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Allison Basford  
Property Development Manager  
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Dear Allison

### Development Application for extension of Somersby Plant

#### Summary of Advice

1. CSR has made a development application (**Development Application**) for the extension of its plant at Somersby (**Development**).
2. The Development Application came before the Hunter and Central Coast JRPP on 15 December. The JRPP has suggested that the applicant provide a legal opinion as to whether the Development is designated development for the purposes of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.
3. In our opinion, for the reasons we set out in this letter, the Development should not be classified as designated development.

#### Background

4. The Statement of Environmental Effects (**SEE**) accompanying the Development Application describes the development as follows:

##### 4.1 In part 1:

This Statement of Environmental Effects (SOEE) has been prepared on behalf of CSR Building Products Limited (hereafter CSR) by Monteath & Powys Pty Ltd. This statement is to accompany a Development Application (DA) to extend the existing manufacturing plant for Hebel products at Somersby Industrial Park, 98 Wisemans Ferry Road, Somersby.

##### 4.2 In part 1.2

CSR Building Products Limited (**CSR**) is seeking to extend the Hebel plant facilities which are currently situated on Lot 1 DP 816083, over and into part of the adjoining lot to the south, being Lot 22 DP 873845. Lot 22 is currently vacant, although a previous approval exists for earthworks/hardstand which has been physically commenced (see below).

##### 4.3 In part 3:

#### 3. PROPOSED DEVELOPMENT

The proposed development involves the construction of an extension to the ongoing operation of an autoclave aerated concrete manufacturing facility (Hebel facility). The proposal consists of extending the existing Hebel plant facilities on the site by construction of:

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- A production plant building including facilities for cutting, storage of raw materials, and a boiler room;
- Hardstand storage areas and vehicle loading facilities;
- Two new driveways and onsite carparking; and
- An extended administration building, staff amenities and landscaping.

Attached Appendix A shows the detailed design of the proposal.

The existing facility is approximately 9,624 square metres in size, while the proposed extension is approximately 10,911 square metres, meaning the facility (plus extension) will be approximately 20,535 square metres in size. It is understood that an additional 50 car parking spaces will be provided taking the total number of spaces (including disabled parking) to 122 spaces.

As part of the manufacturing process, the ongoing operations that will be carried out on the site will include:

- Loading, storage and preparation of raw materials such as sand, lime, gypsum, and cement;
- Concrete mixing, casting, cutting and curing (autoclave); and
- Storage and loading of products for distribution.

There is no change proposed to the hours of operation that apply to the existing manufacturing plant, that is both the existing plant and extension will operate over a 24 hour period. If the extension is approved, it is anticipated that up to 24 staff will be additionally employed at the facility.

The proposed extension will create approximately 320 vehicle movements per day, which will be about a 7% increase on existing traffic counts. Delivery and supply of materials to the plant will also continue to occur over a 24 hour period.

The estimated CIV of the proposal is \$12,137,449<sup>1</sup>.

5. The Development Application has been made as a normal application under Part 4 of the EP&A Act. It has not been made as an application for designated development.

#### **Is the Development Designated Development?**

6. Schedule 3 of the EP&A Regulations sets out developments that are designated developments. These developments require that any development application be accompanied by an EIS.
7. Schedule 3 includes:

##### **14 Concrete works**

(1) Concrete works that produce pre-mixed concrete or concrete products and:

(a) that have an intended production capacity of more than 150 tonnes per day or 30,000 tonnes per year of concrete or concrete products, or

(b) that are located:

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<sup>1</sup> The CIV has now been updated to \$28,412,632 ref RPS advice 28 November 2016 but nothing turns on this for the purposes of this advice.

- (i) within 100 metres of a natural waterbody or wetland, or
- (ii) within 250 metres of a residential zone or dwelling not associated with the development.

(2) This clause does not apply to concrete works located on or adjacent to a construction site exclusively providing material to the development carried out on that site:

- (a) for a period of less than 12 months, or
- (b) for which the environmental impacts were previously assessed in an environmental impact statement prepared for that development.

8. It is possible that these declarations could apply to the development.

9. The SEE says sat part 4.3:

Under section 77A of the EP&A Act, development is classified as 'designated development' if it is so declared by the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation). Clause 14 of Schedule 3 to the EP&A Regulation declare concrete works that have an intended production capacity of more than 150 tonnes per day or 30,000 tonnes per year of concrete or concrete products to be 'designated development'. While it may be debated whether the proposal is for 'concrete works' given there is no definition in the EP&A Regulations or Act, it is considered in this instance that the extension actually falls within Part 2 of Schedule 3 of the EP&A Regulations as the proposal is for an addition to the existing facility.

10. However, part 2 of schedule 3 excludes certain developments from the declarations in part 1 of the schedule as follows:

Part 2 Are alterations or additions designated development?

**35 Is there a significant increase in the environmental impacts of the total development?**

Development involving alterations or additions to development (whether existing or approved) is not designated development if, in the opinion of the consent authority, the alterations or additions do not significantly increase the environmental impacts of the total development (that is the development together with the additions or alterations) compared with the existing or approved development.

Note. Development referred to in this clause is not designated development for the purposes of section 77A of the Act. This means that section 98 of the Act (Appeal by an objector) will not extend to any such development even if it is State significant development.

**36 Factors to be taken into consideration**

In forming its opinion as to whether or not development is designated development, a consent authority is to consider:

- (a) the impact of the existing development having regard to factors including:
  - (i) previous environmental management performance, including compliance with the conditions of any consents, licences, leases or authorisations by a public authority and compliance with any relevant codes of practice, and
  - (ii) rehabilitation or restoration of any disturbed land, and
  - (iii) the number and nature of all past changes and their cumulative effects, and
- (b) the likely impact of the proposed alterations or additions having regard to factors including:



(i) the scale, character or nature of the proposal in relation to the development, and

(ii) the existing vegetation, air, noise and water quality, scenic character and special features of the land on which the development is or is to be carried out and the surrounding locality, and

(iii) the degree to which the potential environmental impacts can be predicted with adequate certainty, and

(iv) the capacity of the receiving environment to accommodate changes in environmental impacts, and

(c) any proposals:

(i) to mitigate the environmental impacts and manage any residual risk, and

(ii) to facilitate compliance with relevant standards, codes of practice or guidelines published by the Department or other public authorities.

11. The SEE identifies these requirements. There is a table set out in part 4.3 that sets out the considerations and then concludes:

The information presented in the table above identifies that the proposed works can comply with current standards and guidelines. The existing EPL and consent conditions will ensure ongoing management of environmental issues. The proposed works are for an extension to the existing facility which has operated for a significant period of time without significant issues, thus the proposed works are not expected to have a significant impact.

12. The test in s35 is that in the opinion of the consent authority, the alterations or additions do not significantly increase the environmental impacts of the total development. The consent authority does not need to apply any particular standards of proof but must form its opinion rationally; for a proper purpose; without preconceptions or bias; having regard to relevant matters and disregarding irrelevant matters. One way that the Courts have put the question of whether an opinion has been formed rationally is to ask whether it is reasonably open to the consent authority to form the opinion.

13. Having regard to the SEE, it is reasonably open to the consent authority to form the opinion that the alterations or additions do not significantly increase the environmental impacts of the total development. On the basis of the information that we have seen, unless there is additional and proper evidence of impacts, the contrary opinion (that the alterations or additions do significantly increase the environmental impacts of the total development) could not be said to be reasonably open.

14. Accordingly, it would be proper for the consent authority to form the opinion that the alterations or additions do not significantly increase the environmental impacts of the total development and accordingly the Development would not be designated development.

Yours sincerely

Patrick Ibbotson  
Partner