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Dear Lewis

Advice on proposed concept development application for Private Hospital and ancillary tenancies

Property: Faunce Street West, West Gosford (Lot 2 DP1226923)

We refer to your request to provide advice in relation to the proposed redevelopment of the above site. Specifically, you have asked us to advise on whether the delivery of pedestrian and cycleway areas proposed within the site and also along the street frontage (external to the site) can lawfully be approved and required to be undertaken by way of condition of consent or if a planning agreement is required.

Summary advice

In our view, based upon the relevant facts set out below and the applicable legislative provisions which apply to the concept development application, we advise as follows:

- The consent authority may lawfully require the construction of the shared pedestrian and cycleway facilities both within and external to the site by way of condition of consent.
- Section 4.17 of the *Environmental Planning and Assessment Act 1979* authorises the imposition of conditions which require the carrying out of works, whether or not the works apply to the land the subject of the development application or not.
- The Court of Appeal has held that the imposition of a condition of consent requiring the delivery of upgrade works within the road reserve adjacent to a site which improve the amenity of a street to be lawful and for a proper planning purpose (see *Botany Bay City Council v Saab Corp Pty Ltd* [2011] NSWCA 308).

Background

We are instructed and understand the relevant facts to be as follows:

- You act for AA Crown Holdings Pty Ltd and intend to submit a Concept Development Application for the State Significant Development of a private hospital and ancillary facilities at Faunce Street West, West Gosford (**Proposed Development**).
- The proposed development includes the following:

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- **Stage 1** – Concept and Detailed Built Form Development Application - the demolition of the existing buildings and a built form development application for a part 11 storey, part 5 storey building with 2 basement levels and a lower ground floor level. Stage 1 will consist of in-patient units, general practitioner clinics, radiology rooms, pathology room, intensive care unit, operating theatres and ancillary retail. The basement levels will consist of parking, waste storage and loading dock.
- **Stage 2** – Concept Development Application - Stage 2 comprises a concept development application for a 4 storey building along Racecourse Road and it is anticipated that it will be used for retail tenancy, ancillary tenancies and medical tenancies
- The proposed development also includes detailed layout and landscape plans which indicate the location of pedestrian and cyclist paths along the edges of the site and also in the road reserve, beyond the boundaries of the site (**Pedestrian and Cycleway works**).
- You intend to submit a development application for the proposed development as a State Significant Development Application. You have prepared the Environmental Impact Statement (**EIS**) which includes a response to the SEARs issued by the Department of Planning on 5 April 2019.
- You have sought our advice in relation to whether the delivery of the cycleway and pedestrian works is required to be undertaken in accordance with a Planning Agreement or if it may lawfully be the subject of a requirement by way of condition.

Detailed advice

1. **Can the proposed Pedestrian and Cycleway works be approved by way of condition or is a Planning Agreement required to be entered into?**

1.1 Although the Pedestrian and Cycleway works provide for a clear public benefit which benefits those beyond users of the proposed development they may lawfully be required by way of condition imposed by the consent authority.

1.2 Section 4.17 of the Act prescribes the power that is vested in a consent authority to impose conditions on the grant of a development consent and relevantly, provides as follows:

“4.17 Imposition of conditions(cf previous s 80A)

(1) Conditions—generally

A condition of development consent may be imposed if:

- (a) it relates to any matter referred to in section 4.15 (1) of relevance to the development the subject of the consent, or...*
- (f) 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, or”*

1.3 The terms of the section are clear and expressly permit the imposition of a condition

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which requires the carrying out of works in locations beyond the boundaries of the property to which development consent relates – in addition to works within the boundary of the site.

- 1.4 In order for such a condition to be valid and imposed lawfully, it must also satisfy the other requirements which apply to conditions in that it must “reasonably relate to the proposed development” and be imposed for a “proper planning purpose” see *Botany Bay City Council v Saab Corp Pty Ltd* [2011] NSWCA 308.
- 1.5 For example, a condition of consent could not impose a requirement that works be undertaken in a location unrelated to the proposed development (outside the boundaries of the subject site) which were required for a reason unrelated to the actual development proposed.
- 1.6 Although such a condition would comply with the strict terms of s4.17(f) it would fail on other grounds which also regulate the imposition of conditions.
- 1.7 Importantly, the terms of s4.17(f) apply to all consent authorities, whether that be a Local Council, Planning Panel, The Minister (or delegate) and also the Land and Environment Court on appeal.
- 1.8 It is important to note that the plans which support the proposed development clearly depict the location and extent of the Pedestrian and Cycleway Works proposed – both internally and external to the site. Those plans form the ‘development’ for which consent is sought.
- 1.9 In any approval the relevant plans would form the subject of a condition which expressly incorporated them into such an approval – the typical condition 1 which lists the plans approved by the development consent and in accordance with which the development is required to be carried out.
- 1.10 In our view, the proposed application clearly seeks approval as part of the development consent for the works which are sought to be carried out within the boundaries of the site. These works can uncontroversially be approved by any consent authority as they form the development for which consent is sought.

The external works

- 1.11 The works which extend beyond the boundary of the property are located within what we understand to be the road reserve within Faunce Street and Racecourse Road. Both local roads under the control of Council as the Roads Authority.
- 1.12 Through their identification on the proposed plans there is a clear intent for the proposed development to include the carrying out of such works within the public domain to complement the links and pathways contained within the site.
- 1.13 The requirement to carry out works beyond the boundaries of the land the subject of a development consent is a situation expressly contemplated by s.4.17(f).
- 1.14 As excerpted above, a consent authority may lawfully impose a condition if it relates to ‘any matter referred to in section 4.15 (1) of relevance to the development’.
- 1.15 Relevantly, section 4.15(1)(b) 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:..

(b) the likely impacts of that development, including environmental impacts on both the

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natural and built environments, and social and economic impacts in the locality,

- 1.16 Accordingly, the power to impose conditions on a development consent lawfully extends to matters which relate to the likely impact of the development on the locality and to land beyond the boundaries of the subject site.
- 1.17 By the operation of s4.17(a) and (f) the consent authority may lawfully impose conditions which require works that relate to the proposed development's impact in the locality.
- 1.18 Helpfully, the question of whether a condition may lawfully be imposed which requires works beyond the boundary of the site the subject of a development application is a matter which the Land and Environment Court and Court of Appeal has been asked to consider on numerous occasions.
- 1.19 In the seminal case of *Botany Bay City Council v Saab Corp Pty Ltd* [2011] NSWCA 308 the Court of Appeal considered the validity of a condition which imposed a requirement to underground power cables within the road reserve adjacent to a Site in Botany.
- 1.20 In that matter the undergrounding and works in the road reserve were not depicted or "offered" on the proposed plans and the requirement was imposed only by way of condition.
- 1.21 In upholding the validity of the condition, the Court made a number of findings in relation to the power to impose conditions under what was previously s80A (now s4.17).
- 1.22 The Court ultimately concluded that the imposition of a condition which required works within the public domain by way of condition which benefitted the amenity of the area immediately adjacent to the development was a proper exercise of the power under s80A. The Court found at [19]:

"19. It is apparent that the obligation imposed on the developer is to place underground "all service cables" in the street (or, in the language of the condition, road reserve - nothing was suggested as turning on this variation in language) "adjacent to" the site and thus not in the part of the street which is not so adjacent. There is no reason to limit the obligation to cables providing services to the development itself. First, the condition is not in terms so restricted. Secondly, it must cover cabling that predates the development. Thirdly, it is clear from the authorities, that no such constraint should be implied as a limitation on power. As explained by Gibbs CJ in Cardwell Shire Council (referred to at [15] above) at 388, a condition requiring the upgrading of a road and bridge away from the development site (and not exclusively used by residents of the development) could properly be the subject of a condition attaching to the development approval.

20. Improvement to the amenity of the area immediately adjacent to the development is a proper subject of an approval; it is not advanced by restricting the obligation to cables providing services to the development itself. The condition requires that if the cables are in that part of the street adjacent to the site, they must go underground at the developer's expense."

- 1.23 The circumstances in that case contemplated the requirement to provide for works within the road reserve beyond the boundary of the proposed development site and are analogous to the Pedestrian and Cycleway Works offered by the proposed development.
- 1.24 In our view, the power to require the delivery of those elements of the Pedestrian and Cycleway Works beyond the boundary of the site is clearly contemplated by s.4.17(f) of

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the Act.

- 1.25 Similar works have been required and found to be a lawful exercise of that power by the Court of Appeal (see paragraph 8-16 in *Botany Bay City Council v Saab Corp Pty Ltd* [2011] NSWCA 308).

Conclusion

In our view, the proposed Pedestrian and Cycleway works may lawfully be approved and required to be carried out by way of condition of consent on any approval. The works internal to the site form part of the development application works within the land for which development consent is sought. Those works external to the site, are offered and may lawfully be required to be undertaken in any event by the consent authority exercising the power established by s.4.17(f) of the Act – being works which reasonably relate to the proposed development and is impact on the surrounding locality.

In our view there is no legal requirement for a planning agreement which, practically, would be a complex, expensive and unnecessary mechanism for such works to be delivered.

Please contact Matt Sonter on (02) 8035 7850 or Kate Marginson (02) 8035 7851 should you wish to discuss.

Kind regards



Matt Sonter
Partner

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