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25 March 2021

Your ref:
Our ref: AXGS/3507783

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The Secretary
Department of Planning, Industry and Environment
Locked Bag 5022
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By email: Tim.Green@planning.nsw.gov.au
Andy.Nixey@planning.nsw.gov.au

Attention: Andy Nixey, Tim Green

Dear Andy

Objection to DA 10646 for the placement of signage on Wynyard Walk Pedestrian Bridge

We act for William S Lloyd (**our client**). We are instructed that:

- Our client is the owner of the residential and commercial terrace at 26 Sussex Street Sydney.
- The ground floor of our client's property is a commercial shop.
- The first floor has, at times, been let as a residence or an office. It is presently let to a business.
- The three upper floors are our client's private residential city apartment.

Summary

In our opinion:

- The consent authority is the City of Sydney under clause 12(a) of SEPP 64. The development application cannot be determined and has no legal consequence. If Sydney Trains wants to pursue this development application it should lodge it with the City of Sydney.
- In any event (whoever the consent authority is), the proposed signs will plainly be displayed or erected on the parapets of the bridge (which, as a structure, is a 'building'). This triggers the development standards set out in clause 21 of SEPP 64. Two of the three mandatory standards under clause 21 are not met. Accordingly, even if the development application were to be determined by the Minister for Planning and Public Spaces (which it cannot) the Minister must refuse it in any event.
- No clause 4.6 request has been submitted to vary clause 21. However, even if one were to be submitted, we do not see how it could be legally reasonable to uphold such a request. There is little point in the proponent attempting to remedy its failure to comply with clause 21(1)(a) and (c) by submitting a clause 4.6 request. Such a clause 4.6 request could not be lawfully upheld.

Detail

1. Advertising signs

1.1 According to the *Statement of Environmental Effects*, Ethos Urban (11 November 2020) (**the SEE**) development application is for:

> for installation of two 'Super Site' digital advertising signs, each with an area of approximately 39m2 . Signage supporting structure including framework, wiring, electrical and communications are also proposed to be installed.

1.2 The SEE says (on page 3) that:

> The signs are intended to be privately leased for display purposes.

1.3 The proposed signs will, therefore, plainly:

(a) be an 'advertisement' within the meaning of *State Environmental Planning Policy No 64—Advertising and Signage* (**SEPP 64**); and

(b) subject to Part 3 of SEPP 64 (under clause 9 of SEPP 64).

1.4 Part 3 of SEPP 64 is directed to the regulation of 'Advertisements'.

2. The applicable local environmental planning instrument

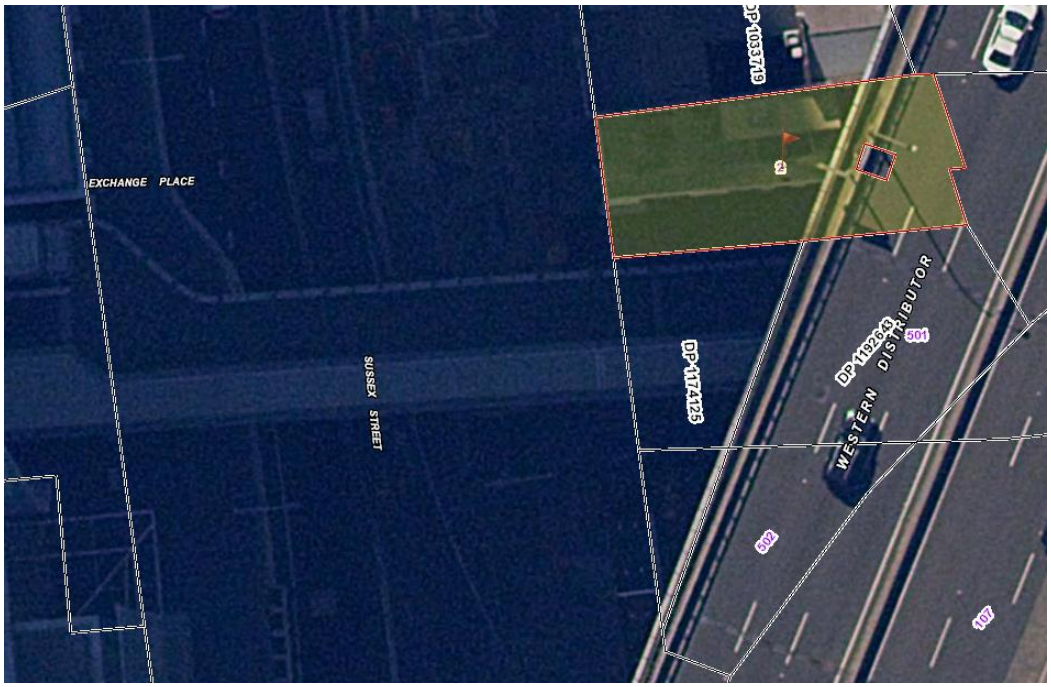
2.1 Aside from SEPP 64, the other relevant environmental planning instrument need to be noted.

2.2 The 'Response to Submissions' dated 25 February 2021 (Ethos Urban) says on page 3 that:

> Furthermore, the site is zoned as B4 Mixed Use under the State Environmental Planning Policy (State Significant Precincts) 2005, sitting within the Appendix 9 Barangaroo site of the SEPP.

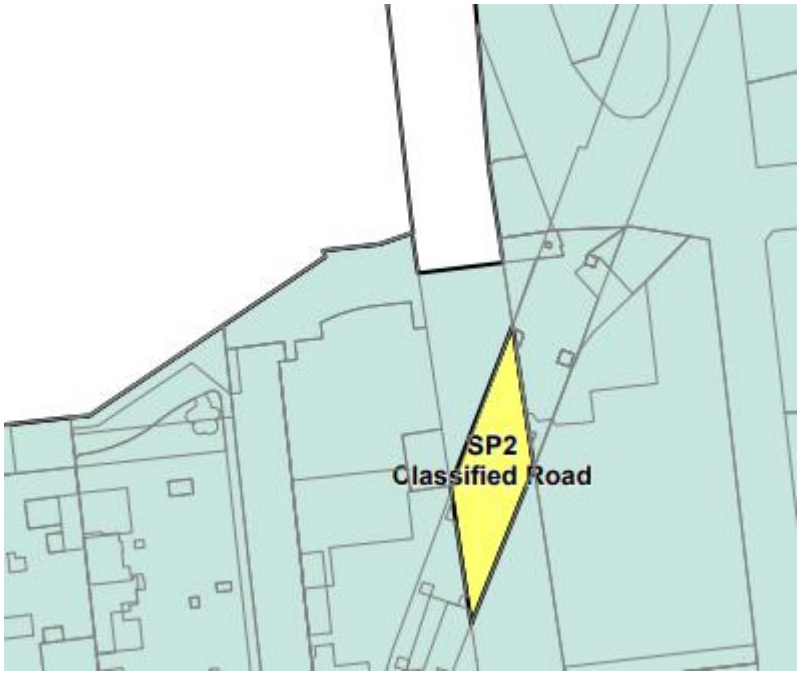
2.3 This is not correct.

2.4 The location of the Wynyard Walk Bridge is shown in the image below extracted from the SixMaps website:



2.5 The highlighted lot is our client's site (26 Sussex Street Sydney). It should be noted that the bridge is to the south of that lot.

2.6 Reproduced below is an extract from the Land Zoning Map for the *Sydney Local Environmental Plan 2012* (**the LEP**), formally identified as '7200_COM_LZN_Ü014_005_20120926':



2.7 It can be seen that the LEP's zoning takes over from the zoning conferred by the *State Environmental Planning Policy (State Significant Precincts) 2005* **immediately to the south of the southern boundary of our client's property**. This locates the bridge in the 'B8 Metropolitan Centre' zone under the LEP.

2.8 This is relevant (as will be discussed later) because (among other things) it makes the *Sydney Development Control Plan 2012* (**the DCP**) the applicable development control plan.

3. The consent authority

3.1 The Minister for Planning and Public Spaces is not the consent authority for this development application and has no power to determine it (either by rejection or the grant of development consent).

3.2 Clause 12 of SEPP 64 says:

> **12 Consent authority**
>
> For the purposes of this Policy, the consent authority is—
>
> (a) the council of a local government area in the case of an advertisement displayed in the local government area (unless paragraph (c), (d) or (e) applies), or
>
> (b) TfNSW in the case of an advertisement displayed on a vessel, or
>
> (c) the Minister for Planning in the case of an advertisement displayed by or on behalf of RailCorp, NSW Trains, Sydney Trains, Sydney Metro or TfNSW on a railway corridor, or
>
> (d) the Minister for Planning in the case of an advertisement **displayed by or on behalf of RMS** on—
>
> (i) a road that is a freeway or tollway (under the *Roads Act 1993*) or associated road use land that is adjacent to such a road, or
>
> (ii) a bridge constructed by or on behalf of TfNSW on any road corridor, or

(iii) land that is owned, occupied or managed by TfNSW, or

(e) the Minister for Planning in the case of an advertisement displayed on transport corridor land comprising a road known as the Sydney Harbour Tunnel, the Eastern Distributor, the M2 Motorway, the M4 Motorway, the M5 Motorway, the M7 Motorway, the Cross City Tunnel or the Lane Cove Tunnel, or associated road use land that is adjacent to such a road.

Vessel — clause 12(b)

3.3 Clause 12(b) plainly does not apply as the advertisements will not be on a vessel.

Railway corridor — clause 12(c)

3.4 The advertisement is to be displayed on behalf of Sydney Trains, so (at first blush) it may appear that clause 12(c) would apply.

3.5 However, clause 12(c) also requires that the advertisements be displayed on a 'railway corridor'. This is defined to mean:

(a) **land** on which railway track **and** associated railway infrastructure is located (**including** stations and platforms),

(b) land that is adjacent to land referred to in paragraph (a) and that is owned, occupied or managed by RailCorp or Sydney Metro and used for railway purposes or associated purposes (such as administration, workshop and maintenance facilities, and bus interchanges),

(c) land zoned for railway (including railway corridor) purposes under an environmental planning instrument, and

(d) land identified as a railway corridor in an approval of a transitional Part 3A project (within the meaning of Schedule 6A to the Act), an approval to carry out State significant infrastructure or a development consent given by the Minister (bold added).

3.6 The bridge is clearly not located on a **railway track**. It is plainly not infrastructure associated with a **railway track**. There is no railway track in the vicinity. There is no railway station in the vicinity. Paragraph (a) of the definition requires that the railway track **and** the associated railway infrastructure be on the same land. This is obviously not the case here. The railway station (and the track in which it contains) is located underneath Wynyard Park, more than 200 metres to the east of the bridge.

3.7 Paragraph (a) of the definition of 'railway corridor' plainly uses the word 'including' to list things (ie 'stations and platforms') that are of a kind that would ordinarily fall into the meaning of the phrase 'associated railway infrastructure' to a 'railway track'. This means that the list indicates the narrowness of the class intended to be identified (cf *Cranbrook School v Woollahra Municipal Council* [2006] NSWCA 155 at [88]). 'Associated railway infrastructure' is infrastructure that is associated with a railway track and is on the same land as the track (such as a station and platform).

3.8 The bridge is not 'associated railway infrastructure' and therefore is not in a 'railway corridor' under paragraph (a) of that definition.

3.9 Nor is the bridge adjacent to such land. The bridge is situated away from Wynyard Station by more than 200 metres — with other properties (including Westpac Plaza and several public roads) separating it from the station. This means it is not in a 'railway corridor' under paragraph (b) of that definition.

3.10 The land is not zoned for railway (including railway corridor) purposes under an environmental planning instrument. It is zoned B8. This means it is not in a 'railway corridor' under paragraph (c) of that definition.

3.11 We have not seen any material to suggest that the land has been identified as a railway corridor in an approval of a transitional Part 3A project (within the meaning of Schedule

6A to the Act), an approval to carry out State significant infrastructure or a development consent given by the Minister. It appears that it is not in a 'railway corridor' under paragraph (d) of that definition.

3.12 Clause 12(c) does not apply as the advertisements will not be on a railway corridor.

Specific situations — clause 12(d)

3.13 For **any** of the specific situations in clause 12(d) to apply, the advertisements **must** be displayed **by or on behalf of 'RMS'**.

3.14 The RMS has been dissolved. Statutory references to 'RMS' are now taken to be references to Transport for NSW (**TfNSW**) (clause 218(5) of schedule 7 of the *Transport Administration Act 1988*).

3.15 The SEE says (on page 3) that:

> **Sydney Trains** will own the advertising structure with revenue received from the sale of advertising time directed to maintaining the rail network. The project will provide a valuable on-going revenue stream to **Sydney Trains**, with the signs intended to be privately leased for display purposes, with the revenue then to be used to support a number of improvements and maintenance programs for **Sydney Trains** in accordance with the public benefit test provisions identified in SEPP 64 and the Transport Corridor Outdoor Advertising and Signage Guidelines (bold added).

3.16 TfNSW and Sydney Trains are legally distinct entities.

3.17 TfNSW is a corporation constituted under section 3C(1) of the *Transport Administration Act 1988*.

3.18 Sydney Trains is separate corporation — constituted under section 36(1) of the *Transport Administration Act 1988.*

3.19 The statutory reference, in clause 12(d), to the 'RMS' is taken to be a reference to TfNSW, **but cannot be taken to be a reference to Sydney Trains**.

3.20 Accordingly, the advertisements:

(a) will not be displayed by or on behalf of 'RMS'; and

(b) will be displayed by or on behalf of Sydney Trains.

3.21 Clause 12(d) does not apply as the advertisements cannot fall into any of the nominated specific situations.

Certain transport corridor land — clause 12(e)

3.22 The advertisements will not be displayed on transport corridor land comprising a road known as the Sydney Harbour Tunnel, the Eastern Distributor, the M2 Motorway, the M4 Motorway, the M5 Motorway, the M7 Motorway, the Cross City Tunnel or the Lane Cove Tunnel, or associated road use land that is adjacent to such a road.

3.23 Clause 12(e) does not apply.

The consent authority is the City of Sydney — clause 12(a)

3.24 As a result of the above, the consent authority is the City of Sydney under clause 12(a) of SEPP 64. The development application cannot be determined and has no legal consequence. If Sydney Trains wants to pursue this application it should lodge it with the City of Sydney.

4. Clause 21 — Roof or sky advertisements

4.1 In any event, whoever the consent authority is — there is another more fundamental issue. This would be a problem for the proponent even if the development application was lodged with the correct consent authority.

4.2 The proponent of the development has relied on clause 16 of SEPP 64 to establish permissibility.

4.3 Clause 16 relevantly says:

> **16 Transport corridor land**
>
> (1) Despite **clause 10(1)** and the provisions of any **other** environmental planning instrument, the display of an advertisement on transport corridor land is permissible with development consent …

4.4 Clause 16, in itself, does not override provisions of SEPP 64 generally. The only part of SEPP 64 that it overrides is clause 10(1) (which is not presently relevant). Clause 16 otherwise only overrides 'other' environmental planning instruments (that is, those that are not SEPP 64).

4.5 This means clause 21 of SEPP 64 applies. This clause relevantly says:

> **21 Roof or sky advertisements**
>
> (1) The consent authority may grant consent to a **roof or sky advertisement** only if—
>
> (a) the consent authority is satisfied—
>
> (i) that the advertisement replaces one or more existing roof or sky advertisements and that the advertisement improves the visual amenity of the locality in which it is displayed, or
>
> (ii) that the advertisement improves the finish and appearance of the building and the streetscape, **and**
>
> (b) the advertisement—
>
> (i) is no higher than the highest point of any part of the building that is above the building parapet (including that part of the building (if any) that houses any plant but excluding flag poles, aerials, masts and the like), and
>
> (ii) is no wider than any such part, **and**
>
> (c) a development control plan is in force that has been prepared on the basis of an advertising design analysis for the relevant area or precinct and the display of the advertisement is consistent with the development control plan (some bold added) …

4.6 A 'roof or sky advertisement' is defined to mean:

> an advertisement that is displayed **on**, or erected **on** or above, the **parapet** or eaves of a **building** (bold added).

4.7 Words and expressions that occur in an instrument have the same meanings as they have in the Act under which the instrument is made (section 11 of the *Interpretation Act 1987*).

4.8 This means that the word 'building' in the above definition of 'roof or sky advertisement' has the same meaning as under the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**). A 'building' is relevantly defined (in section 1.4(1) of the EP&A Act) as follows:

> ***building*** includes part of a building, and also includes any **structure** or part of a structure (some bold added)…

4.9 The bridge is plainly a structure. This means that it is a 'building'. The proposed signs will be located on a 'building'. If the signs are displayed or erected on a 'parapet' of the bridge they will be a 'roof or sky advertisement' under clause 21 of SEPP 64.

4.10 The word 'parapet' is used in its ordinary-English sense. The *Macquarie Dictionary* relevantly defines the word as follows:

> any protective wall or barrier at the edge of a balcony, roof, **bridge**, or the like (bold added).

4.11 The proposed signs will plainly be displayed or erected on the parapets of the bridge (which, as a structure, is a 'building').

4.12 Accordingly, even if the development application were to be determined by the Minister for Planning and Public Spaces (which it cannot) the Minister must refuse it, because it does not meet two of the three mandatory requirements of clause 21 of SEPP 64.

4.13 Firstly, in terms of clause 21(1)(a):

(a) The advertisements will not replace one or more existing roof or sky advertisements.

(b) On any reasonable view, it cannot be said that the advertisements will **improve** the visual amenity of the locality in which they are to be displayed. They will undoubtedly have an adverse impact. The only issue for reasonable debate is the extent of the adverse impact. In visual amenity terms the bridge would clearly be better off without the advertisements.

(c) The advertisements cannot reasonably be said to improve the **finish and appearance** of the bridge or the streetscape.

(d) Clause 21(1)(a) cannot be satisfied on any reasonable basis — and any purported satisfaction by a consent authority would be susceptible to being set aside by way of judicial review for legal unreasonableness: *Hornsby Shire Council v Trives (No 3)* [2015] NSWLEC 190 at [16]-[21].

4.14 Secondly, in terms clause 21(1)(c) the only development control plan is the DCP. The DCP says (in section 3.16.7.1(1)) that:

> Generally, new advertising signs and third party advertisements are not permitted

4.15 Clause 21(1)(c) cannot be satisfied on any reasonable basis. Again, any purported assertion of satisfaction by a consent authority would be susceptible to being set aside by way of judicial review for legal unreasonableness.

5. Evaluating the potential for a clause 4.6 request

5.1 No clause 4.6 request has been submitted. However, even if one were to be submitted, we do not see how it could be legally reasonable to uphold such a request.

5.2 A 'clause 4.6 request' is a request to carry out a development (proposed in a development application) in a way that **contravenes** a development standard set out in an environmental planning instrument. SEPP 64 is a type of environmental planning instrument.

5.3 The legal mechanism is set out in clause 4.6 of standard-instrument compliant local environmental plans. Hence its name. The LEP includes the standard clause 4.6 provision.

5.4 For a clause 4.6 request to be legally sound it must (under clause 4.6(3) of the LEP) seek to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is **unreasonable or unnecessary** in the circumstances of the case; and

(b) that there are sufficient **environmental planning grounds** to justify contravening the development standard.

5.5 For a consent authority to actually approve a clause 4.6 request, the consent authority must be satisfied that:

(a) the requests have adequately addressed the matters outlined in paragraph 5.4 above (clause 4.6(4)(a)(i)); and

(b) the proposed development will be in the public interest **because** it is consistent with:

(i) **the objectives of the particular standard**; and

(ii) the objectives for development within the zone in which the development is proposed to be carried out (clause 4.6(4)(a)(ii)).

5.6 This means that if the consent authority is not satisfied as to the matters in paragraph 5.5, a development consent could not be lawfully granted on the strength of a clause 4.6 request.

5.7 If the consent authority purports to reach an opinion that is not legally reasonable it may be set aside by way of judicial review (as per *Trives*).

5.8 There are many reasons why any clause 4.6 request is unlikely to be able to be reasonably upheld. However, the easiest one to highlight is the requirement that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard(s). This would, in the present case, be clause 21(1)(a) and 21(1)(c).

5.9 Clause 21 contains distinct standards(cf *Cittrus Pty Ltd v Inner West Council [2019] NSWLEC 1558* at [45])). The clause is a response to a concern that advertisements located on, or above, the parapet or eaves of buildings/structures would be more prominent, and potentially more obtrusive, than those located for example on a wall: *Administration and Marketing Solutions Pty Ltd v Tamworth Regional Council* [2011] NSWLEC 1343 at [68].

5.10 There are no express objectives for clause 21(1)(a) and 21(1)(c).

5.11 Nonetheless, it is plain that the objective of the standard set out in clause 21(1)(a) is to prevent there being any expansion in the number of parapet/above-eaves advertisements — and cap their number to existing levels. There is no way that a clause 4.6 request could be framed to claim a reasonable consistency with this standard.

5.12 It is plain that the objective the standard set out in clause 21(1)(c) is to ensure that an area or precinct scale planning exercise has been completed by a local council before any parapet/above-eaves advertisements are approved. The only such planning exercise that has occurred is reflected in the terms of the DCP. It is clear that the DCP does not provide any support to the proposed advertisements. There is no way that a clause 4.6 request could be framed to claim a reasonable consistency with this standard.

5.13 In short, there is little point in the proponent attempting to remedy its failure to comply with clause 21(1)(a) and (c) by submitting a clause 4.6 request.

6. Political donations disclosure

In accordance with section 10.4(3) of the EP&A Act our client discloses the following political donations made by him personally to the Liberal Party of Australia:

(a) $600.00 on 10 May 2019; and

(b) $1,000 on 19 May 2019.

Our client's residential address is 5 Pindari Place, Bayview NSW.

Please do not hesitate to contact Amelia Stojevski on (02) 8289 or myself if you have any queries regarding this objection.

Yours sincerely

Aaron Gadiel
Partner
Accredited Specialist—Planning and Environment Law