is, in our view, generally consistent with the Concept Plan;

8.3 whether the conditions of the Concept Plan, in particular Condition 1.8, oblige Landcom to make an offer to enter into a Voluntary Planning Agreement with Liverpool City Council ('**Council**'), in respect to the DA; and

8.4 whether the classification of land as community land under the *Local Government Act 1993* ('**LG Act'**) operates as any impediment, or as a relevant matter for consideration, in the assessment of the DA.

Summary of advice

9 In respect to the above questions, our view is:

9.1 The relevant version of the Concept Plan against which the DA is to be assessed is Mod 11, being the current version of the development consent. Mod 5 has not yet been determined (and may never be approved) – the DA should not be assessed for consistency against a modification to the Concept Plan which may never come into effect.

9.2 The DA is generally consistent with the Concept Plan. To the extent that it departs from the Concept Plan, the departures are, in our view, generally minor in nature and are within the scope of the 'inherent flexibility' with which conditions of concept approvals are to be construed.

9.3 Condition 1.8 should not be read as requiring each and every subdivision application within the 413ha area subject to the Concept Plan to be accompanied by an offer to enter into a VPA with the Council. It cannot have that effect due to s7.7 of the EPA Act. The fact that Landcom has not offered a VPA in respect to the DA is no impediment to the grant of consent to the DA.

9.4 We understand that the land is owned by Landcom and not vested in the Council. Nor is the land under the control of the Council. Accordingly, we consider that the land is not public land within the meaning of the LG Act and is not required to be classified under that Act. Any potential future classification of the land under the LG Act is irrelevant to the permissibility of development on the land and is not a relevant consideration in the assessment of the DA.

Advice

The relevant modification of the Concept Plan

10 Clause 3B of Schedule 2 to the Transitional Regulation applies to the DA.

11 Of particular importance is clause 3B(2), which relevantly provides as follows:

> *(2) After the repeal of Part 3A, the following provisions apply to any such development (whether or not a determination was made under section 75P(1)(b) when the concept plan was approved)—*
>
> *(a) if Part 4 applies to the carrying out of the development, the development is taken to be development that may be carried out with development consent under Part 4 (despite anything to the contrary in an environmental planning instrument),*
>
> *…*
>
> *(d) a consent authority must not grant consent under Part 4 for the development unless it is satisfied that the development is generally consistent with the terms of the approval of the concept plan,*
>
> *(e) a consent authority may grant consent under Part 4 for the development without complying with any requirement under any environmental planning instrument relating to a master plan,*
>
> *(f) the provisions of any environmental planning instrument or any development control plan do not have effect to the extent to which they are inconsistent with the terms of the approval of the concept plan,*
>
> *…*
>
> [our emphasis]

12 As can be seen, clause 3B operates so as to require proponents to apply for and obtain development consent, under Part 4 of the EPA Act, in respect to development authorised by a concept plan approved under the former Part 3A.

13 The clear scheme of the Transitional Regulations as they relate to concept plan approvals is that the terms of the approval prevail over the otherwise applicable controls. For instance, 3B(2)(a), development authorised by a concept approval is taken to be permissible despite anything to the contrary in any applicable environmental planning instrument.

14 The only significant jurisdictional check in clause 3B(2) is that proposed development must be '*generally consistent*' with the concept approval.

15 In assessing whether development proposed pursuant to an approved concept plan is '*generally consistent*' with that concept plan, the relevant assessment is between the development application and the concept plan as last modified.

16 That is because a Concept Plan, in the same way as a development consent, is a single unitary instrument. Modifications of the instrument have the effect of changing the terms of the instrument but there remains only one instrument of consent.

17 This is illustrated by the terms of the former Part 3A and the Transitional Regulations. In the former Part 3A, s 75W defined '*modification of approval*' as follows:

> ***modification of approval*** *means changing the terms of a Minister's approval, including:*
>
> *(a) revoking or varying a condition of the approval or imposing an additional condition of the approval, and*
>
> *(b) changing the terms of any determination made by the Minister under Division 3 in connection with the approval.*

18 Therefore, when a concept plan approval is modified, the instrument is amended in accordance with the terms of the modified approval. It is not the case that there are

various iterations of the concept approval which remain in force and against which a development could be assessed. At all times, there remains a single approval.

19 Accordingly, it can only be the case that a development application pursuant to a concept approval is assessed for consistency against the concept approval as last modified. That is the only version of the Concept Plan which has legal force and effect.

20 The Council is not correct in our view to state that Mod 5 - the unapproved application to modify the Concept Plan currently being assessed by the Council – is '*more relevant*' to Landcom's development than Mod 11.

Is the DA generally consistent with the Concept Plan?

21 We have been briefed with a letter prepared by Urbanco assessing the DA against the relevant aspects of the Concept Plan for Precinct 3.

22 On the basis of that assessment, we note the following in respect to the DA and the Concept Plan:

22.1 **Layout and general arrangement** – the density of development and location of residential lots proposed in the DA are consistent with the land use strategy approved in the Concept Plan. Residential lots are located within the area identified as 'General Residential' in that plan. In addition the Bardia Barracks Heritage Precinct, and surrounding road network, are provided in accordance with the location approved in the Concept Plan;

22.2 **Open space network** – the DA incorporates the three key areas of open space within and surrounding Precinct 3, being:

22.2.1 the Regional Park to the north,

22.2.2 a Conservation open space area to the north western edge of the development; and

22.2.3 an area of open space at the western edge of the development between the residential area and Zouch Road;

22.3 **Proposed pedestrian, cycle, and public transport network** – the DA provides the east-west shared pedestrian and cycle path through the site, providing a connection between MacDonald Road and Zouch Road as shown on the Concept Plan;

22.4 **Water management infrastructure** – in addition to providing additional infrastructure required by the detailed stormwater assessment for the DA (and not required by the Concept Plan) the DA proposes two raingardens and associated basins indicated by the Concept Plan, being the low points in the drainage network in Precinct 3.

In this respect we note that the western raingarden is provided in the location indicated by the Concept Plan and the eastern raingarden has been relocated outside of the Regional Park area (land zoned C1) as raingardens are not permissible in that area; and

22.5 **Bushfire protection** – the DA is entirely consistent with the Concept Plan as a 12m Asset Protection Zone ('**APZ**') has been provided to the western edge of the development, and a 16m APZ has been provided to the north of the development, as required by the Concept Plan.

23 The only particular in which the DA does not strictly accord with the Concept Plan is in respect to the location of certain proposed roads and laneways. However, in our view, close analysis of the DA and the Concept Plan indicates that there is a high degree of

consistency between what is proposed in the DA and what is indicated (rather than strictly required) by the Concept Plan.

24 The relevant part of the Concept Plan 'Road Network and Hierarchy' map is extracted at Figure 1 below.

Figure 1 – extract of Concept Plan Road Network and Hierarchy' map relevant to Precinct 3

25 The proposed subdivision layout is shown at Figure 2 below[1].

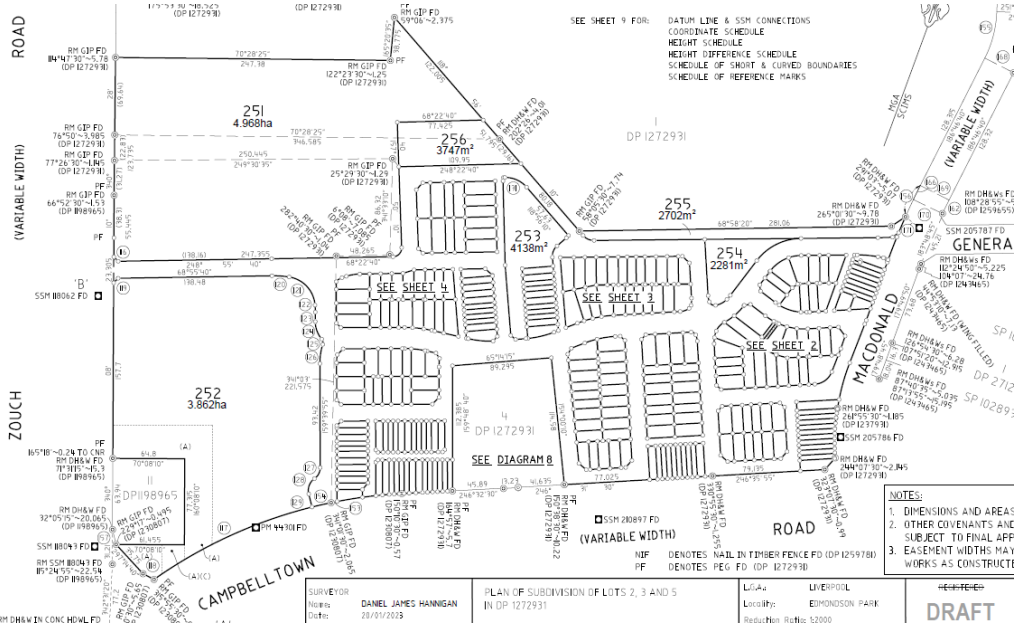

Figure 2 – proposed Precinct 3 subdivision plan

[1] **Note**: we are instructed that the layout of residential lots shown in the Subdivision Plan is subject to potential change but the road layout is unlikely to be amended

26 As can be seen, the DA provides for the open space road (shown in green on Figure 1) in the location, and to the extent, provided for in the Concept Plan.

27 The distinction between the arrangement shown in Figure 1 and that in Figure 2 is that the Concept Plan proposed two intersections to Campbelltown Road (to the south of Precinct 3), and no road connection to Zouch Road to the west.

28 We are instructed that Campbelltown Road, being a road controlled by TfNSW, is an "access denied" road in this location, making the intersection arrangement shown in the Concept Plan impossible to achieve in a practical sense.

29 In response to the denial of access to the south, the DA proposes an alternative second access point, to the west via Zouch Road, so that there are two entry and exit points to the precinct. In this way, the DA replicates the substance, if not the particulars of the Concept Plan.

30 In respect to the internal arrangement of roads within Precinct 3, it clear that there is some rearrangement of the location of the local roads (both major and minor) in the DA.

31 However, we consider that this is unsurprising when taking the Concept Plan as a whole – being by definition a "concept" development for an area of some 413ha – and within the scope of the "inherent flexibility" that should be applied to conditions of a concept approval.

32 It is well established that the conditions attached to a major projects approval or concept plan are to be construed with regard to the '*derisible inherent flexibility*' that the statutory scheme in the former Part 3A provided for: *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 4)* [2019] NSWLEC 58 at [92(k)] citing *Tugun Cobaki Alliance Inc v Minister for Planning* [2006] NSWLEC 396 at [23] per Jagot J; *Ulan Coal Mines Ltd v Minister for Planning* (2008) 160 LGERA 20; [2008] NSWLEC 185 at [80] per Preston CJ and *Pittwater Council v Minister for Planning* (2011) 184 LGERA 419; [2011] NSWLEC 162 at [48] per Pain J.

33 The flexibility implicit in the scheme is clear from clause 3B(2) of the Transitional Regulation extracted above. In assessing the DA, the principal consideration to which the consent authority's attention is directed is the question of whether the '*development is generally consistent with the terms of the approval of the concept plan*'.

34 The meaning of the term '*consistent*' in the context of environmental planning instruments has been considered on a number of occasions. In *Addenbrooke Pty Lty v Woollahra Municipal Council* [2008] NSWLEC 190, Biscoe J (relying on the *Macquarie Dictionary*) considered the meaning of *consistent with* was akin to '*compatible with; not self-opposed or self-contradictory*'. His Honour also accepted the correctness of previous decisions finding that consistency meant '*not antipathetic to*': *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21 at 27 and *Hospital Action Group Association Inc v Hastings Municipal Council* (1993) 80 LGERA 190 at 264.

35 In our view, having regard to Figures 1 and 2 above, it is (at the very least) open to the consent authority to accept that the road layout proposed in the DA is 'not antipathetic' to that set out in the Concept Plan.

36 The requirement of clause 3B(2) is not for absolute or strict consistency. Even taking the word 'consistent' at its highest, it is clear that the requirement for "general" consistency must impose a less onerous standard than consistency alone. On that basis alone we consider that the consent authority could be comfortably satisfied that the DA is generally consistent with the Concept Plan.

37 In our view, it is clearly anticipated by the statutory scheme that some departures from the indicative locations of roads, infrastructure facilities and open space will inevitably flow from changing conditions at and surrounding the site over time.

38 In the above cases, it is recognised that such approvals are granted in respect to developments which are inherently complex, large scale and often multi-stage. As the development progress through their various stages, conditions at and surrounding the site can be expected to iterate and change. Clearly that has been the case in this instance in respect to the implementation by TfNSW of an 'access denied' zone at Campbelltown Road. In that respect, it goes without saying that strict compliance with the Concept Plan is now impossible and alternative access arrangements are required, and have been provided.

39 In our view, to require a modification of the Concept Plan itself in order to allow Landcom to respond to changes in conditions surrounding Precinct 3 would defeat the statutory scheme and the purpose of the former Part 3A (continued in force by the Transitional Regulations) and would fail to have regard to the flexibility inherent in such approvals.

40 There are two further reasons supporting our view that the DA is generally consistent with the Concept Plan, which may be shortly stated.

41 The first is that, at least in respect to the local roads (minor) shown on the Concept Plan (the light blue lines on Figure 1), these are expressed in the Concept Plan itself to be indicative only. Having regard to the principles of construction above and the meaning of 'consistent' it cannot be seriously maintained that Landcom is required to amend the Concept Plan in order to relocate ***indicative*** local roads as a response to changing circumstances.

42 The second point is the Concept Plan itself only imposes a requirement that subsequent development be '*generally in accordance with*' the Concept Plan (condition 1.1). There is well established authority as to the meaning of that phrase which is entirely consonant with our conclusions above. In *Lake Macquarie City Council v Australian Native Landscapes Pty Ltd (No 2)* [2015] NSWLEC 114, Biscoe J held:

> *A development consent that requires development to proceed "generally in accordance with" approved plans, allows for some latitude and deviation from the approved plans of a relatively minor nature:* Oshlack v Irongates Pty Ltd *(1997) 130 LGERA 189 at 196-197 per Stein J;* Wingecarribee Council v CSR Limited *[1993] NSWLEC 184 per Stein J;* Katoomba Gospel Trust v Blue Mountains City Council *[1994] NSWLEC 107 per Talbot J;* Grace Bros Pty Ltd v Willoughby Municipal Council *(1980) 44 LGRA 400 at 406 per Wootten J (SC/NSW);* Maybury v Weston Aluminium (Producers) Pty Limited *[1998] NSWLEC 17 per Talbot J. However, the question whether development is "generally in accordance" with approved plans is one of fact and degree in the context of the overall development.*

43 As a matter of fact and degree in this case, we are of the view that it is, at the very least, open to the consent authority to conclude that the DA is sufficiently consistent with the Concept Plan as to be capable of approval under clause 3B of the Transitional Regulations.

Is Landcom required to make an offer to enter into a VPA with the Council?

44 Condition 1.8 of the Concept Plan provides as follows:

Development contributions

1.8 The subsequent subdivision application within each council area must include an offer to enter into a voluntary planning agreement for payment of local infrastructure contributions, with the details of the contributions, and the nature of any land dedications or works in kind to be negotiated with the relevant council.

45 We note that that part of the Edmondson Park precinct located south of Campbelltown Road is located in the Campbelltown local government area. Accordingly the condition is expressed to relate to '*each council area*'.

46 We understand that Landcom made an offer to the Council to enter into a VPA in August 2014 ('**2014 Offer**'). We have been briefed with a copy of a letter from UrbanGrowth NSW (Landcom's trading name at the time), dated 4 November 2014, offering to enter into a VPA with the Council for '*the delivery of public amenities and services associated with the Edmondson Park Process*'. However, we are also instructed that the offer did not result in the parties in fact entering into a VPA.

47 We are also instructed that UrbanGrowth NSW offered to enter into a VPA with the Council as a part of its statement of commitments for the original Concept Plan approval (we understand that the offer was Appendix K1 to the Preferred Project Report).

48 In this respect, s 7.7 of the EPA Act is relevant:

> ***7.7 Circumstances in which planning agreements can or cannot be required to be made***
>
> *(1) A provision of an environmental planning instrument (being a provision made after the commencement of this section)—*
>
> *(a) that expressly requires a planning agreement to be entered into before a development application or application for a complying development certificate can be made, considered or determined, or*
>
> *(b) that expressly prevents a development consent from being granted or having effect unless or until a planning agreement is entered into,*
>
> *has no effect.*
>
> *(2) A consent authority cannot refuse to grant development consent on the ground that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.*
>
> *(3) However, a consent authority can require a planning agreement to be entered into as a condition of a development consent, but only if it requires a planning agreement that is in the terms of an offer made by the developer in connection with—*
>
> *(a) the development application or application for a complying development certificate, or*
>
> *(b) a change to an environmental planning instrument sought by the developer for the purposes of making the development application or application for a complying development certificate,*
>
> *or that is in the terms of a commitment made by the proponent in a statement of commitments made under Part 3A.*
>
> *(4) In this section, **planning agreement** includes any agreement (however described) containing provisions similar to those that are contained in an agreement referred to in section 7.4.*

49 In our view, having regard to s 7.7 of the EPA Act, it is clear that the consent authority cannot refuse to grant consent to the DA on the basis of Condition 1.8 of the Concept Plan or on the basis that Landcom has not offered to enter into a planning agreement in respect to the DA.

50 Landcom made an offer to enter into a planning agreement in respect to its application for the Concept Plan. Section 7.7(3) of the Act operates so as to permit the imposition

of a condition of development consent requiring that VPA to be entered into between Landcom and the Council.

51 Section 7.7 of the EPA Act does not authorise the imposition of an "ambulatory" condition such as Condition 1.8, which in terms purports to require subdivision applications to be accompanied by an offer to enter into a VPA.

52 To the extent that Condition 1.8 purports to have that operation, it is in our view of no effect.

53 Equally, s 7.7(2) of the EPA Act makes it clear that the consent authority may not refuse consent to the DA on the basis that Landcom has not offered to enter into a VPA. We do not consider that it matters whether such refusal is purported to be based on Condition 1.8 – the condition is inconsistent with the EPA Act.

54 Accordingly it is open to the consent authority to grant consent to the DA regardless of whether Landcom has offered a VPA in respect to it. Indeed, Condition 1.8 would in our view, need to be read down so as to avoid inconsistency with the EPA Act and so would operate only to the extent described above.

The relevance of the classification of land under the Local Government Act

55 We are instructed that Landcom, not the Council, owns the land comprising Precinct 3. We are also instructed that the land is not under the control of the Council.

56 You have asked us whether the zoning of the land, being *RE1 – Public Recreation*, means that the land is properly characterised as public land under the LG Act. For a number of reasons, the answer is 'no'.

57 Firstly, as noted above, the land is not owned or controlled by the Council. This means that it is not 'public land' within the meaning of the LG Act.

58 Secondly, the definition of public land in the LG Act expressly excludes public roads. Therefore, any roads created by Landcom will, by necessity, not be classified as public land once created. Under the LG Act, public roads are not operational land, they are not classified.

59 Finally, it is not correct to say that the zoning of land under the EPA Act (even as RE1) creates any presumption as to the *classification* of the land under the LG Act. It may be true as a matter of practice that land zoned RE1 is generally public land classified as community land, but the two matters are separate categorisations under different statutory regimes.

60 In those circumstances, the classification of land under the LG Act has no bearing whatsoever on whether a development consent under the EPA Act should be granted in respect to that land.

61 In our view, no issue arises which impacts the determination of the DA under the EPA Act. In respect to a development application under the EPA Act – which the DA is – the relevant matters for consideration are those set out in s 4.15 of the EPA Act. That section provides:

> *(1)* ***Matters for consideration—general*** *In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—*
>
> *(a) the provisions of—*
>
> *(i) any environmental planning instrument, and*
>
> *(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent*

authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

(iii) any development control plan, and

(iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),

(v) (Repealed)

that apply to the land to which the development application relates,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

(c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest.

62 Nothing in s 4.15 calls up or directs reference to the classification of land under the LG Act. The classification of land is a matter arising under an entirely separate statutory regime and which has an entirely separate purpose, which is not related to the assessment of development applications under the EPA Act.

63 Accordingly, a site's classification under the LG Act can form no part of the assessment of whether it is 'suitable' in the relevant sense, for proposed development.

64 In respect to the public interest, the scope of relevant considerations was described in *O'Sullivan v Farrer & Anor* (1989) 168 CLR 210 in the following terms:

> *"…the expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable…given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view": Water Conservation and Irrigation Commission (NSW) v Browning, per Dixon J*

65 Given the context of the consideration (s 4.15 of the EPA Act), the classification of land under another statute is not a matter relevant to the public interest.

66 Thank you for your instructions in this matter. If you would like to discuss this advice, please contact Megan Hawley on (02) 8235 9703 or Liam Mulligan on (02) 8235 9715.

Yours Sincerely,

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