

6 November 2015

Your ref:
Our ref: CWDS/TXLS/3168882

All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215

Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

Contact
Christopher Doherty +61 2 8035 7931
Email: cdoherty@millsOakley.com.au

Partner
Tim L'Orange +61 2 8289 5816
Email: tlorange@millsOakley.com.au

Attention: Acting Director – Key Site Assessments
By facsimile also: (02) 9228 6455
Email: information@planning.nsw.gov.au

Dear Sir or Madam

Submission in relation to Hickson Road Remediation Works Environment Impact Statement (EIS) on behalf of Miller Commercial Group Pty Ltd

1.1 Overview

We act for Miller Commercial Group Pty Ltd (**Miller Commercial**), the owner of land at 36 Hickson Road, Milsons Point, better described as Lot 5 on DP873158 and Lot 12 on DP1065410 (**Property**).

The Property is situated adjacent to the Barangaroo development site and the “EPA Declaration Area” (as defined in the EIS) at which remediation works are proposed to be carried out by Lend Lease (Millers Point) Pty Ltd (**Lend Lease**) on behalf of the Barangaroo Delivery Authority.

Our client has reviewed the publically available material to ascertain whether the Property is likely to be impacted by the remediation works and, if so, to what extent.

Some of the potential impacts about which Miller Commercial has some concerns have been set out in the EIS documentation. For example, see section 2.6.1 (Vehicular and Pedestrian Access), 5.3.1 (Perimeter Retention Walls), 5.4.7 (Removal of Trees), 7.8 (Air Quality) and 7.9 (Noise and Vibration).

Miller Commercial adopts those aspects of the EIS documentation as a baseline for the consideration of the potential damage that may be suffered as a result of the impacts associated with the remediation works.

The potential damage suffered by our client includes:

- Reduced rates for the lease of the existing building;
- Costs associated with the delay of the development of the Property; and
- Trading losses.

Further details of these potential losses are set out below.

Our client is particularly concerned that the works are expected to continue for up to 21 months (from the forecasted commencement in June 2016). This extended timeframe will exacerbate the potential losses incurred by Miller Commercial due to impacts on its commercial and

NOTICE

The information contained in this email/facsimile is confidential and intended only for the use of the addressee and it may also be privileged. If you are not the intended recipient, any use, disclosure or copying is prohibited. If you have received this email/facsimile in error, please telephone the sender and return it by mail to the sender.

business operations at the Property, directly resulting from the remediation works.

In response to the expected and potential impacts of the remediation work on our client and its business, we consider it reasonable that the Development Approval for the remediation works to contain conditions requiring Lend Lease and/or the Barangaroo Delivery Authority to:

- compensate adjacent land owners for financial losses that may be incurred as a direct result of the remediation works;
- obtain land owner consent and provide compensation for access to land, if required for the remediation works; and
- assess impacts to adjacent land where it will be impacted by earthworks and / or construction undertaken for the purposes of the remediation works (and consult with land owners regarding those impacts and proposed mitigation measures).

1.2 Current use of the Property

Our client currently leases parts of the Property for commercial office purposes.

Due to the increased general disturbance in the vicinity of the Property resulting from the remediation works (including, for example, increased foot traffic, road diversions, general noise, dust, light and vibrations), our client expects that demand and/or rental rates applicable for commercial office space in the Property will be less than our client would have otherwise expected, were it not for the remediation works.

This is supported by recent commercial-in-confidence negotiations with a potential lessee for the lease of office space in the Property during the period which remediation works will be carried out. In these negotiations, the potential tenants have revealed a market perception that the Property is (or will be) impaired as a result of the remediation works.

While perhaps temporary, the rental rates being offered by potential tenants are significantly lower than recent market rates for similar properties in the area. This potential loss is directly attributable to the remediation works and should be compensated.

1.3 Commercial development of the Property

For some time, our client has planned various developments for the Property and these proposed developments may be adversely impacted or significantly disrupted by the remediation works.

In March 2014, our client lodged a pre-development application with the City of Sydney Council for a planned “tram café” at the Property (in the outdoor area at the Property along Hickson Rd). A formal development application was lodged on 14 October 2015. In anticipation of receiving development consent, our client has already purchased and restored the tram that will be installed at the proposed café site.

It is anticipated that development consent will be obtained in or around March 2016 and, absent the remediation works, will be operational sometime in mid-2016.

In the event that the tram café is operational prior to the remediation works commencing, our client expects that this enterprise will be adversely affected by the general disruption resulting from the works and their proximity to the Property.

Alternatively, where approval is obtained following commencement of the remediation works, the construction of the café may be delayed as a result. Where construction is delayed, our client is likely to incur expenses relating to storage of the tram that would not otherwise have been incurred. Further, there will be a loss of opportunity suffered by our client for the time during which our client could have been conducting this business, were it not for the remediation works.

This potential loss is directly attributable to the remediation works and should be compensated.

Our client also has plans to establish a bar on the Property, and upgrade and modify the external stairs and lobbies in “Building A” of the Property.

A development approval for each of these proposals is due to be submitted in November 2015. Further, access to the site to allow construction/fitout of the bar and staircase will be difficult due to the presence of the remediation works and associated temporary infrastructure.

As a result, our client will likely be prevented from commencing these works until completion of the remediation works, which is not expected to occur for some time. This represents a loss of opportunity for our client. Even where the bar is operational during the remediation works, this enterprise is unlikely to be as profitable as it otherwise would have been were it not for the remediation works.

This potential loss is directly attributable to the remediation works and should be compensated.

1.4 Encroachment/access issues

The available EIS material identifies two possible remediation scenarios – in-situ and ex-situ – with the in-situ method being preferred.

We understand that a trial study of the in-situ method has been approved and will commence shortly.

While the in-situ method has reduced impacts on the Property, the impacts remain sufficient such that current use and the future development plans of the Property will nonetheless be deleteriously affected.

To the extent that the in-situ method trial is not successful, the ex-situ method presents significant issues for the current use and the future development plans of the Property.

Our client has obtained independent engineering advice from Cardno (**enclosed**) which confirms that, regardless of the methodology used, given the location of the Tar Tank, excavation is likely to be required at the front of the Property to enable the remediation works on the Tar Tank to be carried out. The backfill material around the tank at or near the boundary to the Property is also likely to require temporary support or restraint, which will most probably necessitate the use of anchors into the site or works within the Property.

Based on this expert advice, it is our client’s position that the intended method of construction and program of works should be subject to further detailed assessment and any development consent issued should be conditioned as such.

The EIS material indicates that the underground structures (namely the Tar Tank) may abut the Property with the possibility that the remediation works relating to that infrastructure may encroach upon the Property. This is not entirely clear based on the plans available.

In any event, as noted above, the remediation process will likely include the removal or treatment of a significant amount of soil around the Tar Tank which increases the prospect of direct impacts on the Property.

Further, the ‘*Specialist Geotechnical Desktop Report to Accompany Development Application SSD 6617-2014 for Hickson Road Remediation*’ prepared by Coffey and dated 5 November 2014 (**Geotechnical Report**) indicates that retention walls may also encroach onto the Property. See section 7.2 and 7.3 of the Geotechnical Report.

In these circumstances, the proponent will require access to or encroachment onto the Property. Any development consent should be conditioned such that our client’s consent is required prior to any works commencing.

1.5 Overhanging tree

We understand that Lend Lease are in the final stages of gaining approval from City of Sydney Council to prune Tree 45 on the basis that does not require owners consent as the branch is actually overhanging the footpath.

Putting that aside, there is a real prospect that any works at the front of the Property (for example those described in Section 1.4 above) will impact on the root ball of the tree. Furthermore, the injection of material in the in-situ method may have some further effects on the tree.

On the basis that the proposed works are likely to interfere with and/or damage the tree, a condition should be included requiring its protection.

1.6 Proposed Conditions

We note that the application made relates to a State significant development.

Section 89E of the *Environmental Planning and Assessment Act 1979* (NSW) provides that the Minister may grant consent to a development application in respect of State significant development on such conditions as the Minister may determine.

It is our client's position that it would be reasonable in the circumstances for the Minister to impose a condition on the remediation works requiring the proponent to mitigate the reasonable financial losses to existing commercial and business operators in the vicinity of the EPA Declaration Area attributable to the remediation works, including Miller Commercial, and meet the costs associated with the investigation, negotiation and administration of any compensation package in respect of those losses.

By way of example, a similar condition was imposed by the Coordinator-General in Queensland in relation to the Western Basin Dredging Project undertaken by the Gladstone Ports Corporation (similar a State significant project), on the basis that the project was likely to have some degree of impact on the business activities undertaken by commercial fisherman in the Port of Gladstone.

An extract copy of the Queensland Coordinator-General's report (including the relevant conditions) is **attached** for your reference.

Using this condition as a guide we respectfully request that any development consent should be conditioned as follows:

1. Compensation Condition

*The proponent must compensate commercial and business operators (**Operators**) in the area adjacent to, or in the vicinity of, the EPA Declaration Area for any financial or business-related losses or costs (including consequential losses) suffered or incurred by the Operators due to the remediation works being carried out on or around the EPA Declaration Area (**Loss**).*

The proponent must meet the costs associated with the investigation, negotiation and administration of any compensation package in respect of any Loss.

Further, in view of our client's request above that a condition is imposed requiring the proponent to obtain our client's consent for access to the Property we propose the following condition:

2. Access

The proponent must obtain the written consent of any affected land owner to access the land owner's property for the purpose of carrying out the remediation works and must compensate the land owner appropriately for such access (including, but not limited to, compensation for any Loss as described in Condition 1).

The proponent must meet the costs associated with the negotiation and administration of any access and compensation package in respect of access to land as described above.

Finally, based on our client's independent engineering advice, we ask that any development consent for the remediation works is conditioned as follows:

3. *Engineering Assessment*

Where remediation works are expected or proposed to have a direct physical impact on land adjacent to or in the vicinity of the EPA Declaration Area, the proponent must undertake a detailed engineering assessment of the proposed construction methods and program of works to determine the extent of any impacts to the relevant land and any assets situated on that land (for example, buildings, structures, improvements and installations).

The proponent must consult with the affected land owner in respect of the proposed works and likely impacts arising from those works, and the implementation of mitigation measures to minimise impacts to land or assets as a result of the remediation works, to the extent that adverse impacts to the land or assets cannot be avoided.

If you have any questions or require further information please do not hesitate to contact Christopher Doherty on +61 2 8035 7931 or cdoherty@millsoakley.com.au.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Tim L'Orange', with a stylized flourish at the end.

TIM L'ORANGE
PARTNER

Enc