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**By email**

Dear Sue

**Catherine Hill Bay State Significant Site proposal – Coal & Allied Industries Limited**

We refer to your email dated 12 December 2010.

You have requested advice as to whether a parcel of land contained within the Catherine Hill Bay (Middle Camp) State Significant Site proposal by Coal & Allied Industries Limited (C&A), currently on public exhibition, can legally be zoned "E2 – Environmental Conservation", as opposed to "E4 – Environmental Living".

***Background***

The subject parcel of land formed part of an earlier State significant site and Concept Plan proposal for Catherine Hill Bay (Middle Camp) under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) by C&A, which were both withdrawn prior to determination by the Minister for Planning.

Prior to its withdrawal, the earlier Concept Plan for Middle Camp was the subject of an Interim Report by an Independent Hearing and Assessment Panel (**IHAP Report**), constituted to advise the Director General of the Department of Planning on 19 June 2007 on various impacts of the Concept Plan.

In relation to Middle Camp, the IHAP Report made the following findings:

Key Principles

Having regard to the above the Panel considers that any development at Middle Camp, Catherine Hill Bay shall comply with the following key planning principles:

...  
4. It is noted that the development at Middle Camp is proposed in four distinct precincts totalling a developable area of 50ha (300 lots) at an average dwelling density of 6 dwellings per hectare:

...  
(iv) Precinct D "South East Hamlet" 7.4ha (22 lots) – the area is located to the



east of the existing Middle Camp settlement and is defined by Middle Camp Creek to the north, Northwood Road and its landscape buffer to the south and wetlands to the east.

Having regard to Principle 2 above it is considered that there is potential for residential development as generally detailed in the Concept Plan within Precincts A and B but that development should not proceed in Precincts C and D having regard to the significance of this land in providing a visual, cultural and landscape connection between Middle Camp Village in the north and Catherine Hill Bay Village in the south.

7. The Panel considers that Precinct D is highly sensitive given its location in close proximity to the beach, the cemetery and the old railway alignment. It is of the view that consideration should be given to the provision of a public recreational park in the location of the existing Precinct D on land not taken up by the existing 4 dwellings and their allotments (to be created). Further work is required to determine appropriate allotment boundaries for these existing dwellings given the sensitive nature of the area.

“Precinct D” referred to in the IHAP Report, now constitutes the parcel of land which is proposed to be rezoned “E4 - Residential Living” in the current State Significant Site Proposal which is on exhibition.

You have instructed us that a representative of C&A has advised that the area should be zoned “E4 – Environmental Living” and has challenged the Association to provide legal advice to the contrary.

You are concerned that the area is proposed to be rezoned as E4, to enable future residential development of the area.

### *Advice*

In order for the rezoning proposed for Middle Camp to be effected, the Governor must amend Schedule 3 of the *State Environmental Planning Policy (Major Development) 2005 (Major Development SEPP)*, to make provision with respect to any matter that, *in the opinion of the Minister for Planning* is of State or regional environmental planning significance.<sup>1</sup>

The Minister *may* require a State Significant Site study (**SSS Study**) to be prepared for this purpose.<sup>2</sup>

Pursuant to clause 8(2) of the Major Development SEPP, any such study is to assess:

- a) the State or regional planning significance of the site, and
- b) the suitability of the site for any proposed land use taking into consideration environmental, social and economic factors, the principles of ecologically sustainable development and any State or regional planning strategy, and
- c) the implications of any proposed land use for local and regional land use, infrastructure, service delivery and natural resource planning, and
- d) any other matters required by the Director-General.

Once a SSS Study has been publicly exhibited, the Director-General is required to provide a copy of the study and any recommendations to the Minister.<sup>3</sup>

There is no requirement for the Minister to convene a SSS Study, nor consider the contents of it, when forming the opinion that a matter is of State or regional planning significance.

<sup>1</sup> Section 37(2) of the *Environmental Planning and Assessment Act 1979* (NSW).

<sup>2</sup> Clause 8(1) of the Major Development SEPP.

<sup>3</sup> Clause 8(3) and 8(5) of the Major Development SEPP.



On 16 August 2010, C&A was requested by the Director-General to prepare a SSS Study assessing the matters outlined in (a) to (c) above, as well as a number of additional matters, including the following:

*(g) the recommended land uses and development controls for the site that should be included in Schedule 3 [to the Major Development SEPP].*

The recommended land uses and development controls for the site are set out in Appendix B to the SSS Study dated November 2010, entitled "Proposed Listing in SEPP Major Development – Schedule 3".

Page 31 of the SSS Study states that the proposed land use zones "have been based upon the Department of Planning's gazetted Standard Instrument - Principal Local Environmental Plan."

The reference to the "gazetted Standard Instrument" is a reference to an Order by the Governor gazetted on 1 March 2006 (**Standard Instrument Order**) which prescribes the form and content of a principal local environmental plan, prepared by local councils. It refers to the Standard Instrument, a drafting template for local environmental plans which sets out a number of compulsory and optional provisions. The Standard Instrument Order (and therefore the provisions of the Instrument itself) is clearly expressed to apply only to the form and content of a local environmental plan.<sup>4</sup>

As stated above, the rezoning proposed by C&A in the SSS Study will, if approved, be effected by an amendment to Schedule 3 of the Major Development SEPP, which is dependant only on the Minister forming the opinion that the proposed rezoning is "of State or regional environmental planning significance".

In our view the Minister is not bound by the Standard Instrument Order, nor the provisions of the Standard Instrument itself, in forming the opinion that the proposed rezoning is "of State or regional environmental planning significance". It is likely that C&A have adopted the provisions of the Standard Instrument to comply with the spirit and intention of the Standard Instrument, which was introduced to achieve consistency in land use and zoning across the State.

Even if C&A (and the Minister) were bound to comply with the Standard Instrument, there is nothing in that instrument to prevent the subject parcel of land from being zoned "E2 – Environmental Conservation".

The Standard Instrument contains 34 different zones, and the choice of zone should reflect the primary intended use of the land. Each zone also contains certain 'zone objectives'. Under the Standard Instrument, Councils are permitted to add additional objectives to a zone to reflect particular local objectives of development, but the added objectives must be consistent with the core objectives as set out in the Standard Instrument. Objectives are an important part of zoning as they provide a context that helps to interpret the rest of the zone's provisions. For example, it may be unclear as to whether a particular development is allowed in the zone and in such cases the objectives will help to decide the matter.

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<sup>4</sup> Clause 2 of the *Standard Instrument Order 2006*.

Councils can also add to the types of development that are permitted or prohibited in the zone. However, councils are not allowed to remove any types of development from the list contained in the Standard Instrument.

Even if the Minister were bound by the provisions of the Standard Instrument, on our examination of the zone objectives and development permissible in the “E2 – Environmental Conservation” zone, the subject parcel of land could potentially be zoned as such.

The Standard Instrument contains the following for E2:

#### **Zone E2 Environmental Conservation**

##### **Direction.**

The following must be included as either “Permitted without consent” or “Permitted with consent” for this zone:

Environmental protection works

##### **1 Objectives of zone**

- To protect, manage and restore areas of high ecological, scientific, cultural or aesthetic values.
- To prevent development that could destroy, damage or otherwise have an adverse effect on those values.

##### **2 Permitted without consent**

##### **3 Permitted with consent**

##### **4 Prohibited**

Business premises; Hotel or motel accommodation; Industries; Multi dwelling housing; Recreation facilities (major); Residential flat buildings; Retail premises; Seniors housing; Service stations; Warehouse or distribution centres; Any other development not specified in item 2 or 3

E2 zoning is suitable for areas with high ecological, scientific, cultural or aesthetic values outside the reserve system. It allows for uses compatible with its ecological values. It can be seen from the above that although residential flat buildings and multi-dwelling housing are prohibited in this zone, a ‘dwelling houses’ are not listed in the ‘prohibited’ section, and accordingly it would be open to a Council (or the Minister in this case) to make dwelling houses permissible with consent in this zone. Dwelling houses could only be approved in the zone however if they were consistent with the zone objectives, which include to, “prevent development that could destroy, damage or otherwise have an adverse effect on those [high ecological, scientific, cultural or aesthetic] values.” In our view, such a zoning would be more appropriate given the recommendations of the IHAP Report for the subject parcel of land.

As stated above, the applicable zoning is selected to reflect the intended use of the land. It is clear that in designating the subject parcel of land as “E4 – Environmental Living”, C&A intend for the area to be more developed. This is illustrated by contrasting the zone objectives. The zone objectives for E4 in the Standard Instrument are:

- To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.
- To ensure that residential development does not have an adverse effect on those values.



Whilst development for dwelling houses can be made permissible with consent in either zone E2 or E4, obviously it would be easier to approve dwelling houses in the E4 zone, as they would more clearly be consistent with the zone objectives.

### **Summary of advice**

In summary, the Minister is not bound by the zoning provisions of the Standard Instrument in forming the opinion that the rezoning of Middle Camp is of "State or regional environmental planning significance".

Even if the Minister were bound by the Standard Instrument, it would be open to him or her to rezone the subject parcel of land as "E2 – Environmental Conservation", as dwelling houses could be made permissible with consent in this zone. Development applications in this zone would be subject to more stringent environmental considerations, which would be consistent with the recommendations made in the IHAP Report in respect of this parcel of land.

Yours sincerely

**Environmental Defender's Office (NSW) Ltd**



**Melissa Jolley**  
Solicitor



