MinterEllison

2 September 2021

Director
Industry Assessments – Planning and Assessment
Department of Planning, Industry and Environment
Locked Bag 5022
PARRAMATTA NSW 2124

Attention: Katelyn Simington

Dear Ms Simington

SSD-10412 – Submission

We act for Besmaw Pty Ltd and are instructed to provide this legal opinion to DPIE in respect of State Significant Development Application SSD – 10412 (**the Application**).

The application has been submitted in respect of land situated at 330 Captain Cook Drive, Kurnell (**the Site**).

For the reasons articulated below, the application should be refused.

Zone Objectives

The Application has been drafted in a manner which suggests the application is consistent with the zone objectives. For example, on page 5 of the EIS, the applicant states:

> *"The Proposal is consistent with the requirements of all relevant SEPPs. The Proposal Site is zoned (7(b) Special Development Zone under State Environmental Planning Policy (Kurnell Peninsula) 1989. The majority of the Proposal is permissible with consent and meets the objectives of the subject zone, including the extent of the resource recovery facility that treats, stores or disposes of natural excavated material and demolition materials and the proposed parklands that use those materials for land forming…"*

The strident manner in which the EIS argues zone objectives are met is in our respectful view is misleading, wrong at law and, if accepted by the consent authority, would lead the consent authority into legal error in granting any consent.

By way of explanation, we agree that the Site is zoned 7(b) Special Development Zone under *State Environmental Planning Policy (Kurnell Peninsula)* 1989 (**the SEPP**).

Clause 9 provided the following land use table for that zone:

> ***Zone No 7 (b) (Special Development Zone)***
>
> ***1 Objectives of zone***
>
> *The objectives of this zone are—*
>
> *(a) to provide flexible planning controls which permit a broad range of land uses subject to compliance with environmental performance criteria,*
> *(b) to ensure that development is compatible with the unique ecological and landscape attributes the Kurnell Peninsula, especially the wetland areas and their environs,*
> *(c) to ensure that sand mining is controlled and to facilitate the progressive phasing out of sand mining and the rehabilitation of degraded lands,*

(d) to promote the orderly and economic development of land within the zone subject to the provision of adequate water and sewerage services and the disposal, in an environmentally sensitive manner, of all wastes and stormwater from the land,
(e) to promote, enhance and utilise the development potential of the zone primarily for tourism, recreation or industrial parks, where this is consistent with the conservation of the unique, ecological and landscape attributes of the Kurnell Peninsula, and
(f) to promote the sharing of the responsibility for environmental planning by creating a broad framework of controls and requiring the Council to adopt development control codes or design and management guidelines applying to development in the zone.

2 Without development consent

Nil.

3 Only with development consent

Any purpose other than a purpose included in Item 4.

4 Prohibited
Dwelling-houses; extractive industries (other than sand mining); hazardous industry or storage establishments; junk yards; mines; offensive industries; places of public worship; residential flat buildings (other than those used only for holiday or other non-permanent residential accommodation); stock and sale yards; toxic industries; transport terminals; units for aged persons; waste disposal.

The zone objectives are very broad and all encompassing. Further, they are cumulative in nature which is self evident from the drafting of the clause identified above.

The Applicant offers only a cursory examination of the merit impacts of the proposed resource management facility in the EIS. We do not consider the EIS has satisfied the requirements of the SEAR's in that regard but in any event the Application has more fundamental problems.

We anticipate that the consent authority will consider such impacts against the recommendation of the EPA that all waste materials are stored and processed inside an enclosed building. However, any such argument is not strong and fails to account for these matters:

- the significant truck movements into and out of the Site and impacts on Captain Cook Drive (the truck movements are proposed to double, from an existing 585 to 1070 truck movements on weekdays);
- any enclosed building must be open in order for trucks and other vehicles/machinery to transport product into and out of the enclosed building;
- dust, odour, noise, stormwater and leachate impacts will inevitably be generated from these movements;
- any enclosed building will have a significant adverse visual impact on the landscape attributes of the Kurnell Peninsula; and
- the length of time for waste disposal on could be up to 60 years.

Having regard to these matters, and in the context of the zone objectives, it is important to consider clause 9(3) of the SEPP which provides:

(3) Except as otherwise provided by this Policy, the consent authority shall not grant consent to the carrying out of development on land to which this Policy applies unless it is of the opinion that the carrying out of the development is consistent with the aims and objectives of the Policy and the objectives of the zone within which the development is proposed to be carried out.

In our view, the Application is clearly inconsistent with objective (e), "*to promote, enhance and utilise the development potential of the zone primarily for tourism, recreation or industrial parks, where this is consistent with the conservation of the unique, ecological and landscape attributes of the Kurnell Peninsula"*.

There is long standing authority from the NSW Court of Appeal that in the context of zone objectives consistent means 'not antipathetic' (*Coffs Harbour Environment Centre Inc v Coffs Harbour City Council*

(1991) 74 LGRA 185). The very nature of the operations and environmental impacts of a waste facility (some off which are described above) make it abundantly clear the Application is antipathetic to the development of the zone for tourism, recreation or industrial parks and the landscape attributes of the Kurnell Peninsula. Indeed, the substance of the Application ignores the objectives and attributes.

Given that these attributes are very specific, in our view a consent authority acting reasonably could not form the necessary opinion that the Application is consistent with objective (e) of the zone objectives.

For this reason alone the Application should be refused.

Prohibition on Waste Disposal and reliance in Application on Clause 8(2) of State Environmental Planning Policy (State and Regional Development) 2011

Of importance to the lawfulness of the Application is that development for the purposes of waste disposal is a nominate prohibited category of development in the 7(b) Special Development Zone. This is significant given the majority of the uses proposed are for the proposed Resource Management Facility. Indeed, the front cover of the EIS is entitled 'Captain Cook Drive, Kurnell, Breen Resource Management Facility'.

The prohibition arises from the language in Clause 5 of the SEPP where waste disposal is defined as follows:

> ***waste disposal*** *means—*
>
> *(a) the use of a building or place for the purpose of treating, storing or disposing of any waste, as defined by the Waste Disposal Act 1970, other than a building or place used for the treatment, storage or disposal of waste resulting from any other activity carried out on the same land, or for the purposes of a depot registered with the Environment Protection Authority for the receipt of natural excavated material and demolition materials as approved by that Authority, and*
>
> *(b) the use of any bore or excavation that is connected with the underlying shallow groundwater system for disposal of wastes.*

This is a very particular definition of waste disposal unlike the standard definitions as contained in the Dictionary of the Standard Instrument, which are as follows:

> ***waste disposal facility*** *means a building or place used for the disposal of waste by landfill, incineration or other means, including such works or activities as recycling, resource recovery and other resource management activities, energy generation from gases, leachate management, odour control and the winning of extractive material to generate a void for disposal of waste or to cover waste after its disposal.*
>
> ***Note—***
> *Waste disposal facilities are a type of* ***waste or resource management facility****—see the definition of that term in this Dictionary.*
>
> ***waste or resource management facility*** *means any of the following—*
> *(a) a resource recovery facility,*
> *(b) a waste disposal facility,*
> *(c) a waste or resource transfer station,*
> *(d) a building or place that is a combination of any of the things referred to in paragraphs (a)–(c).*
>
> ***waste or resource transfer station*** *means a building or place used for the collection and transfer of waste material or resources, including the receipt, sorting, compacting, temporary storage and distribution of waste or resources and the loading or unloading of waste or resources onto or from road or rail transport.*
>
> ***Note—***
> *Waste or resource transfer stations are a type of* ***waste or resource management facility****—see the definition of that term in this Dictionary.*

> ***resource recovery facility*** *means a building or place used for the recovery of resources from waste, including works or activities such as separating and sorting, processing or treating the waste, composting, temporary storage, transfer or sale of recovered resources, energy generation from gases and water treatment, but not including re-manufacture or disposal of the material by landfill or incineration.*
>
> ***Note—***
> *Resource recovery facilities are a type of* ***waste or resource management facility****—see the definition of that term in this Dictionary.*

The Standard Instrument does not define waste and all of the definitions of waste or resource management facilities do not seek to narrow or segment the categories of waste.

Yet the SEPP does this by carving out of the definition of the nominate prohibited use of waste disposal to allow in the 7(b) Zone development for the waste disposal only of "*natural excavated material and demolition materials"*. The other category of development in the definition being '*a building or place used for the treatment, storage or disposal of waste resulting from any other activity carried out on the same land*' is not a category sought in the Application for two reasons. The first is that this category does not expressly authorise the receipt of waste from off-site which the Application clearly does. The second reason is that it does not expressly contemplate activities being registered with the EPA which means activities requiring an environment protection licence (as is the case with the second exclusionary category).

So the only category that the Application could potentially rely on is '*or for the purposes of a depot registered with the Environment Protection Authority for the receipt of natural excavated material and demolition materials as approved by that Authority'.*

The drafting of this category indicates a high priority at a State level that no waste that is other than *natural excavated material and demolition materials* should be emplaced on the Site. An obvious inference is that only these more benign waste streams were deemed acceptable and that any other waste streams would not be consistent with the zone objectives or protection of the environmental attributes of the Kurnell Peninsula.

A fundamental problem with the Application is that it proposes a resource management facility that accepts a far broader range of materials than natural excavated material and demolition materials. As such, a significant proportion of the Application constitutes 'Waste Disposal' which is a prohibited use in the zone. The EIS concedes this prohibition.

The Applicant in its EIS seeks to overcome this prohibition by relying on s. 4.38(3) of the *Environmental Planning and Assessment Act* 1979 (**EPA Act**) and clause 8(2)(a) of the SRD SEPP.

Turning firstly to s 4.38(3) of the EPA Act, this section provides:

> ***4.38 Consent for State significant development*** *(cf previous s 89E)*
> *(1) ….*
> *(2) Development consent may not be granted if the development is wholly prohibited by an environmental planning instrument.*
> *(3) Development consent may be granted despite the development being partly prohibited by an environmental planning instrument.*

The DPIE will of course will be aware that s4.38(3) provides an avenue in which consent may be granted despite a partial prohibition.

The Application also relies on clause 8(2)(a) of the SRD SEPP which provides:

> ***"****(2) If a single proposed development the subject of one development application comprises development that is only partly State significant development declared under subclause (1), the remainder of the development is also declared to be State significant development, except for—*
>
> > *(a) so much of the remainder of the development as the Director-General determines is not sufficiently related to the State significant development, and*

(b) coal seam gas development on or under land within a coal seam gas exclusion zone or land within a buffer zone (within the meaning of clause 9A of State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007, and

(c) development specified in Schedule 1 to State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007."

The Application relies on these provisions to submit that:

(a) the permissible components of the Application are sufficiently related to the prohibited waste disposal uses such that the waste disposal uses also constitute State Significant Development; and

(b) having regard to s4.38(3) of the EPA Act, despite the partial prohibition, development consent can still be granted for the Application.

There are no meaningful arguments set out to support this submission other than numerous references to all components of the Proposal being 'highly integrated'. The Application appears to treat the determination to be made by the Secretary under clause 8(2) as a mere formality.

For the reasons set out below, we consider there are compelling grounds for the Secretary to have regard to in exercising discretion not to make the declaration sought in the Application.

1. The task for the Secretary in making a determination under clause 8(2) is an evaluative one and a task which requires consideration of whether there is an adequate relationship between the prohibited uses and the permissible uses. As Justice Biscoe stated in *Besmaw v Secretary of Department of Planning and Environment* (2017) LEC 74:

> *89. Considering the text of cl 8(2)(a) of the SRD SEPP, the words "related to" are preceded by the word "sufficiently", which accordingly qualifies the degree of relationship required between the SSD and non-SSD components of the Proposed Development. The word "sufficiently" is defined in the Macquarie Dictionary as "that suffices; enough or adequate". While this is not a significant qualification on the words "related to", it does import an evaluative task and implies an element of discretion, in that the Director-General or his or her delegate must be satisfied that the relationship between the SSD and non-SSD components of a proposed development is "sufficient".*
>
> *91. … The SRD SEPP confers an unconfined discretion on the Director-General, except insofar as may be implied by the subject matter, scope and purpose of the SRD SEPP, see e.g. Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40 ('Peko-Wallsend') at 39; Price v Elder (2000) 97 FCR 218; [2000] FCA 166 at [13]. The SRD SEPP does not set out any criteria to which the Secretary must, or indeed must not, have regard, and accordingly it was open to the Secretary to consider the relative size of the non-SSD components of the Proposed Development in forming an opinion as to whether they were "sufficiently related to" the SSD components. The failure to circumscribe considerations which the Secretary must take into account is reflective of a legislative recognition that the Secretary, with her experience and understanding of public policy, is best placed to make the determination required in cl 8(2)(a). It is not for the Court to limit this discretion, other than in accordance with general principles of administrative decision-making."*

2. In our respectful view, the submission that the SSD and non-SSD components are sufficiently related is a sham and should be wholeheartedly rejected by the consent authority. This is for the following reasons:

(a) The EIS places significant importance on the proposed delivery of community open spaces being the Embellished Marang Park Parklands as a large part of the works comprised in the Application. Such works are an innominate permissible use in the zone which may require development consent;

(b) However, these works are already required to be delivered under a Planning Agreement dated June 2010. The parties to that agreement are Breen Holdings, Australand Kurnell

Pty Ltd and Sutherland Shire Council. Pursuant to that agreement significant landholdings of the private parties to the agreement were rezoned from industrial to residential. Importantly, the dedication of those lands was to provide a public benefit in recognition of the upzonings;

(c) the only apparent difference between the parkland dedication works described in the 2010 planning agreement and the works described in the Application is to enable a different end recreational outcome;

(d) The length of time that has elapsed since the 2010 VPA was executed, together with the minor nature of changes to the parkland contribution works suggest that these works have been deliberately included in the Application for the sole purpose of seeking to overcome the prohibition; and

(e) But even if that were not the case, there is no evidence at all to justify a position that the Parkland works have any relationship at all to the prohibited resource recovery or waste disposal use, let alone being sufficiently related. The uses are completely separate. The parklands are not at all dependent on the resource management/waste facility uses. These uses do not relate at all to the proposed waste use. Moreover, the contouring of the land and delivery of the parklands and the playing fields is targeted in the EIS to be completed in 2024. The Application then proposes some material placement, recountouring of the Site and the embellishment works themselves. Relevantly, it is then proposed to fill the waste cell within the western portion of Lot 5, a process that may take up to 60 years. These are separate and unrelated uses that are divisible from the parklands works. In our opinion, these are factual matters that condemn the Application in respect of satisfying clause 8(2)(a).

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Yours faithfully
MinterEllison

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