

1. Background

A report on an application (DA201500168) to demolish existing improvements and Torrens title subdivision of the site into 2 allotments and construct and fit out a 13,350sqm Masters Home Improvement store including vehicle access, loading, car parking and landscaping on Lot 1 and construct 10 industrial units varying from 348sqm to 635sqm including vehicle access, loading, car parking and landscaping on Lot 2 is to be considered by the JRPP at its meeting on 15 October 2015.

In that report concern is raised with the ability to use Clause 5.3 (Development near zone boundaries) of Marrickville Local Environmental Plan (MLEP) 2011 to extend the “*garden centre and hardware and building supplies*” use that is permitted on Lot 202 in DP 1133999 under Clause 2.5 (Additional permitted uses for particular land) and Schedule 1 of MLEP 2011 into the SP2 - Stormwater Management Systems zone that affects a portion of the site.

That report contends that while Schedule 1 of MLEP permits a “*garden centre and hardware and building supplies*” as an additional permitted use on Lot 202 in DP 1133999, Clause 5.3(4) does not refer to permitted uses on adjoining lots but specifically refers to “*adjoining zones*” and accordingly Clause 5.3(4) does not permit the “*garden centre and hardware and building supplies*” allowed on Lot 2 in DP 1133999 to be expanded into the SP2 zone as the use is otherwise prohibited in the IN1 – General Industrial zone.

Accordingly the report recommends that a deferred commencement consent be issued with the building to be slightly amended to ensure that the Masters store is contained to that land referred to in Schedule 1 of MLEP 2011.

2. Legal Advice

Subsequent to the original report being written, legal advice has been provided by the applicant discussing the permissibility of that portion of the Masters building to be constructed in the SP2 zone.

The legal advice provided by the applicant contends that the proposal is a permissible form of development having regard to a recent court judgement. A copy of that legal advice is **ATTACHED** at **ATTACHMENT 1**.

The advice provided supports the permissibility of the proposal for the following reasons:

- The objective of Clause 5.3 of the MLEP 2011 is to ‘*provide flexibility where the investigation of a site and its surroundings reveals that a use allowed on the other side of a zone boundary would enable a more logical and appropriate development of the site and be compatible with the planning objectives and land uses for the adjoining zone*’.
- The legal advice contends that to avoid an interpretation that would lead to an unreasonable result, Clause 5.3 should be read so as to refer to *all* uses that are permitted on the adjoining land, including both those listed in the Land Use Table for the zone and any additional permitted uses in schedule 1 of the MLEP 2011.
- The proposal is consistent with the object and purpose of Clause 5.3, and that it should be read so as to apply to **any use** that is permissible on the other side of the zone boundary, including any additional permitted uses identified in Schedule 1 of the MLEP 2011. This same conclusion was reached by Dixon C in *Kirkham v City of Canada Bay* [2013] NSWLEC 1263. In this instance there is no basis for confining its operation to uses permitted in the land use table and excluding additional permitted uses.

The legal advice provided by the applicant was referred to Council’s General Counsel - Legal Services who advised that the decision of Dixon C in *Kirkham v City of Canada Bay* is directly on point and supports the permissibility of the development in the SP2 land.

In light of the advice provided, this report recommends that Part A of the recommendation of the original report containing the deferred commencement matter be deleted, with the application now recommended for approval subject to the imposition the other conditions contained in the original report with condition 1 reworded slightly to reflect that there is no longer a deferred commencement matter to be satisfied.

RECOMMENDATION

THAT Part A of the recommendation of the original report containing the deferred commencement matter be deleted with the application now recommended for approval subject to the imposition the other conditions contained in the original report with condition 1 reworded to reflect that there is no longer a deferred commencement matter to be satisfied as follows:

- The development must be carried out in accordance with plans and details listed below:

Plan, Revision and Issue No.	Plan Name	Date Issued	Prepared by	Date Submitted
DA01 Rev E	Site Plan	24/7/15	Leffler Simes	30/7/15
DA02 Rev E	Basement	24/7/15	Leffler Simes	24/7/15
DA03 Rev B	Ground floor masters	2/4/15	Leffler Simes	16/4/15
DA04 Rev B	Roof plan Masters	2/4/15	Leffler Simes	16/4/15
DA05 Rev B	Elevations Masters	2/4/15	Leffler Simes	16/4/15
DA06 Rev B	Sections Masters	2/4/15	Leffler Simes	16/4/15
DA07 Rev B	Floor Plan Industrial Units	15/7/15	Leffler Simes	15/7/15
DA08 Rev A	Roof plan	20/3/15	Leffler Simes	16/4/15
DA09 Rev C	Elevations Industrial Units	24/7/15	Leffler Simes	30/7/15
DA10 Rev B	Section Industrial Units	15/7/15	Leffler Simes	15/7/15
SA00 Rev B	Signage aerial view	2/4/15	Leffler Simes	16/4/15
SA01 Rev B	Site plan signage	2/4/15	Leffler Simes	16/4/15
SA02 Rev B	Signage elevations	2/4/15	Leffler Simes	16/4/15
SA03 Rev A	Signage elevations	2/4/15	Leffler Simes	16/4/15
SA04 Rev B	Ancillary signage	2/4/15	Leffler Simes	16/4/15
-	Acid Sulphate Soils Management Plan	3/2/15	Enviromental Investigation Services	16/4/15
SI0102	Hazardous Materials Survey report	9/2010	Noel Arnold & Associates	16/4/15
	Plan of Subdivision	18/9/2015	LTS Lockley	18/9/15
SS14-2887_000, SS14-2887_101 &102, SS14-2887_501 &502	Landscape plans	14/8/15	Site Image Landscape Architects	17/8/15
SS14-2887_10	Landscape plans	28/7/15	Site Image	17/8/15

3 and 104			Landscape Architects	
Rev 3	Noise impact assessment	10/2/15	Acoustic Logic	16/4/15

and details submitted to Council on 16 April 2015, 22, 28 and 30 July 2015 and 5, 10,13, 17 and 18 August 2015 with the application for development consent and as amended the following conditions.

Reason: To confirm the details of the application submitted by the applicant.

ATTACHMENT

1. Legal Advice submitted by the applicant