

26 April 2023

Our Ref: AKL:CAT004/4006

Ethos Urban
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ATTN: Yvette Carr

By Email:
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Dear Yvette

Modification Application for Westmead Catholic Community Campus – SSD10383

1. Introduction

- 1.1 You have asked us to provide a further legal submission as part of the Response to Submissions Report prepared by Ethos Urban (**RTS Report**) responding to submissions made by Parramatta City Council (**Council**) dated 28 July 2022 and the Department of Planning and Environment (**DPE**) dated 9 August 2022 in relation to an application to modify certain conditions of consent (**Modification Application**) for the Westmead Catholic Community Campus (**WCC Site**) SSD10383 (the **Consent**). We reiterate the submissions set out in our letter of 30 May 2022, which we encourage Council and DPE to carefully review and further consider. We have provided a further response to matters raised by Council and DPE below.

2. Conditions B1, B2, E4, F1

- 2.1 The abovementioned conditions were sought to be modified to the extent they required future public pedestrian access be provided, firstly by identification on a schematic diagram and secondly by way of registration of easements and/or positive covenants to ensure public pedestrian access in the future. We refer to our previous letter dated 30 May 2022 which set out these conditions in detail, and we do not repeat them in this submission. We note that the RTS Report has suggested further modifications be made to the relevant conditions the subject of the Modification Application.

Condition B1 and B2

- 2.2 Council has objected to the proposed modifications of these conditions on the basis that the “proper planning purpose is to ensure that the school’s redevelopment is considered wholly in the context of the entire block which currently only has access via Darcy St”.
- 2.3 In response to the proposed modification of condition B1(b), Council only refers to the need for access to be provided to students and staff and not access to the general public. Council also refers to its “Draft Westmead Place Strategy 2036” in support of its position that public access be provided.
- 2.4 We are instructed that the Catholic Schools Parramatta Diocese (CSPD) has no objection to facilitating access to the WCC Site for its students and staff. CSPD is also willing to provide an indicative plan that shows a pedestrian link from Farmhouse Road to the primary school if that pedestrian link is only accessible to staff and students during school hours and the condition is amended as proposed in the RTS Report.

- 2.5 We do not agree with Council that providing public access or making provision for future public access across private land is a matter that should be dealt with by way of a condition of consent for the current proposal. We refer to our previous submission and case law references in this regard, in particular our submission that the relevant conditions may not satisfy the *Newbury* test. The requirement for public access in the future does not reasonably relate to the development, and Council is trying to advance its own objectives at the cost of the applicant.
- 2.6 We refer to the principles of construction of development consents which were recently discussed by Preston CJ in *J.K. Williams Staff Pty Limited v Sydney Water Corporation* [2021] NSWLEC 23:

"[59] A development consent granted under Part 4 of the EPA Act or an approval granted under Part 3A of the EPA Act are to be construed having regard to the statutory provisions governing its grant (Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council (2019) 101 NSWLR 1; [2019] NSWCA 147 at [268]) and "its enduring functions" of authorising the carrying out of the development or activity for which consent or approval was sought (Winn v Director-General National Parks and Wildlife (2001) 130 LGERA 508; [2001] NSWCA 17 at [4]). The consent or approval speaks "according to its written terms, construed in context but having regard to its enduring function": House of Peace v Bankstown City Council (2000) 48 NSWLR 498; [2000] NSWCA 44 at [37] and see [23]. The meaning of the language used in the consent or approval "is to be determined objectively having regard to the context in which the consent was issued and taking into account the fact that, unlike a contract between parties, the consent operates in rem and is for the benefit of subsequent owners and occupiers, as well as the applicant": K&M Prodanovski Pty Ltd v Wollongong City Council (2013) 195 LGERA 23; [2013] NSWCA 202 at [23].

[60] It is permissible to look at the application seeking consent or approval and the documents and plans accompanying the application in order to determine the scope and operation of the consent or approval and the development or activity for which consent or approval was sought: Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council at [57]-[59], [62], [80], [296]-[298], [302]-[305], [310] and [311]."

- 2.7 We understand that public access through the WCC Site was not the subject of the relevant development application. As such, in light of the above legal principles, the Consent should only apply to the development for which approval was sought, for the benefit of the applicant and subsequent owners of the WCC Site. Although there is a broad "master plan" for the WCC Site, this does not have any legal status. If public pedestrian access is required to fulfil the master plan, any plans for such public access will be subject to separate development applications at an undetermined time in the future. In our view, the "Draft Westmead Place Strategy 2036" (which we understand has now been adopted by Council) should be given little weight in the determination of the Modification Application as it does not have any direct application to the WCC Site.
- 2.8 We note DPE's submission requested further clarification of how the "future proofing of a pedestrian link for public use in and around the site can be assured". Respectfully, we do not consider it is appropriate for any future public pedestrian link to be assured in the context of the proposed development and the Consent, given the nature and scope of the development application, and for all of the reasons set out above.

Condition E4 and F1

- 2.9 We refer to DPE's request for further information as to how access could be assured for future students and staff of the three schools at the WCC Site to the internal pedestrian link without an easement or covenant being registered. As outlined in the RTS Report, a boundary adjustment is proposed which we understand means no easement or covenant will be required.
- 2.10 In any event, the internal access arrangements between the owners of various lots within the WCC Site can be legally established by way of access licence agreements if necessary at any point in the future. These agreements would be legally enforceable by the relevant parties to the agreements.

- 2.11 In relation to Council's submission regarding condition E4(d), we reiterate our response above in respect of condition B1 and B2, namely that future public pedestrian access across the WCC Site is beyond the scope of the proposed development and is not a proper condition of consent. The language of the condition requires a positive covenant being registered prior to the occupation certificate for the current proposed development, for a potential future use of the Site that is not the subject of the Consent. The condition presumptively refers to "when the connection is extended from the site to Bridge Road in the future", however there is currently no specific obligation in the Consent for such a connection to Bridge Road to occur and no basis upon which this is required in the context of the proposed development. Therefore, condition E4(d) fails to satisfy the *Newbury* test as further detailed in our previous submission and should be removed from the Consent.
- 2.12 We note Council's reference to public access through Leichhardt Secondary School. Respectfully, we do not consider this to be relevant as the operational outcomes, ownership, zoning and planning history of that particular school site is unknown and may be completely different to the current circumstances.
- 3. Conclusion**
- 3.1 For all the legal reasons set out above, and the merit reasons as set out in the Ethos Urban Response to Submissions report, we submit that the Department should grant the modification application as requested by Ethos Urban.

Yours faithfully



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