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**Request for Advice**  
**State Environmental Planning Policy (Western Sydney Employment Area) 2009**  
**Property: 585 Mamre Road Erskine Park**

We refer to the above matter and to your request for our advice in relation to the proposed redevelopment of land at 585 Mamre Road Erskine Park (the **Land**).

**The Proposed Development**

You are proposing to redevelop the Land for the purpose of a warehouse and logistics hub. It is intended to develop the Land via a staged development application. Stage 1 of the development application will involve:

- (a) a concept master plan for the warehouse and logistics hub and
- (b) works for infrastructure, roads, bulk earthworks and built form for Precinct 1.

The following stages of the development will involve the construction of the remaining precincts (the **Proposed Development**).

You have indicated that the capital investment value of the Proposed Development exceeds \$50 million and therefore it is intended to seek development approval under *Statement Environmental Planning Policy (State and Regional Development) 2011* (the **SRD SEPP**). Clause 12 of Schedule 1 of the *State Environmental Planning Policy (State and Regional Development) 2011* (the **SRD SEPP**) provides that warehouse or distribution centres are State significant development if the capital investment value exceeds \$50million.

As the Proposed Development relies solely on the capital investment value to classify the development as State significant we point out that you will need to ensure that **the stage 1** development application has a capital investment value of more than \$50 million as the definition specifically excludes the costs relating to the separate / later stages of the development (as they require a separate development application). The definition of 'capital investment value' for the purposes of the SRD SEPP is the definition set out in the *Environmental Planning and Assessment Regulation 2000* (the **EP&A Regulation**) which is:

all costs necessary to establish and operate the project, including the design and construction of buildings, structures, associated infrastructure and fixed or mobile plant and equipment, **other than the following costs:**

- (a) amounts payable, or the cost of land dedicated or any other benefit provided, under a condition imposed under Division 6 or 6A of Part 4 of the Act or a planning agreement under that Division,
- (b) **costs relating to any part of the development or project that is the subject of a separate development consent or project approval,**
- (c) land costs (including any costs of marketing and selling land),
- (d) GST (within the meaning of [A New Tax System \(Goods and Services Tax\) Act 1999](#) of the Commonwealth).

We note that you will be required to submit a quantity surveyors report with the development application (as part of the application for the Secretary's Environmental Assessment Requirements (SEARs)) in order to confirm that the Proposed Development exceeds \$50M in capital investment costs and is therefore State significant.

We assume for the purposes of our advice below that you are able to provide evidence that the stage 1 of the Proposed Development exceeds a capital investment value of \$50 million.

## Advice

You have specifically asked for our advice on the following questions (in bold) which we have set out and answered below.

1. **Can the Department of Planning and Environment (the Department) issue Secretary's Environmental Assessment Requirements (SEARs) despite the zoning not being gazetted and will they be valid (if issued) for the purpose of State Significant Development?**

Yes. The Department can issue SEARs despite the zoning change not being gazetted.

Section 89E(5) of the *Environmental Planning and Assessment Act 1979* (the **EP&A Act**) provides:

A development application in respect of State significant development that is wholly or partly prohibited may be considered in accordance with Division 4B of Part 3 in conjunction with a proposed environmental planning instrument to permit the carrying out of the development.

Furthermore, s72J of the EP&A Act (being part of Division 4B of Part 3) provides that nothing in the Act prevents:

- (a) the making of a development application for consent to carry out development, that may only be carried out if an environmental planning instrument applying to the land is appropriately amended, or
- (b) the consideration by the consent authority of such a development application.

The *State Environmental Planning Policy (Western Sydney Employment Area) Amendment 2014* (the **Amendment**) was formally made on 16 January 2015 and accordingly the Land is now subject to the *State Environmental Planning Policy (Western Sydney Employment Area) 2009* (the **Western Sydney SEPP**). One of the aims of the Western Sydney SEPP is to rezone land for employment and conservation purposes. We understand that the Land is proposed to be rezoned IN1 General Industrial and E2 Environmental Conservation and that under the IN1 General Industrial zoning, the Proposed Development is permissible.

Therefore in our view nothing in the EP&A Act precludes:

- (a) you from making an application for SEARs (which is part of a development application for State significant development) and
- (b) the Department issuing SEARs

despite the Proposed Development being prohibited within the current zoning. However this can only be done once there is a Planning Proposal on foot for the rezoning of the Land.

Although the Amendment incorporated the Land within Precinct 11 of the Western Sydney SEPP, the Amendment did not rezone the Land. Therefore you will need to seek SEARs once there is a planning proposal being considered by the Department so that the development application and that planning proposal can be considered concurrently.

In conclusion, if the Department chooses to issue SEARs for the Proposed Development they will be valid for the purposes of State significant development because this process is expressly allowed by sections 89E(5) and 72J of the Act.

**2. By virtue of issuing SEARs, does that deem the project State significant development?**

Technically, no. A project is automatically State significant if it falls within Schedule 1 or Schedule 2 of the SRD SEPP or the Minister calls in specified development on specified land to be State significant development (s89C of the EP&A Act).

As such the issuing of SEARs does not 'deem' the Proposed Development State significant in any legal sense. From a practical perspective though it does signal that the Department agrees and accepts that the Proposed Development qualifies as State significant. The Department's opinion is therefore obviously important.

**3. Can the Department lawfully exhibit the application in the absence of the appropriate zoning, and if so, at what stage of the SEPP amendment would this occur?**

The Department will only be able to exhibit the development application for the Proposed Development either concurrently with or within a reasonable time after the Department exhibits the planning proposal for the rezoning change (s72K(1) of the EP&A Act). That section expressly says:

(1) Public notice that is required to be given under this Act in connection with the making of a proposed environmental planning instrument and notice that is required to be given under this Act of a development application in circumstances where this Division applies **are to be given by the same notice if that is practicable or, if that is not practicable, as closely together as is practicable** (our emphasis).

Please note that the reference to exhibition of the development application in s72K(1) is reference to the exhibition of the completed EIS and not the application for SEARs. After the Department issues the SEARs you will be required to prepare an Environmental Impact Statement (EIS) in accordance with the SEARs and Schedule 2 of the *Environmental Planning and Assessment Regulation 2000* (the **EP&A Regs**) and it is this document(s) that we consider is the 'development application' for the purposes of s72K(1) of the EP&A Act. Following completion of the draft planning proposal to re-zone the Land, it will be exhibited by the Department. It will be at this stage when the EIS (and other necessary documents) for the Proposed Development will be exhibited.

As we are not aware of any current draft planning proposals to re-zone the Land, we are unable to say when the exhibition is likely to occur. This timing should be checked with the Department.

**4. Can a determination or draft conditions be issued prior to gazettal?**

A determination cannot be issued until such time as the planning proposal to rezone the Land is exhibited and gazetted. However, depending on the Department's practice, you may be able to obtain draft conditions prior to gazettal of the zoning change. This will be at the discretion of the Department as there is no legal requirement that draft conditions be provided to any applicant for approval of a State significant development application. However we expect that the Department would agree to such a request.

If you have any questions in relation to this matter please contact Anthony Whealy (9931 4867) or Emma Whitney (9931 4893).

Yours sincerely



Anthony Whealy

**Partner**

Accredited Specialist Local Government and Planning Law