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Dear Geoff

Characterisation of Proposed Development at Werris Creek

You have asked us to provide a short advice on the proper characterisation of the proposed workforce accommodation facility for 1,500 occupants (**Proposed Development**) on land located at Werris Creek (**Site**) under the *Liverpool Plains Local Environmental Plan 2011* (**Liverpool Plains LEP**).

1 Background

- 1.1 On 14 July 2011, The Mac Services Group (**The MAC**) lodged a development application (37/2011) for the Proposed Development. At that time, the Site was zoned 1(b) General Agriculture under the *Parry Local Environmental Plan 1987* (**Parry LEP**). Under the PLEP, development for the purpose of “*residential buildings (other than dwelling-houses and units for aged persons)*” was prohibited in that zone. The Parry LEP did not define the term “*residential building*”.
- 1.2 On 17 November 2011, the Northern Joint Regional Planning Panel (**JRPP**) granted development consent to the Proposed Development (**Consent**). On 28 June 2012, Lloyd AJ upheld the validity of the Consent in proceedings brought by GrainCorp Operations Ltd (**GrainCorp**) in the NSW Land and Environment Court (**LEC Decision**) who sought to set aside the Consent on the basis that the Proposed Development was prohibited. GrainCorp appealed the LEC Decision to the NSW Court of Appeal.
- 1.3 On 1 May 2013, the NSW Court of Appeal handed down judgment in *GrainCorp Operations Ltd v Liverpool Plains Shire Council* [2013] NSWCA 171 overturning the LEC Decision and finding that the Consent was invalid and of no effect (**COA Decision**). In reaching this conclusion, the Court held that the use of the Proposed Development was characterised as a “*residential building*” and, therefore, was a prohibited use under the Parry LEP.
- 1.4 The principles outlined by the NSW Court of Appeal in the COA Decision need to be taken into consideration in determining the proper characterisation of the Proposed Development under the Liverpool Plains LEP.

2 COA Decision

2.1 The COA Decision determined that the proper characterisation of the Proposed Development was as a “*residential building*” for the following reasons:

- (a) the ***purpose*** of the Proposed Development, in a planning sense, is to accommodate the residential needs of the mine workers. It is immaterial whether or not the workers occupy the same rooms each time they stay at the Proposed Development (paragraph 120);
- (b) the Proposed Development is residential in ***character*** in that it will provide accommodation and living facilities for mine workers for considerable periods of time, in aggregate, over the working life of the mine (however long or short that may be) (paragraph 120); and
- (c) the Proposed Development is a “*residential building*” as it is intended to fulfil the ***purpose*** of being a permanent and settled abode (paragraph 123).

3 Characterisation

3.1 On 18 January 2013, the Liverpool Plains LEP came into force and repealed the Parry LEP. Under the Liverpool Plains LEP, the Site is zoned R1 General Residential (**R1 Zone**).

The Land Use Table for the R1 Zone provides as follows:

1. Objectives of zone

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To permit other development that is compatible with the surrounding residential environment and that is unlikely to adversely affect the amenity of residential development within the zone.

2. Permitted without consent

Building identification signs; Environmental protection works; Home-based child care; Home occupations; Roads; Water reticulation systems

3. Permitted with consent

*Attached dwellings; Boarding houses; Child care centres; Community facilities; Dwelling houses; Group homes; Home industries; Hostels; Markets; Multi dwelling housing; Neighbourhood shops; Places of public worship; Residential flat buildings; Respite day care centres; Semi-detached dwellings; Seniors housing; Sewage reticulation systems; Shop top housing; **Any other development not specified in item 2 or 4***

4. Prohibited

Advertising structures; Agriculture; Air transport facilities; Airstrips; Amusement centres; Animal boarding or training establishments; Boat building and repair facilities; Boat launching ramps; Boat sheds; Cemeteries; Charter and tourism boating facilities; Commercial premises; Correctional centres; Crematoria; Eco-tourist facilities; Electricity generating works; Emergency services facilities; Entertainment facilities; Environmental facilities; Extractive industries; Farm buildings; Farm stay accommodation; Forestry; Freight transport facilities; Function centres; Heavy industrial storage establishments; Helipads; Highway service centres; Home occupations (sex services); Industrial retail outlets; Industrial training facilities; Industries; Jetties; Marinas; Mooring pens; Moorings; Mortuaries; Open cut mining; Passenger transport facilities; Public administration buildings; Recreation facilities (major); Registered clubs; Research stations; Restricted premises; Rural industries; Rural workers' dwellings; Service stations; Sewerage systems; Sex services premises; Transport depots; Truck depots; Vehicle body repair workshops; Vehicle repair stations; Veterinary hospitals; Warehouse or distribution centres; Waste or resource management facilities; Water recreation structures; Water treatment facilities; Wharf or boating facilities; Wholesale supplies

[emphasis added].

- 3.2 Despite the commencement of the Liverpool Plains LEP, in light of the COA Decision, it is our view that the Proposed Development is properly characterised as "*residential accommodation*" (a defined term in the Liverpool Plains LEP) or its sub-set "*residential building*" (an innominate use).
- 3.3 The use of the word "includes" in the definition of "*residential accommodation*" in the Liverpool Plains LEP suggests that if the Proposed Development does not fit within any of the definition's specified uses, this is not determinative, as those uses are not intended to be exhaustive. As such, there are a number of types of developments that may be characterised as "*residential accommodation*", including "*residential building*", both of which uses are permissible with consent in the R1 Zone under the Liverpool Plains LEP.
- 3.4 We are of this view because:
 - (a) the ***purpose*** of the Proposed Development is to accommodate the residential needs of mining workers;
 - (b) the ***character*** of the Proposed Development is residential as it will provide accommodation and living facilities for mine workers for considerable periods of time, in aggregate; and
 - (c) the Proposed Development will provide a ***permanent or settled abode*** for its guests.
- 3.5 The Proposed Development is also consistent with the objectives of the R1 Zone, particularly the objective to provide for a variety of housing types and densities.
- 3.6 For completeness, we have also considered whether the Proposed Development can properly be characterised as a use falling within the stated "prohibited" uses under the Land Use Table for the R1 Zone. As the Proposed Development is for

a residential purpose, we are of the view that the Proposed Development could only potentially fall within the "residential" type uses in the prohibited use table of "eco-tourist facilities", "farm stay accommodation" or "rural workers' dwellings". However, upon analysis, we are of the view that the Proposed Development does not satisfy the definitions of these prohibited uses and is not properly characterised as a prohibited use.

- 3.7 Finally, in our opinion, the Proposed Development does not satisfy the definition of "temporary workers' accommodation" under clause 7.8 of the Liverpool Plains LEP. This is primarily because the CoA Decision held that the use is not "temporary" in nature.
- 3.8 Accordingly, the Proposed Development is to be correctly characterised as "**residential accommodation**" or "**residential building**" and not as "**temporary workers' accommodation**".
- 3.9 On this basis, the JRPP has the power to grant consent for the Proposed Development given that the use is permissible with consent and does not fall within any of the stated prohibited uses.

Please let us know if have any questions regarding the above advice.

Yours faithfully

Corrs Chambers Westgarth


 Christine Covington
Partner