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Confidential

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Dear Sir,

Part 3A Section 75W Modification Assessment

Modification No.8 – Concept Plan 07_0166 – Bushfire Protection

- 1 Capital Bluestone is the proponent of MP 07_0166 MOD 8 (**'Modification Application'**) to modify Approved Concept Plan 07_0166 (**'Concept Approval'**).
- 2 The Modification Application is made pursuant to s75W of the preserved provisions of the former Part 3A of the *Environmental Planning and Assessment Act 1979* (**'EPA Act'**).
- 3 The Modification Application relevantly seeks approval to amend the residential building envelopes within Precinct B of the approved project.
- 4 The Independent Planning Commission (**'IPC'**) is the delegate of the responsible Minister for the purposes of determining the Modification Application.
- 5 We are asked to review the assessment of bushfire protection contained in part 5.4 of the document titled *'Wahroonga Estate Concept Plan - Part 3A Section 75W Modification Assessment (MP_070166 MOD8)'* prepared by the NSW Department of Planning, Industry & Environment in September 2019 (**'Assessment Report'**).
- 6 In reviewing the Assessment Report, we are asked to have regard to the letter from Ethos Urban to the Independent Planning Commission (**'IPC'**) dated 10 October 2019 (**'Ethos Urban Letter'**).
- 7 Condition 5(1) of the Concept Approval relevantly requires that *'All Asset Protection Zones are to be located outside of the conservation land as shown in the approved Concept Plan...'*

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- 8 We understand that the edge of the conservation area shown in the Concept Approval plans is the boundary between *Zone E2 - Environmental Conservation* and *Zone R3 – Medium Density Residential* under *Ku-ring-gai Local Environmental Plan 2015* (**Zone E2 Boundary**).
- 9 The Assessment Report notes that concern was raised by Ku-ring-gai Council and in public submissions ‘*about the revised building envelopes encroaching into the bushfire asset protection zones (‘APZs’) shown on the plans*’ (p.27).
- 10 This statement is correct if the edge of the E2 Conservation Land is used to define the boundary of the applicable APZ.
- 11 However, the Modification Application uses a different line, referred to in the Ethos Urban Letter as the ‘*Vegetation Transition Management Line*’ (**VTML**), to define the boundary of the conservation land.
- 12 The Ethos Urban Letter sets out reasons why the VTML should be accepted as the boundary of the conservation land for the purposes of the assessment of the modification application.
- 13 The most compelling reason is that the actual boundaries of land having environmental conservation value and land that could be used for bushfire protection land were established through the preparation of a detailed biodiversity management plan (**BMP**) that was required to be prepared by condition B4 of the Concept Approval.
- 14 The BMP identified that the area between the E2 Zone boundary and the VTML has been actively managed as a bushfire protection zone for existing development and had diminished environmental conservation value whereas the land beyond the VTML was less disturbed and merited environmental conservation.
- 15 Condition B4 of the Concept Approval expressly required the BMP to include a vegetation management plan and a fire management plan. As explained in some detail in the Ethos Urban Letter, the process of preparing these plans informed the establishment of the VTML having regard to the area within the E2 Zone that has been actively managed as a bushfire protection zone for existing development.
- 16 Upon its proper construction, condition B4 required a process to be undertaken that might establish that the E2 Zone boundary was not the appropriate boundary of the APZ for development on the site.
- 17 To this extent, condition B4 had the embedded potential to create a conflict with condition B5(1) of the Concept Approval if the BMP established that the E2 Zone boundary is not the appropriate boundary for the APZ for development, which is what in fact occurred when the VTML was identified.
- 18 As far as bushfire protection is concerned, the Modification Application is consistent with the BMP by adopting the VTML as the boundary of the APZ for the proposed modified development. To have adopted the E2 Zone boundary as the APZ boundary would have rendered the BMP and the operation of condition B4 of the Concept Approval redundant.
- 19 To implement the Concept Approval in a manner which produces such an outcome would be perverse and contrary to the proper construction of the Concept Approval.
- 20 The case law establishes that instruments such as development approvals and conditions of approval must be construed fairly and liberally in the context of their written terms and having regard to their enduring function: *Roberts v Blue Mountains City Council* [2012] NSWLEC 2 at [53], citing *House of Peace Pty Ltd v Bankstown City Council* [2000] NSWCA 44; (2000) 48 NSWLR 498 at [37] and [41] and *S J Connelly Pty Ltd v Ballina Shire Council* [2010] NSWLEC 151 at [59]). Further, they must also be applied in a practical and common sense manner rather than as

documents drafted with legal expertise (*Boral Resources Pty Ltd v Wingecarribee Shire Council* [2003] NSWLEC 39; (2003) 124 LGERA 90 at [29], *Westfield Management Limited v Perpetual Trustee Company Limited* [2006] NSWCA 245 at [36] and [40]; *Baulkham Hills Shire Council v Ko-veda Holiday Park Estate Ltd* [2009] NSWCA 160; (2009) 167 LGERA 395 at [96]-[98] and *Botany Bay City Council v SAAB Corp Pty Ltd* [2011] NSWCA 308 at [80].

21 To adopt a construction of the Concept Approval that renders the BMP and the operation of condition B4 of the Concept Approval redundant in circumstances where condition B4 required a process to be undertaken that might establish that the E2 Zone boundary was not the appropriate boundary of the APZ for development on the site and might lead to a need to modify condition B5 to establish the VTML as the APZ boundary is not consistent with the proper interpretation of the Concept Approval based on the case law.

22 However, the Assessment Report inexplicably adopts exactly that approach.

23 The sum total of the analysis of the issue of bushfire management contained in the Assessment Report can be reduced to the following two legally misconceived or erroneous propositions appearing on page 29:

23.1 ‘...the Department notes that the revision to the APZs has never been specifically sought as a modification to the Concept Plan’,

23.2 ‘the Department considers the APZ shown on the modification plans would be inconsistent with the intention of the original approval, as it would potentially require the removal of vegetation within the conservation land and / or prevent rehabilitation and revegetation of this area with associated potential biodiversity impacts, contrary to the intention of the zone and FAR B5(1).’

24 As to the first proposition, the fact that the APZ is shown on the plans accompanying the Modification Application as referable to the VTML is sufficient in itself to establish that the Modification Application does in fact seek an amendment to the Concept Approval in relation to the boundary of the APZ.

25 This gives the IPC the power to modify condition B5(1) of the Concept Approval when determining the Modification Application. See *North Sydney Council v Michael Standley & Assoc Pty Ltd* (1998) 43 NSWLR 468; 97 LGERA 433 at 440; *King v Bathurst Regional Council* (2006) 150 LGERA 362 at [105]; *Malcolm Smith Pty. Limited v The Hills Shire Council* [2019] NSWLEC 1096 at [40].

26 The Ethos Urban Letter recommends an appropriate amendment to condition B5(1) on page 6, and it is within the IPC’s power to adopt the amended condition if it determines to approve the Modification Application.

27 The duty imposed on the IPC when assessing the Modification Application is to ‘engage actively’ in the matter in question: *Wollar Progress Association Incorporated v Wilpinjong Coal Pty Ltd* [2018] NSWLEC 92 at [132], citing *Weal v Bathurst City Council* [2000] NSWCA 88. The Assessment Report does not do this. Rather, it deals with the issue from a purely procedural standpoint and applies no consideration of the merit of the proposed use of the VTML to define the APZ for the development.

28 The implication in the proposition that the revised APZ is not a matter that can be dealt with in the assessment of the Modification Application is plainly wrong. On the contrary, the failure to properly address a substantive environmental matter, such as bushfire risk, by having regard to the facts and circumstances of the application will inevitably lead to a court setting aside the determination of the application as invalid: see *Hoxton Park Residents Action Group Inc. v Liverpool City Council* [2011] NSWCA 349.

29 Furthermore, the cases show that the Court considers environmental evidence when determining bushfire asset protection zones: see, for example, *Hazcorp Pty Ltd v*

Roads and Traffic Authority of New South Wales [2006] NSWLEC 661 and *Randall v Great Lakes Council* [2003] NSWLEC 225 and the IPC must do the same.

- 30 As to the second proposition:
- 30.1 as discussed above, far from being '*inconsistent with the intention of the original approval*', the revision of the APZ boundary sought by the Modification Application is the outcome of the requirement under condition B4 to prepare the BMP and is consistent with the Concept Approval because condition B4 necessarily contemplated the possible revision of the APZ boundary as a consequence of preparing the BMP,
 - 30.2 it fails to have any regard to the fact that the area between the E2 Zone boundary and the VTML has been actively managed as a bushfire protection zone for existing development and the VTML establishes the boundary between the existing bushfire managed area and the area where environmental conservation is merited,
 - 30.3 it is not permissible for the '*intention of the zone*' to inform the Assessment Report as this would breach s75R(3) of the EPA Act, which provides that '*Environmental planning instruments (other than State environmental planning policies) do not apply to or in respect of an approved project*',
 - 30.4 the Assessment Report fails to have regard to the important fact that other development, being an expansion of the Sydney Adventist Hospital and development at the Wahroonga Adventist School, were approved with APZs determined by reference to the VTML in 2011 and 2015, respectively.
- 31 We recommend that Capital Bluestone provides a copy of this letter to the IPC and requests it to have proper regard, according to law, to the matters raised in the Ethos Urban Letter and this letter when determining the Modification Application.
- 32 I thank you for your instructions in this matter. If you would like to discuss any aspect of this advice or require any further assistance, please do not hesitate to contact me on 02 8235 9701.

Yours Sincerely,



Dr Lindsay Taylor
Senior Partner

D: 
M: 
E: 