

18 September 2018

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Dear Bill

Billbergia Group - Proposal for development of Leeds Street foreshore precinct, Rhodes Request for Secretary's Environmental Assessment Requirements

1 Introduction

You have asked us to advise on whether the proposed development of the Leeds Street foreshore, Rhodes, as proposed under the Request for Secretary's Environmental Assessment Requirements (**SEARs**) prepared by Urbis, is properly characterised as State Significant Development (**SSD**) for the purposes of the *Environmental Planning and Assessment Act 1979* (**EPA Act**) and *State Environmental Planning Policy (State and Regional Development) 2009* (**SRD SEPP**).

2 Summary of advice

For the reasons outlined below, we consider that the proposed development is properly characterised as SSD under Schedule 1 of the SRD SEPP.

3 Summary of the proposal

We are instructed that the proposal involves development of land at 7 Leeds Street, 9-11 Leeds Street and 13/13B Leeds Street, Rhodes and the adjoining waterway for the purposes of:

- (a) a public ferry terminal with covered walkway and a new sea wall along the width of the site;
- (b) a mixed use building with 2 podium levels of residential and commercial / retail uses, an additional 43 residential storeys, and 5 levels of underground parking, including 2 levels of public parking accommodating approximately 238 vehicles;
- (c) a public landscaped foreshore area of approximately 3,000m² (45m wide); and

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- (d) provision for a bus interchange and ring road through the site, with a driverless bus service dropping off adjacent to the ferry wharf.

We understand that a key driver for this project is the NSW Government's desire to construct a ferry terminal to service the existing and future population of Rhodes. The proposal has been designed to facilitate and encourage use of the ferry terminal by:

- (a) providing public access to and along the privately owned foreshore;
- (b) activating the current industrial precinct by creating a mixed-use community at the waterfront, including ground and first floor retail;
- (c) providing public parking for commuters at the ferry terminal; and
- (d) enhancing transport linkages by providing a bus service connecting the proposed ferry terminal to Rhodes train station.

4 Consideration of SSD planning pathway

Section 4.36 of the EPA Act provides that a SEPP may declare any development, or any class or description of development, to be SSD.

Clause 8 of the SRD SEPP relevantly provides:

8 Declaration of State significant development: section 4.36

- (1) *Development is declared to be State significant development for the purposes of the Act if:*
 - (a) *the development on the land concerned is, by the operation of an environmental planning instrument, not permissible without development consent under Part 4 of the Act, and*
 - (b) *the development is specified in Schedule 1 or 2.*
- (2) *If a single proposed development the subject of one development application comprises development that is only partly State significant development declared under subclause (1), the remainder of the development is also declared to be State significant development, except for:*
 - (a) *so much of the remainder of the development as the Director-General determines is not sufficiently related to the State significant development, and ...*

With reference to clause 8(1)(a) of the SRD SEPP:

- (a) The ferry wharf component of the proposed development will be located on land zoned W1 Maritime Waters under the *State Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SHC SREP)*. The proposed ferry wharf would be

properly characterised as “public water transport facilities” under the SHC SREP¹, which are permissible with consent in the W1 zone; and

- (b) The land-based components of the development are located on land zoned “IN1 General Industrial” under the *Canada Bay Local Environmental Plan 2013*. Relevantly, both “commercial premises” (which includes “retail premises”) and “residential accommodation” are prohibited under the IN1 zone. Accordingly, in order to facilitate the proposed development, an amendment to the zoning (as well as the maximum height and floor space ratio standards) under the Canada Bay LEP is required. In this respect, section 4.38(5) of the EPA Act permits a planning proposal to be lodged concurrently with an application for SSD where a development is wholly or partly prohibited.

As a separate matter, for the purposes of clause 8(1)(a) of the SRD SEPP, no aspect of the development appears to be permissible without consent under Part 4 of the EPA Act but even if it were, section 4.38(4)(b) of the EPA Act would apply such that those components would then also require development consent.

4.2 SRD SEPP, Schedule 1

With reference to clause 8(1)(b) of the SRD SEPP, clause 18 of Schedule 1 provides:

18 Port facilities and wharf or boating facilities

Development for the purpose of port facilities or wharf or boating facilities (not including marinas) that has a capital investment value of more than \$30 million.

The ferry terminal component is properly characterised as “wharf or boating facilities”, defined under the *Standard Instrument – Principal Local Environmental Plan*² as follows (emphasis added):

wharf or boating facilities means a wharf or any of the following facilities associated with a wharf or boating that are not port facilities:

- (a) *facilities for the embarkation or disembarkation of passengers onto or from any vessels, including public ferry wharves,*
- (b) *facilities for the loading or unloading of freight onto or from vessels and associated receipt, land transport and storage facilities,*
- (c) *wharves for commercial fishing operations,*
- (d) *refuelling, launching, berthing, mooring, storage or maintenance facilities for any vessel,*
- (e) *sea walls or training walls,*

¹ Defined as “any structure used primarily in connection with transporting the public by water”.

² The term “wharf or boating facilities” is not expressly defined in the SRD SEPP. However, clause 4(3) of the SRD SEPP provides that words and expressions used in the SRD SEPP have the same meaning as they have in the standard local environmental planning instrument prescribed by the *Standard Instrument (Local Environmental Plans) Order 2006*.

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- (f) administration buildings, communication, security and power supply facilities, roads, rail lines, pipelines, fencing, lighting or car parks.

In light of sub-clauses (a), (e) and (f) of the above definition, we consider that the public ferry wharf, as well as the associated covered walkway, sea wall and public car parking components of the development are also properly characterised as “wharf or boating facilities”.

We are instructed that the wharf and boating facility components of the development (including the ferry wharf and associated administration building, security, power supply, fencing and lighting, the covered walkway, the new sea wall, the public car parking area accommodating approximately 238 vehicles, and the associated roads comprising the interchange and ring road connecting to the ferry wharf), has an estimated capital investment value of approximately \$41.78 million.³

Accordingly, given that the estimated CIV of these elements is in excess of \$30 million, these components of the proposed development fall squarely within clause 18 of Schedule 1 of the SRD SEPP.

In relation to the balance of the proposed development (comprising the commercial / retail and residential components of the proposed building, the landscaped foreshore area and the driverless bus service), the question is whether these elements are also SSD by virtue of clause 8(2) of the SRD SEPP (extracted above). As part of the proposed development constitutes SSD under clause 18, Schedule 1 of the SRD SEPP, the balance of the proposed development will be SSD as the default position, subject to the Secretary determining that these components are not “sufficiently related to” the SSD components.

In considering this question, we have had regard to the decision of the Land and Environment Court (**Court**) in *Besmaw Pty Ltd v Secretary of the Department of Planning and Environment* [2017] NSWLEC 74 (**Besmaw**). The Court’s decision in *Besmaw* clearly confirms that it is a matter for the Secretary to determine whether non-SSD components of a proposal are “sufficiently related to” the SSD components for the purposes of clause 8(2) of the SRD SEPP. This involves a discretionary, evaluative judgment of each application on its merits.

For the following reasons, we think that the Secretary can reasonably conclude that all of the non-SSD components of the proposed development are “sufficiently related to” the SSD components, and therefore constitute SSD under clause 8(2) of the SRD SEPP.

The Leeds Street foreshore is currently subject to industrial uses and is inaccessible to the general public. Each component of the proposed development is a necessary aspect of, and interrelated to each other aspect of, the proposal because it is only with the simultaneous provision of the proposed mix of uses that activation of the foreshore can be achieved in a manner that facilitates use of the proposed ferry terminal. Specifically:

³ With reference to the *Rhodes Ferry Wharf and Water Precinct Public Benefit Cost Plan* prepared by Altus Group dated 13 August 2018, which estimates the cost of “Ferry Wharf, Covered Boardwalk, Sea Wall & Covered Walkway” at \$14,208,601 and the cost of “Basement Parking & Bus Interchange” at \$27,568,853.

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- (a) the covered walkway will facilitate public access to the foreshore (which is currently privately owned) and the proposed new ferry terminal;
- (b) the commuter car park for some 240 vehicles associated with public use of the ferry terminal will be located in the basement of the proposed mixed-use building;
- (c) construction of the proposed the mixed-use building, including podium level commercial / retail uses and provision of a landscaped foreshore will activate the use of the foreshore (which is currently used for industrial purposes) and the ferry terminal, by creating a landscaped area for congregation of ferry passengers and a mix of uses at the waterfront which are complementary to ferry services and commuter needs, and by locating residential uses in closer proximity to public ferries; and
- (d) provision of the bus service from Rhodes train station will enhance transport linkages and facilitate increased use of the ferry terminal at the desired capacity.

Further, we understand that construction of the proposed mixed-use building will be required to fund the extensive public benefits which are proposed by way of the ferry terminal, including public walkway and sea wall and landscaped public foreshore. We consider that this factor further embeds the interconnectedness of the SSD components with the non-SSD components at the proposed development.

Although in *Besmaw* the Court agreed with the Secretary that certain residential and commercial components of that proposal were not “sufficiently related to” the SSD components, we consider Billbergia’s proposal to be distinguishable from *Besmaw*’s proposal in this regard because:

- (a) in relation to the proposed residential use, the applicant in *Besmaw* sought to argue that there were some “land title and management” interrelationships between the condominiums and the hotel. Specifically, the applicant claimed that approximately 1,400 – 2,000 of the condominiums would use the services and facilities of the hotel. However, ultimately the Secretary concluded that these uses were insufficiently related, as there were no real links between them. The fact that the condominiums and the tourist facilities were proposed to have common management services, for example, was not a true link because these services could equally be carried out by different entities for the different uses. In the case of Billbergia’s proposal, however, the interrelationships between the residential use and the proposed SSD components are tangible and uncontrived. There can be no doubt, for example, that the residents of the proposed multi-storey building will utilise the ferry terminal. Commuters who do not have the benefit of living within the proposed multi-storey building will be able to park in the commuter car park that is located within that building, or utilise the bus service providing a linkage from Rhodes station to the new ferry terminal;
- (b) in *Besmaw*, the condominiums were physically separated from the other uses, including the tourism and health uses which comprised the SSD components. Billbergia’s proposal, however, proposes that the commuter car park, which is an SSD component and essential for utilisation of the ferry terminal by members of

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the public, is physically co-located within the same multi-use building as the residential component of the proposed development. The commuter car park occupies two basement levels and would not be able to be constructed in isolation of the proposed multi-use building. Accordingly, unlike *Besmaw*, the residential and commercial components of Billbergia's proposal are physically interconnected with and therefore "sufficiently related to", the SSD components including the commuter car park;

- (c) in relation to the proposed retail / commercial uses, in *Besmaw*, the Secretary considered that the scale of the proposed retail centre (of 5,000m²) business park (of 12,000m²) and ancillary office (of 6,000m²) would provide "significantly more retail and office floor space than would reasonably fulfil an ancillary, supporting or complementary function" to the tourism or health uses (being the SSD components). In contrast, Billbergia's proposal includes a relatively small retail component (of approximately 550m²), which has been specifically designed to complement the ferry services and to meet commuter needs;
- (d) in *Besmaw*, the relative scale of the non-SSD components (comprising the condominiums and proposed commercial uses) as compared to the SSD components was considered to be a relevant, albeit not determinative, factor. The condominiums in particular formed a significant component of the proposal, being over 50% of the proposed total GFA and approximately 20% of the site coverage. However, we consider that it is inappropriate in the case of Billbergia's proposal to undertake a comparative exercise by reference to the GFA or site coverage of each proposed use. This is because Billbergia proposes the development of significant transport infrastructure (including the ferry terminal and associated car park, walkway and sea wall, and bus service) and other public contributions (including the landscaped foreshore), the value of which cannot be measured on the basis of GFA. It is also difficult to separate and compare the uses in terms of site coverage because some SSD elements are physically co-located with the non-SSD elements (for example, as noted above, the commuter car park is located within the proposed multi-use building). The proposed multi-use building has a floor plate of approximately 2,550m² at the ground floor podium level (and ranging from approximately 1,242m² and 968m² for the residential tower), which constitutes approximately 28% of the total area of 7, 9-11 and 13/13B Leeds Street (9,100m² approximately). However, the commuter car park, with a floor plate of approximately 2,550m², is also contained within this building and as this is an SSD component, it would need to be discounted from the quantitative analysis. Further, this percentage does not take into account the water-based development, which comprises a significant proportion of the proposal. In addition, the proposed bus link will provide benefits which extend beyond the site boundaries. The difficulties inherent in comparing the relative scale of each proposed use reveal the extent of interconnectedness between them, which supports our conclusion that the non-SSD components are "sufficiently related to", the SSD components;

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- (e) finally, in reaching her conclusion in *Besmaw*, the Secretary considered that the proposal was inconsistent with government policy which sought to exclude residential and commercial uses from SSD. Indeed, clause 13 of Schedule 1 of the SRD SEPP (cultural, recreation and tourist facilities), which was under consideration in that case, expressly excludes “any commercial premises, residential accommodation and services apartments whether separate or ancillary to the tourist related component”. However, in our view Billbergia’s proposal should be distinguished on the basis that it aims to deliver significant transport upgrades and linkages for the current and future population of Rhodes, and relies upon clause 18, Schedule 1 of the SRD SEPP, which does not expressly exclude residential or commercial uses. It also entirely consistent with State Government strategic planning policy to co-locate residential density and commercial uses (particularly retail) at the sites of key transport terminals, such as the proposed ferry terminal. This is consistent with the recent amendments to *State Environmental Planning Policy (Infrastructure) 2007*, which facilitate the development of residential, retail and business uses within rail corridors or above railway stations, and facilitate the development of retail and business uses in a railway complex, transport interchange or commuter car park.⁴

Accordingly, in summary, we consider that the whole of the proposed development is properly characterised as SSD under Schedule 1 of the SRD SEPP.

4.3 SRD SEPP, Schedule 2

Of course, it is also open to the Minister to specifically declare the site to be SSD under Schedule 2 of the SRD SEPP. Given the significance and value of the proposed transport infrastructure upgrades, the Secretary may form the opinion that this pathway is preferable for the assessment of the proposed development.

Please contact Louise Camenzuli on (02) 9210 6621 or Louise Lee on (02) 9210 6121 if you have any queries.

Yours sincerely



Louise Camenzuli
Partner

⁴ Clause 81 of *State Environmental Planning Policy (Infrastructure) 2007* was amended to permit these uses with consent, by way of *State Environmental Planning Policy (Infrastructure) Amendment (Review) 2017*, which commenced on 15 December 2017.