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Matt Cohen
Director, Development Approvals & Design
Planning & Land Services
Department of Transport and Planning
8 Nicholson Street
East Melbourne VIC 3002

11 July 2024
Matter 82731515
Via DTP Planning Portal

Dear Matt

Legal Access Mechanism Development Facilitation Program - Planning Permit Application Property: 158-162 High Street, Belmont

We act alongside Tract Consultants Pty Ltd (**Tract**) for Coles Group Property Developments Ltd (**Coles**), in relation to its planning permit application under the Development Facilitation Program (**Application**) for its proposed development of the Property (**Development**).

1 Background

We note that Coles originally lodged a planning permit application (PP470-2023) with the City of Greater Geelong (**Council**) for the Development, prior to identifying the Development Facilitation Program as an alternative planning permit pathway.

Following the lodgement of the planning permit application with Council, Coles and Council have been in discussions in relation to the utilisation of the Property to allow for access from the one-way Discovery Lane through to Belmont Square, Belmont Walk and the public road network for loading and waste collection purposes following the Development. Currently, the Property is accessed by the public for this purpose, and Council was concerned that the Development may limit or prevent this access. Council and Coles have since agreed that an agreement under s 173 of the *Planning and Environment Act 1987* (Vic) (**P&E Act**) would be the appropriate mechanism to facilitate this access and that the requirement to enter into the s 173 agreement would be appropriate to include as a condition of a planning permit for the Development.

As Coles is now seeking planning approval for the Development under the Development Facilitation Program, we set out below the reasons for Coles proposing the s 173 agreement as a condition of any permit granted for the Development by the Minister for Planning and why this is preferable to any other mechanism to provide the desired access.

2 Summary

In this instance, the imposition of a carriageway easement is not considered to be the best way to achieve the legal access sought to be required. Rather, Coles submits that a permit condition should instead be imposed to require an agreement under s 173 of the P&E Act to be entered between Coles and Council requiring provision of the desired access over the Property. The s 173 agreement would provide a formal legal structure for the access arrangement and would be recorded on title to the Property and run with the Property, addressing planning considerations regarding access but without diminishing Coles' legal interest in its own land.

Doc 114587777.6



3 Proposal for s 173 agreement to govern legal access

To facilitate access from Discovery Lane to Belmont Square, Belmont Walk and the public road network for loading and waste collection purposes, Coles proposes that a condition be included on the permit that requires Coles to enter a s 173 agreement which provides the sites along Discovery Lane with access through the Property for the purposes of loading and waste collection.

We propose the following wording may be adopted (though note Coles is open to discussing the appropriate wording of the condition):

*Prior to the commencement of construction of the development authorised by the permit, the Owner must enter into an agreement under s 173 of the Planning and Environment Act 1987 (Vic) with the City of Greater Geelong (**Council**). The agreement must be in a form to the satisfaction of the Council and must provide for the following:*

The Owner must incorporate into the development and maintain a thoroughway over the land from the south-western end of Discovery Lane to Belmont Square, Belmont Walk and High Street for the use of loading and waste collection vehicles attending the rear of:

- 156 High Street, Belmont;
- 13 Discovery Lane, Belmont;
- 152 High Street, Belmont;
- 148 High Street, Belmont;
- 142 High Street, Belmont;
- 140 High Street, Belmont; and
- 138 High Street, Belmont.

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The thoroughway must provide for vehicles of a size up to and including Council waste collection vehicles and tenant loading vehicles up to Class 5 as per Austroads Vehicle Classifications (8.8-metre-long medium rigid vehicle, as defined within AS2890.2:2018).

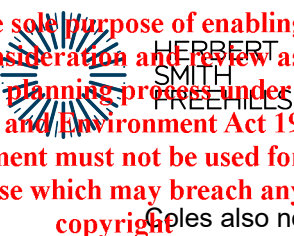
Coles may from time to time temporarily close the thoroughway at its discretion for no longer than 3 hours at a time. Such discretionary temporary closures may only occur after written notice is provided to the properties listed above no less than 1 day prior to the proposed closure and such closures must not be scheduled when they may interfere with Council waste collection.

In cases of emergency, the thoroughway may be temporarily closed with no notice and for as long as is required to respond to or manage the emergency.

The owner must pay the reasonable costs of the preparation, execution and recording of the section 173 agreement on the title to the land.

Coles proposes that the agreement be entered into by Coles (as the registered proprietor of the Property) and Council only. It is not proposed that any of the registered proprietors of the High Street and Discovery Lane properties listed above be a party to the s 173 agreement nor that the agreement encumber any other land. Coles does not propose that there be any obligation on, or express right in favour of, the neighbours specifically (and considers this to be appropriate) that would require the neighbours to be parties to the agreement or the s 173 agreement to be recorded on their titles. Coles also considers it would be inappropriate to have third parties be parties to an agreement where the obligation is limited to regulating the design of the Development sought by Coles on its Property.

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Coles also notes that the Minister would not be the responsible authority for the purposes of a s 173 agreement and has accordingly proposed that Council be the relevant responsible authority.

While open to providing the required access through its Property, as part of the Development, Coles equally wishes to protect its legal interests in the Property. The ability to close the thoroughway is important to its ability to exercise legal control over its land and so protect these interests.

Coles considers the proposed s 173 agreement will fully address the need to provide access without unnecessarily constraining future development of the Property if this should be required. The intent of the s 173 agreement will be to ensure there is always *an* access from Discovery Lane through the Property to Belmont Square, Belmont Walk and the public road network to facilitate loading and waste collection, while providing flexibility for future development if that is necessary in response to changes in the precinct over time. The provisions of the s 173 agreement for commencement, ending and management of the access obligation can be addressed in the terms of the agreement. Accordingly, we consider this is also an appropriate planning outcome.

4 Carriageway easement not preferred

Coles considers that the imposition of a condition requiring provision of a carriageway easement by Coles in favour of other private land would not be appropriate, nor is it necessary.

Firstly, a carriageway easement would not be the preferred arrangement to achieve access through the Property in any event, as:

- the process to negotiate and implement an easement with each of the relevant landowners prior to advertising would take time;
- a carriageway easement would provide private legal rights to easement beneficiaries, rather than focussing on the key issue of ensuring appropriate traffic circulation and planning outcomes; and
- the easement itself will unnecessarily encumber and potentially sterilise part of the Property, where a s 173 agreement in the form proposed above will provide certainty of access without doing so and while maintaining flexibility for the future.

Secondly and importantly, we note there is a proper statutory process for the acquisition of easements and other land rights by government authorities, including under the *Local Government Act 2020* (Vic), with compensation accordingly payable by the acquiring authority in accordance with the *Land Acquisition and Compensation Act 1986* (Vic). We consider that compulsory acquisition of an easement is not necessary given the required outcome can be achieved under the s 173 agreement as proposed.

We consider it would be preferable to utilise the appropriate planning mechanism (s 173 agreement) to achieve the required outcome, rather than bypass this legal process by imposing a requirement for the vesting of an easement over private land in favour of other private land through a planning process, or expose Council to compensation liability by requiring compulsory acquisition of an easement.

5 Conclusion

Coles considers that a s 173 agreement provides the most appropriate mechanism for achieving the desired outcome for access in the course of the Development. Coles does not consider that other access mechanisms, such as an easement, to be practicable or appropriate where matters can be appropriately addressed under conditions of a permit and planning instruments.

Further, to provide information and comfort to relevant stakeholders, Coles will be undertaking consultations with the adjoining neighbours immediately prior to advertising officially commencing for the Application. The intent behind the community consultation is to liaise with neighbours, hear any concerns they may have and provide context as to how decisions were



made, to ensure that Coles maintains relationships with local traders and convey that the Application maintains the interests of their neighbours. This will include reaffirming the commitment to maintaining the access over the Property.

During these discussions, it will be made abundantly clear by Coles that any access arrangements have considered the needs of Belmont Walk and Discovery Lane users, and will implement appropriate measures to formalise access through the Property following construction.

In summary, Coles respectfully requests that, if planning approval for the Development is granted, that a condition is placed on the planning permit to require a s 173 agreement to provide for access through the Property, as set out above.

Should you have any queries regarding the above, or require any further clarification, please contact us at the details below or Jackie Kirby at Tract on 0431 813 533 / jkirby@tract.net.au.

Yours sincerely

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