
Investigation Report – Mascot Towers Development

NSW Department of Planning and Environment

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Introduction

1 Context

- 1.1 On 14 June 2019, residents of the mixed-use development known as 'Mascot Towers' located at 1-5 Bourke Street, Mascot NSW (**Mascot Towers**) were ordered to evacuate the building following cracking being observed throughout the building.
- 1.2 Since the evacuation, the residential component of Mascot Towers has remained vacant.
- 1.3 In late December 2020, it is understood that the shops and restaurants situated on the ground floor of the Mascot Towers building also became inaccessible due to similar safety concerns associated with similar major structural defects being identified.
- 1.4 The affected residents and business owners of Mascot Towers are reported to have experienced significant hardship arising from the major building defects, which have prevented them from being able to return to their properties for a period of over three years.
- 1.5 Based on information available in the public domain, we understand that following the evacuation of Mascot Towers the NSW Department of Planning and Environment (**Department**) had initially received advice indicating that relevant Council documents pertaining to the assessment, determination and certification of the Mascot Towers development could not be located and had gone missing.¹ It is understood that this perception was associated with initial delays experienced in locating the former City of Botany Bay Council's (**Council**) development file containing the relevant approval and certification documentation for the Mascot Towers development.

2 Section 430 Investigation

- 2.1 On 12 May 2022, the Hon Wendy Tuckerman, Minister for Local Government, made a speech in the NSW Legislative Assembly in relation to the Mascot Towers Development. In summary, the Minister noted that it was her intent to request that an investigation be conducted into the former Council's role in the assessment, determination and certification of the Mascot Towers development, pursuant to section 430 of the *Local Government Act 1993* (**LG Act**).
- 2.2 Section 430 of the LG Act provides that:

'The Departmental Chief Executive may, at the request of the Minister or on the Departmental Chief Executive's own initiative, conduct an investigation into any aspect of a council or of its work and activities.'

¹ See by way of example:

- [https://www.abc.net.au/news/2022-05-12/investigation-launched-into-sydney-council-over-mascot-towers/101057552;](https://www.abc.net.au/news/2022-05-12/investigation-launched-into-sydney-council-over-mascot-towers/101057552)
- <https://insidelocalgovernment.com.au/council-to-be-investigated-over-mascot-tower-safety-saga/>

- 2.3 In accordance with section 431 of the LG Act, the Departmental Chief Executive has significant investigative powers in connection with any investigation requested under section 430 of the LG Act.

Instructions

3 Brief

- 3.1 We refer to the correspondence received from Erin Gavin, Director, Planning and Resources Litigation at the Department dated 2 September 2022. In summary, this correspondence confirms that McCullough Robertson Lawyers has been briefed to carry out the investigation pursuant to section 430 of the LG Act on behalf of the Local Government Minister, in accordance with the following Terms of Reference (**Investigation**).

4 Terms of Reference

- 4.1 The Terms of Reference issued by the Department on 10 August 2022 requested an investigation and report on the following matters in relation to the Mascot Towers development:
- (a) Whether the councillors of Botany Council met their responsibilities under the LG Act, the *Local Government (General) Regulation 2005 (LG Regulation)*, and other relevant legislation and any relevant standards in relation to the granting of relevant interim and final Occupation Certificates.
 - (b) Whether the officers of the Council met their responsibilities under the LG Act and LG Regulation, and other relevant legislation and any relevant standards in relation to the granting of relevant interim and final Occupation Certificates.
 - (c) In considering the above, whether or not the relevant people met their responsibilities under the LG Act and LG Regulation, and other relevant legislation and any relevant standards, in relation to:
 - (i) the assessment and determination of the relevant development application;
 - (ii) the granting of the relevant Construction Certificates.
 - (d) Any other matter that warrants mention in relation to the Council's responsibilities and conduct.

Background

5 Documents reviewed

- 5.1 The Mascot Towers development is situated within the Bayside Local Government Area (**LGA**). At the time that the Mascot Towers development was first approved, it was within the Botany Bay LGA which was amalgamated with the Rockdale LGA in September 2016, to form the Bayside LGA.
- 5.2 For the purposes of completing this Investigation we confirm that we have reviewed and considered the bundle of documents produced by Bayside Council on 9 September 2022 in

relation to the former City of Botany Bay Council's processing, assessment, determination and certification of the Consent issued for the Mascot Towers Development (**Council's file**).

- 5.3 Based on our review of Council's file that was provided for the purposes of our Investigation, it is apparent that the Mascot Towers development was a complex site that was consequently the subject of a significant amount of documentation pertaining to its assessment, approval and certification. For this reason, a comprehensive framework has been prepared in connection with the preparation of this report to enable us to identify the key dates and events associated with Council's role in the approval and certification of the Mascot Towers development, and most importantly, Council's compliance with the statutory regime underpinning these.
- 5.4 Refer to **Annexure A** for a copy of the Assessment Framework.
- 5.5 In accordance with the Terms of Reference, we note that we have not given consideration to that component of Council's file which includes documentation relating to complying development certificate No. 190039/01 made on 14 August 2019 and determined on 19 August 2019 by a private certifier, noting that it relates to 'remedial works' to the building after the identification of cracking issues with the Mascot Towers development.

6 Development Consent and Certification History

- 6.1 The development application for the Mascot Towers development (Development Application No. 04/071) was taken to be lodged with the Council on **14 August 2003 (the DA)**.
- 6.2 In summary, the DA sought development consent for:
- (a) the demolition of existing structures (single storey warehouse building/factory);
 - (b) the construction of a commercial/retail and residential development featuring a two storey podium and two residential buildings, comprising:
 - (i) a 10 storey (including loft) residential tower to the south eastern corner of the site containing 77 units (referred to in DA documentation as 'Building 1');
 - (ii) a 7 storey residential tower to the corner of Bourke Road containing 38 units (referred to in DA documentation as 'Building 2');
 - (iii) a commercial/retail component and restaurant located on level 7 of Building 2;
 - (iv) recreational facilities (pool, spa, sauna and gymnasium) with communal garden areas on the roof of the podium level;
 - (v) basement carparking.
- on land at 1-5 Bourke Road and 29-35 Church Avenue, Mascot (Lot 1,2,4 DP 220989, Pt Lot 4 DP 506923, Lot D DP 370926, Lot A DP 366679 and Lot 1 DP 455495).
- 6.3 The Strata Subdivision of the development was the subject of a separate application.
- 6.4 A deferred commencement development consent (Development Consent No.04/071) was granted by Council subject to conditions on **21 July 2004 (the Consent)**. In summary, the deferred commencement conditions required the submission of amended architectural plans including certain design changes to the restaurant for Building 2 and submission of amended landscape drawings and specifications.

- 6.5 Council issued a notice of determination confirming that additional information (i.e. amended plans) that were submitted by the Applicant satisfied the deferred commencement conditions of the Deferred Commencement Consent on **11 August 2004**.
- 6.6 Council was appointed as the principal certifying authority (**PCA**) for the development on **21 April 2005**.
- 6.7 Modifications to the Consent were subsequently granted on the following dates:
- (a) MOD 1 was determined on 12 July 2005 and sought changes to conditions 1 and 119 to postpone section 94 contributions to occupation certificate stage;
 - (b) MOD 2 was determined on 23 May 2006 and sought changes to the number of units within Building 1 increasing from 77 to 85; deletion of rooftop restaurant in Building 2; increased number of units within residential building 2 from 38 to 44; and internal changes relating to lift locations and apartment layouts;
 - (c) MOD 3 was determined on 20 June 2006 and sought changes to the amount of development contributions payable and changes to the timing of payments prior to the grant of construction and occupation certificates;
 - (d) MOD 4 was determined on 23 July 2007 and sought changes to include a penthouse on level 9, suites in Tower 1, changes to the sprinkler pump room, carparking and pool plant; and
 - (e) MOD 5 was determined on 12 August 2008 and sought changes to conditions 72, 78 and 94 of the Consent.

7 Assessment Framework

- 7.1 In order to address those matters outlined in the Terms of Reference, the Assessment Framework was developed as a checklist to specifically assess whether Council satisfied its statutory obligations in its capacity:
- (a) as the consent authority in respect of the processing, assessment and determination of the DA;
 - (b) as PCA in respect of the issuing of the abovementioned construction certificates and final occupation certificate issued for the Mascot Towers development; and
 - (c) under the LG Act as a local council with responsibility for carrying out certain statutory functions in NSW.
- 7.2 The Assessment Framework was prepared based on the *Environmental Planning and Assessment Act 1979 (NSW)* (**EP&A Act**) and the *Environmental Planning and Assessment Regulation 2000 (NSW)* (**EP&A Regulation**) that was in force as at the following relevant dates. In particular:
- (a) the EP&A Act and EP&A Regulation as at **14 August 2003** have been adopted in respect of the legislative processes and requirements associated with the lodgment of the DA;
 - (b) the EP&A Act, EP&A Regulation and Botany Local Environmental Plan 1995 (**BLEP 1995**) as at **14 August 2003** have been adopted in respect of the assessment of the DA;
 - (c) the EP&A Act and EP&A Regulation as at **21 July 2004** have been adopted in respect of the determination of the DA (and issuing of the Deferred Commencement Consent);

- (d) the EP&A Act and EP&A Regulation as at **17 October 2006** have been adopted in respect of the assessment and determination of construction certificate no. 04/071-CC1-Stage 1 (Stage 1 works: Excavation work and sheet piling work);
- (e) the EP&A Act and EP&A Regulation as at **22 December 2006** have been adopted in respect of the assessment and determination of construction certificate no. 04/071-CC2-Stage 2 of 3 (Stage 2 works: mixed residential and commercial building, with car park and swimming pool);
- (f) the EP&A Act and EP&A Regulation as at **17 October 2007** have been adopted in respect of the assessment and determination of construction certificate no. 04/071-CC3-Stage 3 of 3 (Stage 3 works: gymnasium);
- (g) the EP&A Act and EP&A Regulation as at **16 July 2008** have been adopted in respect of the determination of final occupation certificate no. 04/071-OC1.

7.3 As noted above, there were five modification applications approved in respect of the Consent between 2005 and 2008. Several of these modification applications were generally administrative in nature (for example, seeking the deletion or amendment of conditions relating to the payment of development contributions). We do not consider that a detailed review of these modification applications is required for the purposes of this report having regard to the Terms of Reference. To the extent that the modification applications sought material changes to the approved development, the assessment process undertaken by the Council has been considered in further detail in the Framework and this report.

8 Limitations

- 8.1 We note that our advice is limited to our area of legal expertise, which does not extend to consideration of the accuracy or quality of certain technical reports and plans that were assessed by Council in connection with its assessment, determination and certification of the Mascot Towers development.
- 8.2 To the extent that there is any doubt as to the accuracy of any technical reports or plans in Council's file, we would recommend that the Department obtain separate advice from persons with the requisite qualifications and technical expertise, such as engineers, private certifiers or other people with building expertise.

Advice

9 Summary of Findings

- 9.1 In summary, based on our review of Council's file, in our opinion there is adequate documentation available demonstrating that Council:
 - (a) satisfied its statutory obligations in its capacity as the consent authority in the processing, assessment and determination of the DA;
 - (b) satisfied its statutory obligations in its capacity as the PCA appointed to certify the Mascot Towers development and issue the requisite construction and occupation certificates required in accordance with the conditions of the Consent; and

- (c) satisfactorily exercised its statutory functions as a local council pursuant to the provisions of the LG Act.

10 Statutory Functions of Council

10.1 We refer to clause 21 of the LG Act, which provides that a council has the functions so conferred or imposed on it by or under the LG Act. Clause 22 of the LG Act further confirms that a council also has the functions conferred or imposed on it by or under any other Act or law.

10.2 We refer to section 4(3) of the EP&A Act (as on 14 August 2003 at the time of lodgment of the DA) which provides:

'Where functions are conferred or imposed by or under this Act on a council:

(a) except as provided in paragraph (b), those functions may be exercised in respect of an area by the council of that area, or

(b) if the functions are conferred or imposed in respect of part of an area, those functions may be exercised in respect of that part by the council of that area.'

10.3 Clause 1.6 of the *Botany Bay Local Environment Plan 2013* (as on 14 August 2003 at the time of lodgment of the DA) confirms that the consent authority for the purposes of that plan (subject to the EP&A Act) was Council, referring to the City of Botany Bay Council.

10.4 As is outlined in further detail in the Assessment Framework, the DA sought approval for development for which Council was the relevant consent authority in accordance with the EP&A Act. Accordingly, Council was the consent authority responsible for the processing, assessment and determination of the DA.

10.5 At the time of lodgment of the DA, Section 8 of the LG Act specified a 'charter' that applied to all local council's in NSW. Clause 8(2) of the LG Act provided that:

'A council, in the exercise of its functions, must pursue its charter but nothing in the charter or this section gives rise to, or can be taken into account in, any civil cause of action.'

10.6 Relevantly, the charter specified in section 8(1) of the LG Act included but was not limited to the following set of principles that guided a council in the carrying out of its functions:

- *'to provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively*
- *to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development*
- *to have regard to the long term and cumulative effects of its decisions*
- *to keep the local community and the State government (and through it, the wider community) informed about its activities*
- *to ensure that, in the exercise of its regulatory functions, it acts consistently and without bias, particularly where an activity of the council is affected'*

- 10.7 In preparing this report and specifically in the context of considering whether the Council satisfactorily exercised its statutory functions pursuant to the provisions of the LG Act, we have given consideration to whether Council's actions, based on what is indicated in Council's file, align with these principles.

Processing DA

- 10.8 The EP&A Regulation contains detailed provisions relating to the administrative requirements applicable to the making of a DA.
- 10.9 In summary, once a DA is lodged the relevant council is responsible for:
- (a) ensuring the DA is in the approved form and contains all relevant information and documents specified in the EP&A Regulation for development of its kind;
 - (b) processing the DA, including registering the DA and ensuring it is referred to all relevant Government authorities or approval body; and
 - (c) notifying the public of the DA that has been made and providing an opportunity for the public to comment on the DA.
- 10.10 We note that the DA for the Mascot Towers development constituted integrated development requiring concurrence from the Department of Infrastructure, Planning and Natural Resources (**DIPNR**). Council's file indicates that this 'integrated development' status was on the basis that the DA involved the redirection of the water table. Accordingly, in order for the development to be carried out, the DA required development consent and one or more specified approvals under Part 3 of Chapter 3 of the *Water Management Act 2000* (sections 89, 90 and 91).
- 10.11 Based on our review of Council's file, in our opinion there is sufficient evidence available to demonstrate that Council processed the DA in a satisfactory manner consistent with the requirements of the EP&A Act and EP&A Regulation for a DA for integrated development, including obtaining the required concurrence from DIPNR.
- 10.12 For detailed consideration of the requirements applicable to the processing of a DA for integrated development and evidence of Council's compliance with respect to these requirements, please refer to the Assessment Framework.

Assessing DA

- 10.13 Council was required to formally assess the DA taking into consideration all relevant matters, including in particular those matters referred to in section 79C of the EP&A Act, prior to determining whether to grant development consent. In summary, Council's must consider the following matters when assessing a DA:
- (a) whether the proposed development application is compliant with legislation and environmental planning instruments;
 - (b) whether the proposed development meets local planning controls and objectives;
 - (c) any environmental, social and economic impacts;
 - (d) any submissions from impacted properties, neighbours and interested parties; and
 - (e) the public interest.

- 10.14 Having regard to the scale and complexity of the DA for the Mascot Towers development, it is apparent that a significant amount of documentation was submitted to Council in support of the DA, which was in turn required to be considered and assessed by Council officers.
- 10.15 Based on our review of Council's file, in our view it appears that the Council considered all those matters discerned to be relevant to the assessment and subsequent determination of the DA and in accordance with the requirements of section 79C of the EP&A Act.
- 10.16 In summary, based on our review of Council's file it is apparent that the following key issues (albeit not the only issues) were considered Council's assessment of the DA:

(a) **Owners consent - acquisition of 31 Church Avenue, Mascot**

Submissions were received by Council in response to the notification of the DA referring to the Applicant's failure to purchase the site known as 31 Church Avenue, Mascot. These submissions included an objection letter from Pike, Pike & Fenwick to Council dated 16 September 2003 that was made on behalf of Mogusa Pty Limited and Messrs C & K Davis, being the (then) registered proprietors of 31 Church Avenue, Mascot. Reference is made in these submissions to there being insufficient certainty that development consent for Stage 2 works (being works that were separate to these Stage 1 DA) would proceed in circumstances where the letter alleges that the Applicant had not agreed to purchase 31 Church Street following an offer of sale having apparently been made.

Ultimately this objection was resolved when, prior to the determination of the DA, the Applicant acquired 31 Church Avenue. A letter from Mogusa Pty Limited to Council can be seen in Council's file, which requests the withdrawal of previous objections made on behalf of Mogusa Pty Ltd and confirms its consent with respect to the development of 31 Church Avenue, Mascot.

(b) **Site consolidation and design related issues**

The relevant Mascot Station DCP required the Applicant to consolidate the sites known as 1, 3 and 5 Bourke Road and 29 & 33 Church Avenue into one lot for redevelopment.

Accordingly, condition 3(b) of the Consent was imposed requiring that the separate allotments forming the subject site were to be consolidated into a single allotment, the linen plans for which were to be submitted to Council prior to the issue of an occupation certificate.

(c) **Dewatering of Site and Detailed groundwater assessment**

We note that in its letter to Council dated 19 November 2003, the DIPNR recommended that the detailed groundwater investigation, as recommended in the geotechnical report accompanying the DA, be undertaken *'to provide adequate detail on groundwater conditions at the site such that departmental requirements would be met'* (**DIPNR Letter**). The DIPNR Letter further stated that *'Council needs to be satisfied that no further consideration of these points is required prior to granting approval for the proposed development.'*

Specifically, this recommendation made in the DIPNR Letter is with reference to Section 4.8 of the Geotechnical Investigations Report prepared by Jefferey & Katauskas Pty Ltd (Ref: 17848WZrpt) dated 31 July 2003 (**Geotechnical Report**):

"4.8 Additional Investigations

We recommend a detailed groundwater investigation/analysis be carried out for the proposed dewatering/recharged system. Insitu pump-out tests should be carried out to confirm groundwater levels and to determine the permeability of the subsoils, so that an appropriate dewatering/recharge system may be designed."

Based on our review of Council's file, we have sighted the following documents, which indicate that a supplementary groundwater investigation was provided by the Applicant to Council, however this assessment was undertaken following the determination of the DA (i.e. after the Consent was granted in 2004):

- Supplementary Groundwater Assessment prepared by Aargus Australia, dated 20 July 2005 (Ref: EM916/2);
- Memorandum from Manager, Development Assessment to Team Leader - Regulation at Council requesting that the Groundwater Assessment prepared by Aargus Australia dated July 2005 be reviewed by a specific Council Officer, dated 7 June 2006;
- Memorandum from relevant Council Officer tasked with reviewing Groundwater Assessment to Manager, Development Assessment and Team Leader-Regulation re: 'Review Groundwater Report 29 and 35 Church Street and 1-5 Bourke Street', dated 19 June 2006.

In relation to the Council's consideration of the groundwater requirements applicable to the DA, Council's Assessment Report dated 12 August 2003 provides that:

"The Department of Infrastructure, Groundwater Planning and Natural Resources requirements (DIPNR) have granted approval to the proposed development subject to conditions of consent and have advised that temporary dewatering can be carried out as part of the proposed development. The development will be conditioned to require a tanked or suitably waterproofed/basement construction so to avoid the need for permanent dewatering of the site in accordance with DIPNR requirements."

We refer to conditions 10 and 11 of the Consent that were imposed by Council, which in our view reflect the requirements of the DIPNR with respect to dewatering of the site.

We note that General Terms of Approval were also issued by the DIPNR (annexed to the DIPNR Letter) and these were captured in condition 117 of the Consent. In our view, the provision of the General Terms of Approval can reasonably be interpreted as the DIPNR's granting its concurrence to the proposed development.

Having regard to the date of the Supplementary Groundwater Assessment prepared by Aargus Australia, dated 20 July 2005, we note that the further detailed groundwater assessment recommended by the DIPNR was ultimately not obtained by Council until after the determination of the DA. Further, the Supplementary Groundwater Assessment does not necessarily appear to have been obtained having regard to the DIPNR's recommendation. Rather, based on the introduction to this report it is indicated that the supplementary report was required 'to assist in the preparation of a Site Audit Report'.

Whilst the DIPNR Letter does not specifically say when the further groundwater assessment should be obtained, the DIPNR Letter does state that Council should be satisfied in relation to these groundwater issues prior to granting approval. Therefore, in our view, the DIPNR's recommendation could be reasonably interpreted as suggesting that Council should have obtained a detailed groundwater assessment before the determination of the DA.

Notwithstanding the above, we note that ultimately the recommendations of the DIPNR were not binding on the Council who retained the discretion as to whether they would request or require this information from the Applicant before determining the DA or whether they were satisfied, based on the information before Council, as to the likely groundwater impacts from the proposed development.

(d) **Restaurant car parking**

The DA proposed a total of 245 off-street parking for the Mascot Towers development, comprising 12 retail spaces, 17 visitor spaces, 208 residential and 8 restaurant spaces for the 300m² restaurant.

The Council's Off Street Parking Development Control Plan nominated for restaurants greater than 100m² a parking requirement that was to be determined based on merit. A merit-based assessment was therefore undertaken by Council by reference to the RTA Parking Guidelines that required restaurant parking to be provided at the rate of 15 spaces per 100m² namely 45 spaces.

The DA proposed restaurant parking for 8 vehicles only thereby having a deficiency of 37 spaces having regard to the RTA's Parking Guidelines.

Council therefore imposed a deferred commencement condition requiring the submission of amended plans that either reduced the area or the restaurant or provided for more basement car parking.

An Officer's Report prepared by the Manager – Development Assessment dated 3 August 2004 confirms that Council subsequently received additional information in compliance with the Deferred Commencement conditions and an 'operational consent' was subsequently granted on 11 August 2004.

- 10.17 Based on our review of Council's file, including in particular Council's Assessment Report and the conditions imposed on the Consent, in our view there is sufficient evidence available to demonstrate that conditions were imposed on the Consent consistent with what would be expected having regard to the various merit issues relevant to the DA.
- 10.18 For further detail on the matters considered by the Council officers in the assessment of a DA and evidence observed in Council's file with respect to the same, please refer to the Assessment Framework at Annexure A..

Determining DA

- 10.19 In accordance with the recommendation in Council's Assessment Report dated 7 June 2004, a deferred commencement development consent (Development Consent No.04/071) was granted by Council subject to conditions on 21 July 2004.

- 10.20 It is not apparent from our review of Council's file whether the Consent was granted following a Council meeting or whether the decision was made by a Council officer under delegated authority. Nonetheless, we do not consider that there would be any material implications arising with respect to the determination of the DA.
- 10.21 Two (2) deferred commencement conditions were imposed by Council relating to the proposal's non-compliance with the DCP's car parking requirements for the proposed restaurant in Building 2. In summary, the deferred commencement conditions required the Applicant to submit amended design of the restaurant in Building 2 and amended landscape drawings, to Council's satisfaction.
- 10.22 The Deferred Commencement Consent notes that when Council is satisfied that the deferred commencement conditions have been satisfied, an operational consent would be issued in accordance with the conditions appended to the Deferred Commencement Consent.
- 10.23 On 11 August 2004, Council subsequently issued another notice of determination confirming that additional information that had been submitted by the Applicant satisfied the deferred commencement conditions.
- 10.24 Based on our review of the determination and those documents in Council's file relating to the granting of the Consent, in our view there is sufficient evidence available to demonstrate that a valid determination was issued by Council.

11 Statutory Obligations of Principal Certifying Authority

- 11.1 Council was nominated by the Applicant as the PCA in respect of the Consent issued for the Mascot Towers development.
- 11.2 As the PCA, the Council was required to comply with the statutory scheme established under the EP&A Act and EP&A Regulation relating to the carrying out of certification work.
- 11.3 For a certifier to be able to reasonably determine whether the relevant requirements have been met depends on the level and quality of information included with an application for a construction, compliance or occupation certificate and any additional information requested by the certifier.
- 11.4 It is the certifier's state of satisfaction that is relevant in relation to the certification of development, noting that *'any requirement of the conditions of a development consent that a consent authority or council is to be satisfied as to a matter ... is taken to have been complied with if a certifying authority is satisfied as to that matter.'*²

Construction Certificate

- 11.5 Council's file includes a number of documents demonstrating that a total of three (3) construction certificates, together with plans and specifications, were issued by the Council in its capacity as the appointed PCA. Copies of the following certificates can be found in Council's file:
- (a) construction certificate no. 04/071-CC1-Stage 1 (Stage 1 works: Excavation work and sheet piling work) issued 22 December 2006;
 - (b) construction certificate no. 04/071-CC2-Stage 2 of 3 (Stage 2 works: mixed residential and commercial building, with car park and swimming pool) issued 22 December 2006;

² Clause 161(2), Environmental Planning and Assessment Regulation 2000

- (c) construction certificate no. 04/071-CC3-Stage 3 of 3 (Stage 3 works: gymnasium) issued 17 October 2007.

11.6 Each of the construction certificates issued with respect to the Mascot Towers development includes a statement to the effect that Council was satisfied that development consent was issued and cites the relevant development application number. Copies of Council's determination with respect to the abovementioned construction certificates can also be found in Council's file.

Compliance Certificates

- 11.7 A number of compliance certificates were required to be issued in accordance with conditions 18 20 and 114 of the Consent.
- 11.8 Based on our review of Council's file and having regard to the abovementioned conditions, we have identified that these compliance certificates appear to have been provided to Council. This is consistent with the attachments noted on the final occupation certificate (no. 04/071-OC1) issued on 16 July 2008.

Occupation Certificate

- 11.9 A final occupation certificate for the Mascot Towers development was issued by Council in its capacity as the appointed PCA on 16 July 2008. The certificate states the following:

"The Botany Bay City Council certifiers that:

- *It has been appointed as the Principal Certifying Authority under Section 109E.*
- *A Development Consent is in force with respect to the building.*
- *A Construction Certificate has been issued with respect to the plans and specifications for the building.*
- *The building is suitable for occupation or use in accordance with its classification under the Building Code of Australia.*
- *Where required, a Final Fire Safety Certificate has been issued for the building.*
- *A report from the Commissioner of NSW Fire Brigades dated 28th April 2008 prepared under Clauses 152 EPA Reg 2000 has been considered."*

- 11.10 The occupation certificate further states that it has been issued in respect of the following development:

- *'Whole of building.*
- *Description of Use – Residential & Commercial building together with associated car park, swimming pool and gymnasium*
- *Building Code of Australia Class:*
 - *Class 2 – Residential*
 - *Class 4 – Caretakers Residence*
 - *Class 5 – Commercial*
 - *Class 6 – Retail/Shops*
 - *Class 7a – Car park*
 - *Class 9b – Gymnasium*
 - *Class 10a – Awning*
 - *Class 10 b- Swimming Pool / Fencing*

- *New Building'*

- 11.11 Based on our review of Council's file, no other or 'earlier' or interim occupation certificates were issued in respect of the Mascot Towers development.
- 11.12 We have not identified any documents in Council's file that indicates that occupation of the Mascot Towers development occurred prior to the issuing of the final occupation certificate.

12 Conclusion

- 12.1 We refer to our observations made at 10.16(c) of this report in relation to the recommendation made by the DIPNR that a further detailed groundwater assessment be undertaken, which aligned with the recommendation made at Section 4.8 of the Geotechnical Report.
- 12.2 Noting that a further detailed groundwater assessment (based on our review of Council's file) was not requested or obtained by Council until after the determination of the DA, we have given consideration as to whether further investigation into this matter is warranted in these circumstances, including consideration as to whether any individuals involved in the determination of the DA should be interviewed. Ultimately, we have concluded that any such further enquiries would be unlikely to yield answers that would materially alter the findings of this investigation having regard to the passage of time since the DA was determined and the wide discretion conferred on Council as the relevant consent authority to determine to grant or refuse a DA following a merit-based assessment carried out within the parameters of the statutory planning regime. On this basis, we do not consider any further investigation of this issue is necessary for the purposes of addressing the Terms of Reference.
- 12.3 Except for the abovementioned matter, we have not identified anything else in Council's file that, in our view, would warrant the carrying out of any further investigation into Council's role in the approval and certification of the Mascot Towers development. In our opinion, the documentation in Council's file is generally indicative of Council acting in accordance with the functions and responsibilities conferred and imposed on it by the law.

Contact details



Dated: 21 March 2023