

Our Ref: TC:KT:149922

Your Ref:

5 December 2024

The Proper Officer  
Department of Planning, Housing and Infrastructure  
4 Parramatta Square, 12 Darcy Street  
Parramatta NSW 2150

Submitted via upload to the NSW Planning Portal

Dear Proper Officer,

**State Significant Development Application SSD-66409468 (not SSD-64409468)  
Submission In Opposition to (1) Continued Exhibition of the Application; (2)  
Acceptance of the Application; and (3) Grant of Development Consent**

1. We act for Dong & Young Pty Ltd (**DYPL**), the registered owner of the property known as 180 Adams Road Luddenham, also known as Lot 30 in DP 1251450 (**Lot 30**).
2. We refer to the notified exhibition of the State Significant Development Application for the Western Sydney Business Park SSD-66409468 (**SSDA-664**). **Attached** and marked **"A"** is a copy of the formal Notification of Exhibition published through Department's State Significant Development Planning Portal (**Notification**).

**Inadequate Notification and Inaccurate Identification of Land subject to Development**

3. We note each of the following matters in relation to the Notification of SSDA-664:
  - (1) The reference to the application in the Notice is incorrect. The application is identified as SSD-64409468. The correct reference is SSD-66409468.
  - (2) The application does not accurately describe the land that is the subject of the proposed development. The Notice identifies only Lots 3-7 DP 1240511. In fact, SSDA-664 proposes works within Lot 30 that are an essential component of the proposed development.

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**PRINCIPALS**

PAUL MCPHEE LL.B., Public Notary Acc. Spec. (Property Law, Family Law)  
TREVOR CORK B.A., LL.M., Acc. Spec. (Planning and Environment Law)  
STEVEN NICHOLSON B.A., LL.B.

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**ASSOCIATES**

ASHLEY DEWELL B Comp SC., LLB(Hons), LL.M., MThSt  
SUSAN WILD LL.B.  
JUSTINE COLE DipLaw

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**SOLICITORS**

ANNALIESE PEIXOTO BCrim and LL.B.

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**LICENSED CONVEYANCER**

EMMA BREW

4. In relation to the matter identified in paragraph 3(1) above, DYPL submits that SSDA-664 must be re-notified if, notwithstanding this submission, the Department concludes that SSDA-664 is a valid application.
5. In relation to the matter identified in paragraph 3(2) above, DYPL submits that SSDA-664 proposes development within Lot 30. The development concerned is the construction of Collector Road 3, and associated extensive drainage and civil engineering works. The application must be re-notified if, notwithstanding this submission, the Department concludes that SSDA-664 is a valid application. The new Notification must accurately describe the land within which the development will be conducted, including Lot 30.

**The Development will be conducted within Lot 30**

6. On page iii of the EIS, the following description is given:

*Land to be developed      Lots 3 to 7 in DP 1240511  
2422-2430 The Northern Road, Luddenham  
Plus ancillary works (access road) on Lot 30 in DP  
1251450*

7. At page x of the EIS, the following statement appears:

*To this end, WSABP Management is proposing to construct the collector road and intersection with Adams Road on the alignment as per the transport overlay in the WSA Precinct Plan. This would require amendment to the existing right of carriageway between the site and Adams Road across a neighbouring lot (Lot 30 in DP1251450). WSABP Management has commenced proceedings under Section 88K of the Conveyancing Act 1919 to create the revised easement over Lot 30, with this determination expected in late 2024 or early 2025.*

*Once the easements are created and the collector road (Collector Road 3) and intersection constructed, all access to the site would be via this road. WSABP Management has committed to not commence operations of any facility on site until this road is commissioned.*

8. At page 24 of the EIS, the following paragraphs appear:

*As shown on the master plan and outlined in Section 3.10 below, the proposal involves construction of an access road (Collector Road 3) through the neighbouring lot to the south (Lot 30 in DP 1251450). The road would be constructed in accordance with the alignment under the WSA Precinct Plan, and would replace the existing right of carriageway that runs along the western boundary of Lot 30 (see Figure 3.8 and Appendix E).*

*WSABP Management has engaged with the landowner of Lot 30 to seek agreement to realign the right of carriageway over Lot 30 to be consistent with the alignment under the WSA Precinct Plan, however to date these attempts have been unsuccessful in negotiating an outcome. As such, WSABP Management has commenced proceedings in the Supreme Court of NSW under Section 88K of the*

*Conveyancing Act 1919 to create the easement over Lot 30 for the purposes of the construction of the access road (Collector Road 3) on the alignment as proposed under the WSA Precinct Plan. The proceedings were commenced in June 2024, and the Court's determination is expected in late 2024 or early 2025.*

9. In relation to the Supreme Court proceedings initiated by the Applicant against DYPL, the summary given in the second quoted paragraph above, taken from page 24 of the EIS, and the information provided on page x of the EIS, is incorrect.
10. Proceedings have been commenced in the Supreme Court between the Applicant and DYPL. Those proceedings are being defended by DYPL. There is no prospect that the proceedings will be determined by the Supreme Court in either late 2024 or early 2025. The proceedings have not been listed for hearing. Orders have not been made by the Court for the allocation of a hearing date and those orders are not, in DYPL's submission, likely to be made in the immediate future.
11. **Attached** and marked "**B**" is a copy of page 33 from the EIS which further describes the road that the Applicant proposes to construct through Lot 30. In the lower half of page 33 the EIS describes the road that will be constructed. On any reasonable reading, the road proposed to be constructed within Lot 30 is an essential element of the development proposed in SSDA-664.
12. Although the completed development proposed in SSDA-664 will totally rely upon the Collector Road to be constructed through Lot 30 to link up with Adams Road and the public road network (**Collector Road 3**) there is not one reference to Collector Road 3 in the document titled *Civil Engineering Report Incorporating Water Cycle Management Strategy* prepared CRC (**CRC Report**).
13. On that issue, we note Section 4 of the CRC Report titled *ESTATE ROADS & ACCESS*. Table 4.1 within Part 4 refers to Collector Roads generically, but without specific reference to Collector Road 3.
14. Section 4.4 deals with the intersection of Collector Road 3 with Adams Road and is described as follows:

*An intersection will be required to Adams Road for access to the proposed estate.*
15. There is no explanation as to the way in which vehicles leaving the estate will arrive at Adams Road or vice versa. Access to and egress from the estate, when it is completed and fully constructed, will be entirely dependent upon Collector Road 3. The legal status of Collector Road 3 is addressed below in this submission.
16. Figure 4.4 in the CRC Report (page 34) dramatically illustrates the force of this point. That Figure identifies the intersection, which is located within the public road corridor for Adams Road. However, the access road to reach the intersection and the Adams Road road reserve is depicted on Figure 4.4 as being almost entirely located and constructed within Lot 30.

17. A full understanding of the nature and extent of the works proposed by SSDA-664 within Lot 30 can be secured by viewing the Engineering Plans submitted in support of the application.
18. For example, the Plan titled *CONCEPT WATER SENSITIVE URBAN DESIGN PLAN SHEET 4* Drawing no. CO15092.00-SSDA409 Issue E, clearly depicts a road and substantial batters that are proposed to be constructed within Lot 30. A culvert or creek crossing is also identified on that drawing.
19. A more detailed depiction of the works within Lot 30 is provided on CRC drawing *ROADWORKS STORMWATER DRAINAGE PLAN SHEET 7* Drawing no. CO15092.00-SSDA416 Issue C.
20. One important issue that readily emerges from a review of such drawings is that the proposed road corridor (as described by reference to the relevant Precinct Plan) will not wholly contain the works that are proposed to be conducted by the Applicant within Lot 30. The batters proposed by the Applicant extend beyond the generic corridor for a collector road, which has a width of 25.6 metres. The legal basis for these works, in the absence of the Applicant owning Lot 30, is not identified in SSDA-664.
21. Within the plans that form Appendix H to SSDA-664 *ROADWORKS LONG SECTIONS SHEET 2* provide the longitudinal section for Collector Road 3.
22. In summary, there is no doubt that SSDA-664 proposes substantial civil engineering works and road works that must constructed within Lot 30. In particular, the Applicant proposes, as part of its development, the construction of Collector Road 3, together with all of the substantial civil engineering (including substantial drainage) works associated with the construction of that road.
23. SSDA-664 must be re-notified to accurately inform the public that works are proposed to be undertaken within Lot 30, assuming that the following submission, which confirms that SSDA-664 is not a valid development application, is not accepted by the Department.

### **SSDA-664 is Not a Valid Application**

24. As the Applicant has not put forward SSDA-664 on the basis that Collector Road 3 does not form part of the development, we note one fundamental defect, which is fatal to the validity of SSDA-664. DYPL has not granted written owner's consent to the submission of SSDA-664.
25. The Department is fully aware of that omission. **Attached** to this letter and marked "C" is a copy of a letter dated 8 November 2024 sent to our firm by Ms Joanna Bakopanos of the Department, which specifically addresses the absence of owner's consent given by DYPL. Within that letter, Ms Bakopanos on behalf of the Department states:

*The Department acknowledges that where an applicant of a development application is not the owner of the land to which the proposed development relates, the making of a development application in most cases, requires the written consent of the relevant owner of the land. Landowner's consent can be provided at any time*

*up until the determination of the development application, and generally, the absence of landowner's consent, does not, of itself, prevent an applicant from uploading a development application on the NSW Planning Portal. However, the absence of landowner's consent, where it is required, will prevent the grant of any consent to the proposed development.*

*As landowner's consent can be provided at any time before determination of a development application, if a development application generally complies with other requirements for a development application, it can proceed to public exhibition and any person may make submissions in relation to that development application within the relevant exhibition period.*

26. The statement made by Ms Bakopanos on behalf of the Department is plainly wrong, as a matter of law.
27. Section 23 of the *Environmental Planning and Assessment Regulation 2021 (EP&A Regulation)* reads as follows:

**23 Persons who may make development applications**

*(1) A development application may be made by -*

- (a) the owner of the land to which the development application relates, or*
- (b) another person, with the written consent of the owner of the land.*

(Underlining added for emphasis)

28. Section 24 of the EP&A Regulation provides that a development application must contain all the information and documents required by the EP&A Act and by the Regulation itself. SSDA-664 does not comply with this requirement. No owner's consent has been granted by DYPL. That omission to comply with each of s 23 and s 24 of the EP&A Regulation cannot be cured or overcome by the Department's bland statement that owner's consent can be given at any time up to the date on which SSDA-664 is determined. As a matter of law, SSDA-664 cannot be accepted by the Department as a valid application without the written owner's consent of DYPL.
29. SSDA-664 clearly seeks consent for works within Lot 30, given that the application proposes a development that will entirely rely on a constructed road through Lot 30 to the proposed intersection in Adams Road. SSDA-664 cannot be made and lodged without DYPL's written owner's consent.
30. DYPL submission in relation to the invalidity of SSDA-664, given the absence of owner's consent, is supported by the following extract from the decision of the Land and Environment Court (Commissioner Gray) in *Harbour Port East Coast Pty Ltd v Sutherland Shire Council* [2023] NSWLEC 1683 (13 November 2023) at paragraphs 44 to 48 (noting that the Commissioner's decision accurately references judgments delivered by the NSW Court of Appeal and by the Land and Environment Court):

### ***The parties' position***

44. *The parties' agreed position is that the development applications were neither 'made', 'lodged' nor 'submitted' until such time as the final version of the owners' consent of TNSW was provided, which was in March 2023. They say that until that occurred, the development application was incomplete and was therefore not "made" or "lodged".*

45. *There are a number of authorities that support the parties' position. In Botany Bay City Council v Remath Investments No. 6 Pty Limited (2000) 111 LGERA 446; [2000] NSWCA 364, the Court of Appeal found that the development applications were not "made" before a given date because they were not accompanied by an environmental impact statement, which was required by cl 77 of the applicable regulations to accompany applications for designated development. The Court found that there has to be "substantial compliance" with the requirements for a development application before it can be considered to be made. Stein JA summarised the principles in the following way (at [13]-[15]):*

*"13 I see no warrant for splitting the requirements of a development application between it being made in the prescribed form and the documents necessary to accompany it, as well as the payment of the fee. I cannot accept that the latter requirements may be hived off so as not to be requirements for the making of the development application.*

*14 That is not to say that a development application is invalid or void if it is not accompanied by, for example, an EIS, SIS or the prescribed fee, at the very time of its lodgment with the consent authority. Substantial compliance may be satisfied by the later accompaniment of the required document under subparas (c), (d) or (d1) or the fee under subclause (e) of s 77(3).*

*15 For the purposes of this case, the construction which I favour means that the EIS has to substantially comply with the requirements of the unamended Act prior to the appointed day (1 July 1998) for it to qualify under cl 11 as a development application made but not determined under the unamended Act."*

46. *In Rose Bay Marina Pty Ltd v Minister for Urban Affairs and Planning (2002) 122 LGERA 255; [2002] NSWLEC 123, the Court found that a development application lodged by a person other than the owner of the land, without being accompanied by owners' consent, was "incomplete and ineffective". This conclusion was reached based on the requirement in the regulation for a development application to be "made" either by the owner of the land, "or by any other person, with the consent in writing of the owner of that land".*

47. *In Becton Corporation Pty Limited v Minister for Infrastructure, Planning and Natural Resources & Anor [2005] NSWLEC 197 at [7] (Becton), Lloyd J confirmed that "it is settled law that a development application which is not accompanied by the landowner's consent is not made within the meaning of cl 49(1) of the EP&A Regulation". Clause 49(1) of the EPA Regulation 2000, at that time, required a development application to be "made... by any other person, with the consent in writing of the owner of that land".*

48. *The parties' agreed position is that, because the development applications were not accompanied by a valid written owners' consent and there was no completed "owners consent" section in the development application forms, they were incomplete and ineffective, not being in the "form approved" and not being made with the consent of the owner of the land.*

31. Based on the authorities cited by Commissioner Gray, the decision in *Harbour Port East Coast* is clearly correct. The Department has made a significant error of law in accepting SSDA-664 as a valid development application and has made a further significant error of law in notifying and publicly exhibiting the application.

### **Appropriateness of Proposed Access Arrangements**

32. Again, assuming that SSDA-664 is a valid application (which DYPL denies), the Department will appropriately consider whether provision of access to a major warehouse development is appropriately provided by means of a right of access, being a private easement granted over Lot 30, assuming that the Supreme Court does order the grant of the easements proposed by the Applicant.
33. The Department must also appropriately consider the alternative. What will happen if the Supreme Court rejects the application that DYPL grant a right of access over Lot 30? In our submission, that outcome, given the nature and the scale of the works proposed by the Applicant within Lot 30, is highly likely.
34. Further, the Applicant does not propose, and has no means of securing, the dedication of Collector Road 3 as a public road. DYPL does not propose to dedicate that road (if it is constructed) as a public road nor can DYPL be compelled to do so.
35. The corridor within which the Precinct Plan for the Western Sydney Aerotropolis envisages that Collector Road 3 will ultimately be constructed is not land identified for compulsory acquisition by the Ministerial Corporation or by any other public authority, including Sydney Water Corporation or Liverpool City Council. That land will remain in the ownership of DYPL.
36. The Applicant proposes the construction of 8 very large warehouses within the development site. Those warehouses will be served by Collector Roads which will almost certainly be dedicated as public roads. SSDA-664 appears to contemplate that the public road network within the land now known as Lots 3-7 inclusive, will rely totally upon a constructed road over which a right of access, created under Schedule 8 to the *Conveyancing Act 1919*, will be in force and effect. In DYPL's submission, this is an inappropriate and anomalous circumstance and one which should not be accepted by the Department.
37. If there is to be a grant of development consent to the development proposed in SSDA-664 then in DPYL's submission, that consent must be a deferred commencement consent. The development consent should not become operational and effective until any road constructed through Lot 30 (assuming that the Applicant ever secures the right to construct that road through Lot 30) is dedicated as a public road.

## Summary Submission

38. In summary, we make the following submissions on behalf of DYPL, as the owner of Lot 30:

- (1) SSDA-664 is not a valid application in the absence of the written owner's consent of DYPL.
- (2) SSDA-664 has not been validly and accurately notified if the Department does accept that the application can propose development within Lot 30, without owner's consent. It must be re-notified.
- (3) If the Department is prepared to accept SSDA-664, but does not accept that it can propose works within Lot 30, then the application must be amended to delete any reference to works within Lot 30. Once that amendment is made, the Department must re-notify the application. The issue of a deferred commencement development consent will inevitably arise for consideration in that circumstance.
- (4) The Department would not grant development consent to SSDA-664 if the proposed Collector Road 3, which the Applicant seeks to construct through Lot 30, will have the legal status of a Right of Access and not be dedicated as a public road.

Yours faithfully,

*McPhee Kelshaw*

Trevor Cork



## EXHIBITION OF STATE SIGNIFICANT DEVELOPMENT APPLICATION

### Western Sydney Airport Business Park

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Application No	SSD-64409468
Location	2422-2430 The Northern Road, Luddenham (Lots 3-7 DP 1240511)
Applicant	WSABP Management Pty Limited
Council Area	Liverpool City
Consent Authority	Minister for Planning and Public Spaces or Independent Planning Commission

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#### Description of proposal

The proposal involves the construction and 24/7 operation of a business park, comprising eight warehouse and distribution centres with a gross floor area of 279,340 square metres and a maximum building height of 16.8 meters within the Agribusiness Precinct of the Western Sydney Aerotropolis. The proposal also involves construction of estate roads and intersections, the restoration of Cosgroves Creek riparian corridor and ancillary development including offices, carparking, infrastructure and landscaping.

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#### About the exhibition

An exhibition process allows any individual or organisation to have their say about a proposed development.

The Department of Planning, Housing and Infrastructure (Department) has received a State significant development application for the abovementioned project. The application, environmental impact statement, and accompanying documents are on exhibition from **Friday 8 November 2024** until **Thursday 5 December 2024**.

You can view these documents online at [planningportal.nsw.gov.au/major-projects](https://planningportal.nsw.gov.au/major-projects).

At the time of publishing this notice, the Minister for Planning and Public Spaces has not directed that a public hearing should be held.

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#### Have your say

To have your say on this project, you must lodge a submission online through the NSW Planning Portal before the close of exhibition.

To do this, search for this project at [planningportal.nsw.gov.au/major-projects](https://planningportal.nsw.gov.au/major-projects) and click on 'Make a submission'. You will need to log in or create a user account.

Resources to help you use the NSW Planning Portal are available at [planningportal.nsw.gov.au/major-projects/help](https://planningportal.nsw.gov.au/major-projects/help) including a step-by-step [guide](#) on how to make a submission. If you require further assistance making a submission through the portal, please contact Service NSW on 1300 305 695.

If you think you'll need help making a submission using the portal, it's a good idea to contact Service NSW sooner rather than later. Ensure you give yourself plenty of time to make a submission before the project's exhibition end date.

**Before making your submission:** You should read the Department's:

- disclaimer and declaration at [planningportal.nsw.gov.au/major-projects/help/disclaimer-and-declaration](https://planningportal.nsw.gov.au/major-projects/help/disclaimer-and-declaration); and
- privacy statement at [planning.nsw.gov.au/privacy](https://planning.nsw.gov.au/privacy).

Your submission will be published on the NSW Planning Portal in accordance with our privacy statement and disclaimer and declaration. You can elect to have your name withheld from the published list of submitters. If you choose this option, do not include personal information in the body of your submission or any attachments as your submission will be published in full.

## Department of Planning, Housing and Infrastructure

When making a submission you will be required to include:

- your name and address;
- the name of the project and the application number;
- a statement on whether you 'support' or 'object' to the application or if you are simply providing comment;
- the reasons why you support or object to the application;
- a declaration of any reportable political donations you have made in the last two years (visit [planning.nsw.gov.au/assess-and-regulate/development-assessment/planning-approval-pathways/donations-and-gift-disclosure](https://planning.nsw.gov.au/assess-and-regulate/development-assessment/planning-approval-pathways/donations-and-gift-disclosure) or phone 1300 305 695 to find out more); and
- an acknowledgement that you accept the Department's disclaimer and declaration.

For more information, including the Department's submissions policy, please go to [planningportal.nsw.gov.au/major-projects/have-your-say](https://planningportal.nsw.gov.au/major-projects/have-your-say).

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For more information about the project: Contact (02) 9274 6386

If you require assistance to use the NSW Planning Portal or you are having difficulty making a submission online, please call Service NSW on 1300 305 695.

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### Site Access and Internal Roads

The site's existing accesses from The Northern Road would only be used during the initial stages of site establishment and construction activities, until the long term access via Adams Road is established.

The existing right of carriageway along the western boundary of Lot 30 would also be used to access the site until the new southern connection to Adams Road is established. As outlined in Section 3.2, WSABP Management has commenced proceedings under Section 88K of the *Conveyancing Act 1919* to create the required easement over Lot 30 for the purposes of the proposed access road (Collector Road 3) and associated services on the alignment as proposed under the WSA Precinct Plan. Once the easement is established, WSABP Management would construct the access road and associated services across Lot 30 to the site.

Collector Road 3 would cross Cosgroves Creek via culvert to a three way roundabout, from which branches the proposed primary estate road (Collector Road 1) and Collector Road 2, which would eventually connect with the Anton Road extension which is planned to be located to the east of the site. An additional local road (Local Road 1) off Collector Road 1 would be constructed and would provide access to Warehouse 7, north of the Cosgroves Creek riparian corridor.

The proposed road network for the WSABP has been designed to be consistent with the alignment and layout in the WSA Precinct Plan (see Section 4.4).

The proposed road design cross sections are shown on **Figure 3.15**, with detailed designs provided on the civil design plans in **Appendix H**. These cross sections have also been designed to be generally consistent with the cross sections in the Western Sydney Aerotropolis DCP, however additional tree planting bays have been incorporated into the design to improve the amenity of the estate and discourage on-street parking by trucks (see Section 6.1 for further detail).

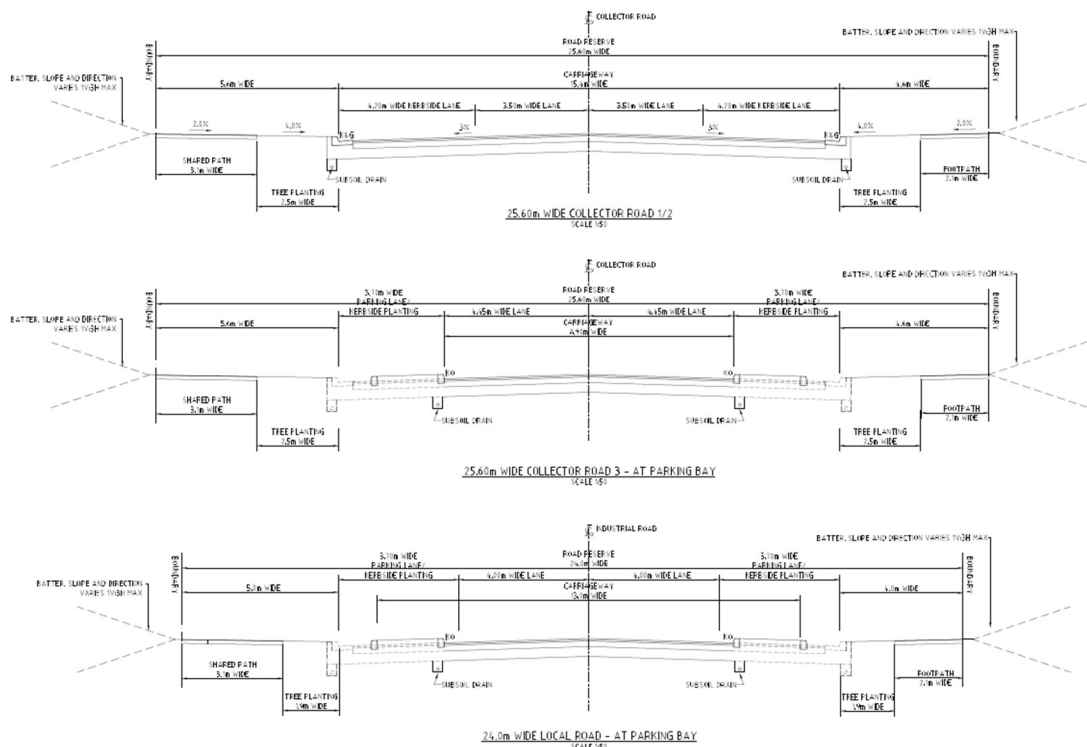


Figure 3.15: Typical Road Cross Sections (Source: Costin Roe)

Department of Planning, Housing and Infrastructure

Our ref: SSD-66409468

Your ref: TC:KT:149922

Mr Trevor Cork  
Principal  
McPhee Kelshaw Solicitors and Conveyancers  
Suite 1 170 Macquarie Road,  
Springwood NSW 2777

8 November 2024

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**Subject: Western Sydney Airport Business Park, 2422-2430 The Northern Road, Luddenham  
(SSD-66409468)**

Dear Mr Cork

Thank you for your recent letters dated 21 and 28 October 2024 on behalf of your client, Dong & Young Pty Limited, regarding the matter of landowner's consent and the lodgement of a State significant development application for the Western Sydney Airport Business Park (SSD-66409468).

The Department of Planning, Housing and Infrastructure (**the Department**) notes your concerns that your client is the owner of the property at Lot 30 DP1251450, also known as 180 Adams Road, Luddenham, and that your client has not provided landowner's consent for the lodgement of a development application for SSD-66409468.

The Department acknowledges that where an applicant of a development application is not the owner of the land to which the proposed development relates, the making of a development application in most cases, requires the written consent of the relevant owner of the land. Landowner's consent can be provided at any time up until the determination of the development application, and generally, the absence of landowner's consent, does not, of itself, prevent an applicant from uploading a development application on the NSW Planning Portal. However, the absence of landowner's consent, where it is required, will prevent the grant of any consent to the proposed development.

As landowner's consent can be provided at any time before determination of a development application, if a development application generally complies with other requirements for a development application, it can proceed to public exhibition and any person may make submissions in relation to that development application within the relevant exhibition period.

The Department notes that the development application for SSD-66409468 and its accompanying Environmental Impact Statement (EIS) commenced exhibition on Friday 8 November 2024. For State significant development, the minimum public exhibition period is 28 days. The Department has notified your client of the public exhibition for SSD-66409468 and your client can make any

## Department of Planning, Housing and Infrastructure

submission in relation to the proposed development during the relevant public exhibition period. If landowner's consent has not yet been requested or has not yet been provided during this time, your client can raise this as a relevant matter in its submission.

The Department will remain in contact with the Applicant for SSD-66409468, which includes requiring the Applicant to respond to any relevant submissions made during public exhibition period.

If your client has questions about the EIS for SSD-66409468, please contact Pamela Morales on (02) 9274 6386 or via email at [pamela.morales@planning.nsw.gov.au](mailto:pamela.morales@planning.nsw.gov.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read "Bakopanos".

Joanna Bakopanos

**Acting Director**

**Industry Assessments**