INNER WEST COUNCIL – CHANGES TO APPROVED WESTCONNEX PROJECTS

MEMORANDUM OF ADVICE

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1. I am asked to advise whether, if Stage 3 of WestConnex involves alterations to the proposed connections between the New M5 and the M4 East Projects, that would invalidate the approvals for those Projects.

2. In particular, concern has been expressed that the environmental assessment of the impacts of the Projects may become misleading, if changes to those connections alter traffic flows, construction periods and the areas of land consumed by works for the Projects. This concern invites consideration of the resolution of conflicts between approvals.

3. Both Projects are pieces of linear infrastructure, and both were premised on later approvals of connecting infrastructure. The need for those connections was disclosed in each environmental assessment, and was part and parcel of the overall WestConnex concept. The New M5 even involved the construction of stub roads, to ensure that a seamless connection could be effected in due course.

4. The Projects were approved under Part 5.1 of the *Environmental Planning and Assessment Act 1979* ("the EPA Act) as critical State significant infrastructure ("SSI"). The approvals are not development consents, which are granted under Part 4 of the Act: s.115ZF(1). Part 4 only applies to SSI approvals not carried out by or on behalf of public authorities, and then only in relation to development and affordable housing contributions: s.115ZF(3). Otherwise, it does not apply "to or in respect of" the SSI: s.115ZF(1). Other legislation requiring approvals either does not apply (s.115ZG) or must be applied consistently with the SSI approval: s.115ZH. A consequence of these provisions is that a consent granted under Part 4 will not impede the

carrying out of SSI, and any question of inconsistency between an approval and consent would be resolved in favour of the approval.

5. Although the grant of an SSI approval may have similar consequences to the grant of a consent, the two classes of instrument should not be confused. In particular, the systems for administrative and judicial enforcement widely differ (note that a breach of an SSI approval is not taken to be a breach of the EPA Act, unlike a consent), and enforcement action cannot be taken without Ministerial consent in the case of critical SSI: s.115ZK.

6. Inconsistencies between approvals (and it seems that my instructions presage an inconsistency between the Projects and a later approval) can be resolved in several ways.

7. First, if a later approval requires different roadworks to works which were earlier approved, then the earlier approval can be surrendered, as a condition of the later approval (s.115ZL(5)), or by any person entitled to act on the earlier approval: s.115ZL(4). This seems unlikely, especially if only a small portion of the Project is involved.

8. Second, the first approval can be modified by changing the terms of the approval: s.115ZI(1), (4). An application to the Minister is required, and the Secretary of the Department can impose environmental assessment requirements: s.115ZI(3). The request for and any modification must be exhibited: s.115ZL(1)(g).

9. Third, the later approval can overlap the earlier approval, but approve infrastructure which is different from and inconsistent with the infrastructure approved by the earlier approval.

10. The second and third ways require discussion, because it has been suggested that the second way is constrained by the scope of the modification power and the third may have chaotic consequences.

11. The Minister may change the terms of the approval, including by adding or subtracting conditions. The power to modify an infrastructure approval is

wider than modifications of development contents: *Barrick Australia Ltd v Williams* (2009) 74 NSWLR 733. The infrastructure as modified need not be substantially the same as the infrastructure as originally approved. The assessment of whether a proposed modification extends beyond the scope of the power is to be made by the Minister and is only reviewable by the Court on the established grounds of judicial review, and not on its merits: *Botany Bay City Council v Minister for Planning* [2015] NSWLEC 12 at [160].

12. No test has been developed for defining the scope of the power, but in *Billinudgel Property Pty Ltd v Minister for Planning* [2016] NSWLEC 139, Robson J identified two steps which he suggested were useful in determining whether an application to modify an approval was beyond power. First, what was approved by the Minister should be identified. This will be the latest iteration of the approval: [55]. The second step is to consider whether a modification of that approval has been sought. To modify something is to change or alter it somewhat, so a modification refers to a limited change. The power extends to changing the terms of the approval. Terms are conditions or stipulations which limit the proposal, a change can either alter or substitute them, and therefore a modification is restricted to altering or substituting the limiting conditions or stipulations that form part of the approval, rather than changing an underlying and essential part of the approval itself: [59], [60].

13. I do not think that the power only extends to limiting conditions, but must include changes to the infrastructure itself. With respect, Robson J's formulation of the second issue is too narrow, and may defeat the purpose of the power to modify. Section 115ZI(2) provides that the Minister's approval is not required "if the infrastructure as modified will be consistent with the existing approval". The converse is that his or her approval would be required (and capable of being given) if it was inconsistent. As well, it speaks of modifying the infrastructure, not the approval, and infrastructure includes development for the purposes of roads, among other things: s.115T. What is left undetermined is the extent of change, but it is clear that it is to be judged by the Minister, not the Court. In practice, that confers a

largely unfettered power on the Minister to determine the scope of modification.

14. In my opinion, a modification of critical SSI can involve a change in the land to be affected by the Project, but in the case of a road I doubt whether it would extend to a change of route. The absence of obligatory environmental assessment *(Barrick* at [53]) and public disclosure and consultation *(Lester v Minister for Planning* [2013] NSWCA 45 at [54], [55]) when modifying an approval suggests that modifications should have limited environmental impacts. A change of route would be a case of different infrastructure having potentially large impacts, rather than modifying the approved infrastructure. Beyond these general observations, it is difficult to go.

15. There is no certainty about the changes which might be necessitated by the next leg of WestConnex, but it is almost certainly the case that if it is inconsistent with the approved infrastructure, an application will be made to modify the existing approvals to integrate the Projects. Without knowing the final iteration of that change, it is impossible to advise whether it would be beyond power for the Minister to modify it. However, any doubt about the scope of the modification power could be sidestepped by including route changes and other significant changes to approved infrastructure in the next application for SSI. That raises the question whether a later approval can be superimposed over an earlier one: that is, what if any rules govern inconsistent approvals?

16. It is not unusual for the same piece of land to be subject to multiple planning approvals, and for those approvals to conflict: *Waverley Council v CM Hairis Architects* (2002) 123 LGERA 100 at [29]. In the case of linear infrastructure comprising traffic arteries which necessarily connect with other parts of the network, it would be expected that as the Projects are designed and constructed changes will be made. In some cases those changes will be driven by the conditions of the approval, which require adaptive management of the construction project, with feedback loops designed to assist decision-making. It is inevitable that projects involving lengthy traffic

arteries in urban areas will involve such changes. A degree of such flexibility is built into the approval in both cases. It is worthwhile considering the position of inconsistent development consents to see if any light is cast on the problem.

17. Where the source of power to grant conflicting consents is the same, the ordinary rules of statutory construction will apply to resolve inconsistencies. The first principle is that an inconsistency is not presumed. On the contrary, potentially conflicting instruments emanating from the same law making source should be read together so as to resolve any conflicts: *Saraswati v The Queen* (1991) 172 CLR 1 at 17. In reconciling them, a general provision will often be suppressed in favour of a specific one where they deal with the same subject matter, at least where it can be said that the law conferred only one power: *Minister v Nystrom* (2006) 228 CLR 566 at [59]. Implied repeal of the earlier instrument by the later instrument will only arise if irreconcilable conflict remains, and is only to be inferred "on very strong grounds": *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 139 at [4].

18. This approach to construction presupposes that consents granted by a Council are intended to work together. The application of the presumption that instruments are intended to work together may not support the approach taken in New South Wales where the same land is subject to two or more development consents, the effect of which may be to ignore one consent when implementing the other. The existence of a consent does not affect the power to grant a fresh consent. There may be any number of development consents applying to the same parcel of land: *Progress and Securities Pty Ltd v North Sydney Municipal Council* (1988) 66 LGRA 236 at 241-242; *Hairis* at [29]; *John Bruce and Partners Pty Ltd v Willoughby Municipal Council* (1987) 64 LGERA 67 at 68-69, where Bignold J described it as axiomatic that a land owner may obtain "any number of development consents (including those relating to mutually inconsistent developments) for the same development site". In *Hairis,* Talbot J recognised the right to take advantage of multiple consents, as well as the power of a consent authority

to condition later consents under s.80A(1)(b) of the EPA Act to modify or require the surrender of earlier consents to avoid any inconsistency. In the absence of the exercise of that power, it was not contrary to any principle, Talbot J decided, to rely upon different development consents in relation to the same land, even though "it may be complicated, inept, inconvenient, inappropriate or conceptually unsound" [29].

19. English law recognises a doctrine to the effect that a development consent can be vitiated if, by reason of the implementation of a supervening consent, it is physically impossible to carry out the development: *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132. Mere inconsistency or incompatibility between consents is insufficient: it must be physically impossible to implement the consent before it is of no effect: *Prestige Homes (Southern) Ltd v Secretary of State for the Environment* [1992] JPL 842.

20. These decisions are premised upon the implementation of conflicting land uses on the one site and do not address the problem of the same land use subject to conflicting sources of authority for carrying it out. This problem arose in *Rutland v Shoalhaven City Council* (1997) 94 LGERA 370, where a subsequent subdivision application would if granted have been in breach of a condition of an earlier grant of subdivision consent. Bignold J expressed the opinion (in *obiter)* that the proposed development would "by virtue of a direct conflict with the development consent, not be legally capable of receiving development consent granted under the EPA Act" [12]. *Rutland* was followed by Lloyd J in *Mason Architects v North Sydney Council* [1999] NSWLEC 176. This was not the unanimous view in the Land and Environment Court. In *Silverwater Estate Pty Ltd v Auburn Council* [2001] NSWLEC 60, Talbot J said:

> *"The contradiction of a condition in an earlier consent by the granting of a further development consent does not, of itself, result in a contravention of the Act, an environmental planning instrument or the regulations".*

This is consistent with the position Talbot J expressed in *Hairis.* The matter was resolved by the Court of Appeal in *Wingecarribee Shire Council v Pancho Properties Pty Ltd* (2001) 117 LGERA 104, in favour of Talbot J's view. An existing development consent for a new dwelling house on the land required upon its completion the removal of the original dwelling. A later development application was lodged to use the existing dwelling for a manager's residence which, if granted, would have directly contradicted the requirement for its removal imposed by the earlier consent. It was argued that the proposed use was unlawful and the subsequent development application was merely an attempt to take advantage of that unlawful use. The Court rejected the argument, even though the applicant was already in breach of the earlier consent. It was open to the applicant to appeal the condition on the earlier consent, and the fact that it may have been in breach of that consent did not deprive it of its appeal rights. That, however, did not address the issue raised in *Rutland* about whether there was in fact power to grant a consent inconsistent with an earlier consent without removing or modifying that earlier consent. The Court of Appeal decided that, as a matter of power; there was nothing that would prevent the grant of the later and inconsistent consent, although it noted that the existence of the earlier consent and its condition requiring removal of a dwelling house was clearly a relevant factor that would need to be considered by the decision-making authority. The Court of Appeal rejected the reasoning in *Rutland.* While accepting that it had been decided that a consent may not be given to a development which would be contrary to an environmental planning instrument, it said that "there is not a necessary transmission to conflict with a condition of an earlier development consent, and I do not think these cases provided a sound basis for the decision in *Rutland*" [44]. However, the Court of Appeal did not resolve the fundamental problem whether, if the second application was granted and the first consent remained on foot, the implementation of the second would be inconsistent with the requirement to remove the dwelling imposed by the first: [46]. It only resolved the question of power and said that:

> *"it would be possible for consent to use the existing dwelling as a manager's residence ... to be granted on condition that the consent to the erection of the new dwelling be modified or surrendered or on condition that the new dwelling be removed ... that is sufficient to determine the separate question":* [47].

21. Regrettably, the Court of Appeal did not address itself to the problem which would arise if compliance with a later consent required a breach of an earlier consent, apart from observing that the field of conflict could be removed by the later consent changing the earlier one. If both consents are alive, then a breach of a condition of one of them is a breach of the EPA Act to which civil enforcement and criminal penalties apply. It seems to me that that is an impossible position to place the holder of the conflicting consents and that the general approach of the Court to resolving conflicting legislative enactments must apply. The first step is to read the consents together but if they cannot be reconciled to give effect to the specific provision over the general and if that is not possible, to apply the doctrine of implied repeal where the later instrument abrogates the earlier.

22. There is, however, an alternative approach. Where two laws apply to an activity, and one authorities it and the other prohibits it, both laws must be obeyed, and in the absence of implied repeal, the activity cannot be undertaken, because otherwise the activity would be unlawful. In other words, the authorisation is effective only after the prohibition is removed. This approach is consistent with decisions concerning parallel systems of statutory regulation when double obedience is required before action can be lawfully taken. These decisions concern related but disparate subject matters (liquor v planning, mining v planning, pollution control v Local Government, fire standards v planning) and are exemplified by the Privy Council's decision in *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 at 553-4. In those cases, the different regulatory systems evidenced an intention to require compliance with all of them, and there was no room for the doctrine of implied repeal by the later or more specific regulatory scheme to operate.

23. Where, however, it was intended to confer significant control over the approval and implementation of infrastructure on a political officer, I think that Parliament intended that the later instrument should prevail, in the event of irreconcilable conflict. The point of conferring political control is to reflect the likely public investment in the infrastructure, and the need for it. That suggests that the later approval, as the most recent political endorsement of the infrastructure, was intended to govern in the case of conflict with the earlier approval.

24. Finally, it has been suggested that the proposal to remove the Camperdown portal from the M4-M5 Link Road will generate more traffic at St Peters and Haberfield, negativing the impact assessments undertaken for those Projects. If that occurs, then it is a consequence of Stage 3, the implications of which must be assessed when the environmental assessment for that project is prepared: *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2011) 81 NSWLR 638 at [46] *ff.* The practical consequence is that there will need to be a re-assessment of traffic flows and therefore impacts which had been undertaken in the environmental studies for the New M5 and the M4 East, in the third stage. However, the change in the portal should not affect the validity of the Minister's approval for the earlier Projects, as the question of validity is to be judged on the facts and law in existence when the Projects were approved. There is no doctrine of retrospective invalidation in administrative law. If, as a consequence of that re-assessment, it becomes necessary to change the infrastructure approved for the New M5 and the M4 East, or for that matter to reinstate the Camperdown portal, those changes can be effected in the subsequent approval, or by modifying the earlier approvals, in the ways that I have earlier discussed.

25. For completeness, I have reviewed both approvals and can find no condition that would be breached by this proposed change. Enforcing conditions of approval requires the consent of the Minister: a breach of a condition would not amount to a jurisdictional defect in the approval itself. Rather, an enforcement suit is predicated upon the validity of the approval.

On behalf of
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17 March 2017