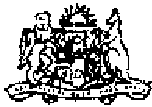

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Media Release - Minister Beamer's Office

Sydney: 13 May 2004

ADI ST MARYS - IT'S UP TO THE LANDOWNERS

The Minister for Western Sydney, Diane Beamer, said today the future of the former ADI site at St Marys lay squarely in the hands of the Commonwealth Government.

"The Commonwealth and Delfin-Lend Lease have signed contracts on the sale of the land and the transaction is due to be settled next month," Ms Beamer said.

"As the original owner of the land, the Commonwealth has had the power all along to control the scope of any development on the ADI site.

"The Commonwealth decided to develop this land and they have had every opportunity to create a parkland for the entire 1545 hectares but has chosen not to.

"The Howard Government determined the amount of land to be developed and the amount of land to be conserved.

"The Premier, Bob Carr, has made it quite clear that if the Commonwealth decided to buy back the ADI St Marys site and hand it over to the people of NSW, we would turn the whole area into parklands," Ms Beamer said.

The Assistant Planning Minister also said that she had been advised that NSW faced the real "probability" of "very substantial" compensation claims if the State Government revokes the planning instrument or puts a stop to the Commonwealth instigated development.

"I have received advice to this end from Mallesons Stephen Jaques and the Department of Infrastructure, Planning and Natural Resources," Ms Beamer said.

"Why should NSW cop a massive bill for the actions or inaction of the owner of this land, the Commonwealth.

"It would be totally irresponsible of me to put the taxpayers of NSW at risk of compensation claims running into many millions of dollars," Ms Beamer said.

ADI RESIDENTS ACTION GROUP

RE: SYDNEY REGIONAL ENVIRONMENTAL PLAN NO. 30

OPINION

Scope of Advice

1. My instructing solicitors, Woolf Associates (Mr Bruce Woolf), act for the ADI Residents Action Group. My advice is sought on the question whether the Minister for Infrastructure Planning and Natural Resources ("the Minister") may repeal *Sydney Regional Environmental Plan No. 30 – St Marys* ("SREP 30") without the Minister or the New South Wales Government being liable to a compensation claim from St Marys Land Limited ("the Landowner") and/or Lend Lease Development Pty Limited ("LLD").

2. I am instructed that the Minister, the Landowner and LLD are parties to a deed of agreement called the St Marys Development Agreement ("the Agreement"). I have been provided with an unexecuted copy of the Agreement dated 30 September 2002, which indicates in Part 1 that the other parties to the Agreement are the Roads and Traffic Authority of New South Wales, the Council of the City of Blacktown, the Council of the City of Penrith, ComLand Limited and Lend Lease Corporation Limited. The last two named parties are guarantors under the Agreement. The Landowner and LLD are also defined to be the "Joint Venture" referred to in the Agreement. I assume that the copy of the Agreement provided to me is complete and accurate and contains all the express terms of the Agreement.

3. The other document provided to me is an extract from a media release apparently published by the Minister for Western Sydney and Assistant Planning Minister, Ms Diane Beamer, on 13 May 2004. The release is titled "*ADI St Marys – It's up to the landowners*" and includes the following statements:

"The Premier, Bob Carr, has made it quite clear that if the Commonwealth decided to buy back the ADI St Marys site and hand it over to the people of NSW, we would turn the whole area into parklands", Ms Beamer said.

The Assistant Planning Minister also said that she had been advised that NSW faced the real "probability" of "very substantial" compensation claims if the State Government revokes the planning instrument or puts a stop to the Commonwealth instigated development.

"I have received advice to this end from Mallesons Stephen Jaques and the Department of Infrastructure, Planning and Natural Resources", Ms Beamer said.

"Why should NSW cop a massive bill for the actions or inaction of the owner of this land, the Commonwealth.

"It would be totally irresponsible of me to put the taxpayers of NSW at risk of compensation claims running into many millions of dollars", Ms Beamer said.

Power to repeal SREP 30

4. SREP 30 is an environmental planning instrument made by the Minister exercising power under section 51 of the *Environmental Planning and Assessment Act 1979* (the EPA Act). SREP 30 commenced operation on 19 January 2001 upon its publication in the *NSW Government Gazette* No. 20 of 19 January 2001, p184. It provides a legislative framework for the development and management of a large area of land lying within Blacktown City and Penrith City local government areas.

5. Section 74(1) of the EPA Act provides that the Minister may alter, vary or repeal an environmental planning instrument (in whole or in part) by a subsequent environmental planning instrument made in accordance with Part 3 of the EPA Act (except that certain provisions of Part 3 shall not apply unless the Minister or the relevant Director-General directs to the contrary). Accordingly, in my opinion, the Minister has statutory power to repeal SREP 30 subject to the procedures and qualifications set out in the applicable provisions of Part 3 of the EPA Act.

6. In addition to the existing power of the Minister to repeal environmental planning instruments, I note that it would also be open to the New South Wales Parliament to enact new legislation the effect of which is to repeal SREP 30.

The effect of the Agreement

7. The Agreement contains detailed provisions by which the Landowner and the Joint Venture agree to carry out certain works on the land to which the Agreement relates (that is, the REP land together with a Special Uses Corridor as indicated on a map annexed to the Agreement) and for the coordination of infrastructure and other services to be provided by the State, the Landowner and the Joint Venture.

8. Clause 2.3 of the Agreement provides that the Agreement is a "*development agreement*" for the purposes of SREP 30, which defines (in Schedule 1 of SREP 30) that term to mean:

> a legally enforceable agreement to which an owner of land to which this plan applies is a party, together with one or more of the Crown in right of the State of New South Wales, Penrith City Council or Blacktown City Council, and which makes provision for services, infrastructure or facilities to support the development of land to which this plan applies or for the transfer of land ownership.

9. I note that the provisions of such a development agreement must be taken into account when the Minister or other consent authority takes certain steps under SREP 30: see clauses 7(2)(b), 11(e), 20(2)(b) and 61(b) of SREP 30.

10. Under the Agreement the Landowner and the Joint Venture assume certain obligations to dedicate defined portions of land, carry out specified works and make substantial payments of money towards the infrastructure necessary for development of the land to which SREP 30 relates. Clauses 4.1 and 4.2 describe the overall purposes of the Agreement to which those obligations are directed.

11. According to the recitals to the Agreement, the dedications, works and contributions go beyond those that would be required of the Landowner or developer of the land under section 94 of the EPA Act. The recitals also record the "*preparedness of the Landowner and the Joint Venture to make the dedications and contributions and to carry out the other works... which are not required by Law*": see recital G(d).

12. Those matters provide some context for understanding the Agreement and the positions of the Landowner and Joint Venture. For instance, the reference to section 94 contributions is consistent with an expectation by the parties that there will, in the future, be development consents granted for development of the land to which the Agreement relates, which consents will be subject to conditions requiring contributions

by the developer to defray the costs of providing public amenities the demand for which is created or increased by the development.

13. The Agreement does not itself set out or otherwise describe the benefits that the Landowner and/or Joint Venture might derive, or can expect to derive, as a result of assuming the various obligations concerning dedications, works and contributions under the Agreement. As a matter of commercial reality and having regard to the significant and expensive steps that the Landowner and the Joint Venture have agreed to take and the money those parties have agreed to pay, those parties must have an expectation of substantial benefits accruing to them in the future development of that part of the land that is to be developed.

14. I also note that the Agreement does not provide for specific development outcomes on the land. By that I mean that the process by which future development proposals might be assisted is canvassed (for example, the coordination of the provision of infrastructure and other services), but the nature and form of future residential development (for example) that might occur on parts of the land (to the benefit of the Landowner and the Joint Venture) are not the subject of the Agreement. In that respect, I note that clause 1.2 of the Agreement expressly states that the Agreement is not intended to operate as an unlawful fetter on the future exercise of any statutory power or discretion by the Parliament, the State, any Minister of State or any other governmental or local authority.

15. Part 2 of the Agreement refers to certain rights and obligations of the Minister, which include the following:

 15.1 Accepting buildings S43 and S44 in their condition at the time of transfer of the Regional Park: clause 11.2;

 15.2 Ensuring the RNE land is studied and, if appropriate procuring the RNE land to be declared a regional park: clause 11.5;

 15.3 Accepting transfer of Residual RNE land subject to certain easements: clause 11.7;

 15.4 Warranting that the NPW Minister will manage the Regional Park after transfer, including establishing an Advisory Group and preparing a Statement of Management Intent and then a Plan of Management: clauses 11.10-11.16;

15.5 Permitting the Joint Venture to carry out certain Capital Improvements (in alternative satisfaction of having to make a monetary contribution to their provision under clause 11.21): clause 11.17;

15.6 Ensuring that monetary contributions made towards the Capital Improvements are used solely for nominated purposes, and in accordance with certain timing requirements: clauses 11.21-11.23;

15.7 Establishing an Open Space Advisory Committee and preparing an Open Space Plan of Management; clause 12.1;

15.8 Accepting transfer of Eastern Regional Open Space, the Central Regional Open Space and Special Uses Corridor subject to certain easements: clauses 12.8, 12.12 and 12.17; and

15.9 Using reasonable endeavours to procure the land to enable the Joint Venture to construct the St Marys and Mt Druitt Bus Priority Works: clause 16.11.

The effect of the repeal by the Minister of SREP 30

16. The question for my advice is whether the Landowner or LLD could successfully claim that the repeal of SREP 30 by the Minister, if it were to occur, is a breach of the Agreement by the Minister for which the Minister / State of New South Wales is liable for damages.

17. Although there are various special principles applicable to the construction and effect of contracts between commercial parties and State or local governments (as to which, see generally N Seddon, **Government Contracts** (2nd edition, 1999)), in many respects the basic principles of the law of contract apply.

18. Some of the express terms of the Agreement providing for the rights and obligations of the Minister have been referred to above.

19. In addition to its express terms, various implied terms are likely to provide some additional contractual protection to the rights of the Landowner and LLD. For example, ordinarily each party to a contract agrees, by implication, to do all such things as are

necessary on its part to enable the other party to have the benefit of the contract: ***Secured Income Real Estate (Aust) Limited v St Martin's Investments Pty Limited*** (1979) 144 CLR 596 at 607, 610, 615. Ordinarily there is also a corresponding implied contractual obligation not to prevent or hinder the fulfilment of the objects of the contract: ***Shepherd v Felt & Textiles of Australia Limited*** (1931) 45 CLR 359 at 372, 378. In some circumstances the duty of contractual parties to co-operate will extend to an implied obligation of good faith upon the parties in the exercise of contractual powers and discretions: see, for example, *Lancedale Holdings Pty Limited v Heath Group Australasia Pty Limited* [1999] NSWCA 460 at [48]-[50], (1999) 33 ACSR 247. The determination whether this particular contract includes the implied terms referred to in this paragraph would require an examination of the particular circumstances involved at or around the time of the formation of the Agreement.

20. In my opinion, it is likely that if the Minister were to repeal SREP 30, the Landowner and/or LLD could successfully maintain a claim for damages against the State of New South Wales on the ground that the conduct of the Minister amounted to a repudiation of the Agreement, or perhaps even a breach of an implied term of the Agreement.

21. That is, if the Minister (who is a party to the Agreement) took the step of repealing the environmental planning instrument that is the express basis upon which the parties have entered into and expect to perform the Agreement, that step could properly be regarded as either (i) the demonstration by the Minister of an intention not to perform, and not to be bound by, the Agreement; and/or (ii) an act of the Minister that deprives the Landowner and/or LLD of the substantial benefit of the Agreement; and/or (iii) a breach of an implied contractual obligation not to prevent or hinder the fulfilment of the objects of the contract.

22. The Landowner and/or LLD would, in those circumstances, be entitled (subject to the dispute resolution provisions in clause 8 of the Agreement) to accept the repudiation, terminate the Agreement and make a claim for damages. Such damages would on ordinary principles include, at the least, (1) the expenditure incurred to date by the Landowner and LLD which is wasted as a result of the Minister's breach, (2) any profit that the Landowner and LLD could establish that they would have earned had the Agreement been performed, and (3) the loss of any foreseeable chance or opportunity of deriving a benefit where such loss was caused by the repudiation.

23. Accordingly, I agree with the substance of the comment made in the Assistant Minister's press release that if the Minister were to repeal SREP 30 it would be likely that the State of New South Wales would face claims for very substantial compensation from the Landowner and LLD.

The effect of repealing legislation

24. My opinion has been sought on the specific question whether the repeal of SREP 30 *by the Minister* would give rise to a liability to compensate the Landowner and/or LLD. However, as I have noted above, it would also be open to the New South Wales Parliament to repeal SREP 30 by legislation. If that were to occur, the Parliament could make provision in that legislation to the effect that the repeal of SREP 30 by the legislation does not give rise to any claim for damages against the Minister or the State of New South Wales under the Agreement or otherwise.

25. In my opinion, legislation to that effect that repealed SREP 30 would be within the legislative power of the Parliament of New South Wales: see section 5 of the *Constitution Act 1902* (NSW); section 2 of the *Australia Act 1986* (Cth); ***Durham Holdings Pty Limited v New South Wales*** (2001) 205 CLR 399 at [10]; ***Arena v Nader*** (1997) 71 ALJR 1604 at 1605.

26. The NSW Parliament has broad legislative power to alter rights, even if those rights are in issue in pending court proceedings (***Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth*** (1986) 161 CLR 88 at 96; ***H A Bachrach Pty Limited v Queensland*** (1998) 195 CLR 547 at 563-564) including retrospectively (***Arena v Nader*** (1977) 42 NSWLR 427 at 435) and even if the legislation amounts to the exercise of judicial power by adjudicating upon disputed rights (***Building Construction Employees' and Builders Labourers' Federation v Minister for Industrial Relations*** (1986) 7 NSWLR 372 at 381 (Street CJ), 400, 405-406 (Kirby P), 407, 413 (Mahoney JA)).

27. Further, in my opinion, the Parliament of New South Wales may validly enact legislation for the acquisition of property without compensation, except perhaps if the acquisition amounts to the confiscation of property as a punishment: ***Durham Holdings Pty Limited v New South Wales*** (2001) 205 CLR 399 at [7]-[8].

28. The power of the Parliament to enact legislative provisions repealing SREP 30 and extinguishing or modifying any contractual rights of the Landowner or LLD is, likewise, not restricted by any requirement to pay compensation to those adversely affected by the legislation.

29. Although the question whether there are restraints upon State legislative power "*by reference to rights deeply rooted in our democratic system of government and the common law*" has not been finally determined (see ***Union Steamship Co of Australia Pty Ltd v King*** (1988) 166 CLR 1 at 10), the High Court has emphatically and recently rejected the proposition that provision of "just" or "properly adequate" compensation for the acquisition of property by State legislation is such a right: ***Durham Holdings*** (2001) 205 CLR 399 at [12]-[14]. In that case, New South Wales legislation having the effect of expropriating coal in specified parcels of land in New South Wales without compensation, or without just compensation, was found to be valid.

30. I have dealt, in the paragraphs above, with the possibility of legislation to repeal SREP 30 on the basis of general principle. Obviously, the true effect of any new legislation would be determined upon the proper construction of the particular provisions of the legislation enacted and in accordance with accepted principles of statutory interpretation. For example, statutes changing the law are presumed not to attach new legal consequences to facts or events occurring before the commencement of the statute (***Fisher v Hebburn Ltd*** (1960) 105 CLR 188 at 194; ***Coleman v Shell Co of Australia Ltd*** (1943) 45 SR(NSW) 27 at 31).

31. I add one further qualification to the discussion in this section of this opinion. That is, that it appears from the terms of the press release I have set out in paragraph 3 above that the Landowner is regarded by the Assistant Minister as "the Commonwealth". I have not been provided with any instructions about the attributes or status of the Landowner (or its ownership or control) and I have proceeded on the basis that it is simply an ordinary corporation. I have therefore assumed that no question of intergovernmental immunity (of the sort referred to in ***Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*** (1997) 190 CLR 410 or otherwise) requires my consideration or advice.

Summary

32. In summary, for the reasons and subject to the qualifications set out above, in my opinion:

    32.1 if the Minister were to repeal SREP 30 it would be likely that the State of New South Wales would face claims for very substantial compensation from the Landowner and LLD; and

    32.2 the Parliament of New South Wales has statutory power to enact legislation to effect the repeal of SREP 30 and to provide that such repeal does not give rise to any claim for damages against the Minister or the State of New South Wales under the Agreement or otherwise.

Richard Lancaster
11 Wentworth Chambers

12 July 2004