

Enclosure

**(Reports to
Council Meetings of:
18 October 2005 and
30 May 2006)**

**for meeting of
7 November 2006**

S04/0012

**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)**

LAND USE MANAGEMENT

Ordinary Meeting, 18/10/05

ITEM NO: 4

SUBJECT: DEVELOPMENT APPLICATION NO. S04/0012 FOR LOT 3 DP 1026915, 227 CLIFF DRIVE, KATOOMBA

FILE NO: S04/0012

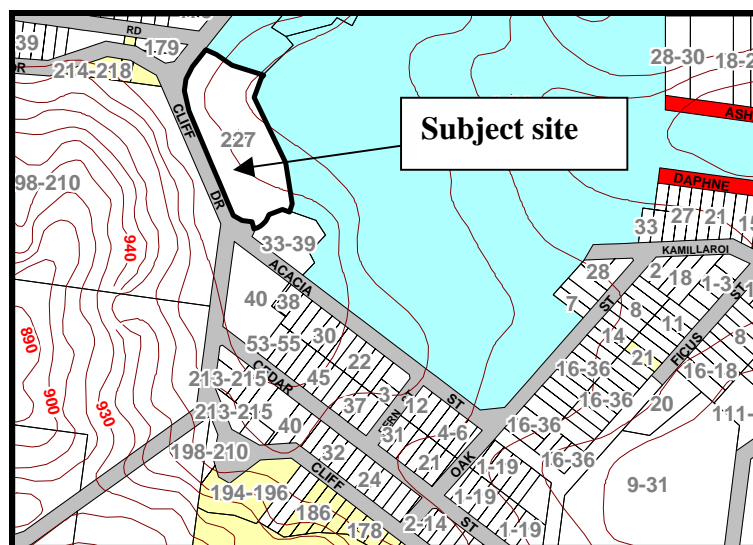
Recommendations:

1. That should the roundabout at the southern access point to the Katoomba Golf Course redevelopment at the intersection of Acacia Street and Cliff Drive, Katoomba, not be completed by 31 October 2005, 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.
2. That 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.

Report by Acting Group Manager, Environmental and Customer Services:

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

Property address Lot 3 DP 1026915, No 227 Cliff Drive, Katoomba (The Escarpments)



Owner Numarra Pty Ltd

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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 with a roadway, one terrace building and four townhouses completed and earthworks for the construction of a number of other buildings commenced.

Background

Council at its Meeting on 26 October 1999 resolved to grant “Deferred Commencement” consent to Development Application No X98/0905 for the redevelopment of the Katoomba Golf Course comprising:

1. Construction of a 120 room hotel;
2. Construction of 102 residential units;
3. Alterations to the clubhouse;
4. Alterations to the golf course itself; and
5. Subdivision of the land into five (5) lots.

Operational consent was subsequently issued on 10 January 2001.

Council at its Meeting on 10 August 2004 resolved to:

1. *Modify Development Consent No B98/0905 by approving minor modifications to the design of Terrace Block 6 under Section 96 of the Environmental Planning & Assessment Act;*
2. *Grant “Deferred Commencement” consent to the Torrens Title subdivision within a Community Plan of Management for Lot 3 DP 1026915 (DA No S04/0012);*
3. *Grant “Deferred Commencement” consent to the strata subdivision of one of the terrace buildings (on proposed Lot 6 in the re-subdivision of Lot 3 DP 1026915) (DA No S04/0011).*

Operational consent was subsequently issued in respect of the Torrens Title subdivision (DA No S04/0012) in accordance with Council’s resolution.

Council, at its Meeting on 29 March 2005 subsequently resolved to grant approval to three (3) further applications to modify Development Consent No X98/0905 to allow minor alterations to Terrace Blocks 1, 2, 3, 4, 5 and 8, replacement of terrace block 7 with 4 villas and the minor modification of the coach travel paths and parking areas associated with the hotel component of the development.

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Introduction

Development Consent No B98/0905 was not issued as a 'staged' consent, however it was always understood that the redevelopment of the Katoomba Golf Course site would proceed in stages.

This matter was discussed in the then Acting Group Manager's Report considered by Council at its Meeting on 10 August 2004 (Item 5) in relation to the Torrens Title subdivision of Lot 3.

Section 109J of the Environmental Planning & Assessment Act specifies those matters that a Council must be satisfied of prior to the issue of a subdivision certificate. Generally, in respect to a subdivision that involves subdivision work, the work must be completed and all relevant conditions of the development consent must be satisfied prior to issue of the subdivision certificate.

However, Section 109J(3) of the Act provides for a Council to issue a subdivision certificate for part of land to be subdivided provided the requirements of Section 109J have been complied with in relation to that part. Given that the development is proceeding in stages, it was considered that it was unnecessary to require the entire development to be completed, and those conditions relevant to latter stages complied with, prior to issue of subdivision approval for the initial stages of the development. Accordingly, the report considered by Council on 10 August 2004 identified those conditions of the original consent for the overall development that would need to be satisfied as part of the subdivision of Lot 3.

The conditions were also included in the formal notice of determination for the subdivision.

Condition 9 of Development Consent No B98/0905 required in part that the southern access drive for the development be provided with a four leg intersection incorporating a roundabout control at the junction of Acacia Street and Cliff Drive, Katoomba.

The aim of this condition is to ensure that the development is provided with a safe and adequate means of vehicular access.

Accordingly, the provision of a roundabout to this intersection was identified as requiring completion prior to final approval of the subdivision and release of the Linen Plan.

An application was subsequently lodged seeking release of the Subdivision certificate notwithstanding the roundabout had not been constructed. In lieu of constructing the roundabout at that time, the applicant proposed the submission of a security or performance bond together with a written undertaking that the outstanding works would be completed by a specified date. In the interim, temporary access to the first stage of the development was proposed via the car park for the golf club itself.

Section 109J(2)(c) of the Act enables a Council to consider the issue of a subdivision certificate while certain works remain outstanding subject to the lodgement of a bond and an undertaking that outstanding works will be completed within a specified time.

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This application was assessed by Council officers who acknowledged that the value of the performance bond was less than the estimated construction costs for the work. Notwithstanding, on the basis that:

1. Council is able to withhold the release of any further subdivision certificates relating to development on Lot 3 until such time as the outstanding works are completed (this has been acknowledged and accepted by the developer);
2. the owner and developers have certain obligations under the Development Agreement with Council to comply with the terms of the development consent; and
3. Council is at liberty to call upon the performance bond to provide a temporary adequate and safe means of vehicular access to the site pending full construction of the roundabout as part of the next stage of the development;

it was considered that the amount in the performance bond was adequate to enable the subdivision certificate to be released.

Accordingly, the subdivision certificate of the subdivision was released on 26 May 2005.

Details of Bond

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

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

1. The works in relation to the roundabout are required to be completed by 31 October 2005;
2. The bond expires on 15 December 2005 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 Council in accordance with the terms of the bond and received by the Surety prior to the expiry date;
4. Any demand issued by Council must be in writing, signed by 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;

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5. The demand must include a certificate under 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 circumstances beyond the control of the contractor such as acts of war or natural disaster);
 - c. 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. 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.

Current Position

As discussed in the preceding section of the report, the roundabout is required to be constructed by 31 October 2005. The applicant had indicated in correspondence supporting the application for the subdivision certificate that their civil engineers had estimated construction of the roundabout would take a period of approximately six (6) weeks. This is consistent with the timeframes estimated by Council's development engineering staff and assumes favourable weather conditions.

Based on this schedule, construction work would need to commence in mid September in order for the roundabout to be completed by 31 October 2005.

At the time of preparation of this report in early October, work had not yet been commenced. Accordingly, having regard to the estimated work schedule, it is unlikely that the contractor will complete construction of the roundabout by the due date.

In consideration of the steps imposed on Council in calling upon the bond, including the need for any letter of demand to be accompanied by a certificate under Council's common seal, and the relatively short timeframes provided under the terms of the bond, it would be prudent at this time for Council to put in train the necessary procedures to give effect to making a demand on the bond.

Accordingly, it is recommended that should the roundabout not be completed by 31 October 2005, Council resolve to forward a letter of demand, including a certificate under Council's common seal, to the Surety calling upon the bond.

While it is acknowledged that the bond is inadequate to cover the cost of all work required to fully construct the roundabout in accordance with the approved plans, it is anticipated that it will be sufficient to undertake temporary improvements to the intersection to ensure a safe and adequate means of vehicular access is provided to the development until such time as the roundabout is constructed. As indicated in a preceding section of this Report, there are other obligations on the owner and developers to construct the roundabout should they wish to continue with the development.

Conclusion

Council is presently in possession of a performance bond requiring construction, by the 31 October 2005, of a roundabout at the southern access drive to the Katoomba Golf Course redevelopment at the intersection of Acacia Street and Cliff Drive Katoomba. Work on construction of the roundabout has yet to commence and it is highly unlikely that it will be completed by the due date.

The bond is due to expire on 15 December 2005 and the terms of the bond impose certain procedures and timeframes on Council should it wish to make a demand upon it. It would be prudent for Council to now commence proceedings to ensure that there is adequate time to fulfil its obligations under the terms of the bond.

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Ordinary Meeting, 30/5/06

ITEM NO: 9

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 1026915, NO. 227 CLIFF DRIVE, KATOOMBA)

FILE NO: S04/0012

Recommendation:

1. *Council 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, 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 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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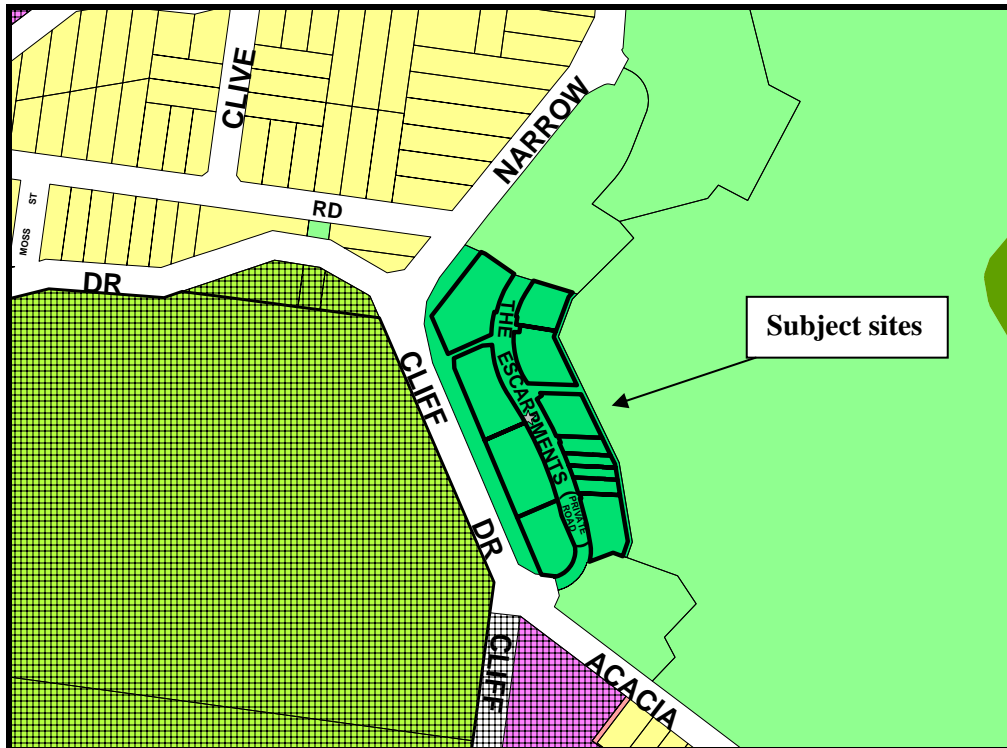
Report by Group Manager, Environmental and Customer Services:

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

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Item 9 - Ordinary Meeting, 30/5/06

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 terrace building and four townhouses completed and earthworks for the construction of a number of other buildings commenced.

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Item 9 - Ordinary Meeting, 30/5/06

Introduction

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 Council in respect of the construction of a roundabout at the intersection of Cliff Drive and Acacia Street, Katoomba, and resolved:

- “1 That Council 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, 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 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 18 October 2005 is provided as 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.

However at this stage, works in relation to the construction of the roundabout have not been commenced and remain outstanding. Furthermore, it has now become possible that the original developer will not complete the development and a new developer may seek to take over the project.

Details of Bond

The performance bond had initially been lodged with 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.

Further details regarding the requirement for the bond are contained in the Report considered by Council on 18 October 2006 (enclosed).

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The performance bond is for the amount of \$140,000 and is payable to Council upon receipt, by the Surety, Great lakes Reinsurance (UK) PLC C/- Australian Surety Corporation Pty Ltd, of a demand issued by 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 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 30 June 2006 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 Council in accordance with the terms of the bond and received by the Surety prior to the expiry date;
4. Any demand issued by Council must be in writing, signed by 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 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. 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. 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 30 June 2006 was to provide additional time for the developer to undertake these works. This arrangement was, and still is, considered preferable to Council calling in the bond and arranging for the works to be undertaken.

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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.

Subsequent to extending the bond, the Council has become aware that the original developer may not complete the development and that it is possible that a new developer may take over the project. Preliminary discussions have been held with the possible new developer, and between Council's and their legal advisers, regarding the roundabout issue. The possible new developer has indicated its willingness to seek a further extension to the bond so as to enable them to complete the roundabout.

While these discussions are continuing, given that at the time of preparing this Report construction works had not commenced, it is almost certain that the roundabout will not be constructed prior to the existing expiry date for the bond.

Considering the steps imposed on Council in calling upon the bond, including the need for any letter of demand to be accompanied by a certificate under Council's common seal, and the relatively short timeframes provided under the terms of the bond, 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 9 June 2006, the bond not be extended, Council resolve to forward a letter of demand, including a certificate under Council's common seal, to the Surety calling upon the bond.

Conclusion

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 30 June 2006 and the terms of the bond impose certain procedures and timeframes on Council should it wish to make a demand upon it.

Work on construction of the roundabout has yet to commence and it is highly unlikely that it will be completed prior to the bond's present expiry date. Accordingly, it would be prudent for Council to now commence proceedings to ensure that there is adequate time to fulfil its obligations under the terms of the bond in the event that it not be extended.