

14 May 2024

Mosman Heights Action Group

By email

46 Manning Street Mosman Park - SDAU development approval, 10 August 2023 – agreement between the Town of Mosman Park (Town) and developer re public land

I refer to your instructions, following the meeting with the Council this evening.

I understand, from what you have described, that the Town is considering undertaking steps to accede compliance with Condition 42, because of representations made to them by the developer, ADC.

I understand that there was some discussion with representatives of Mosman Heights Action Group (MHAG) and the Council, in relation to a proposed permit and side agreement between the Town and ADC, to give effect to the satisfaction of Condition 42. I have no instructions on the nature of that proposed agreement, so I can provide general comments only on potential risks.

Any agreement to effectively cede management and control of valuable public property to a private party, without due regard to process and probity, is likely to result in scrutiny of the Town's affairs by the Department of Local Government. I am aware of the sensitivity of this particular issue, as a result of my acting for the Town of Cambridge during the period 2019-2022, while it was the subject of a Departmental Inquiry.

I set out below my comments on this aspect. It is useful to reiterate my understanding of the issues associated with Condition 42 at the outset.

1. Condition 42 – the use of public land

The SDAU Approval (see WAPC Part 17 Significant Development minutes of 10 August) (**WAPC Minutes**) included the following condition:

Public realm

42: Prior to the occupation of the development, suitable arrangements are made for construction, implementation and maintenance of the works in the public realm, as depicted on the Landscape Plans.. as amended, to the satisfaction of the (WAPC), on advice from the Town of Mosman Park.

There are a series of advice notes which suggest ways in which 'suitable arrangements' may be made.

It is a well-established principle of planning law that advice notes are guidance only, have no legal status, and cannot be construed as forming part of the development approval. Therefore, there is no mandated requirement for an agreement (nor indeed any other instrument), between the Town and the developer, for the purposes of Condition 42.

There is a line of authority in WA planning law, relating to the treatment of vague or uncertain conditions of approval, which in effect, relate to planning conditions which require a third party to agree; are vague, uncertain or otherwise

incapable of satisfaction (and enforcement). These types of conditions are now, as a matter of practice, amended by JDAPs or local governments at a preliminary stage of planning assessment, and it is now comparatively rare to see planning conditions which might be regarded as ambulatory. I attach copies of two SAT decisions which did consider conditions of approval which were vague and uncertain and accordingly determined to be invalid (*Tierney* and *UWA*).

The reason for raising this particular issue is that, if a view is taken that Condition 42 is incapable of satisfaction and/or enforcement, then it may also be the subject of an application for review by the SAT.

2. Public Realm

It is clear that the Public Realm refers to the verges, on street parking and contiguous areas to the development site, which are acknowledged by the Town, developer and WAPC as land which is controlled and/or owned by the Town. As you have pointed out, it is not clear whether this description includes Turnbull Lane.

I am instructed that the Town, in its written deputation to the WAPC, advised that it would not cede any of the public realm (however so described) for the purposes of the development.

I note that Condition 42 refers only to the landscape plans (included as part of the application to SDAU) as the appropriate reference to the definition of ‘public realm’.

The successful acquittal of Condition 42 by the developer will therefore, require the Town to agree to, in effect, the ceding of the land which is described as public realm on the landscape plans. This is land controlled and/or owned by the Town. If the Town refuses, as it indicated in its August 2023 deputation to the WAPC, to cede the land, the condition cannot be satisfied. That then becomes a matter for the developer.

3. Part 8 – Local Government Act - Scrutiny of the affairs of local governments: Misapplication of funds and property

As we know, a local government (as a statutory entity) is tasked with onerous obligations in the way in which it deals with and acquires its property and funds. I draw to your attention to Part 8 of the *Local Government Act* 1995, which sets out the way in which an Inquiry can be established into the affairs of a local government; and specifically: *Division 4 — Misapplication of funds and property*.

Local government property (under section 1.4) “*means anything, whether land or not, that belongs to, or is vested in, or under the care, control or management of, the local government;*” – clearly, the public realm falls within this definition.

The Departmental CEO can authorize an Inquiry into matters (section 8.3) which focus on concerns relating to the potential misapplication of local government property or funds.

Particularly, I note sections 8.35- 8.39:

8.35. Interpretation

(1) For the purposes of this Division, funds of a local government are misapplied if any moneys paid from, or due to, any fund or account of the local government are misapplied to purposes not authorised by law.

(2) For the purposes of this Division, local government property is misapplied if anything that belongs to the local government is dealt with in a way that is not authorised by law and causes the local government to suffer loss.

8.38. Liability for misapplication of funds or property

(1) If —

(a) there has been a misapplication of funds of a local government or of local government property; and

(b) any council member or employee of the local government, has wilfully or through culpable negligence misapplied the funds or property or connived at or concurred in the misapplication,

that council member or employee is personally liable to pay the amount misapplied to the local government.

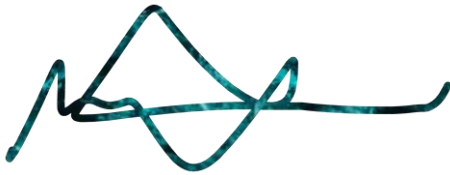
(2) If 2 or more people are liable to pay the amount misapplied, their liability is joint and several.

(3) A person's liability to pay the amount misapplied continues whether or not the person is still a council member or employee of the local government.

I have set out the relevant sections in full, so there is no misunderstanding about the risks associated with a Departmental Inquiry; and the significant implications of a finding of misapplication of council property.

Please let me know if you require any further information.

Yours faithfully

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke.

ESG LEGAL