MID-WESTERN REGIONAL COUNCIL –
RE: DEVELOPMENT APPLICATION FOR WORKERS ACCOMMODATION

MEMORANDUM OF ADVICE

Local Government Legal
PO Box 3137
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Attention: Mr Tony Pickup

Mid-Western Regional Council –
Re: Development Application for Workers Accommodation

MEMORANDUM OF ADVICE

1. My instructing solicitors act for the Mid-Western Regional Council ("the Council").

Background

2. In December 2011, a development application ("the Application") under the Environmental Planning and Assessment Act 1979 ("the EPA Act") was lodged with the Council by the Mac Services Group Pty Ltd ("Mac") for a 'Proposed Workers Accommodation Facility' ("the Proposal") at Lots 346, 348, 350 DP 755434 & Lot 476 DP 755433, also known as 2 Black Lead Lane, Gulgong ("the Site").

3. At the time of the lodgement of the Application the site was zoned *Agriculture* pursuant to the provisions of the Midwestern Interim Local Environmental Plan (ILEP). On 10 August 2012 the provisions of ILEP were repealed and the provisions of the Mid Western Local Environmental Plan 2012 (LEP 2012) came into force. LEP 2012 was amended on the same day by Amendment No 1 to LEP 2012 to incorporate Clause 6.11 that related specifically to the provision of temporary workers accommodation. LEP 2012 (which incorporated the

amendment No 1) contained a savings provision which provides:

> ***1.8A Savings provision relating to development applications***
>
> *If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.*
>
> ***Note.*** *However, under Division 4B of Part 3 of the Act, a development application may be made for consent to carry out development that may only be carried out if the environmental planning instrument applying to the relevant development is appropriately amended or if a new instrument, including an appropriate principal environmental planning instrument, is made, and the consent authority may consider the application. The Division requires public notice of the development application and the draft environmental planning instrument allowing the development at the same time, or as closely together as is practicable.*

4. I am not instructed that the Application was made relying upon the provisions of the Environmental Planning and Assessment Act (EPA Act) which permit consideration of an application which relies upon the amendments to an LEP being made (see note to clause 1.8A). Accordingly, for the purposes of this advice I have assumed that the Application is subject to the operation of the savings provision and therefore is to be assessed in accordance with the provisions of ILEP.

5. The Statement of Environmental Effects dated 20 December 2011 ("the SEE") describes the Proposal as involving a workers accommodation facility comprising 400 rooms to service the surrounding mine construction and associated peak workforce, being either "fly in/fly out" or "drive in/drive out" workers. The Proposal physically involves:

- On-site preparation works;
- Construction of an internal road system and associated car parking;
- Earthworks;
- Associated landscaping and outdoor open space areas;
- Construction of the facility with 400 rooms;

- Ancillary amenities including central facilities building, convention centre, administration building, shed, gazebos, laundries and indoor and outdoor recreation facilities including ancillary gymnasium, lap pool and multi-purpose court;
- Utility services and drainage works; and
- Entry signage.

6. The SEE describes the rooms as being in building modules generally comprising three rooms per module, or situated in a group of six. The SEE notes that guests of the facility are not staying for recreational purposes, and will stay longer than ordinarily associated with tourist and visitor accommodation.

7. The SEE also suggests that the facilities are proposed to be decommissioned at the end of their lifespan.

8. Included with the SEE was a document described as "Outline Plan of Management" dated 16 December 2011. However, that document does not include details of how the Proposal is expected to operate on a day-to-day basis. The Noise Impact Assessment dated 20 December 2011 indicates that it is expected that the site will accommodate shift workers. The Socio-Economic Report dated 16 December 2011 states that workers are expected to occupy the site on a temporary basis, maintaining a permanent residence elsewhere.

Advice Sought

9. I have been requested to advise the Council:

a) Whether the Proposal is prohibited development in the Agriculture zone under the Mid-Western Regional Interim Local Environmental Plan 2008 ("the ILEP"), on the basis that the use of the Site for the purpose of temporary workers accommodation would fall under the definition of *Tourist and visitor accommodation*, which is prohibited development in that zone; and

b) If the proposal is for prohibited development did the Council have the power

to accept the DA or should it have been rejected; and

c) If the application should have been rejected should the JRPP now proceed to determine the application.

10. On 10 August 2012, by further addendum to my brief, I was advised that amendment Number 1 had been gazetted to Mid Western Local Environmental Plan 2012 (LEP 2012). Amendment No 1 comprised the introduction of clause 6.11 which dealt with temporary worker's accommodation. I have been requested to advise whether Amendment No 1 impacts upon the characterisation of the current proposal in any material way.

Statutory Provisions

11. The Land Use Table of the ILEP for the Agriculture zone relevantly provides:

> 2 ***Permitted without consent***
> *Agriculture; Biosolid waste applications; Bush fire hazard reduction work; Drainage; Environmental protection works; Forestry; Home industries; Home occupations; Public utility undertakings; Restriction facilities; Utility installations.*
> 3 ***Permitted with consent***
> *Any other development not otherwise specified in Item 2 or 4.*
> 4 ***Prohibited***
> *Agricultural machinery showrooms; Backpackers' accommodation; Boarding houses; Bulky goods premises; Bus stations; Business premises; Car parks; Caravan parks; Child care centres; Dual occupancies—attached; Entertainment facilities; Heavy industries; Home occupation (sex services); Hospitals; Hostels; Hotel accommodation; Industries; Kiosks; Light industries; Manufactured home estates; Medical centres; Motor showrooms; Office premises; Places of public worship; Pubs; Reception centres (except where ancillary to an approved use); Recreation facilities (indoor); Recreation facilities (outdoor); Registered clubs; Residential flat buildings; Restaurants (except where ancillary to an approved use); Restricted premises; Retail premises; Road transport terminals; Seniors housing; Service stations; Sex services premises; Shop top housing; Tourist and visitor accommodation.*

(Emphasis added)

12. By the operation of this table, a land use that is not specifically nominated as prohibited development is permissible subject to development consent. Thus, if

the Proposal is not *Tourist and visitor accommodation* (or any other nominated prohibited use) then that use will permissible in the agriculture zone and may be granted consent.

13. The term '*Tourist and visitor accommodation*' is defined under ILEP as follows:

> *...a building or place that provides temporary or short-term accommodation on a commercial basis, and includes hotel accommodation, serviced apartments, bed and breakfast accommodation and backpackers' accommodation.*

14. This definition provides within it nominated types of accommodation after the word "includes". The nominated types of accommodation are not an exhaustive description of all development that may be so described as *Tourist and visitor accommodation*. This is because the use of the word "includes" indicates that there a potentially other forms of accommodation, which are not specifically listed, which may still fall within the definition.

15. The terms 'hotel accommodation', 'serviced apartment' and 'bed and breakfast accommodation' are separately defined under the ILEP as follows:

> ***Hotel accommodation*** *means a building...that provides tourist and visitor accommodation consisting of rooms and self-contained suites, but does not include backpackers' accommodation, bed and breakfast accommodation, a boarding house or a serviced apartment.*
>
> ***Serviced apartment*** *means a building or part of a building providing self contained tourist and visitor accommodation that is regularly serviced or cleaned by the owner or manager of the building or part of a building or the owner's or manager's agents.*
>
> ***Bed and breakfast accommodation*** *means tourist and visitor accommodation comprising a dwelling...where the accommodation is provided by the permanent residents...*
>
> ***Backpackers' accommodation*** *means tourist and visitor accommodation:*
> a) *that has shared facilities, such as a communal bathroom, kitchen or laundry; and*
> b) *that will generally provide accommodation on a bed basis (rather than by room).*

Principles

16. Questions of characterisation of development proposals are often difficult as they are based upon their unique facts and the description of the development

provided to the consent authority with the supporting materials. Even then, the actual character of a development proposal is subject to judicial determination by the Land and Environment Court of NSW: *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707.

17. The principles concerning characterization were summarized by Preston CJ in *Chamwell v Strathfield Council* (2007) 151 LGERA 400 (at [27] – [36]) as follows:

> *In planning law, use must be for a purpose: Shire of Perth v O'Keefe (1964) 110 CLR 529 at 534-535 and Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (1993) 80 LGRA 173 at 188. The purpose is the end to which land is seen to serve. It describes the character which is imparted to the land at which the use is pursued: Shire of Perth v O'Keefe (1964) 110 CLR 529 at 534.*
>
> *In determining whether land is used for a particular purpose, an enquiry into how that purpose can be achieved is necessary: Council of the City of Newcastle v Royal Newcastle Hospital (1957) 96 CLR 493 at 499-500. The use of land involves no more than the "physical acts by which the land is made to serve some purpose": at 508.*
>
> ...
>
> *However, the nature of the use needs to be distinguished from the purpose of the use. Uses of different natures can still be seen to serve the same purpose: see Shire of Perth v O'Keefe (1964) 110 CLR 529 at 534, 535 and Warringah Shire Council v Raffles (1978) 38 LGRA 306 at 308.*
>
> ...
>
> *The characterisation of the purpose of a use of land should be done at a level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on, not in terms of the detailed activities, transactions or processes: Royal Agricultural Society of NSW v Sydney City Council (1987) 61 LGRA 305 at 310.*

18. Though the Application does not include specific details as to the daily activities, transactions and processes involved for the Proposal, the information in the SEE indicates that small rooms will be provided to a workforce population engaged at nearby mining sites for their accommodation for short terms, though those same workers may use the facilities for several short terms over a longer period.

19. The definition for *Tourist and visitor accommodation* has several elements. They are:

a. That there be a 'building' or 'place';
b. That building or place must provide accommodation, short or long term; and
c. The accommodation must be on a commercial basis.

20. In my opinion, these elements are involved with the Proposal. That is:

a. The Proposal clearly involves use of a 'place' and a 'building'.

b. The documents provided with the Application arguably indicate that the place is intended to provide 'accommodation' to workers on nearby sites;

c. In *GrainCorp Operations Pty Ltd v Liverpool Plains Shire Council* [2012] NSWLEC 143[1] the Land and Environment Court confirmed that a development such as the Proposal cannot be classified as 'residential' in nature since the occupation by the workforce population is not permanent, but only temporary: see [28]; and

d. The materials provided with the Application arguably indicate that the accommodation is provided on a commercial basis (in that there is no indication that the facilities are provided without charge). In addition, the documents provided with the Application indicate that the Proposal is seen as complementing and supporting mining activities and operations and so, in my opinion, the accommodation provided could be classified as commercial for that reason.

21. Accordingly, in my opinion, the Proposal includes each of the elements that could be said to reasonably comprise *'Tourist and visitor accommodation'* as defined.

22. It may not be necessary to undertake any further analysis. This is because once a development proposal *can* be classified as prohibited development, then there is

[1] This decision is pending appeal to the Court of Appeal.

no power for a consent authority to grant consent under the EPA Act: see, eg, *Abret v Wingecarribee Shire Council* (2011) 180 LGERA 343.

23. However, further analysis may be prudent.

24. There is no specific definition of 'temporary' or 'visitor' in the ILEP. Where terms are not defined by an instrument, it is appropriate to consider their meaning in ordinary usage. To determine ordinary usage, for the purpose of construing planning instruments, recourse to dictionaries is permitted: *House of Peace v Bankstown City Council* (2000) 48 NSWLR 498. The terms 'temporary' and 'visitor' are defined in the Macquarie Dictionary to include 'not permanent' and '*one who visits...for friendly, **business**, official or other purposes*'.

25. Accordingly, it is arguable that the supply of accommodation to workers could be characterised as development for the purpose of '*Tourist and visitor accommodation*' as it provides not-permanent accommodation to a visitor/worker attending on a business purpose. Being so characterised, the use would in my opinion comprise prohibited development in the agriculture zone.

26. Further, if the Dictionary definitions of the terms 'visitor' and 'temporary' are adopted in the construction of the ILEP, then the Proposal would also arguably fall under the definitions of 'Hotel accommodation' or 'serviced apartments' under the ILEP (the latter based on an assumption that the rooms are regularly serviced or cleaned, which appears to be a reasonable assumption to make given that details of the day-to-day operation have not been provided with the Application). Thus, this would provide additional support for a conclusion that the Proposal comes within the definition of 'Tourist and visitor accommodation' and is prohibited.

Power to assess or reject application.

27. Clause 51 of the EPA Regulation provides that

> ***51 Rejection of development applications***
>
> *(cf clause 47 (1)–(3) of EP&A Regulation 1994)*

(1) A consent authority may reject a development application within 14 days after receiving it if:
(a) the application is illegible or unclear as to the development consent sought, or
(b) the application does not contain any information, or is not accompanied by any document, specified in Part 1 of Schedule 1, or
(c) being an application referred to in section 78A (8A) of the Act, the application is not accompanied by an environmental impact statement referred to in that subsection.
Note. *Schedule 2 sets out requirements in relation to environmental impact statements.*
(2) A consent authority may reject a development application within 14 days after receiving it if:
(a1) being an application for development requiring concurrence, the application fails to include the concurrence fees appropriate for each concurrence relevant to the development, or
(a) being an application for integrated development, the application fails:
(i) to identify all of the approvals referred to in section 91 of the Act that are required to be obtained before the development may be carried out, or
(ii) to include the approval fees appropriate for each approval relevant to the development, or
(iii) to include the additional information required by this Regulation in relation to the development, or
(b) being an application referred to in section 78A (8) (b) of the Act, the application is not accompanied by a species impact statement referred to in that paragraph.
(3) An application is taken for the purposes of the Act never to have been made if the application is rejected under this clause and the determination to reject the application is not changed following any review.
(4) The consent authority must refund to the applicant the whole of any application fee paid in connection with an application that is rejected under this clause and must notify the applicant in writing of the reasons for the rejection of the application.
(5) Immediately after the rejection of a development application for:
(a) development for which the concurrence of a concurrence authority is required, or
(b) integrated development,
the consent authority must notify each relevant concurrence authority or approval body of the rejection.

28. Clause 51 is the only power conferred upon a Council to reject an application without a determination of the application. In my opinion clause 51 is an exhaustive list of the circumstances in which the power of rejection may be exercised. In this case clause 51 does not identify prohibited development as a basis for rejection and accordingly there is no power to reject the application on

this basis. Further, the determination of the proper characterisation of an application is for the consent authority at first instance or upon review by the Land and Environment Court. As characterisation involves a consideration of the facts of the application applied to the legal definition of the use the application itself must undergo some consideration. In my opinion this process precludes a rejection of the application without assessment.

29. For the foregoing reasons it is my opinion that the JRPP must determine the issue of characterisation of the use for itself having regard to the advice provided to it. Accordingly, the application must be considered by the JRPP.

Impacts of making of amendment No 1 to LEP 2012.

30. On the basis of the assumption I make above that the savings provision applies to the Application LEP 2012 and Amendment No 1 are relevant only as a s.79C consideration of a merit assessment of the Application. That is, the provisions of LEP 2012 are not relevant to a determination of characterisation of a use having regard to the provisions of ILEP. If a characterisation of a use under ILEP determines that the use is prohibited the provisions of LEP 2012 are irrelevant. However, if the use was characterised as permissible the provisions of LEP 2012 would be relevant as a consideration of the LEP as a draft for the purposes of a merit assessment of that permissible application under s. 79C.

Conclusion

31. In my opinion, for the reasons given above, the Proposal would be reasonably characterised as prohibited development in the Agriculture zone under the ILEP.

16 August 2012

Chambers

SANDRA DUGGAN SC

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