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From: system@acelo.com on behalf of Luke Walker [REDACTED]
Sent: Thursday, 1 November 2018 9:58 AM
To: [REDACTED]
Subject: Submission Details for Luke Walker of MinterEllison Lawyers (comments)
Attachments: 291615_MinterEllison submission.pdf

Confidentiality Requested: no

Submitted by a Planner: no

Disclosable Political Donation:

Agreed to false or misleading information statements: yes

Name: Luke Walker
Organisation: MinterEllison Lawyers (Partner)
Email: [REDACTED]

Address:
[REDACTED]
[REDACTED]
[REDACTED]

Content:
Please see attached our submission on behalf of our client.

Regards,

IP Address: - 119.225.81.203
Submission: Online Submission from Luke Walker of MinterEllison Lawyers (comments)
https://majorprojects.acelo.com/?action=view_activity&id=291615

Submission for Job: #9552
https://majorprojects.acelo.com/?action=view_job&id=9552

Site: #0
https://majorprojects.acelo.com/?action=view_site&id=0

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MinterEllison

30 October 2018

Ms Catherine Van Laeren
Director Aerotropolis Activation
Planning and Design
Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

Dear Ms Van Laeran

Re: Submission on Western Sydney Aerotropolis Land Use and Infrastructure Implementation Plan

1. Introduction

1.1 We refer to your email correspondence dated 21 September 2018 seeking submissions on the *Western Sydney Aerotropolis Land Use and Infrastructure Implementation Plan Stage 1: Initial Precincts (LUIIP)*.

1.2 We write to provide a submission on behalf Joe and Mary Attard who are the owners of 6 North Avenue, Rossmore (Site).

1.3 The Site is currently zoned *RU4 – Primary Production Small Lots* under the *Liverpool Local Environmental Plan 2008*. The development which is permitted with consent on the site at present includes:

Agriculture; Animal boarding or training establishments; Bed and breakfast accommodation; Building identification signs; Business identification signs; Cemeteries; Community facilities; Crematoria; Dual occupancies; Dwelling houses; Entertainment facilities; Environmental facilities; Environmental protection works; Farm buildings; Farm stay accommodation; Flood mitigation works; Helipads; Home businesses; Home industries; Landscaping material supplies; Places of public worship; Plant nurseries; Recreation areas; Recreation facilities (indoor); Recreation facilities (outdoor); Roads; Roadside stalls; Rural industries; Rural supplies; Rural workers' dwellings; Secondary dwellings; Veterinary hospitals; Water recreation structures

1.4 The LUIIP proposes to rezone part of the Site as 'open space' which would prevent the land from being developed for any of the above uses and would reduce its value.

1.5 We write to provide a submission strongly opposing the proposed zoning and requesting that further information be provided to affected landowners.

1.6 In summary, it is our submission that:

(a) More detailed maps which delineate the boundaries of the proposed re-zoning should be released to the public and affected landowners.

(b) The proposed zoning in the LUIIP should be amended to adopt a flood planning level which is consistent with both national best practice for disaster risk reduction and the *NSW Government Flood Prone Land Policy*.

- (c) Landowners should be informed that a right to compensation only arises in circumstances where a public authority seeks to acquire land, and that the rezoning of land to prevent future development will negatively impact upon the value of that land.
- (d) A scheme for compensation should be established to compensate those landowners affected by any proposed re-zoning which prohibits the future development of their land.

1.7 We set out our detailed submission as follows.

2. Detailed Mapping is Required

2.1 The LUIIP lacks detail as to the boundaries of the proposed re-zoning. It is difficult for landowners to establish whether their land, and how much of their land, will be affected by the proposal. Accordingly, we request that more detailed maps of the rezoning be released to the public and that further consultation be undertaken with landowners to provide detail as to exactly how much of their land will be affected.

3. Flood Planning Levels

3.1 The map at p. 39 of the LUIIP provides for a boundary of Non-Urban Land which appears to be delineated by reference to the Probable Maximum Flood (PMF). If this is the case, it is in conflict with the *NSW Government Flood Prone Land Policy*.

3.2 The *NSW Government Flood Prone Land Policy* as contained in the *Floodplain Development Manual (2005)* provides a very clear statement on the use of the PMF as the basis for a planning level. It proposes:

"a merit based approach to selection of appropriate flood planning levels (FPLs). This recognises the need to consider the full range of flood sizes, up to and including the probable maximum flood (PMF) and the corresponding risks associated with each flood, whilst noting that with few exceptions, it is neither feasible nor socially or economically justifiable to adopt the PMF as the basis for FPLs. FPLs for typical residential development would generally be based around the 1% AEP flood event plus an appropriate freeboard (typically 0.5)." (p. 2).

3.3 The Department of Planning issued Planning Circular PS 07-003 on 31 January, 2007. This Circular stated:

"A new Guideline on development controls on low risk areas—Floodplain Development Manual (the Guideline) has been issued to provide additional guidance on matters dealt with in the Manual. The Guideline should be read as part of the Manual. The purpose of the Guideline is to assist councils in determining the appropriate flood planning level (FPL) for residential development as well as to determine what are appropriate flood-related development controls on residential development in low flood risk areas.

The Guideline confirms that, unless there are exceptional circumstances, councils should adopt the 100-year flood as the FPL for residential development. In proposing a case for exceptional circumstances, a council would need to demonstrate that a different FPL was required for the management of residential development due to local flood behaviour, flood history, associated flood hazards or a particular historic flood.

The Guideline also notes that, unless there are exceptional circumstances, councils should not impose flood related development controls on residential development on land above the residential FPL (low flood risk areas)."

3.4 Accordingly, if the re-zoning in the LUIIP has been based on the PMF it is inconsistent with existing government policy on flood planning levels and should be amended to adopt the 100 year flood.

3.5 A far more sophisticated and nuanced approach to land use planning and flooding consistent with the merit-based approach in the *NSW Government Flood Prone Land Policy* is taken in the *Australian Institute for Disaster Reliance's Flood Information to Support Land Use Planning (2017) (AIDR Report)* produced by the Commonwealth Government. This document provides the best practice model for managing land use in flood affected areas. It identifies a series of 4 Flood Planning Constraint Categories and assigns separate controls based on those categories.

3.6 Based upon the above, it is our submission that the LUIIP needs to be revised to ensure that flood planning levels are calculated in accordance with the AIDR Report and the *NSW Government Flood Prone Land Policy*.

4. **Misinformation about acquisition and compensation**

4.1 We understand from discussions with affected landowners that there is a misperception that:

(a) landowners will be compensated for any decrease in the value of their land as a result of the rezoning, and;

(b) land will automatically be acquired as a result of the re-zoning.

4.2 As you would be aware, under existing statute, there is no right to be compensated for the 'downzoning of land' – the change of zoning to prevent the permitted use. Furthermore, the right to compensation and the procedures under the *Land Acquisition (Just Terms Compensation) Act 1991* are only triggered in circumstances where a public authority exercises its power to acquire land for a public purpose. The rezoning of land does not mandate a requirement that a public authority acquire the land. Relevantly, in the context rezoning land for open space, a local council is not required to exercise its powers to acquire that land to turn it into park space. Practically, this means that the re-zoned land may never be acquired and therefore the landowners may never be compensated for the effective sterilisation of their land.

4.3 In the interests of transparency, it is our view that the Department of Planning and Environment should clearly communicate that landowners affected by any re-zoning will not necessarily be compensated.

5. **Establish scheme for compensation**

5.1 Given the potential that the rezoning of land from *RU4 – Primary Production Small Lots* to open space has to decrease the value of land, the significance of the Western Sydney Aerotropolis project and the number of landowners affected, it is our view that the Minister for Planning should legislate a scheme to compensate landowners affected by any rezoning which prevents an existing permitted use.

5.2 If you have any questions regarding this submission, please contact Matthew Cole on (02) 9921 4329 to discuss in greater detail.

Yours faithfully
MinterEllison



Luke Walker
Partner

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OUR REF:

