

ITEM NO: 15

SUBJECT: DEVELOPMENT APPLICATION NO. S04/0012 FOR LOTS 1-13 DP 270422, NOS. 1-18 AND 22-25, THE ESCARPMENTS AND NO. 227 CLIFF DRIVE, KATOOMBA (FORMERLY LOT 3 DP 1-26915, NO. 227 CLIFF DRIVE, KATOOMBA)

FILE NO: S04/0012

Recommendations:

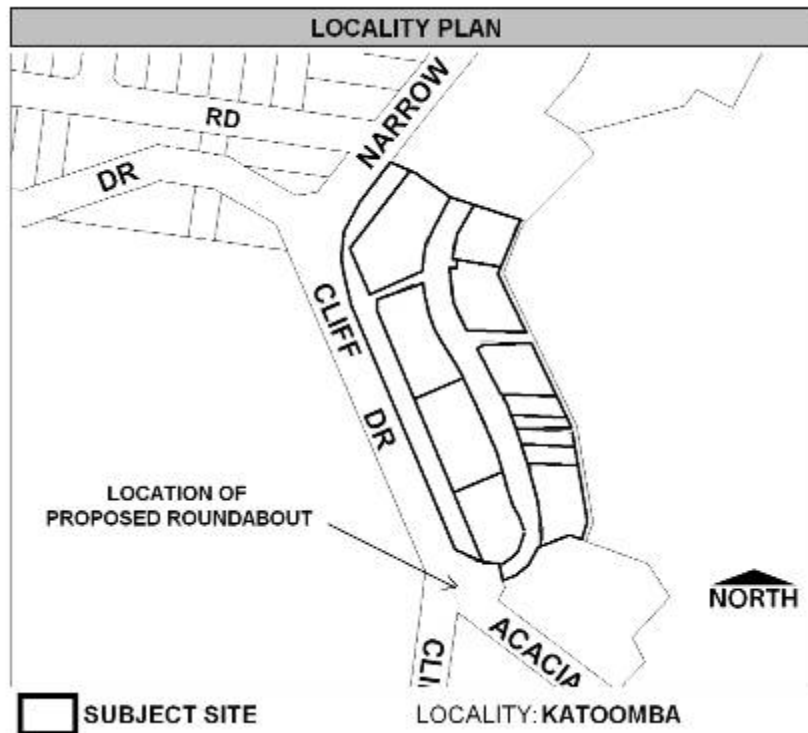
1. *That the General Manager enter into negotiations with Reed Constructions Australia Pty Ltd to extend the expiry date of the performance bond (Bond number GPFB-R7-93) lodged in respect of the construction of the roundabout at the southern access point to the Katoomba Golf Course redevelopment at the intersection of Acacia Street and Cliff Drive, Katoomba, from 31 December 2007 until 30 June 2008.*
 2. *That if, by 5.00 pm on 30 November 2007, the bond has not been extended and the roundabout construction has not been completed to the Council's satisfaction, the Council shall forward a letter of demand to Great Lakes Reinsurance (UK) PLC calling upon the performance bond (Bond number GPFB-R7-93) lodged in respect of the subject works.*
 3. *That the Council attach its Common Seal to certification required to accompany the letter of demand as required under the terms of the performance bond, as necessary.*
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Report by Group Manager, Environmental and Customer Services:

Reason for report

This matter is referred to the Council for determination as it has commercial implications for the Council and requires the affixing of the Council's common seal to documents.

Property address Lots 1-13 DP 270422, Nos. 1-18 and 22-25, The Escarpments and No. 227 Cliff Drive, Katoomba (formerly Lot 3 DP 1026915, No. 227 Cliff Drive, Katoomba)



Owners Numarra Pty Ltd, Mr M and Mrs K Prendergast and Mr S Callender, Mr E Stirling and Mrs K Stirling, Mr W and Mrs R Laforest, Community Association DP 270422, Proprietors of SP 74576, Ms F Russell, and Mr A Ward.

Site description The subject site is located on Cliff Drive between Acacia Street and Narrow Neck Road and immediately adjoins the Katoomba Clubhouse and Golf Course (which are situated on Lots 4 and 5 to the south and east respectively).

The site has recently been developed and re-subdivided with a roadway, one (1) terrace building and four (4) townhouses completed and earthworks for the construction of a number of other buildings commenced.

Introduction

Operational development consent for the redevelopment of the site was issued by the Council on 10 January 2001. This consent included the construction of a roundabout at the intersection of Cliff Drive and Acacia Street.

The engineering design for the roundabout was approved pursuant to the Roads Act 1993 on 1 April 2005.

The Stage 1 Strata Subdivision of the site was released on 25 May 2005 subject to a performance bond for the construction of a roundabout at the intersection of Acacia Street and Cliff Drive.

Because of ongoing negotiations regarding a transfer of ownership of the development, the roundabout has not yet been constructed. The transfer of ownership has been completed and the current owners have demonstrated their commitment to construct the roundabout and progress the development. The water main adjustment has been recently completed by the developer to facilitate the roundabout works. Commencement of the roundabout construction is imminent.

The Council's position is not compromised by the ongoing delay in the roundabout construction. The current intersection geometry can safely accommodate traffic generated by Stage 1. The existing situation does not warrant the immediate construction of the roundabout, however no further stages of the subdivision will be released until the roundabout is completed.

The Council, at its Meeting on 18 October 2005, considered a Report from the then Acting Group Manager, Environmental and Customer Services, relating to a Performance Bond lodged with the Council in respect of the construction of a roundabout at the intersection of Cliff Drive and Acacia Street, Katoomba, and resolved:

- “1 That the Council's officers enter into negotiations with Reed Constructions Australia Pty Ltd to extend the expiry date of the performance bond (Bond number GPFB-R7-50) lodged in respect of the construction of the roundabout at the southern access point to the Katoomba Golf Course redevelopment at the intersection of Acacia Street and Cliff Drive, Katoomba, from 15 December 2005 until 30 June 2006.
- 2 That should negotiations be unsuccessful, and the roundabout not be constructed by 31 October 2005, the Council forward a letter of demand to Great Lakes Reinsurance (UK) PLC calling upon the performance bond (Bond number GPFB-R7-50) lodged in respect of the subject works.
- 3 That the Council attach its Common Seal to certification required to accompany the letter of demand as required under the terms of the performance bond, as necessary.”

A copy of the full Report to the Council's meeting of 18 October 2005 is provided as part of an Enclosure to this Report.

Negotiations were subsequently held with Reed Constructions through both parties' legal representatives and the expiry date of the bond extended until 30 June 2006.

The works in relation to the construction of the roundabout were not commenced in sufficient time to complete the works by 30 June 2006. Accordingly, the Council, at its Meeting on 30 May 2006, considered a further Report from the Group Manager, Environmental and Customer Services, relating to the extended Performance Bond, and resolved:

- “1. *The Council's officers enter into negotiations with Reed Constructions Australia Pty Ltd to extend the expiry date of the performance bond (Bond number GPFB-R7-69) lodged in respect of the construction of the roundabout at the southern access point to the Katoomba Golf Course redevelopment at the intersection of Acacia Street and Cliff Drive, Katoomba, from 30 June 2006 until 31 December 2006.*
2. *That if, by 5.00 pm on 9 June 2006, the bond not be extended, the Council forward a letter of demand to Great Lakes Reinsurance (UK) PLC calling upon the performance bond (Bond number GPFB-R7-69) lodged in respect of the subject works.*
3. *That the Council attach its Common Seal to certification required to accompany the letter of demand as required under the terms of the performance bond, as necessary.”*

A copy of the full Report to the Council's meeting of 30 May 2006 is provided as part of an Enclosure to this Report.

Negotiations were subsequently held with Reed Constructions through both parties' legal representatives and the expiry date of the bond extended until 31 December 2006.

The works in relation to the construction of the roundabout were not commenced in sufficient time to complete the works by 31 December 2006. Accordingly, the Council, at its Meeting on 7 November 2006, considered a further Report from the Group Manager, Environmental and Customer Services, relating to the extended Performance Bond, and resolved:

- “1. *The Council's officers enter into negotiations with Reed Constructions Australia Pty Ltd to extend the expiry date of the performance bond (Bond number GPFB-R7-76) lodged in respect of the construction of the roundabout at the southern access point to the Katoomba Golf Course redevelopment at the intersection of Acacia Street and Cliff Drive, Katoomba, from 31 December 2006 until 31 December 2007.*
2. *That if, by 5.00 pm on 21 November 2006, the bond not be extended, the Council forward a letter of demand to Great Lakes Reinsurance (UK) PLC calling upon the performance bond (Bond number GPFB-R7-76) lodged in respect of the subject works.*
3. *That the Council attach its Common Seal to certification required to accompany the letter of demand as required under the terms of the performance bond, as necessary.”*

A copy of the full Report to the Council meeting of 7 November 2006 is provided as part of an Enclosure to this Report.

At this stage, works in relation to the construction of the roundabout have not been commenced and remain outstanding.

Details of Bond

The performance bond had initially been lodged with the Council to enable release of the subdivision certificate in respect of the re-subdivision of former Lot 3 in DP 1026915, being part of the Katoomba Golf Course redevelopment, prior to construction of a roundabout at the corner of Cliff Drive and Acacia Street Katoomba. The construction of the roundabout is a condition of the original development consent granted for the Katoomba Golf Course redevelopment (X98.0905).

Further details regarding the requirement for the bond are contained in the Report considered by the Council on 18 October 2005 (enclosed).

The performance bond is for the amount of \$140,000 and is payable to the Council upon receipt, by the Surety, Great Lakes Reinsurance (UK) PLC C/- Australian Surety Corporation Pty Ltd, of a demand issued by the Council and stating that the terms of the bond have not been met.

There are a number of provisions in the bond that are relevant to the Council at this time:

1. The works in relation to the roundabout were required to be completed by 31 October 2005;
2. The bond expires on 31 December 2007 or on return of the bond to the Surety, whichever is the earlier;
3. The Surety's liability under the bond automatically ceases on its expiry except in respect to demands made by the Council in accordance with the terms of the bond and received by the Surety prior to the expiry date;
4. Any demand issued by the Council must be in writing, signed by the Council or its representative, and delivered in a letter addressed to the Surety at its address by hand, or by facsimile transmission to the registered office of the Surety;
5. The demand must include a certificate under the Council's common seal to the effect that:
 - a. The Contractor has defaulted under the Contract and the default has not been remedied; and
 - b. The default is not due to certain circumstances of the kind referred to in the Schedule to the bond (these relate to circumstances beyond the control of the contractor such as acts of war or natural disaster);
 - c. The Council has, at least 7 working days prior to making a demand on the Surety, given the Contractor written notice of its intention to call on the bond;
 - d. The Council has delivered by hand or facsimile transmission a copy of the demand to the registered office of the Contractor at the same time it delivers any demand to the Surety.

The full terms of the bond are set out in the written instrument and its attached schedule.

Discussion and Current Position

Under the terms of the bond, the roundabout was required to be constructed by 31 October 2005. While this period lapsed some time ago, the aim of extending the expiry date of the bond until 31 December 2007 was to provide additional time for the developer to undertake these works. This arrangement was, and still is, considered preferable to the Council calling in the bond and arranging for the works to be undertaken. It was indicated during the previous negotiations between the legal representatives to extend the bond that the principals for the development fully intended to complete the works prior to the expiry date.

At the time of preparing this report, the commencement of the roundabout construction was imminent. The contractor was in the process of submitting the final documentation prior to commencement of works.

The developer has informed the Council that the anticipated construction period is 5 weeks.

Due to lost working days over the Christmas period, and the risk of additional lost days due to wet weather, it is considered a sensible and reasonable precaution to extend the bond period.

Preliminary negotiations between the Council's legal representative and the developer's legal representative have commenced in relation to the extension of the current bond. The developer's legal representative has noted:

"It is my client's expectation that, subject to the outcome of the meeting with the Council next Wednesday (24/10/07), the roundabout works will commence as soon as possible thereafter and can be completed within 4 weeks of commencement.

In the above context, my client does not seek to have an extension date for completion of the roundabout works but I am instructed to advise that if it becomes necessary, then my client is in a position, on short notice, to procure and provide to the Council a replacement insurance bond should the circumstances of the case develop such that the roundabout works will not be relevantly completed."

Considering the steps imposed on the Council in calling upon the bond, including the need for any letter of demand to be accompanied by a certificate under the Council's common seal, and the relatively short timeframes provided under the terms of the bond, the Council needs to now commence the necessary procedures to give effect to making a demand on the bond in the event that the possible new developer does not take over the project, or that further negotiations to secure the extension of the bond prove unsuccessful.

Accordingly, it is recommended that if, by 5.00 pm on 30 November 2007, the bond not be extended and the roundabout construction not be completed to the Council's satisfaction, the Council resolve to forward a letter of demand, including a certificate under the Council's common seal, to the Surety calling upon the bond.

Conclusion

The Council is presently in possession of a performance bond in relation to the construction of a roundabout at the southern access drive to the Katoomba Golf Course redevelopment at

the intersection of Acacia Street and Cliff Drive Katoomba. The bond is due to expire on 31 December 2007 and the terms of the bond impose certain procedures and timeframes on the Council should it wish to make a demand upon it.

Work on construction of the roundabout was due to commence on the 25 October 2007 and scheduled for completion on the 29 November 2007. However due to unforeseen circumstances, there is a risk that the works will not be completed prior to the bond's present expiry date of 31 December 2007. Accordingly, as a precautionary measure, it is appropriate that the bond period be extended for a further six months to 30 June 2008.

Enclosures(1)