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Experts in Property & Planning Law

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Our Ref: GS:PC:21018

29 January 2021

NSW Department of Planning, Industry and Environment  
4 Parramatta Square  
12 Darcy St  
PARRAMATTA NSW 2150

**By Email: [brent.devine@planning.nsw.gov.au](mailto:brent.devine@planning.nsw.gov.au)**

**Attention: Mr B Devine**

Dear Mr Devine

**Submission objecting to State Significant Development application no. SSD-10445  
Pty: 79 & 83-87 and 66 & 80 Gurner Avenue, Austral**

We act for Mr John and Ms Natasha Gojnich and Ms Vera Chevell (**Clients**), relatives of Ms Radmila Gojnich who is the owner of 90 Gurner Avenue, Austral, known (**Property**).

In summary, our Clients' concerns with the development proposed in State Significant Development application no. SSD-10445 (**Proposal**) are as follows:

1. Lack of owner's consent for land on which roadworks are proposed, and lack of proper consideration of those impacts;
2. Traffic impacts and undesirable locations of proposed roads; and
3. Unreasonably lengthy project period, uncertainty due to project length and inability for impacts to be assessed.

Lesser, but still important, concerns include exceedances of height of building controls and inadequate stormwater measures in circumstances where there have already been delays to the rollout of stormwater infrastructure in the Austral locality.

Our Client's three main concerns are expressed in greater detail below.

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## 1. Roadworks not on Proponent's land

- 1.1. It is a jurisdictional prerequisite for owner's consent to be provided in respect of all land to which a development application applies, including a State Significant Development application.
- 1.2. The Environmental Impact Statement prepared by Planning Ingenuity (**EIS**), the civil engineering roadwork plans prepared by Henry & Hymas (**Engineering Plans**) and the Transport and Accessibility prepared by Traffix (**Traffic Report**) propose a number of roads which are partially (and, in the case of the proposed "West Avenue", entirely or predominantly) on land other than the land the subject of the Proposal. That is, the Proposal seeks consent for works, or relies on works, on other land for which there is no owner's consent.
- 1.3. We understand that these proposed road layouts may be broadly based on the Department's Austral and Leppington North Indicative Layout Plan (**ILP**). However, the layout of proposed roads in the ILP does not have the force of environmental planning instrument reservation, or anything which would give any certainty that those lands will ultimately be acquired by the roads authority and developed for roads. In the interim, this certainly does not equate to owner's consent, and, legally, simply cannot be relied upon by the Proponent as the basis for the layouts in the Proposal.
- 1.4. It is not clear if the Proposal's applicant (**Proponent**) has obtained owner's consent in relation to all lots over which future roads are proposed. However, this appears unlikely. What is clear is that the Proponent certainly does not have owner's consent in respect of the proposed "West Avenue", which is located on our client's land.
- 1.5. This is also true in relation to the access handle for 70 Gurner Avenue, which appears to sit between the land proposed as stages 3 and 10 and stages 11 of the Proposal, and in relation to the proposed "East Avenue".
- 1.6. We note further that, at section 3.2 of the EIS, the Proponent concedes that:

*The two lots are separated by a 6m wide access handle associated with No. 70 Gurner Avenue which is to the south of No.66 Gurner Avenue... It is the intention of the applicant to purchase the access handle in order to consolidate the site however, negotiations for purchase are still underway. The staging of the development has taken into consideration the purchase of the access handle in the timeline.*
- 1.7. It is unclear how the Proposal is capable of approval when it contemplates a future purchase of land which may never occur and includes that land in its staging.
- 1.8. With specific reference to the Property, it is unclear from the Engineering Plans and Traffic Report how the proposed "West Avenue" (and an intersection for an as-yet-unnamed connecting road running east-west from "West Avenue") are to be constructed in circumstances where no owner's consent has been obtained (or, we are instructed, discussed even on a preliminary basis). To be clear – the land on which West Avenue is proposed is owned by our client, and our client has no intention of selling.
- 1.9. The Department (or the Land and Environment Court (**Court**) on appeal) does not have the power to grant consent to the Proposal in the circumstances, on this basis alone.

- 1.10. In the event that the Proponent is not proposing roadworks (and ancillary earthworks as shown on the Engineering Plans) to be carried out on the Property, and instead seeks to defer these matters to a later stage (and a later development application), the Department is similarly constrained from granting consent to the Proposal as it would be impermissibly deferring a crucial matter relevant to, and forming part of, the Proposal to a later point in time.<sup>1</sup>
- 1.11. Access is a necessary requirement for the school expansion – it cannot function without those roads. As there is at present no concrete proposal for “West Avenue” amongst other roads and no certainty about their location (at least not without owner’s consent), there is simply no certainty that the proposed access can be provided. The Traffic Report relies upon these proposed roads for crucial functional elements of the Proposal (such as bus and car drop-off zones). Without the certainty as to those roads, including location, the impacts of these functional elements cannot therefore properly be considered at this stage.
- 1.12. We are of the view that if consent were to be granted to the Proposal, it would be liable to a finding of invalidity by the Court on review as it lacks certainty, on the same basis as held in the *Hoxton Park Case*.
- 1.13. However, even if not subject to Court challenge, as a matter of merit the Proponent should be constructing all proposed roads entirely upon land owned by the Proponent itself. The demand is being created by this proposal. It is therefore the Proponent that should provide the traffic solution, entirely at the Proponent’s cost (whether paid for directly or as part of a Voluntary Planning Agreement entered into both with the local Council and with the Department), and on the Proponent’s land.
- 1.14. Further, should the Department be minded to grant consent to the Proposal, it is our view that an alternative collector road (currently proposed as “South Avenue”, also known as Sixteenth Avenue running between Craik Avenue and Fourth Avenue) be used instead of “West Avenue”. This could be imposed as a deferred commencement condition, as there would need to be further traffic modelling and engineering plans provided to show this proposed road in place of “West Avenue”. Other traffic concerns are addressed below.

## **2. Traffic impacts and proposed road locations**

- 2.1. As is apparent to the Department, the Property is in very close proximity to the lots the subject of the Proposal and is functionally situated between the two main parcels of land the subject of the Proposal in terms of road access. Our Clients are, therefore, concerned not only with their own amenity impacts but also of the impacts that the increased traffic volume will place on the surrounding road network.
- 2.2. The locality is currently the subject of a significant shift in proposed future character as is detailed in the EIS. However, one important omission from the EIS and other supporting documentation in this respect is the lack of reference to the B1 – Neighbourhood Centre zoning under the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* of the northern part of the Property (and adjoining properties).

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<sup>1</sup> *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349 at [47]-[48] (***Hoxton Park Case***)

- 2.3. The B1 zoning on the corner of Fourth Avenue and Gurner Avenue will allow for business premises, food and drink premises, hotels and accommodation, medical centres, serviced apartments, shops and similar types of development. It will help Liverpool Council achieve the goal of 1,000 to 5,000 new jobs (as stated in the Liverpool Council's Local Strategic Planning Statement), help drive economic growth, attract new residents, potentially attract tourism, help bring together the community and will be an important part of making the locality a great liveable area that also could help support the surrounding needs of the Western Sydney International (Nancy-Bird Walton) Airport (**WSIA**).
- 2.4. The additional proposed roadways set out in the Traffic Report are not accurately modelled to account for this increase, and instead the Proposal focuses only on the impact that it proposes that the various stages will have on the road network. It is extremely ambitious for the Proponent to project numbers up to 2042 given the transforming nature of the area, and we suspect that the impact on the future residents of the area will be vastly greater than the models show.
- 2.5. Another important context is the location of this development to the high frequency Fifteenth Avenue Smart Transit Corridor (autonomous transportation technology to connect Liverpool and WSIA). It is approximately 650 metres apart, a walkable distance that with the right upfront planning can help promote walking and cycling as a healthy mode of transport to shops, schools and business premises.
- 2.6. Liverpool City Council's Local Strategic Planning Statement has highlighted the need for congestion to be properly managed. Given that there is expected to be a significant increase in residential premises and traffic movements associated with those new premises (as detailed in Annexure U to the EIS), the sheer volume of vehicle movements associated solely with the Proposal will result in increased traffic congestion even in circumstances where all proposed roads are constructed (which, for the reasons set out at section (1) above, is uncertain). All sections of the EIS and other supporting documentation discussing the road upgrades are extremely vague and do not have any commitments to staging; that is, there is no certainty as to precisely what works will happen at what time.
- 2.7. It is suggested that if the Proposal were capable of approval, the Department ought to require the closure of that part of Gurner Avenue between the two primary lots the subject of the Proposal and convert that former roadway into a pedestrian plaza and require the Proponent to reorient the locations of the access roads into the school precincts (subject to our comments at section (1) above about all roads being constructed on land owned by the Proponent, or on land with owners' consent).
- 2.8. As is discussed below, the traffic impacts of the various stages of the Proposal cannot be properly assessed for a 21 year project when the timing of stages is uncertain, and a significant number of residential and commercial properties will be constructed in the locality within that period, and when the Traffic Report itself (at page 48) assumes up to 3,000 trips every day during peak school hours. Accordingly, the Proposal should be refused for uncertainty, and instead, stage-by-stage DAs submitted for each expansion, to ensure traffic impacts are adequately and accurately accommodated.
- 2.9. Otherwise given the vast timeframe contemplated for this development (over 20 years), significantly more conservative modelling should be adopted, and the Proponent required

to undertake far more extensive road network upgrades, to accommodate the likely future capacity (including greater surrounding density), and to allow for 2042 and beyond.

### **3. Project period and assessment of impacts**

- 3.1. The Proposal is a pseudo-staged development application, without formally being lodged as a concept development application. Instead, it makes vague reference to various stages of development and works, with uncertain timing.
- 3.2. It appears that the Proposal is, in fact, a means of 'locking in' all future development, over a multi-decade period, before the redevelopment of the locality and of Austral in general, in order to avoid having to contend with the future impacts (in 2030, 2040 and beyond) of the school's continued expansion on the future residents.
- 3.3. If the Proponent wishes to pursue this approach, the more appropriate and legally sound course of action that the Proponent ought to have followed (and which the Department ought to require), is for a concept development application followed by staged development applications into the future.
- 3.4. This would enable the impacts of each stage to be assessed at that point in time and taking into account accurate and current traffic counts as the locality is progressively redeveloped. It would also give the future owners of the area a chance to have their say in respect of each stage, which is an opportunity that they will presently be denied.
- 3.5. The likely impacts of the present Proposal simply cannot be assessed with any certainty, given the timing and staging of the various works is vague and uncertain, and stretched over a more than 20-year timeframe. Impacts such as traffic impacts are particularly difficult to assess. It is highly unreasonable to seek to 'lock in' 20 years' worth of development into a single application, particularly when various elements of the Proposal are vague and uncertain as outlined above.
- 3.6. It is also highly problematic that the impacts of the Proposal from construction will not be capable of proper control via conditions of consent. This is because both the planning system (including conditions of consent) and the private certification system contemplates a single construction period involving the appointment of a principal certifying authority, the relevant certification, and ultimately, an occupation certificate. What is contemplated in this Proposal is a continuous period of on-off construction over more than 20 years, which will be difficult to control via the normal conditions/certification process and, more importantly, cause unreasonable disruption and impacts to surrounding residents, including our client.
- 3.7. We agree with a recently expressed view of the Court that a changing environment requires periodic reassessment,<sup>2</sup> and that it would be more appropriate for the stages set out in the Proposal each to be the subject of a later application at the relevant time.

A final point that is minor in nature but of high importance to our Clients is that Appendices AA and BB to the EIS have misspelled the name of a deceased member of the Gojnich family. We ask that Annexures AA and BB to the EIS be amended to include the following correction –

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<sup>2</sup> Per Pain J in *Salama v Northern Beaches Council* [2020] NSWLEC 143  
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"~~Borwich~~ Borivoj Gojnich". We trust that this change can be quickly and easily made out of respect to our Clients' family regardless of whether or not consent is granted to the Proposal. We note in closing that our Clients have not made any reportable political donations in the previous two year period.

In conclusion, we consider the above matters to be fatal to the Proposal, and that it should either be refused in its entirety or the Proponent required to fundamentally revisit the nature and details of the Proposal to resolve these issues.

Please do not hesitate to contact us should you wish to discuss this submission.

Yours faithfully

**HONES LAWYERS**



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