

5 April 2019

Our Ref: HSK:LEN008/4012

Minister for Planning
c/o Department of Planning
320 Pitt Street
Sydney NSW 2000

By Online Submission

Dear Sir/Madam

RE: Fischl VPA

1. We act for Lendlease Communities (Calderwood) Pty Limited (**Lendlease**) in relation to the Calderwood Urban Development Project (**CUDP**) and refer to the draft Planning Agreement (**Fischl VPA**) between the Minister for Planning (**Minister**), Benaughton Calderwood Pty Ltd (**Developer**) and Gerhard Josef Fischl and Suzanne Margaret Fischl (**Landowners**) that is currently on exhibition.
2. The Fischl VPA applies to 128 North Macquarie Road, Calderwood, NSW 2527 and legally described as Lot 8 in DP259137 (the **Fischl Land**). The Fischl Land is part of the land the subject of the CUDP which is subject to Concept Plan MP09_0082, approved on 8 December 2019 (**Concept Plan Approval**). Lendlease is the Proponent of the Concept Plan Approval.
3. On 3 March 2011, Lendlease entered into a Voluntary Planning Agreement with the Minister in relation to the CUDP, which has since been amended by three amendment deeds. The Voluntary Planning Agreement, as amended (**Lendlease VPA**), applies to the Fischl Land (which is not owned or proposed to be developed by Lendlease) and other land not owned or proposed to be developed by Lendlease (together, the **Non-Core Land**) and land proposed to be developed by Lendlease. We have adopted the defined terms from the relevant Voluntary Planning Agreements discussed in this submission unless otherwise defined herein.
4. In our view, it is inappropriate for the Minister to be a party to both the Lendlease VPA and the Fischl VPA in their current respective forms. A mischief is created when the Lendlease VPA and the Fischl VPA applies to the same parcel of land. Furthermore, Lendlease is required to provide contributions that are significantly higher than the contributions required of the Developer under the Fischl VPA.
5. Failure to address the issues identified here may render the Fischl VPA unlawful as not properly levying and applying money for a public purpose in breach of the *Environmental Planning and Assessment Act 1979* (**EPA Act**). The Fischl VPA may also be open to legal challenge for not being reasonable in the present circumstances.
6. The combined effect of the Fischl VPA and the Lendlease VPA is that the Minister may "double dip" by requiring monetary contributions for the same transport infrastructure to service the development of the Fischl Land from two different parties in circumstances where only one of those parties (Fischl) is proposing to develop the Fischl Land. This could result in a breach of section 7.3(1) of the EPA Act if money paid under either VPA is not held and subsequently applied for the purpose for which it was paid and within a reasonable time.

7. In addition, the Education Contributions required under the Lendlease VPA should be equitably allocated between all developers of the CUDP. As it stands, Lendlease is the only developer in the CUDP that is required to expressly provide separate Education Contributions by contributing land. The Developer and the other developers of the Non-Core Land should also be expressly required to provide education contributions, given that the development of the Non-Core Land in accordance with the Concept Plan Approval will generate a need for education facilities that are being facilitated by the Education Contributions. This approach will also assist to promote the orderly and economic use and development of CUDP land consistent with section 1.3(c) of the EPA Act.
8. We discuss these points in detail below.

Background

9. The Concept Plan Approval provides concept approval for 4,800 dwellings (amongst other things) on the land to which the Concept Plan Approval applies. In accordance with item (d) on the first page of the Concept Plan Approval, all development subject to Part 4 of the EPA Act is to be generally consistent with the terms of the Concept Plan Approval. This requirement effectively mirrors the statutory requirement in clause 3B(2) of Schedule 2 to the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (Transitional Regulation)*.
10. The Lendlease VPA requires the provision of two types of development contributions in connection with the CUDP: the Education Contributions and the Transport Contributions (as defined in the Lendlease VPA). The Education Contributions require Lendlease to dedicate 12 hectares of land in the CUDP for the purposes of two primary schools and one high school. The Transport Contributions require Lendlease to pay monetary contributions for the provision of transport infrastructure.
11. The Fischl VPA requires the Developer to pay a monetary contribution of \$58,247 per hectare of "Net Developable Area" to the Minister. The Explanatory Note to the Fischl VPA states that the public purpose of the contribution is for "the provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land". Notably, unlike the Lendlease VPA, the Fischl VPA does not expressly require the provision of contributions for education infrastructure for the CUDP.

Monetary Contributions

12. On 23 November 2017 the Developer lodged development application DA577/2017 with Shellharbour City Council for a residential subdivision of 227 lots (**Fischl DA**). The Fischl DA notes that the total area of the Fischl Land is approximately 38.9ha. We understand that the Net Developable Area (as that term is defined in the Fischl VPA) (**NDA**) of the Fischl Land is approximately 14.7182 ha. We note that this is an estimate based on the Fischl DA documents which were publicly available.
13. The Fischl VPA requires a payment of \$58,247 per hectare of NDA for any part of the Fischl Land to which a Subdivision Certificate application relates. Based on our understanding of the NDA of the Fischl Land, that equates to approximately \$857,291 in total contributions to be paid by the Developer. If this rate is applied to the number of Dwellings proposed in the Fischl DA that equates to approximately \$3,776.60 in contributions per Dwelling.
14. The proposed contribution rates in the Fischl VPA are much lower than the rate for residential lots in the *Environmental Planning and Assessment (Special Infrastructure Contribution – Illawara (West Lake Illawara) Determination 2011 (Draft SIC)*, which is \$73,219 per hectare of NDA.

15. The practical effect of the Fischl VPA and the Lendlease VPA is that the Minister could require contributions for the same infrastructure to be paid by both the Developer and Lendlease without due regard to the true cost of that infrastructure.
16. In order to overcome the mischief created by the combined effect of the Fischl VPA and the Lendlease VPA, we propose that appropriate amendments be made to both VPAs to address the need for carefully apportioned contributions in respect of the development of land for the CUDP. A further amendment will also be required to exclude all Non-Core Land from the Lendlease VPA (given that Lendlease does not intend or have any right to develop the Non-Core Land).

Education Contributions

17. Under the Lendlease VPA, the Education Contributions require Lendlease to dedicate 12 hectares of its land for two primary schools and one high school to the Minister (or the Minister for Education and Training) (**Education Land**). The Education Land has a significant value, as well understood by the Department, and Lendlease is required to provide that value to the Minister.
18. If we add the Transport Contributions to the value of the Education Land to be dedicated, Lendlease will clearly pay well in excess of the contributions that the Developer is required to pay, being only \$3,776.60 per Dwelling in contributions for the CUDP. This is plainly not fair and reasonable.
19. As the development of the Non-Core Land in accordance with the Concept Plan approval will generate a need for transport infrastructure and education facilities (amongst other things), it is only reasonable that the Developer (and the other developers of the Non-Core Land) be required to pay its proportionate share of the Education Contributions.
20. Lendlease acknowledges that it is still the primary developer in the CUDP and accordingly will pay more overall contributions. However, each developer in the CUDP should be contributing proportionately to the infrastructure and services that are needed to facilitate the orderly and economic development of the CUDP. Any other outcome would be both unfair and unreasonable.
21. To this end, Lendlease would welcome the opportunity to meet with members of the Department of Planning to discuss the appropriate amendments to both the Fischl VPA and the Lendlease VPA.
22. We reiterate that, failure to address the issues identified above may render the Fischl VPA unlawful as not properly levying and applying money for a public purpose in breach of the EPA Act. The Fischl VPA may also be open to legal challenge for not being reasonable in the present circumstances.

Yours faithfully



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